



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for April 9, 2021

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#### NONPRECEDENTIAL COURT DECISIONS

*Terry v. Department of Agriculture*, No. [20-1604](#) (Fed. Cir. Apr. 8, 2021) (MSPB Docket No. DC-0752-19-0453-I-1): Mr. Terry was appointed to the position of an Information Technology Specialist. The agency classified this position as requiring a high degree of trustworthiness due to the access to sensitive information. A background investigation revealed two areas of concern: (1) a termination by a former employer that Mr. Terry had not disclosed when he was hired; and (2) evidence of financial irresponsibility. After an investigation, the agency removed Mr. Terry from his position for failure to satisfy a condition of unemployment, i.e., receipt of a favorable adjudication of his background investigation. On appeal to the Board, the administrative judge sustained the charge, found that there was a nexus between his misconduct and his employment, and upheld the removal penalty. Before the court, Mr. Terry asserted that substantial evidence did not support the two grounds on which the agency based its removal decision—financial irresponsibility and a false representation on two different employment forms that he had not been fired from a job within the previous 5 or 7 years. The court rejected these arguments, explaining, among other things, that the administrative judge did not credit Mr. Terry’s testimony on these issues, and her credibility determinations, which were “virtually unreviewable,” were corroborated by other evidence in the record. The court also addressed Mr. Terry’s claim that the delay between when he was hired and when he was removed was

impermissibly long and that the charge was barred by laches. The court noted that Mr. Terry did not specifically raise a claim of laches before the administrative judge, but the administrative judge found that the 3-year delay was not extraordinary because of the “substantial backlog” of pending investigations and the delay did not prejudice Mr. Terry. The court affirmed the administrative judge’s finding in this regard. The court also affirmed the administrative judge’s determination that the agency properly removed Mr. Terry.

*Reid v. Department of Homeland Security*, No. [20-2022](#) (Fed. Cir. Apr. 8, 2021) (MSPB Docket No. DA-0752-20-0018-I-1): Rule 36 affirmance.

*Sphatt v. Department of Homeland Security*, No. [20-1451](#) (Fed. Cir. Apr. 7, 2021) (MSPB Docket No. NY-0752-19-0146-I-1): Ms. Sphatt was removed from her position as an Immigration Officer in April 2019 for misuse of her Government position and Government credentials, lack of candor, and unauthorized use of a Government database. On appeal to the Board, the administrative judge affirmed the agency’s decision, finding that it proved all four charges, Ms. Sphatt did not prove any of her affirmative defenses, and the removal penalty was reasonable. On review, the court noted that Ms. Sphatt did not challenge the administrative judge’s decision to merge charges 1-2. The court found that the administrative judge’s decision to uphold all of the charges was supported by substantial evidence. The court rejected Ms. Sphatt’s argument that there was no nexus between the sustained misconduct and the efficiency of the service, noting that the evidence showed that her misconduct affected management’s trust and confidence in her ability to support the agency’s mission. The court also rejected her argument that removal was an unreasonably harsh penalty for the sustained misconduct. The court also addressed and rejected Ms. Sphatt’s argument that the agency violated her procedural rights. Therefore, the court affirmed the administrative judge’s decision to uphold the removal action.

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