



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 3, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jeffrey F. Sayers

Respondent: Department of Veterans Affairs

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

Case Number: [2018-2195](#)

MSPB Docket No. SF-0714-18-0067-I-1

Issuance Date: March 31, 2020

ADVERSE ACTIONS

- STANDARD OF PROOF
- PENALTY

STATUTORY INTERPRETATION

- RETROACTIVITY

On June 23, 2017, Congress enacted the Department of Veterans Affairs Accountability and Whistleblower Protection Act, codified at 38 U.S.C. § 714, which provides the respondent with streamlined authority for disciplining employees for misconduct or poor performance, and places

limitations on the Board's review of those actions. After the statute's enactment, the respondent removed the petitioner, pursuant to section 714, from his position as Chief of Pharmacy Services of the Greater Los Angeles Health Care System based on charges arising from misconduct that occurred prior to the statute's enactment.

The petitioner filed a Board appeal of his removal. Applying section 714, the administrative judge found that the respondent proved its charges by substantial evidence and rejected the petitioner's claims that the respondent had violated his due process rights and committed harmful procedural error during the removal. The administrative judge found that the Board did not have the ability to mitigate or otherwise review the reasonableness of the penalty and affirmed the removal. The administrative judge's decision became the final decision of the Board when neither party filed a petition for review. The petitioner timely filed an appeal with the U.S. Court of Appeals for the Federal Circuit.

Holding: The Court held that: (1) 38 U.S.C. § 714 requires the Board to review for substantial evidence the entirety of the respondent's removal decision, including the penalty; and (2) section 714 cannot be applied retroactively.

(1) Although the petitioner did not argue before the administrative judge that it was error to apply section 714 to his removal because the underlying misconduct took place before the statute's enactment, the Court exercised its discretion to resolve the issue on appeal. The Court observed that the retroactivity of section 714 raises a pure issue of law that affects many of the respondent's employees, the Board lacks a quorum to decide the issue, and administrative judges have interpreted the statute differently. Accordingly, the Court concluded that the interests of justice are best served by reaching the retroactivity issue.

(2) The Court rejected the petitioner's argument that the respondent improperly applied a substantial evidence standard to review the sufficiency of the charges that formed the basis of his removal because the statute leaves the proper standard to the respondent's discretion.

(3) Section 714 gives the Board the authority to review the respondent's entire "decision," including the choice of penalty. Although section 714(d)(2)(B) prohibits the administrative judge from mitigating a

penalty supported by substantial evidence, the statute does not prohibit the Board from reviewing the penalty to ensure it accords with law. The Court rejected the respondent's attempt to analogize section 714 to 5 U.S.C. chapter 43, under which the Court has held that the Board lacks mitigation authority, reasoning that chapter 43 only applies to performance-based removals, but section 714 applies to both performance-based and adverse actions. Additionally, chapter 43 actions provide more pre-determination due process than section 714 and are remedial in nature, rather than punitive. Accordingly, section 714 requires the Board to review for substantial evidence the entirety of the respondent's removal decision, including the penalty, but the Board may not revise the respondent's choice of penalty.

(4) Section 714 cannot be applied to remove the petitioner without giving the statute impermissible retroactive effect. The Court found that section 714 is silent on retroactivity and examined whether the application of the statute to the conduct at issue would result in a retroactive effect. Section 714 operates to lower the evidentiary burden in reviewing the removal decision and prevents the mitigation of the penalty. When a statute changes standards of proof and persuasion in a way favorable to the government, the statute affects an employee's substantive entitlement to relief. Moreover, the Supreme Court has held that the loss of "reasonable reliance on the continued availability of discretionary relief" akin to penalty mitigation has an impermissible retroactive effect. Accordingly, the deviations that section 714 makes from the prior standard applied under 5 U.S.C. chapter 75 diminish the petitioner's property right in continued employment such that there is a presumption against statutory retroactivity.

(5) Because section 714 cannot be applied to the petitioner's removal without impermissible retroactive effect, the Court vacated and remanded the administrative judge's decision upholding the removal.

NONPRECEDENTIAL:

Valenzuela v. Department of the Treasury, No. [2019-2069](#) (Fed. Cir. Apr. 1, 2020) (MSPB Docket No. SF-0752-18-0805-I-1): The court affirmed the administrative judge's decision affirming the petitioner's removal because of his medical inability to perform the essential duties of his position.

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