



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 11, 2020

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

COURT DECISIONS

PRECEDENTIAL:

Case Name: Esparraguera v. Department of the Army
Tribunal: United States Court of Appeals for the Federal Circuit
Case Number: [2019-2293](#)
MSPB Docket Number: CB-3592-18-0022-U-1
Issuance Date: December 4, 2020

COURT REVIEW

- APPEAL RIGHTS UNDER CSRA

PERFORMANCE BASED ACTIONS

- JURISDICTION

The petitioner sought review of the agency's action removing her for performance reasons from her Senior Executive Service (SES) position and placing her in another high-level position outside the SES. The Board did not issue a decision under its normal appellate procedures. Instead, pursuant to 5 U.S.C. § 3592(a), the Board held an informal hearing and issued an order referring the record to the respondent agency, as well as to the Office of Special Counsel and Office of Personnel Management. The petitioner then filed an appeal at the Federal Circuit, arguing that she had been denied due

process.

Holding: The court held that it lacked jurisdiction to review the Board's order referring the record because that order did not constitute a "final order or final decision" that "adversely affected or aggrieved" the petitioner.

1. First, the court held that the Board lacked authority to review the petitioner's removal from her SES position. By granting employees like the petitioner an informal hearing, Congress was providing an opportunity to be heard, not an adversarial forum. Section 3592(a) permits an affected employee to "appear and present argument," but it does not incorporate any of the substantive or procedural requirements that apply to adverse action appeals under chapter 75. The fact that Congress specifically gave the Board authority to review actions against other Federal employees and against SES employees removed for misconduct demonstrates that it did not intend to provide for review in performance-based actions against SES employees.
2. The court rejected the petitioner's argument that a post-deprivation hearing is required as a matter of due process. The court held that even if the petitioner were deprived of a due process interest, the clear text and structure of the Civil Service Reform Act prevents a court from expanding the Board's jurisdiction in this context.
3. The court then held that because the Board lacked review authority in this matter, its order referring the record was not a reviewable "final order or decision." Under 5 U.S.C. § 7703(a), an employee who is "adversely affected or aggrieved by a final order or decision of [the Board] may obtain judicial review of the order or decision." Applying this standard, the Federal Circuit generally only reviews final judgments from the Board, i.e., orders or decisions that end the litigation on the merits and leave nothing for the court to do but execute the judgment. The Board's order in this case was a ministerial act of record keeping, not a final judgment.
4. Finally, the court rejected the petitioner's argument that it should exercise jurisdiction over her appeal because of the presumption in favor of judicial review of constitutional claims. The court held that even if the petitioner was correct that some court would be required to hear her constitutional claims, she did not establish that the Federal Circuit was the proper court to do so. The court therefore dismissed the appeal for lack of jurisdiction.

Case Name: Harrington v. Department of Veterans Affairs
Tribunal: United States Court of Appeals for the Federal Circuit
Case Number: [2019-1882](#)
MSPB Docket Number: AT-0714-18-0615-I-1
Issuance Date: December 7, 2020

ADVERSE ACTIONS

- STANDARD OF PROOF
- PENALTY

COURT REVIEW

- MISCELLANEOUS

The agency removed the petitioner from his position as a Police Officer based on 38 U.S.C. § 714, which streamlined disciplinary actions by the agency and limited the Board's review of those actions. The Board affirmed the removal and the petitioner appealed to the Federal Circuit. After briefing concluded in this appeal, the court decided [Sayers v. Department of Veterans Affairs, 954 F.3d 1370 \(Fed. Cir. 2020\)](#), in which it held that (1) section 714 requires the Board to review for substantial evidence the entirety of the agency's removal decision, including the penalty, and (2) section 714 cannot be applied retroactively. The petitioner submitted *Sayers* to the court as supplemental authority.

Holding: The court held that the § 714 action against the petitioner was improper under *Sayers* because it relied on conduct that predated enactment of § 714.

1. First, the court held that the Board's failure to review the agency's penalty determination was sufficient to warrant remand for further proceedings consistent with *Sayers*.
2. The court then considered whether the petitioner had waived his argument regarding retroactivity by failing to raise it prior to supplemental briefing. The court found that it was appropriate to excuse waiver under these circumstances, given that retroactivity is a pure question of law, the proper resolution is beyond any doubt, and it would have been difficult for the pro se petitioner to mount a retroactivity defense before the Board.
3. On the merits of the retroactivity issue, the court found that the agency could not remove the petitioner under § 714 without impermissibly applying the statute retroactively. It therefore vacated the removal and remanded the matter to the Board with instructions to remand it to the agency.

NONPRECEDENTIAL:

Flynn v. Department of Veterans Affairs, [No. 2020-1898](#) (Fed. Cir. Dec. 7, 2020) (MSPB Docket No. SF-1221-19-0192-W-1): The court affirmed the Board's final decision denying the petitioner's request for corrective action in his individual right of action appeal. The court rejected the petitioner's argument that he was entitled to the procedures set forth at 5 U.S.C. § 7513; the court found that the petitioner's registered nurse position was specifically exempted from those procedures.

Heslop v. Internal Revenue Service, [No. 2020-1314](#) (Fed. Cir. Dec. 9, 2020): The court affirmed an arbitrator's decision that sustained the petitioner's removal for excessive absences. The court rejected the petitioner's argument that she had submitted post-removal medical evidence that warranted mitigation of the penalty.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)