



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 10, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Lance Robinson

Respondent: Department of Veterans Affairs

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

Case Number: [2017-2143](#)

Docket Number: DE-0752-16-0351-I-1

Issuance Date: May 6, 2019

Adverse Action Charge

- Negligent performance of job duties
- failure to ensure accuracy of information provided
- whistleblower reprisal

Due Process

Whistleblower Reprisal

The agency removed the petitioner from his position as Associate Director of the Phoenix Veterans Administration Health Care System (Phoenix VA) based on three charges of negligent performance of duties, failure to ensure accuracy of information provided, and retaliation against an employee for making protected disclosures. As Associate Director, the petitioner was responsible for, among other things, supervising the Health Administration Services (HAS), which handles the scheduling of patient appointments at the

Phoenix VA. Charges 1 and 2 relate to revelations made public in 2014 that veterans had died while on secret waitlists at the Phoenix VA and a subsequent Office of the Inspector General (OIG) report, which suggested that HAS supervisors should have known that approximately 1,700 veterans had been on the New Enrollee Appointment Request waitlist for longer than 30 days without having seen a physician.

In an initial decision, which became the Board's final decision after neither party filed a petition for review, the administrative judge found that the agency proved charges 1 and 2, the appellant failed to prove his affirmative defenses of whistleblower reprisal and due process violations, and the penalty removal was reasonable.

On appeal before the Court, the petitioner challenged the Board's decision to uphold his removal and to deny his affirmative defenses of whistleblower reprisal and due process violations.

Holding: The Court affirmed the Board's decision to sustain the petitioner's removal.

1. The Court affirmed the Board's finding that the agency proved its charge of Negligent Performance of Duties.
 - a. Substantial evidence supported a finding that the petitioner knew or should have known that his subordinates consistently failed to use scheduling practices required by VA policy.
 - b. The petitioner was aware of the agency's Scheduling Directive and had actual knowledge of the Phoenix VA's scheduling problems based on an audit report and emails he received, which detailed occurrences at the Phoenix VA where scheduling policies were not properly followed.
 - c. Regardless of whether the petitioner had actual knowledge that employees failed to use required scheduling practices, he had an affirmative duty to investigate in light of the audit report, emails he received, and the OIG report. A prudent supervisor with 27 years of the experience at the VA would have sought an investigation into the incidents discussed in the emails he received and the general findings of the audit and OIG reports.
2. The Court affirmed the Board's finding that the agency proved its charge of Failure to Ensure Accuracy of Information Provided.

- a. Substantial evidence supported a finding that the petitioner neglected his duty to ensure the accuracy of information contained in flowcharts, which showed the process from appointment creation to outcome metrics, submitted to the Veterans Integrated Service Network (VISN) 18, the regional entity that oversees the Phoenix VA.
 - b. Substantial evidence supported a finding that the petitioner neglected his duty to ensure the accuracy of information submitted to VISN 18 in an Outpatient Scheduling Processes and Procedures Checklist.
3. Substantial evidence supported the Board's conclusion that removal was reasonable.
 - a. The Board did not err in its conclusion that removal was reasonable even though it did not sustain charge 3.
 - b. Substantial evidence supported the Board's finding that the petitioner failed to show disparate penalty because other similarly situated employees charged with similar misconduct were removed or retired/resigned before the agency could remove them, and the petitioner failed to identify particular individuals in upper management at the VA accused of similar misconduct who were not removed.
4. Substantial evidence supported the Board's conclusion that the VA met its burden of proving by clear and convincing evidence that it would have removed the petitioner absent his protected disclosures.
 - a. The evidence strongly supported the agency's decision to remove the petitioner. Thus, this factor favored the VA.
 - b. Although the administrative judge found that the deciding official did not have a motivate to retaliate because the petitioner's disclosures did not target him personally, the administrative judge failed to consider whether the deciding official nonetheless had a "professional retaliatory motive."
 - i. The appellant's disclosures implicated the capabilities, performance, and veracity of VA managers and employees and implied that the VA had deceived a Senate Committee. The Court has held that those

responsible for the agency's performance overall may be motivated to retaliate even if they are not directly implicated by the disclosures as the criticism reflects on them in their capacities as managers and employees.

- ii. Nonetheless, the Board's conclusion that the deciding official lacked a motive to retaliate was not unreasonable based on testimony of the deciding official, which the administrative judge found credible. Thus, the Court concluded that this factor slightly favored the VA.
 - c. The record contained mixed evidence concerning whether the VA treated the appellant the same as similarly situated nonwhistleblowers. The VA removed similarly situated individuals, including the petitioner's direct supervisor, the Director of the Phoenix VA, as well as the petitioner's direct subordinate, the Chief of HAS. The administrative judge properly weighed this evidence against the petitioner's evidence that individuals at other VA centers were not removed despite their scheduling improprieties. Thus, the administrative judge's conclusion that this factor was neutral was not unreasonable.
5. Substantial evidence supported the Board's conclusion that the petitioner failed to prove a violation of his due process rights.
- a. The Court found no error in the Board's determination that the petitioner failed to show that his removal was predetermined based on public statements made by the deciding official to the New York Times.
 - i. According to the New York Times article, the deciding official stated that he was disappointed that it took so long to remove the petitioner, who was presumably responsible, along with others, for a national scandal over secret waiting lists and unnecessary deaths.
 - ii. The Court found "greatly troublesome" the statements credited to the deciding official in the New York times article, which occurred 1 day before the petitioner received his proposed removal. As the Court described, the New York Times article painted a picture showing

the petitioner to be responsible, in part, for the wait-list scandal and that the deciding official had made up his mind about the petitioner's guilt before issuing the March 16, 2016 proposed removal.

- iii. Although the deciding official's public statements appear on their face to violate the petitioner's due process rights, the administrative judge credited the deciding official's testimony that he was misquoted by the article's author as well as his testimony that he did not predetermine the outcome of the petitioner's case and he gave the evidence a lot of deliberation. The Court declined to disturb the administrative judge's finding that the deciding official's testimony was credible.
- b. The Court found no error in the Board's determination that the petitioner failed to show that his removal was predetermined due to political pressure and public assurances that those responsible at the VA would be removed.
- c. The Court found no error in the Board's determination that it was not a violation of the petitioner's due process rights that the same individual proposed and decided his removal.
- d. The Court found no error in the Board's conclusion that the deciding official fully considered the petitioner's reply to the proposal notice to the extent the record showed that the petitioner's response persuaded the deciding official not to sustain one of the agency's specifications in support of charge 3.