



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for February 15, 2019**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioners:** Eric Cerwonka

**Respondent:** Department of Veterans Affairs

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

**Case Number:** [2018-1398](#)

**MSPB Docket Number:** DA-0752-17-0264-I-1

**Issuance Date:** February 13, 2019

The Louisiana State Board of Examiners of Psychologists (LSBEP) revoked the petitioner's license to practice psychology in Louisiana for cause. The respondent removed the petitioner from his position pursuant to 38 U.S.C. § 7402(f), which provides that a person may not be employed as a psychologist with the Veterans Health Administration (VHA) if his license has been terminated for cause.

The petitioner appealed his license revocation to a Louisiana district court, which reinstated his license. The LSBEP appealed the district court's decision to a Louisiana court of appeals, which reversed and remanded the district court's decision. The Supreme Court of Louisiana denied the petitioner's petition for writ of certiorari, and the proceedings regarding the merits of the license revocation remain pending.

In addition to pursuing his license revocation appeal, the petitioner appealed his removal to the Board. The administrative judge issued an initial decision sustaining the removal. Specifically, the administrative judge found that the petitioner's license was revoked for cause, placing him in violation of 38 U.S.C. § 7402(f) and the respondent's handbook, which requires employees to maintain all qualifications required for appointment. The administrative judge rejected the petitioner's affirmative defense that he was subjected to disparate treatment based on his prior equal employment opportunity activity. Finally, the administrative judge found that the respondent proved a nexus between the charge and the efficiency of the service and that the penalty of removal was reasonable. The petitioner did not petition the Board to review the administrative judge's decision, and it became the final decision of the Board. The petitioner timely petitioned the Federal Circuit for review.

**Holding:** The court concluded that 38 U.S.C. § 7402(f) governs the petitioner's removal and that the respondent complied with the terms of the statute; accordingly, it affirmed the petitioner's removal.

(1) 38 U.S.C. § 7402(f), not Chapter 75 of the Civil Service Reform Act (CSRA), governs the petitioner's removal. Chapter 75 of the CSRA provides that an agency may remove an employee "only for such cause as will promote the efficiency of the service." Under Chapter 75 of the CSRA, in taking an adverse action against an employee, an agency must prove that the charged conduct occurred, establish a nexus between that conduct and the efficiency of the service, and demonstrate that the penalty imposed was reasonable. 38 U.S.C. § 7402 governs the qualifications of appointees to the VHA. Specifically, 38 U.S.C. § 7402(f) prohibits the VHA from employing any psychologist who had a license terminated for cause, without permitting additional considerations or affording discretion. Under 38 U.S.C. § 7425(b), Congress has provided that no provision of Title 5 that is inconsistent with a provision of Chapter 74 of Title 38 shall supersede, override, or modify a provision of Chapter 74 of Title 38, unless otherwise stated. Nothing in Chapter 75 of the CSRA provides that the CSRA supersedes, overrides, or modifies 38 U.S.C. § 7402(f). Accordingly, the CSRA does not supersede, override, or modify the removal standard set forth in 38 U.S.C. § 7402(f).

(2) The respondent's removal decision complied with the standard in

38 U.S.C. § 7402(f). Although the respondent was not required to consider the standard for removal set forth within Chapter 75 of the CSRA, the decision also complied with that standard.

- (3) The express terms of 38 U.S.C. § 7402(f) compel removal and do not permit the respondent to consider subsequent events or give it discretion to impose lesser penalties. Accordingly, the court declined to consider the petitioner's arguments that the Board should have considered subsequent events, such as the reinstatement of his license, or that there should be a waiting period prior to removal to give an opportunity for an appeal of the license revocation.
- (4) The court concluded that substantial evidence supported the administrative judge's findings that neither of the relevant agency officials were aware of the petitioner's prior protected activity, and that the respondent's proffered reason for the removal was the real reason for the action, thus the petitioner did not show that he was removed in retaliation for his prior protected activity.
- (5) The court concluded that the petitioner's arguments that the respondent failed to give him 30-day advance notice of his removal, in accordance with the respondent's handbook, or that the respondent improperly supplied evidence to the administrative judge, were without merit.

**NONPRECEDENTIAL:**

*Redmond v. Department of Veterans Affairs*, No. [2018-2233](#) (Fed. Cir. Feb. 8, 2019) (MSPB Docket No. NY-1221-18-0025-W-1): The court affirmed the administrative judge's decision denying the petitioner's request for corrective action under the Whistleblower Protection Act. The court affirmed the administrative judge's findings that the petitioner established a *prima facie* case of retaliation based on a protected disclosure of erroneous invoicing and that the respondent showed by clear and convincing evidence that it would have reprimanded the petitioner notwithstanding his protected disclosure.

*Fernandez v. Department of the Navy*, No. [2018-1388](#) (Fed. Cir. Feb. 13, 2019) (MSPB Docket No. AT-0752-12-0803-C-1): The court affirmed, per Rule 36, the administrative judge's decision denying the petitioner's petition for enforcement of a final decision reversing the petitioner's removal because the petitioner failed to cooperate with the respondent in calculating his back pay.

*Ryan v. Department of Defense*, No. [2018-1524](#) (Fed. Cir. Feb. 13, 2019) (MSPB Docket No. DC-0752-17-0673-I-1): The court affirmed the administrative judge's decision sustaining the petitioner's removal. The court concluded that substantial evidence supports the administrative judge's findings that the respondent proved its charges of lack of candor, conduct unbecoming a police officer, and unauthorized use of a computer; and that a nexus existed between the charges and the petitioner's ability to perform his job. The court also concluded that the petitioner's arguments that his due process rights were violated were waived or without merit. Finally, the court determined that the administrative judge correctly held that the petitioner's alleged disclosures were either not protected under the Whistleblower Protection Act or did not contribute to his removal.

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