



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 8, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Clarence McGuffin

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

Case Number: [2017-2433](#)

Docket Number: DC-4324-14-0938-B-1

Issuance Date: November 7, 2019

USERRA

The agency removed Mr. McGuffin, a preference-eligible veteran, from his position as an attorney advisor during his 1-year probationary period due to poor performance. Following his termination, Mr. McGuffin sought corrective action before the Board, alleging that the agency had denied him a benefit of his employment because of his military status when it terminated him within the 1-year probationary period applicable to preference-eligible veterans, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In an initial decision, which became the Board's final decision after neither party filed a petition for review, the administrative judge denied Mr. McGuffin's request for corrective action, finding that the agency had not violated USERRA. In particular, the administrative judge concluded that the

agency properly found that Mr. McGuffin's performance during his probationary period was unacceptable and acted promptly to terminate his employment before he acquired employee status with Board appeal rights. She further credited the testimony of Mr. McGuffin's supervisors that they would have terminated any employee who was performing as poorly as Mr. McGuffin was after almost 1 year of training, even if their trial periods extended for an additional year. Thus, she concluded that the agency demonstrated by preponderant evidence that it would have taken the same action against Mr. McGuffin without regard to his military status.

On appeal before the Court, the petitioner challenged the Board's decision.

Holding: The Court reversed the Board's decision that the agency did not violate USERRA and remanded the case to the Board to determine an appropriate remedy.

1. The agency's decision to terminate Mr. McGuffin when it did—4 days before he completed his 1-year probationary period—was substantially motivated by his preference-eligible veteran status.
 - a. The proper inquiry on appeal is not whether Mr. McGuffin's preference-eligible veteran status played a substantial or motivating factor in his termination, but also whether it was a substantial or motivating factor in the agency's timing of his termination.
 - b. The evidence showed that after becoming aware of Mr. McGuffin's preference-eligible veteran status, the agency decided that he must be terminated before his 1-year mark to prevent him from obtaining CSRA benefits.
 - c. The 1-year timeline for obtaining the procedural safeguards afforded to employees under the Civil Service Reform Act of 1978 is intertwined with a veteran's military service.
 - d. If employer's could discriminate against veterans based on this 1-year timeline, then what Congress created as a benefit to veterans for their service—a shortened timeframe for obtaining CSRA protection—could be turned against the veteran by employers who wish to avoid the inconvenience and administrative burden of defending themselves should the veteran obtain and assert such procedural safeguards.

2. Substantial evidence did not support a finding that the agency terminated Mr. McGuffin for a valid reason.
 - a. The documentary evidence did not support the Board's finding that Mr. McGuffin was performing poorly. Rather, it reflected that the agency improperly held Mr. McGuffin to a higher standard by applying the performance element of producing his fair share of work, which under the agency's performance policy, only applied to attorney advisors after they had completed their first year of employment.
 - b. The record reflected that Mr. McGuffin's supervisors delayed providing him with adequate training and disregarded the positive results of such training as well as ignored positive feedback from various administrative law judges concerning the quality of Mr. McGuffin's work.
 - c. In sum, the evidence demonstrated that Mr. McGuffin was not performing poorly, let alone so poorly as to justify the agency's rush to remove him 4 days before the end of his probationary period. Thus, the evidence pointed to only one reasonable motive—that the agency rushed to terminate Mr. McGuffin solely to prevent him from obtaining CSRA benefits.

NONPRECEDENTIAL:

Ferguson v. U.S. Postal Service, [No. 2019-1403](#) (Nov. 7, 2019) (MSPB Docket No. CH-0752-18-0164-I-1): The Court affirmed the Board's decision sustaining the appellant's removal from his position as a postmaster based on a charge of inappropriate conduct. The court rejected the petitioner's arguments that the administrative judge erred in her credibility determinations, erred in failing to consider every one of factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), and made various other alleged procedural errors.