



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 18, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Roberto Ramirez
Respondent: Department of Homeland Security
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2019-1534](#)
Petition for Review from Arbitration
Issuance Date: September 15, 2020

Arbitration - Miscellaneous
Constitutional Issues - Due Process

Following a domestic incident involving the alleged use of a firearm, the agency ordered Mr. Ramirez, a Customs and Border Protection Officer, to complete a psychiatric evaluation. The evaluation was inconclusive, but the examining psychiatrist, Dr. Skop, reported that he could not “confidently say” that Mr. Ramirez was able to safely carry a government-issued weapon, because there was evidence that he was not “totally forthcoming” during the assessment. The agency ordered a second evaluation by a different psychiatrist, Dr. Nahmias, who also did not reach a definite conclusion as to Mr. Ramirez’s dangerousness or ability to safely weapon, but nonetheless recommended that he be restricted from a weapon-carrying position based on his “lack of full cooperativeness” during his evaluation. Both psychiatrists

based their conclusions on the findings of a third-party clinical psychologist, Dr. Frederick, who determined that the results of the Minnesota Multiphasic Personality Inventory (MMPI), a written assessment Mr. Ramirez completed as part of each evaluation, were "invalid" due to "extreme defensiveness." Based on the report by Dr. Nahmias, the agency found that Mr. Ramirez was no longer fit for duty and proposed his removal. The agency provided Mr. Ramirez with copies of the reports by the two examining psychiatrists, but did not provide him access to the MMPI scores or their interpretation by Dr. Frederick. After considering his responses, the agency removed Mr. Ramirez.

Mr. Ramirez elected to challenge his removal through arbitration. During the arbitration proceeding, Mr. Ramirez requested copies of the MMPI assessments and Dr. Frederick's tabulation and interpretation of the scores. The agency denied the requested records on the ground that it had not obtained them from Dr. Frederick. Mr. Ramirez objected to the agency's introduction of evidence that relied on the MMPI assessments, on the ground that he did not have access to the test results, but the arbitrator reserved judgment and allowed the agency to present its evidence. During the hearings, Mr. Ramirez called his own expert witness, who had administered him another MMPI assessment and interpreted his scores as being within the range typical for law enforcement personnel.

Following the hearings, the arbitrator issued an Interim Award ordering Mr. Ramirez to undergo yet another psychiatric evaluation. In concluding that another examination was necessary, the arbitrator declined to credit Mr. Ramirez's expert witness, but found that the conclusions of the agency's medical witnesses fell "technically short of preponderantly proving" that Mr. Ramirez was unfit for duty. Mr. Ramirez appealed the Interim Award to the Federal Circuit, which determined that it lacked jurisdiction because the award was not yet final. Mr. Ramirez then reported for the new examination, during which he completed another MMPI assessment. The new MMPI assessment was again reviewed by Dr. Frederick, who again interpreted the results as invalid due to "high defensiveness." Based in part on Dr. Frederick's interpretation, the new examining psychiatrist, Dr. Yi, concluded that she could not declare the petitioner was safe to return to the workplace. The petitioner requested copies of all records relating to that evaluation, including the MMPI assessments, but agency refused, stating that that it had not received the test results. The petitioner challenged the agency's response, renewed his earlier objections to the agency's medical evidence, and requested that the arbitrator order the agency to produce the MMPI records. The arbitrator issued a Final Award affirming Mr. Ramirez's removal. He also denied Mr. Ramirez's request to order the agency to produce the records of his MMPI assessments, and declined to reopen the record for a new hearing.

Mr. Ramirez petitioned for review, arguing (1) that the arbitrator exceeded his authority in ordering a new psychiatric evaluation and considering the merits of the removal after issuing the Interim Award; and (2) that the agency's denial of access to the records of the MMPI assessments deprived him of due process.

Holding: The court held that (1) the arbitrator did not exceed his authority by seeking additional evidence after issuing the Interim Award, and (2) the petitioner was entitled to a meaningful opportunity to review and challenge the written assessments underlying his adverse psychiatric evaluations.

1. The court first considered Mr. Ramirez's argument that the arbitrator's jurisdiction over the case terminated once he found that the expert opinions proffered by the agency failed to satisfy its burden of proof. In making that argument, Mr. Ramirez relied on the doctrine of *functus officio*, which dictates that once an arbitrator has issued a final decision on a submitted issue, he has no further authority, absent agreement by the parties, to redecide the issue. The court noted that it had not previously considered the question of whether an interim award by an arbitrator constitutes a final decision that triggers *functus officio*. The court answered in the negative, holding that "an arbitrator does not lose the authority to further consider a submitted issue by announcing an interim finding when the award expressly defers a final decision on that issue pending the availability of additional evidence."
2. The court next considered whether Mr. Ramirez was afforded due process in light of the agency's refusal to provide him with access to the records of his MMPI assessments. To begin, the court took note of relevant Supreme Court precedent, including *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), which held that the "essential requirements of due process" for public employees facing removal are "notice and an opportunity to respond"; *Mathews v. Eldridge*, 424 U.S. 319 (1976), which listed the factors to be considered in determining the process due to an individual in a given context; and *Greene v. McElroy*, 360 U.S. 474 (1959), which recognized that a "relatively immutable" principle of due process is that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue." The court then considered cases involving comparable circumstances, in particular *Banks v. Federal Aviation Administration*, 687 F.2d 92 (5th Cir. 1982), which held that Government employees removed on drug charges

established through urinalysis are entitled to access to samples for independent verification, and *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, 251 F. Supp. 3d 1168 (S.D. Tex. 2017), which held that a school district violates the due process rights of its teachers when it bases retention decisions on the results of a proprietary assessment without providing an opportunity to review and assess the accuracy of the testing data and methodology. The court similarly concluded that, in light of the *Mathews* factors and the “immutable” principle of due process announced in *Greene*, Mr. Ramirez was entitled to an opportunity to independently review the tests and their interpretation by Dr. Frederick. The court further noted that the agency made no showing that it would have been unduly burdensome to obtain and produce those records.

3. The court next addressed the arbitrator’s reasoning that: (1) the records were not in the agency’s custody, and it therefore had not regulatory or contractual obligation to produce them; (2) the agency itself did not directly rely on the records in making its removal decision; (3) Mr. Ramirez had the opportunity to cross-examine Dr. Nahmias and present testimony from his own expert; and (4) Dr. Skop and Dr. Yi generally concurred with Dr. Nahmias’s findings. The court found that none of these grounds undermined Mr. Ramirez’s due process rights to the records at issue.
4. The court found, however, that the agency’s failure to provide Mr. Ramirez with the MMPI records *before* removing him was not by itself a sufficient basis for vacating the removal decision. The agency did notify Mr. Ramirez that the proposed removal was based on the conclusions of his psychiatric evaluations, and he received the reports of those evaluations, which informed him that they relied on MMPI results that neither he nor the agency had reviewed first hand. That information explained the basis for the agency’s decision and allowed him to challenge the decision by pointing out ways in which the underlying evidence may have been unreliable. While he was ultimately entitled to independently review the MMPI records with the assistance of his own expert, the fact that he was unable to do so during the pre-termination proceedings was not a constitutional violation so substantial and so likely to cause prejudice that it could not be remedied through post-termination procedures.
5. In sum, the court held that “when an agency relies, directly or indirectly on the results of a psychological assessment in justifying an employee’s removal, the agency must provide the employee with a meaningful opportunity to review and challenge the data, analysis, and results of that assessment.”
6. Because Mr. Ramirez was denied that opportunity, the court vacated the

Final Award and remanded for further proceedings. The court stated that, on remand, the arbitrator must (1) order the agency to provide Mr. Ramirez (or his designated agent) access to the records of the MMPI assessments, including the assessments themselves, his responses, and Dr. Frederick's interpretations; and (2) provide Mr. Ramirez an opportunity to present new evidence and testimony at a hearing concerning those records.

7. The court declined to address the question of what remedies would be acceptable should the parties discover on remand that the relevant records were no longer available. The court reasoned that this would be for the arbitrator to decide in the first instance, should the need arise.
8. Bryson, J. wrote a separate, concurring opinion. Although he agreed with the outcome, he stated that, in his view, the remand order should require the agency to ascertain whether the test results and scoring reports were available, and direct the agency to attempt those items if they are available. He further explained that, if the agency could not obtain those materials despite bona fide efforts to do so, he would not regard the unavailability of the tests as necessarily having deprived Mr. Ramirez of a fair opportunity to respond to the case against him.

NONPRECEDENTIAL:

Mason v. Department of Defense; Defense Commissary Agency, No. [19-72488](#) (9th Cir. Sept. 16, 2020) (MSPB Docket No. SF-1221-19-0468-W-1)

The Board dismissed the appellant's individual right of action (IRA) appeal as barred by res judicata, because it had previously dismissed with prejudice his prior IRA appeal based on the same retaliation claim. The appellant petitioned the Ninth Circuit for review, and the court denied the petition, finding that the Board properly dismissed the appeal as barred by res judicata.

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