



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 28, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Leonard G. Dyer
Respondent: Department of the Air Force
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2019-2185](#)
Docket Number: PH-0752-19-0083-I-1
Issuance Date: August 21, 2020

JURISDICTION

NATIONAL GUARD TECHNICIANS/MILITARY RESERVE MEMBERS

In 1990, while the petitioner was enlisted in the West Virginia National Guard (WVNG), the serving adjunct general of the WVNG appointed him to a dual-status military technician position with the Department of the Air Force. As a dual-status technician, the petitioner's position was part civilian, as a Federal employee of the U.S. Air Force, and part military, as a member of the state national guard. Under 32 U.S.C. § 709(b), (f)(1)(A), dual-status technicians must maintain military membership with the National Guard, and the adjunct general must terminate from dual-status employment any technician who has been separated from the National Guard. Effective June 30, 2018, the serving adjunct general separated the petitioner from the WVNG and terminated him from his dual-status technician position for failure

to fulfill the section 709(b) requirement of National Guard membership.

The petitioner filed an initial appeal challenging his termination. In response, the agency argued that the Board lacked jurisdiction over the appeal. The administrative judge agreed that the Board had no authority to consider the WVNG's decision to separate the petitioner, but determined that the National Defense Authorization Act of 2017 (2017 NDAA) gave the Board jurisdiction over the termination action. The administrative judge adjudicated the appeal on the merits and affirmed the petitioner's termination.

After the initial decision became final, the petitioner filed a petition for review with the Federal Circuit. On review, the agency reargued that the Board lacks jurisdiction over the appeal.

Holding: The Board lacks jurisdiction over the petitioner's appeal of his termination from his dual-status technician position as a result of his separation from the National Guard.

1. The court discussed the changes made to the National Guard Technicians Act of 1968, as codified in relevant part at 32 U.S.C. § 709, and Title 5 by the 2017 NDAA. The court recognized that the 2017 NDAA provided that dual-status technicians are employees under 5 U.S.C. § 7511, allowing them adverse action appeal rights to the Board, except as limited by section 709(f). Pursuant to section 709(f)(4), such appeal rights do not apply, in relevant part, when the appeal "concerns fitness for duty in the reserve components." In such case, the appeal rights are limited to those available before the state adjutant general.
2. The court observed that, despite the changes, section 709 retained the above-mentioned provisions requiring National Guard membership for a dual-status technician and the technician's termination upon his separation from the National Guard. The court found that it was clear from the statute that the petitioner's "membership in the National Guard is a fundamental military-specific requirement." Thus, the petitioner's termination from dual-status employment as a result of his separation from the National Guard concerned his "fitness for duty in the reserve components."
3. The court found that the administrative judge erred in relying on cases when an adverse action is taken for failure to maintain a security clearance to find jurisdiction to review the termination at issue here. The court stated that security clearance cases were inapposite because the petitioner's termination was not "for cause," but rather compelled by statute.
4. The court therefore vacated the Board's decision and remanded with instructions to dismiss the appeal for lack of jurisdiction.

Petitioner: Tawana Harris
Respondent: Securities & Exchange Commission
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2019-1676](#)
Docket Number: DC-0432-18-0390-I-1
Issuance Date: August 25, 2020

**PERFORMANCE-BASED ACTIONS
MIXED CASE PROCEDURES
OPPORTUNITY TO DEMONSTRATE ACCEPTABLE PERFORMANCE**

In October 2017, the agency placed the petitioner on a 90-day performance improvement plan (PIP) because, during the last 3 months of the FY 2017 appraisal period, she had performed unacceptably in two of the three critical elements of her 2017 performance work plan. Ultimately, after the end of the PIP period, the agency removed the petitioner under chapter 43 for unacceptable performance during the PIP.

The petitioner filed a mixed case appeal challenging the merits of her removal and alleging that the action was based on race discrimination and in retaliation for filing an Equal Employment Opportunity complaint. After holding a hearing, the administrative judge issued an initial decision sustaining the petitioner's removal and finding that she did not prove her affirmative defenses of discrimination and retaliation.

After the initial decision became final, the petitioner filed a petition for review with the Federal Circuit. Therein, she argued that the administrative judge erred in finding that the agency proved she was warned of inadequacies in critical elements during the appraisal period and that she was afforded an opportunity to improve after proper notice—i.e., the agency did not establish elements three and four of its burden of proving the chapter 43 removal for unacceptable performance. She also submitted a Form 10 Statement Concerning Discrimination waiving her title VII claims raised before and decided by the administrative judge.

Holding: Substantial evidence supported the administrative judge's finding that the petitioner was warned of her inadequate performance.

1. The petitioner asserted that the agency failed to "warn her during the appraisal period" because the agency issued the PIP in a different performance appraisal period, FY 2018, than the one in which the agency issued her performance appraisal and the performance at issue occurred, FY 2017. The court rejected this argument.

2. The court recognized that in a chapter 43 removal action, the agency must show, among other things, the “twin requirements” that it communicated an employee’s written performance standards and critical elements of her position at the beginning of the rating period, and that it warned the employee of related inadequacies during the rating period.
3. The court clarified that the warning, i.e., the PIP, must “relate to inadequacies that occurred during the same appraisal period for which the written performance standards were communicated.” However, there was no basis for concluding that the agency also must issue the warning in that same rating period.
4. Focusing on the content, as opposed to the timing of the PIP, the court determined that the PIP included the necessary information.

Holding: Substantial evidence supported the administrative judge’s finding that the petitioner was afforded a reasonable opportunity to improve.

1. The court also considered the petitioner’s claim that she did not have a reasonable opportunity to improve because her PIP standards were not reasonable, her PIP placement was pretextual, and her removal was predetermined. In so doing, it also considered the agency’s argument that the court lacked authority to consider any of the petitioner’s claims of pretext and predetermination. The court rejected both the petitioner’s and the agency’s contentions.
2. The court found that it had the authority to review the agency’s action, including any nondiscrimination-related pretext claims, because her explicit waiver of her discrimination claims “effectively convert[ed]” her mixed case appeal to a standard chapter 43 removal appeal within the court’s jurisdiction. The court further found that the petitioner’s concurrent district court case concerning her placement on a PIP, a distinct personnel action, did not affect the court’s authority to review the agency’s removal action.
3. As to the merits of the petitioner’s claims, the court concluded that substantial evidence supported the administrative judge’s finding that the petitioner was afforded a reasonable opportunity to improve, findings that were based heavily on explicit credibility determinations.