



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 1, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jeffrey A. Hansen
Respondent: Department of Homeland Security
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2017-2584](#)
MSPB Docket Number: DE-0752-17-0076-I-1
Issuance Date: December 28, 2018

Adverse Action Charges
- Drug Related

The agency removed the petitioner based on the charge of “positive test for illegal drug use—marijuana,” and he appealed his removal to the Board. The petitioner primarily argued before the Board that he unknowingly ingested marijuana that was contained in brownies. The administrative judge considered his defense, but ultimately affirmed the agency’s decision. He acknowledged that inadvertent ingestion of an illegal drug would be relevant to his decision, if shown, but that the petitioner failed to meet his burden of showing that the ingestion was inadvertent. As a result, he sustained the charge and upheld the removal. Neither party petitioned for review of the administrative judge’s decision, which became the final decision of the Board.

On appeal to the Federal Circuit, the petitioner primarily argued that the Board erred by placing the burden of proof on him to show inadvertent ingestion of the illegal drug.

Holding: The court affirmed the Board's decision.

1. The court found that the agency did not need to prove intent to establish the charge of "positive test for illegal drug use—marijuana" and that the petitioner's positive test result, which he did not dispute, was sufficient to prove the charge.
2. The court also considered his claim of inadvertent ingestion in examining whether nexus existed and whether the penalty was reasonable under the circumstances. It concluded that the agency met its burden as to both given that the evidence in support of the petitioner's claim was weak.
3. The court additionally held that substantial evidence supported the Board's finding that the petitioner occupied a position subject to random drug testing.

Petitioner: Charles T. Jenkins, Jr.

Respondent: Merit Systems Protection Board

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

Case Number: [2017-2193](#)

MSPB Docket Number: DA-0752-16-0080-I-2

Issuance Date: January 2, 2019

Jurisdiction

-Resignation/Retirement/Separation

After receiving a notice of proposed removal, but before the agency issued a decision on the proposed action, the petitioner informed his supervisor that he would retire. Subsequently, the agency issued a decision sustaining the removal action. On the same day, the agency informed the petitioner that, if he retired as indicated, it would revoke and cancel the scheduled removal. The appellant retired and the agency revoked and canceled the removal action. The petitioner then appealed to the Board, alleging that his retirement was involuntary. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the Board lacked jurisdiction over the petitioner's challenge to the proposed removal because the agency rescinded the removal decision when he retired and because it did not appear that the petitioner sought to withdraw his retirement prior to his separation date. The administrative judge also found that the Board lacked jurisdiction over his alleged involuntary retirement claim because he failed to

make a nonfrivolous allegation of involuntariness. Neither party petitioned for review of the administrative judge's decision, which became the final decision of the Board.

On appeal to the Federal Circuit, the petitioner argued that the Board erred in dismissing his appeal for lack of jurisdiction because the agency issued its decision to remove him prior to the date that he retired. He also claimed that his retirement was involuntary because it was based on "misinformation" and "was obtained through coercion."

Holding: The court affirmed the Board's dismissal for lack of jurisdiction.

1. In finding that the Board lacked jurisdiction over the removal claim, the court rejected the petitioner's argument that the Board should have jurisdiction because the agency issued its removal decision prior to his retirement date. The court found that, when an agency cancels a removal decision and all consequences of the removal have been eliminated, the case no longer involves a removal. It also found that, contrary to the petitioner's argument, 5 U.S.C. § 7701(j) is not implicated when a removal action has been rescinded. Accordingly, the court found that the petitioner's retirement status was not material in determining whether it had jurisdiction over the removal action.
2. The court additionally found that the petitioner failed to prove that his retirement was involuntary, finding, among other things, that his retirement was not based on "misinformation" or "caused by coercion."

Judge Reyna issued a dissenting opinion, contending, among other things, that, pursuant to 5 U.S.C. § 7701(j), the agency should not be permitted to force the petitioner to choose between retiring and appealing the removal decision.

Petitioner: Hanh Do

Respondent: Department of Housing and Urban Development

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

Case Number: [2018-1147](#)

MSPB Docket Number: DC-0752-17-0149-I-1

Issuance Date: January 14, 2019

Constitutional Issues

- Due Process

The agency demoted and suspended the petitioner based on the charge of "negligence of duty" for hiring and promoting a certain employee because that employee admitted to the petitioner that she did not

possess a college degree, which the agency claimed was required for the positions at issue. On appeal to the Board, the administrative judge found that a college degree was not required for the positions and that the employee alternatively could qualify for the positions based on a combination of education and experience. Nevertheless, the administrative judge found that the petitioner was negligent because she failed to investigate whether the employee met the alternative qualification requirements for the positions. As a result, she sustained the charge and upheld the penalty. Neither party petitioned for review of the administrative judge's decision, which became the final decision of the Board. The petitioner challenged the Board's decision before the Federal Circuit.

Holding: The court reversed the Board's decision and remanded the case to the Board.

1. The court found that the Board violated the petitioner's right to due process when it exceeded the scope of the agency's charge and relied on a new ground to sustain the penalty. As a result, the petitioner did not have an opportunity to meaningfully address her alleged negligence in failing to investigate whether the employee met the alternative qualification requirements for the positions during the agency proceedings.
2. The court additionally rejected the agency's argument that the due process violation here was harmless.

NONPRECEDENTIAL:

Koester v. United States Park Police, No. [2017-2613](#) (Fed. Cir. Jan. 3, 2019) (Arbitrator Decision in No. 16-53707-A) (vacating and remanding the arbitrator's decision that upheld the agency's decision to remove the petitioner because the arbitrator erred when he ignored certain evidence of alleged mitigating circumstances).

Flynn v. Merit Systems Protection Board and Department of the Army, No. [17-70617](#) (9th Cir. Jan. 8, 2019) (MSPB Docket No. SF-1221-14-0620-W-1) (affirming the Board's decision in this individual right of action (IRA) appeal that found that the agency proved by clear and convincing evidence that it would have taken the same personnel actions in the absence of the petitioner's protected disclosures. The court also dismissed the Board as a respondent, agreeing with the Board's position that it lacked jurisdiction, in the context of an IRA appeal, to consider the petitioner's claims that the agency took personnel actions against her in retaliation for filing an equal employment opportunity complaint).

Lepore v. Office of Personnel Management, No. [2018-1474](#) (Fed. Cir. Jan. 9, 2019) (MSPB Docket No. DC-0831-17-0683-I-1) (affirming the Board's decision that affirmed the Office of Personnel Management's decision concerning the recalculation of the petitioner's retirement annuity).

Grush v. Department of Justice, No. [2018-1575](#) (Fed. Cir. Jan. 16, 2019) (MSPB Docket No. CH-0752-16-0401-I-2) (Rule 36 affirmance).

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