



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 24, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Sean C. Higgins

Respondent: Department of Veterans Affairs

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

Case Number: [2018-2352](#)

Docket Numbers: AT-0752-17-0625-I-2, AT-1221-18-0019-W-2

Date Issued: April 17, 2020

Penalty

- **Reasonableness**
- **Consideration of medical evidence and/or conditions**

Hearings

- **Witnesses**

Mr. Higgins was employed at the Memphis Veterans Administration Medical Center (VAMC). Throughout his employment, he reported unlawful activity at the VAMC, and he had a reputation for being a whistleblower. He also had a history of conflict with his supervisors and coworkers. In 2016, Mr. Higgins was diagnosed with chronic post-traumatic stress disorder (PTSD). Because Mr. Higgins continued to experience significant anxiety at work and ongoing

conflict, his psychologist concluded that he “cannot work, even with restrictions, and this [status] is permanent.” In March 2017, the VAMC suspended Mr. Higgins for using disrespectful language toward a supervisor during a December 2016 interaction with his immediate supervisor and a new second-level supervisor. In June 2017, the VAMC removed Mr. Higgins based on charges of disruptive behavior and use of profane language. These charges stemmed from 3 incidents: (1) in February 2017, Mr. Higgins was observed to have said to the Interim Associate Medical Director “remember I know where you live” or words to that effect; (2) during a March 2017 meeting in the equal employment opportunity office, Mr. Higgins appeared very upset and made threatening and profane statements that caused a witness to contact the VA police; (3) in April 2017, Mr. Higgins loudly confronted another VAMC employee who was escorting a veteran’s family to the morgue after the employee greeted Mr. Higgins by his first name.

Mr. Higgins appealed the suspension and removal decisions to the Board, the appeals were joined, and a hearing was held. The administrative judge (AJ) declined to order corrective action regarding the suspension. Regarding the removal, the AJ found that the agency proved the disruptive behavior and use of profane language charges and a nexus between the charges and the efficiency of the service. He also determined that the agency considered and balanced the relevant penalty factors, including mitigating factors such as Mr. Higgins’s PTSD. The AJ determined that the mitigating factors “could not overcome the extreme seriousness of the charges.” He therefore concluded that the penalty of removal was within the range of reasonableness. The AJ determined that Mr. Higgins established a prima facie whistleblower retaliation defense. He concluded that the agency’s evidence was strong, Mr. Higgins failed to prove a strong institutional motive to retaliate, and neither party had presented relevant evidence of agency actions taken against similarly situated employees. Therefore, he found that the agency would have removed him even in the absence of his protected whistleblowing activity and affirmed the removal action.

Mr. Higgins appealed to the court. He made the following assertions: (1) the Board improperly discounted his medical evidence of PTSD in assessing the reasonableness of the penalty; and (2) the AJ erred by excluding the testimony of certain witnesses regarding an agency motive to retaliate against him due to his whistleblower disclosures.

The court stated that Mr. Higgins did not separately argue that the AJ improperly discounted his PTSD in analyzing the suspension, and it would only address that issue regarding the removal action. The court noted that Mr. Higgins’s PTSD was one of several mitigating factors considered by the both the agency and the

AJ, and the AJ properly balanced his PTSD with the severity of the misconduct and other penalty factors. The court reiterated that the Board's role in reviewing an agency penalty is limited to assuring that the chosen penalty is within tolerable limits of reasonableness, and the AJ did not err in concluding as much here. The court considered Mr. Higgins's contention that this case is similar to *Malloy v. U.S. Postal Service*, 578 F.3d 1351 (Fed. Cir. 2009), and *Bal v. Department of the Navy*, 728 F. App'x 923 (Fed. Cir. 2018), both of which were remanded, but it found his arguments unpersuasive because the deciding official and the AJ acknowledged Mr. Higgins's PTSD and expressly considered it as a mitigating factor in the penalty analysis.

The court also considered Mr. Higgins's argument that the AJ abused his discretion by excluding the testimony of two agency officials regarding an institutional motive to retaliate against him, but it concluded that the AJ did not abuse his discretion. Regarding the first witness, the court noted that Mr. Higgins conceded that this witness "likely possessed no retaliatory motive," but he did not proffer this witness to testify about an institutional motive to retaliate, nor did he proffer the testimony of other individuals who had allegedly spoken with the witness who could have provided first-hand testimony regarding an institutional motive to retaliate. Regarding the second witness, the court noted that some of the proffered topics of testimony of the second witness overlapped with the eleven additional witnesses that Mr. Higgins was permitted to call at the hearing, and thus, the AJ did not abuse his discretion by excluding the second witness's testimony as irrelevant or redundant. The court found unpersuasive Mr. Higgins's remaining arguments and affirmed the Board's decision.

NONPRECEDENTIAL COURT DECISIONS

Martin v Department of Homeland Security, No. [2019-1578](#) (Fed. Cir. Apr. 20, 2020) (MSPB Docket No. DE-0752-17-0341-I-2): The court affirmed the AJ's decision to sustain the appellant's removal based on charges of conduct unbecoming a Customs and Border Protection Officer, lack of candor, and failure to follow a nondisclosure warning. These charges stemmed from an investigation of Mr. Martin by the agency's Office of Inspector General (OIG), during which OIG recorded, with the consent of two employees, Mr. Martin's telephone conversations with them and made a video recording of him with one of the employees in a hotel room, and a subsequent OIG interview. Regarding the conduct unbecoming charge, the court considered Mr. Martin's argument that the AJ erred in considering surveillance evidence gathered during an OIG investigation. The court found that it was appropriate to consider Mr. Martin's off-duty conduct, particularly because it involved another agency employee and agency manager. The court also rejected Mr. Martin's contention that the Fourth Amendment's exclusionary rule applied to bar certain recorded communications

because the U.S. Supreme Court has declined to extend the exclusionary rule beyond criminal trials and the recordings in question were consented to by other individuals. The court considered Mr. Martin's apparent assertion of "a union representative-bargaining unit member privilege"; it stated that it had not recognized such a privilege but, even if it exists, it does not protect union representatives from misconduct charges based on discussions with unit members. Regarding the lack of candor charge, the court found that there was substantial evidence that Mr. Martin was not credible in testifying that he does not recall whether he had made certain sexually suggestive or racially inappropriate comments towards employees because they were part of his "everyday banter." The court rejected Mr. Martin's contention that the AJ did not consider the fact that he was on medication (Bumetanide) that allegedly could cause memory loss because the record only shows that trouble concentrating, condition and memory loss could be possible side effects for people with liver disease, and Mr. Martin admitted that he did not have this condition. The court considered Mr. Martin's remaining arguments, and it concluded that they lacked merit.

Flynn v Department of the Army, No. [18-73009](#) (9th Cir. Apr. 21, 2020) (MSPB Docket No. SF-1221-18-0406-W-1): The court concluded that the Board properly dismissed for lack of jurisdiction Dr. Flynn's claims related to her filing an Equal Employment Opportunity Commission (EEOC) complaint and reporting sexual harassment because such complaints fell within the province of the EEOC and her claims related to the agency's alleged lack of transparency because she failed to allege nonfrivolous allegations of protected whistleblower activity. The court further found that the Board properly dismissed Dr. Flynn's remaining claims related to the agency's mismanagement and abuse of government contracts as barred by res judicata because she could have raised these claims in her prior Board appeal, which was adjudicated in a final decision on the merits. The court rejected Dr. Flynn's remaining arguments.