



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 7, 2018

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COURT ORDER

Petitioner: Justin Grimsrud

Respondent: Department of Transportation

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2017-1737](#)

MSPB Docket No.: NY-0752-14-0340-I-1.

Issuance Date: August 31, 2018

The agency removed the appellant from his position as a result of a positive drug test. He appealed his removal to the Board. The administrative judge issued an initial decision sustaining the removal, which became the final decision of the Board when the two Board members could not agree on the disposition of the petition for review. The appellant then appealed his removal to the Federal Circuit. In a panel decision, the court affirmed the administrative judge's decision. The appellant petitioned for panel rehearing and rehearing en banc.

The panel that heard the appeal denied the appellant's petition for panel rehearing. Thereafter, the petition for rehearing en banc was referred to the circuit judges who are in regular active service. The judges denied the petition for rehearing en banc by a 10-2 vote.

Circuit Judge Newman, jointed by Circuit Judge Wallach, dissented from the denial of the petition for rehearing en banc on the ground that the

appellant's request for rehearing en banc should be granted to determine whether the agency violated his due process rights in refusing to permit him to retest the urine sample that was the basis of his removal.

Circuit Judge Wallach issued a separate dissent from the denial of the petition for rehearing en banc to add that the "possibility of sample contamination simply has not been eliminated on this record" and that "to simply take [the agency's] assurances with no other support in the record is a direct violation of [the appellant's] constitutional rights."

Circuit Judge Lourie, joined by Circuit Judge Chen, concurred in the denial of the petition for rehearing en banc on the ground that the question identified by the dissent did not meet the standard for en banc review under Federal Rule of Civil Procedure 35(a) because it was not "necessary to secure or maintain the uniformity of the court's decisions" and did not "involve[] a question of exceptional importance." The concurrence also noted that the appellant did not raise this issue in the petition for rehearing, which "underscore[d] the lack of necessity for *en banc* review in this case." The concurrence disagreed with the dissent's suggestion that the appellant was entitled to additional testing of his urine specimen for drugs and DNA, noting that the agency complied with its requirements pertaining to drug tests and that the appellant availed himself of the opportunity to request a second test of the sample at another laboratory. The concurrence observed that "[d]ue process does not require unlimited testing." The concurrence also noted that the appellant had "alternative means of demonstrating his innocence" and stated that the administrative judge's rejection of his "fact-specific challenges and credibility determinations are not an appropriate subject for *en banc* review." Lastly, the concurrence found that due process does not require the agency to make the appellant's urine sample available to him for DNA testing.

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