



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 8, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Kevin Sharpe

Respondent: Department of Justice

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

Case Number: [2017-2356](#)

MSPB Docket No. SF-4324-15-0593-B-1

Issuance Date: March 1, 2019

The appellant, a GS-13 agent with the Drug Enforcement Agency who had deployed three times as a reservist in the United States Navy, applied for fourteen GS-14 positions with the agency between 2012 and 2015. Because he scored 91 out of 100 on his Special Agent Promotion Program examination, he was placed on the Best Qualified List (BQL) for each of the GS-14 positions for which he applied. However, his supervisor, who selected and ranked three applicants from the BQL for a final selection decision by the Career Board, selected the appellant only three times and never chose him as the first-ranked agent. The Career Board did not select the appellant for any of the GS-14 positions.

The appellant filed a request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA) alleging, among other things, that his nonselections were motivated by his military status as a reservist. After holding the appellant's requested

hearing, the administrative judge denied his request for corrective action, and the appellant filed a petition for review of the initial decision. The Board granted his petition and remanded the appeal for further adjudication. In a remand initial decision that became the final decision of the Board after neither party filed a petition for review, the administrative judge again denied the appellant's request for corrective action, finding that he did not show that his reservist status was a substantial or motivating factor in his nonselections. The appellant appealed the decision to the court, arguing, in relevant part, that the administrative judge erred by excluding relevant evidence and testimony regarding his supervisor's hostility towards reservists.

Holding: The administrative judge abused her discretion by excluding relevant evidence and testimony that harmed the appellant's ability to meet his burden of proof to show that his military service was a substantial or motivating factor in his nonselections. Specifically, the court held that the administrative judge abused her discretion by excluding a disparaging email sent to another reservist shortly after he filed a USERRA appeal with the appellant's supervisor copied on the email. The court recognized that the email did not mention the appellant but found it to be relevant because it pertained to another agent who worked in the same division under the same supervisor as the appellant, was also a reservist, and filed a USERRA claim naming the same supervisor as the appellant named his USERRA claim.

In light of its holding, the court vacated the administrative judge's decision and remanded the appeal for further proceedings.

NONPRECEDENTIAL

Hairston v. Department of Veterans Affairs, [No. 2018-2053](#) (Fed. Cir. Mar. 8, 2019) (MSPB Docket No. PH-0714-18-0186-I-1): The court affirmed the initial decision, which became the final decision of the Board after neither party filed a petition for review, affirming the agency's decision to remove the appellant based on a charge of conduct unbecoming a Federal employee. The court found that the appellant provided no basis to overturn the administrative judge's credibility determinations and found no merit to his due process claims. The court further found that, because the agency removed the appellant pursuant to 38 U.S.C. § 714, the administrative judge was not required or permitted to mitigate the penalty. Finally, the court found that the appellant failed to show that the administrative judge abused his discretion in making certain evidentiary rulings.

Cooper v. Department of the Army, [No. 2018-1350](#) (Fed. Cir. Mar. 5, 2019) (MSPB Docket No. PH-0752-16-0130-I-1): Rule 36 affirmance.

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