



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 23, 2020

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COURT DECISIONS

PRECEDENTIAL:

Case Name: Baca v. Department of the Army
Tribunal: United States Court of Appeals for the Tenth Circuit
Case Number: [19-9536](#)
MSPB Docket Number: DE-0752-19-0022-I-1
Issuance Date: December 22, 2020

The Court granted in part the petitioner's request for rehearing, and replaced its September 2, 2020 opinion with a revised opinion. The court indicated that the changes to the prior opinion were non-substantive and did not affect the outcome of the appeal.

Case Name: Braun v. Department of Health & Human Services
Tribunal: United States Court of Appeals for the Federal Circuit
Case Number: [2019-1949](#)
MSPB Docket Number: DC-0752-16-0743-I-2
Issuance Date: December 21, 2020

ADVERSE ACTION CHARGES

- PERFORMANCE BASED ACTIONS
- CONSTITUTIONAL ISSUES/DUE PROCESS**
- DUE PROCESS
- DEFENSES AND MISCELLANEOUS CLAIMS**
- HARMFUL ERROR

The petitioner sought review of a Board decision affirming his removal from his position as a research doctor at the National Institutes of Health (NIH). The petitioner had worked at NIH for more than 30 years and had obtained tenure in 2003. In 2015, the petitioner notified his director that he had deviated from the approved protocol for screening human subjects of a study. The agency commissioned an audit of the petitioner's records, which found among other things that complete records existed for less than 9% of participants in the petitioner's study, which had been ongoing for 6 years. The agency suspended the study pending appropriate remediation. It also proposed the petitioner's removal for negligence in the performance of his duties. The petitioner argued that under its own policy the agency could not remove him on performance grounds without first de-tenuring him. The agency nevertheless removed the petitioner, who filed a Board appeal.

The administrative judge found that the agency removed the petitioner "for cause" and therefore it was not required to de-tenure him before taking the removal action. The administrative judge also rejected the petitioner's claims of harmful procedural error, age discrimination, and reprisal for prior equal employment opportunity activity. After the initial decision became the final decision of the Board, the petitioner sought review before the Federal Circuit.

Holding: By a 2-1 decision, the court affirmed the petitioner's removal and held that the agency was permitted to remove him without first de-tenuring him.

1. First, the majority held that the agency was authorized under its policy to remove the petitioner for cause without first de-tenuring him. The petitioner argued that agency policy provided for the removal of tenured scientists for unacceptable performance only after de-tenuring, and thus the agency could only remove him based on his performance if it first de-tenured him. The majority rejected that argument, holding that a separate provision of the agency policy, which authorized removals "for cause" without de-tenuring, could be applied to cases of scientific misconduct. The majority analogized the two agency policy provisions to Chapter 43 and Chapter 75 of Title 5 and noted that although Chapter 43 deals specifically with actions based on unacceptable performance, an agency may nevertheless take a performance-based action under

Chapter 75. The majority found that the specific allegations against the petitioner here, which involved a failure to comply with scientific protocols over a long period of time, fell within the scope of the “for cause” provision.

2. The majority also rejected the petitioner’s argument that the agency denied him due process in its penalty determination. Specifically, the petitioner argued that the agency considered the recommended penalty in its Table of Penalties for “violation[s] of recognized professional or agency standards of medical ethics or patient care,” which was not the specific charge set forth in his notice of proposed removal. Additionally, he asserted that the agency violated his due process rights by using the term “misconduct” in its removal decision, while that term did not appear in the notice of proposed removal. The majority agreed with the Board that the notice of proposed removal provided the petitioner with sufficient information to prepare an informed reply, thereby satisfying the requirements of due process.
3. The majority also rejected the petitioner’s argument that the agency committed harmful procedural error by misrepresenting the timing of his removal to its Institutional Review Board. The majority agreed with the Board that the petitioner failed to show that any error by the agency was harmful.
4. Finally, the majority declined to consider the petitioner’s argument regarding alleged disparate treatment because he failed to raise it in his opening brief.
5. Judge Newman dissented, arguing that the majority had erroneously conflated negligence in the performance of one’s duties with misconduct, which in her view had the effect of rendering virtually meaningless the tenure protections for NIH scientists.

NONPRECEDENTIAL:

Pak v. Department of Veterans Affairs, [No. 2020-1845](#) (Fed. Cir. Dec. 22, 2020) (MSPB Docket No. CH-1221-19-0337-W-1): The court affirmed the Board’s decision denying the petitioner’s request for corrective action in his individual right of action appeal. The court found that the administrative judge properly excluded the petitioner’s evidence and witnesses as a sanction for repeated failure to comply with orders. The court also found that the Board’s findings on the merits were supported by substantial evidence.

Franco v. Department of Defense, [No. 2020-1499](#) (Fed. Cir. Dec. 18, 2020) (MSPB Docket No. SF-4324-19-0187-I-2): The court affirmed, per

Rule 36, the Board's decision dismissing as moot the petitioner's appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994.

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