



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 12, 2021

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Lawrence Brenner
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2019-2032](#)
MSPB Docket No. NY-0714-19-0007-I-1
Issuance Date: March 9, 2021

Performance Based Actions
Penalty
Statutory Interpretation

On June 23, 2017, Congress enacted the Department of Veterans Affairs Accountability Act (the Act), codified in relevant part at 38 U.S.C. § 714, which provides the agency with streamlined authority for disciplining employees for misconduct or poor performance, and places limitations on Board review of those actions. The statute provides that in an appeal of an action taken under section 714, the Board “shall uphold the decision of the [VA] Secretary . . . if the decision is supported by substantial evidence.” Section 714 further provides that, if the decision is supported by substantial evidence, the Board may not mitigate the penalty.

In September 2018, the agency removed Mr. Brenner under section 714 for failing to meet performance standards. In taking that action, the agency relied on Brenner's alleged performance deficiencies both before and after June 23, 2017.

On appeal, the Board affirmed the removal action. Applying section 714, the Board concluded that the agency met its burden of proof by substantial evidence, and that Brenner failed to prove his various affirmative defenses. In finding that the agency met its burden of proof, the Board considered only the charges, finding that it lacked authority under the Act to consider the reasonableness of the penalty.

Brenner appealed to the Federal Circuit, arguing, inter alia, that (1) the Board erred in concluding that the Act prohibited it from reviewing the reasonableness of the penalty; and (2) that the agency and the Board improperly applied the Act retroactively to actions that occurred prior to its enactment.

Holding: Relying on its recent decision in *Sayers v. Department of Veterans Affairs*, 954 F.3d 1307 (Fed. Cir. 2020), the court found that the Board erred (1) in finding that it could not review the agency's penalty determination, and (2) in applying section 714 retroactively to conduct occurring before June 23, 2017. The court clarified that both the penalty review and retroactivity holdings of *Sayers* extend to performance-based actions under section 714.

1. Addressing Brenner's first argument, the court cited its recent decision in *Sayers v. Department of Veterans Affairs*, [954 F.3d 1307](#) (Fed. Cir. 2020), which held that the Board's review of an adverse action under section 714 must include review of the penalty. As explained in *Sayers*, the Board's review of the agency's "decision" necessarily encompasses not only the facts, but also the decision to impose a certain penalty based on those facts. The court further explained that review of the penalty is consistent with both the plain meaning of the statute and the congressional intent underlying the Act. The court also noted that, because the Board lacks authority to mitigate the penalty in section 714 actions, if it determines that the agency did not support the removal penalty by substantial evidence, it must remand to the agency to assess the appropriate penalty.
2. The court considered the agency's counterargument that the holding of *Sayers* concerning penalty review was *obiter dicta*. The agency reasoned that the court remanded *Sayers* because the agency had improperly applied section 714 retroactively. The court rejected that

- argument, explaining that it could not have addressed the retroactivity issue without first determining the Act’s “meaning and effect.”
3. The court next considered the agency’s argument that the holding of *Sayers* regarding penalty review did not extend to Brenner’s removal, because he was removed for performance reasons and not for misconduct. The court found that argument unpersuasive, reasoning that section 714 does not distinguish between removals based on performance and removals based on misconduct.
 4. Proceeding to Brenner’s second argument, the court found that the administrative judge erred in applying section 714 retroactively to conduct occurring before June 23, 2017. As the court previously held in *Sayers*, section 714 does not apply to proceedings based on conduct occurring before its enactment. Even if Brenner’s performance worsened after the effective date of the Act, as the agency alleged, this did not allow the agency to base its actions events that took place before that date. Rather, Brenner was entitled to the legal protections that were in place at the time the alleged poor performance occurred.
 5. Finally, the court considered the agency’s argument that *Sayers* did not preclude retroactive application of section 714 in this case, because section 714 did not significantly change the procedures for performance-based actions under chapter 43. The court found that, although section 714 and chapter 43 both involve the substantial evidence standard and do not allow for mitigation of the penalty, the differences are not merely procedural, and that removing Brenner under section 714 for events occurring before the effective date of the Act would give the Act impermissible retroactive effect.
 6. The court vacated the Board’s decision and remanded for further proceedings to consider whether the agency’s decision—including the penalty—was supported by substantial evidence postdating the Act. The court noted that if the agency wishes to rely on evidence predating the enactment of the Act, it must proceed in accordance with 5 U.S.C. chapter 43 or 75.

Petitioner: Fernando Santos

Respondent: National Aeronautics & Space Administration

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

Case Number: [2019-2345](#)

MSPB Docket No. AT-0432-19-0074-I-1

Issuance Date: March 11, 2021

Performance Based Actions
Statutory Interpretation
USERRA

Mr. Santos was a mechanical engineer for NASA and a commander in the U.S. Navy Reserve, with 18 years of service and numerous accolades. Following his transfer to a new division, Santos began receiving letters of instruction and reprimand from his new supervisor, alleging poor performance. The timing of many letters coincided with Santos's request for or absences for military leave, and emphasized his alleged inability to "report to work in a timely manner and maintain regular attendance at work." After months of difficulties, the supervisor placed Santos on a performance improvement plan (PIP), and ultimately removed him under chapter 43. Santos then filed a Board appeal, in which he alleged, among other things, that the agency discriminated against him because of his military service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Pursuant to 5 U.S.C. chapter 43, the Board considered whether the agency proved by substantial evidence that: (1) Santos's performance failed to meet the PIP-established standards in one or more critical elements of his position; (2) the agency established performance standards and critical elements and communicated them to Santos at the beginning of the PIP; (3) the agency warned Santos of the inadequacies of his performance during the PIP and gave him adequate opportunity to improve; and (4) after an adequate improvement period, Santos's performance remained unacceptable in at least one critical element. After considering the evidence concerning Santos's performance during the PIP, the Board concluded that the agency established each element by substantial evidence. However, the Board declined to address Santos's argument that he should not have been put on a PIP in the first place. As justification for that decision, the Board cited *Wright v. Department of Labor*, 82 M.S.P.R. 186 (1999), in which the Board held that "an agency is not required to prove that an appellant was performing unacceptably prior to the PIP."

The Board also rejected Santos's USERRA claim, finding that he failed to show that his uniformed service was a substantial or motivating factor in his removal. In reaching that conclusion, the Board found that there was no evidence supporting his claim because Santos's supervisor "thanked him for his service," was "very patriotic," and did not express to others that Santos took too much military leave.

Santos appealed the Board's decision to the Federal Circuit, arguing that the Board (1) failed to consider the events preceding his PIP in assessing the propriety of his removal; (2) failed to engage in the correct inquiry when

assessing his USERRA claim; and (3) predicated its conclusion that his military service was not a primary motivating factor in his removal on inadequate facts.

Holding: The court interpreted 5 U.S.C. § 4302(c)(6) to require that in an appeal of performance-based removal following a PIP, the agency must show by substantial evidence that the employee's unacceptable performance "continued"—i.e., that it was unacceptable both before the PIP and during the PIP. In other words, the agency must justify the imposition of the PIP. The court found that the events leading to the PIP were also relevant to the employee's USERRA claim.

1. Title 5 U.S.C. § 4302(c)(6) provides that employees "who continue to have unacceptable performance" may only be removed "after an opportunity to demonstrate acceptable performance." In *Wilson v. Department of the Navy*, 24 M.S.P.R. 583, 586 (1984), and subsequent cases, the Board held that this provision does not require an agency to prove that an employee was performing unacceptably prior to the PIP in order to justify a post-PIP removal. The court rejected the Board's interpretation, reasoning that, to "continue to have unacceptable performance," an employee must have displayed unacceptable performance *prior* to the PIP, as well as during the PIP.
2. The court observed that requiring the agency to justify initiation of a PIP is particularly appropriate in cases such as this one, where an employee alleges that both the PIP and the removal based on the PIP were in retaliation for protected conduct. Otherwise, an agency could establish a PIP in direct retaliation for protected conduct and set up unreasonable expectations in the PIP in the hopes of predicated removal on them without ever being held accountable for the original retaliatory conduct.
3. The court considered and rejected the agency's counterarguments. The agency first argued that section 4303 is silent as to whether agencies bear the burden of establishing the unacceptability of pre-PIP performance, but the court found that the agency's argument ignored the more relevant statutory language at section 4302(c)(6). The agency further argued that since an agency is not required to notify an employee of unacceptable performance prior to the issuance of a PIP, it is also not required to affirmatively establish the employee's unacceptable performance prior to the PIP. The court rejected this argument as well, reasoning that allowing a PIP to serve as notice of unacceptable performance is not the same allowing the PIP to create a presumption that the pre-PIP performance was actually unacceptable.
4. In sum, the court concluded that, once an agency chooses to impose a post-PIP termination, it must prove by substantial evidence that the

employee's unacceptable performance "continued"—i.e., that it was unacceptable before the PIP and remained so during the PIP.

Accordingly, the court vacated and remanded the issue for the Board to decide whether Santos performed unacceptably before the PIP.

5. Turning to the USERRA claim, the court explained that, under *Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001), an employee making a discrimination claim under USERRA bears the initial burden of showing by a preponderance of the evidence that the employee's military service was a substantial or motivating factor in the adverse employment action. In determining whether showing has been made, factors to be considered include: (1) proximity in time between the employee's military activity and the adverse employment action; (2) inconsistencies between the proffered reason and other actions of the employer; (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. Once the employee has made the required showing, the agency has the opportunity to show by a preponderance of the evidence that it would have taken the adverse action anyway, for a valid reason. Under *Erickson v. U.S. Postal Service*, 571 F.3d 1364 (Fed. Cir. 2009), an agency may not treat employees on military leave the same as employees on nonmilitary leave.
6. Having vacated and remanded the Board's conclusions regarding Santos's performance, the court found it was also necessary to vacate and remand the Board's assessment of his USERRA claim. The court reasoned that the two inquiries are related, since the validity of the reason proffered for the discharge is a factor in the *Sheehan* analysis. Hence, the events leading to Santos's PIP may be directly relevant to Santos's ability to satisfy his initial burden under USERRA.
7. The court stressed that, on remand, the Board should actually apply the *Sheehan* factors, which it had not yet done. In particular, the court noted that Santos had detailed the extent to which his supervisor's complaints about his performance dovetailed with his military obligations, whereas the Board had relied on its findings that Santos's supervisor "thanked him for his service" and was "very patriotic." Those minimal findings did not suffice under *Sheehan*.
8. Judge Hughes issued a brief concurrence in which he agreed that remand was appropriate because Board failed to properly consider Santos's USERRA claims, including his claim that the agency's decision to place him on a PIP was due to unlawful retaliation or discrimination under USERRA.

NONPRECEDENTIAL:

Smith v. General Services Administration, No. [2020-1463](#) (Fed Cir. Mar. 11, 2021) (MSPB Docket No. AT-0752-17-0470-M-1)

Mr. Smith was removed on charges of disrespectful conduct towards his supervisor, absence without leave (AWOL), failure to follow supervisory instructions, and failure to comply with the agency's information technology security policy. On appeal to the Board, the administrative judge affirmed the removal action. He sustained all charges except AWOL, and found that Smith failed to prove his affirmative defenses, which included a claim of whistleblowing reprisal.

After the initial decision became final, the appellant petitioned for review by the Federal Circuit. In a precedential decision, *Smith v. General Services Administration*, [930 F.3d 1359](#) (Fed. Cir. 2019), the court affirmed in part, reversed in part, and vacated in part the Board's decision, and remanded the case for further adjudication. The court determined that, in finding that the agency showed by clear and convincing evidence it would have removed Smith in the absence of his protected disclosures, the administrative judge relied only on the seriousness of the sustained misconduct and failed to apply the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999). The court also reversed the administrative judge's findings as to the charge of failure to comply with information technology, and one specification of failure to follow supervisory instructions.

On remand, the administrative judge again sustained the charge of failure to follow supervisory instructions, based on the remaining specifications. He considered the *Carr* factors in accordance with the court's instructions, again concluding that the agency proved by clear and convincing evidence that it would have removed Smith absent his whistleblowing. Finally, he found that the agency established nexus and that the penalty of removal was reasonable based on the sustained misconduct. After the remand decision became final, Smith again appealed to the Federal Circuit, which affirmed the Board's decision without opinion, pursuant to Rule 36.