



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for November 16, 2018**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Matthew R. Siler

**Respondent:** Environmental Protection Agency

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

**Case Number:** [2017-2446](#)

**Docket Number:** CH-0752-16-0564-I-3

**Issuance Date:** November 13, 2018

##### **BOARD PROCEDURES/AUTHORITY**

- DISCOVERY

##### **WHISTLEBLOWER PROTECTION ACT**

- CLEAR AND CONVINCING EVIDENCE

The petitioner sought review of the administrative judge's decision affirming his removal. Before the Federal Circuit, he argued that the administrative judge erred in finding certain documents subject to attorney-client privilege. He further argued that the administrative judge misapplied the law concerning his whistleblower reprisal affirmative defense and the reasonableness of the

penalty.

**Holding:** The court vacated the decision and remanded the appeal.

1. The court determined that the agency failed to show that draft proposal documents were shielded from discovery under the attorney-client privilege. Specifically, the court found no indication in the record that attorneys prepared or reviewed those documents. Absent evidence of a communication with an attorney, the agency's privilege claim failed. The court was unable to determine whether the administrative judge's refusal to consider the draft proposal documents would not have impacted the outcome of the appeal, and it therefore remanded the appeal to the Board.
2. Regarding the petitioner's whistleblower reprisal claim, the administrative judge found that the petitioner made protected disclosures that were a contributing factor in his removal, but that the agency had proven by clear and convincing evidence that it would have taken the same action absent the whistleblowing. Under *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), in determining whether the agency has met its burden, the Board considers (1) "the strength of the agency's evidence in support of its personnel action," (2) "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision," and (3) "any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." The petitioner argued that the administrative judge misapplied *Carr* factors 2 and 3.
3. The court determined that the administrative judge erred in assessing *Carr* factor 3. First, the court found that the agency's treatment of other whistleblowers was not relevant to *Carr* factor 3, which is specifically limited to the treatment of similarly situated non-whistleblowers. The court also found that the administrative judge failed to sufficiently explain its conclusion that the petitioner and another employee were not sufficiently similar to make a "meaningful comparison."
4. As to *Carr* factor 2, the court found that the administrative judge failed to address the agency's mild treatment of the petitioner's second-line supervisor (who was the subject of his disclosures). The court directed the Board to consider on remand whether that mild treatment was evidence that the supervisor was sufficiently well-liked to provide a motive to retaliate against the petitioner.
5. The court directed the Board to reassess the penalty as appropriate in light of its findings on remand regarding the privilege and reprisal issues.

**Petitioner: Leonard Boss**  
**Respondent: Department of Homeland Security**  
**Tribunal: U.S. Court of Appeals for the Federal Circuit**  
**Case Number: [2017-2231](#)**  
**Docket Number: 13-50967-6 (Arbitration)**  
**Issuance Date: November 13, 2018**

#### **CONSTITUTIONAL ISSUES/DUE PROCESS**

##### **- DUE PROCESS**

The agency suspended the petitioner for 15 days based on three charges. During an arbitration hearing regarding the suspension, the deciding official admitted that he had considered three documents that the agency had not provided to the petitioner or his union. All three documents related to the first charge against the petitioner (failure to follow policy related to overtime sheets), but not to the other two charges (failure to follow supervisory instructions and conduct unbecoming a U.S. Border Patrol Agent). The arbitrator held that the deciding official's consideration of those documents constituted a due process violation. The arbitrator therefore vacated the first charge. However, the arbitrator analyzed the remaining two charges on the merits and determined that the agency proved those charges. The arbitrator found that the two proven charges justified a 10-day suspension, rather than the 15 days imposed by the agency. Before the Federal Circuit, the petitioner argued that the arbitrator erred in failing to reverse the action in its entirety in light of a due process violation that related to one of the three charges against the petitioner.

**Holding: The court affirmed the arbitration decision.**

1. The court agreed with the arbitrator that the due process violation in connection with the first charge did not require that the entire suspension be reversed. The court held that the constitutional due process analysis should be applied on a charge-by-charge basis. The court acknowledged its holdings in *Stone v. Federal Deposit Insurance Corporation*, 179 F.2d 1368 (Fed. Cir. 1999), and its progeny that a procedural due process violation because of *ex parte* communications requires a new constitutionally correct procedure and is not subject to the harmless error test. However, the court determined that such precedent would only prevent it from analyzing whether the agency would have disciplined the petitioner for the first charge even without the procedural defect. The court held that the documents at issue here were unlikely to cause the kind of prejudice the court in *Stone* was

concerned about.

2. The court also noted that post-*Stone*, the Supreme Court in *Shinseki v. Sanders*, 556 U.S. 396 (2009), had clarified how courts should apply harmless error. The court held that adopting the petitioner's approach of vacating the entire personnel action without a charge-by-charge analysis would "increase the likelihood of reversal in cases where, in fact, the error is harmless," contrary to the Supreme Court's admonition in *Shinseki*.
3. The court found further support for its holding in cases addressing constitutional due process errors in the criminal context. In those cases, multiple courts of appeals held that a constitutional violation as to one criminal charge did not necessarily prevent a conviction based on other unrelated charges.
4. The court rejected the petitioner's argument that the Board has consistently held that a due process violation requires reversal of the entire action without any consideration of the merits of the charges. After noting that it is not bound by the Board's decisions, the court nevertheless distinguished the Board decisions cited by the petitioner, finding that they were either single-charge cases or cases in which the due process error had infected all of the charges.

Petitioner: Dalwinder Sihota

Respondent: Internal Revenue Service

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

Case Number: [2017-2252](#)

Issuance Date: November 13, 2018

#### ARBITRATION/COLLECTIVE BARGAINING-RELATED ISSUES

- MISCELLANEOUS

#### BACK PAY

#### PENALTY

- MISCELLANEOUS

In its notice of proposed removal, the agency charged the petitioner with willful understatement of her tax liability, failure to accurately state tax liability, and failure to timely pay tax liability. The agency removed the petitioner based on "[a]ll reasons and specifications [stated in the notice of proposed removal]." An arbitrator found that the petitioner did not willfully understate her tax liability, but that she did negligently provide an inaccurate tax return. The arbitrator determined that the petitioner's negligence did not justify her removal, and he therefore reinstated the petitioner and imposed a 10-day suspension. Although the arbitrator determined that the petitioner was

entitled to reinstatement, he found that she was not entitled to back pay for a period of more than 3 years between her removal and her reinstatement.

Before the Federal Circuit, the petitioner argued that the only charge before the arbitrator required willful understatement of her tax liability and that, because the arbitrator found that she did not act willfully, he should have reversed the action in its entirety. She also argued that the arbitrator violated the Back Pay Act by reducing her back pay.

**Holding:** The court vacated the arbitration decision and remanded the case to the arbitrator for further adjudication.

1. The court agreed with the petitioner that, if the only charge before the arbitrator required willfulness, the arbitrator could not impose any penalty if he found that the petitioner only acted negligently. However, the court found that it was unclear from the record before it whether the alternate charge was before the arbitrator. The court noted an exchange during the hearing in which the arbitrator and the agency appeared to agree that the only charge at issue was the charge requiring willfulness. However, the court also noted other evidence in the record suggesting that the alternate charges may have been properly before the arbitrator. It therefore remanded the case to the arbitrator to determine which charges were submitted for arbitration.
2. The court held that although an arbitrator may deny or reduce back pay as a form of mitigated penalty, the period of withheld back pay cannot be based only on the time served because such a penalty would be arbitrary and capricious. The court determined that, even if the arbitrator properly sustained an alternate charge, nothing in his decision supported what was effectively a 3-year "time-served" suspension.
3. The court further determined that, in reducing the petitioner's back pay, the arbitrator misapplied the doctrine of laches. Laches bars an action when there is both a lack of diligence by the party against whom it is asserted as well as prejudice to the party asserting it. Here, the arbitrator made no finding that the agency was prejudiced by any delay in scheduling the hearing. Additionally, laches does not reduce monetary damages that accrue while a dispute is pending. Thus, after allowing the petitioner's claim to proceed, the arbitrator could not rely on laches to reduce her back pay.
4. The court held that the arbitrator could reduce the petitioner's back pay on remand as a mitigated penalty, but that any such reduction would need to be within the tolerable limits of reasonableness.

**Petitioner: Leslie A. Kerr**  
**Respondent: Merit Systems Protection Board**  
**Tribunal: U.S. Court of Appeals for the Federal Circuit**  
**Case Number: [2017-2538](#)**  
**Docket Number: SF-0752-17-0362-I-1**  
**Issuance Date: November 15, 2018**

**DISCRIMINATION**

- ELECTION OF REMEDIES
- MIXED CASE PROCEDURES

**TIMELINESS**

- MIXED CASES

**WHISTLEBLOWER PROTECTION ACT**

- ELECTION OF REMEDIES
- TIMELINESS

In June 2006, the petitioner filed a Board appeal challenging her alleged involuntary retirement and other personnel actions. She alleged that the personnel actions were based on sex and religious discrimination as well as whistleblower reprisal. The administrative judge informed the petitioner that the Board lacked jurisdiction over the other personnel actions and that she had the option to have her involuntary retirement claim heard in the first instance by either the Board or the agency's equal employment opportunity (EEO) office. The petitioner chose the agency's EEO office, and the administrative judge therefore dismissed the appeal without prejudice to refiling. In September 2008, the agency's EEO office rejected the petitioner's discrimination claims and determined that it lacked jurisdiction over her whistleblower reprisal claim. The EEO office informed the petitioner that because she had a mixed case, she had the option of appealing the decision to the Board or file a civil action in district court.

The petitioner elected to file in district court. The parties litigated the discrimination and retaliation claims on the merits and, in 2011, the district court granted summary judgment in favor of the Government. However, in 2013, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the case. On remand, the Government argued for the first time that the district court lacked jurisdiction over the whistleblower reprisal claim because the petitioner failed to exhaust her remedies by failing to seek review of that claim before the Board. The district court agreed and dismissed the whistleblower reprisal claim in July 2014; it held a jury trial on the discrimination claims, which resulted in a verdict in favor of the Government.

The petitioner appealed the dismissal of her whistleblower reprisal claim. The Ninth Circuit affirmed the dismissal in September 2016, reasoning that permitting an employee to bring an “entirely unreviewed” whistleblower reprisal claim to the district court in the first instance would undermine the “comprehensive system of administrative review” for such claims. The Ninth Circuit acknowledged that the petitioner had reasonably relied on contrary authority from the U.S. Court of Appeals for the Tenth Circuit, which held in 2000 that a district court had jurisdiction over an unreviewed whistleblower reprisal claim.

The petitioner filed a petition for a writ of certiorari with the Supreme Court. The Supreme Court denied that petition in March 2017. A few weeks later, the petitioner filed a request with the Board to reopen her 2006 appeal, which was assigned to an administrative judge in the Board’s Western Regional Office. The administrative judge rejected that request, finding neither good cause for her delay in filing the request nor any basis to equitably toll the filing deadline. The petitioner sought review of the administrative judge’s decision before the Federal Circuit.

**Holding:** The court reversed the administrative judge’s decision and remanded the appeal.

1. In finding no good cause for the petitioner’s filing delay, the administrative judge considered the length of the delay and the fact that the petitioner was represented by counsel throughout the litigation. The crux of the administrative judge’s no good cause determination, however, was that the petitioner did not have a reasonable excuse for pursuing her unreviewed whistleblower reprisal claim in district court in the Ninth Circuit. The court disagreed, finding that the petitioner did have a reasonable basis for thinking that the district court was an appropriate forum for resolving all of her mixed case claims, including her whistleblower reprisal claim. In support of its finding, the court cited the language of the relevant statutory provision, 5 U.S.C. § 7202(a)(2), as well as the Tenth Circuit’s holding in *Wells v. Shalala*, 228 F.3d 1137 (10th Cir. 2000).
2. The administrative judge relied on the Ninth Circuit’s decision in *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1999), which it interpreted as precluding district court review of an unreviewed whistleblower reprisal claim in a mixed case. The Federal Circuit noted that, although the Ninth Circuit in the petitioner’s case interpreted *Sloan* in the same manner, it also suggested that the petitioner had nevertheless acted reasonably in proceeding to district court. The Federal Circuit found that cases arising under the doctrine of equitable estoppel demonstrate

the appropriateness of finding good cause based on a reasonable filing in the wrong forum.

3. The Federal Circuit found further support for the reasonableness of the petitioner's filing delay in the lack of notice she received regarding the jurisdictional defect of her whistleblower reprisal claim. Here, the Government litigated the petitioner's whistleblower reprisal claim for more than 5 years before the district court and the Ninth Circuit before raising the jurisdictional issue. Also, the agency's EEO office informed the petitioner in its final decision that she had the option to pursue review of her mixed case in district court.
4. The Federal Circuit rejected the Government's argument that the petitioner was on notice that she was pursuing the wrong approach once the district court dismissed her whistleblower reprisal claim in July 2014. The court found that it was reasonable for the petitioner to seek review of the district court's decision before the Ninth Circuit and the Supreme Court, particularly in light of the Tenth Circuit's contrary holding in *Wells*. The court therefore determined that the petitioner had established a reasonable excuse for the entirety of her filing delay.
5. The court further found that the agency failed to identify any prejudice it would suffer from having the Board review the petitioner's whistleblower reprisal claim on the merits. The court therefore concluded that it was an abuse of discretion not to excuse the petitioner's untimely request to reopen her earlier Board appeal. Having found good cause for the delay, the court did not address whether the doctrine of equitable tolling would apply in this case.
6. The court rejected the Government's alternative argument that the Board lost jurisdiction over the petitioner's whistleblower reprisal claim when she elected to pursue her mixed case in district court. The court distinguished the instant case from those in which a petitioner "sought a second bite at the apple" in a different forum after the initially selected forum denied a claim on the merits. Here, the Ninth Circuit held that the district court lacked jurisdiction over the petitioner's whistleblower reprisal claim. Accordingly, the Federal Circuit concluded that the petitioner's litigation of her mixed case in district court did not constitute an effective election that stripped the Board of jurisdiction over her whistleblower reprisal claim.

#### NONPRECEDENTIAL:

*Carey v. Department of Agriculture*, [No. 2018-1479](#) (Fed. Cir. Nov. 7, 2018) (MSPB Docket No. CH-0752-16-0423-I-3): The court affirmed, per Rule 36, the administrative judge's decision affirming the petitioner's removal.

*Joy v. Department of the Treasury*, [No. 2017-2331](#) (Fed. Cir. Nov. 8, 2018) (MSPB Docket No. DC-0752-16-0229-I-1): The court affirmed, per Rule 36, the administrative judge's decision affirming the petitioner's removal.

*Jenks v. Office of Personnel Management*, [No. 2018-2176](#) (Fed. Cir. Nov. 9, 2018) (MSPB Docket No. CH-0831-18-0209-I-1): The court affirmed the Board's final decision affirming the Office of Personnel Management's finding that the petitioner was ineligible to receive annuity benefits because she had applied for and received a refund of her retirement contributions. Although the petitioner stated that she was willing to redeposit her refund, only current employees are eligible to make a redeposit and the petitioner did not claim to be currently employed in a covered position.

*Somers v. Department of Veterans Affairs*, [No. 2018-1427](#) (Fed. Cir. Nov. 9, 2018) (MSPB Docket No. CH-1221-16-0259-W-1): The court affirmed, per Rule 36, the administrative judge's decision denying the petitioner's request for corrective action in her individual right of action appeal.

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