U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 22, 2022

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BOARD DECISIONS

Appellant: Fidelis O. Odoh
Agency: Office of Personnel Management
Decision Number: 2022 MSPB 5
Docket Number: CH-0731-16-0344-I-1

SUITABILITY

After investigating the appellant's background and suitability for Federal employment, the Office of Personnel Management (OPM) instructed the Department of the Army to separate him from service, cancelled his eligibility for reinstatement, cancelled his eligibility for appointment, and debarred him for 3 years. OPM's negative suitability determination was based on two charges: (1) misconduct or negligence in employment; and (2) material, intentional false statement, or deception or fraud in examination or appointment. On appeal, the administrative judge sustained only the second charge and remanded to OPM to determine whether the suitability action taken was appropriate based on the sustained charge. The appellant filed a petition for review.

Holding: The agency proved by preponderant evidence its charge of material, intentional false statement, or deception or fraud in examination or appointment.

1. OPM proved that the appellant provided false information on his Optional Form (OF) 306, Declaration for Federal Employment, by answering "no" to the question of whether he had been fired from any job in the last 5 years, when he had been fired from his most recent job just weeks prior.

2. OPM proved that the appellant provided false information with the intent to deceive the agency for his own private material gain. The appellant's purported interpretation of the OF-306 question as asking solely about prior *Federal* employment was unreasonable and implausible based on the plain language of the question, which asked if he had been fired from "any job for any reason."

Holding: The Board lacks the authority to adjudicate a removal based on OPM's negative suitability determination as a chapter 75 adverse action, even if the appellant is a tenured Federal employee.

1. The National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, section 1086(f)(9), 129 Stat. 726, 1010 (2015), amended 5 U.S.C. § 7512(F) to state that an appealable adverse action does not include a suitability action taken by OPM.

2. *Archuelta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015), and *Aguzie v. Office of Personnel Management*, 116 M.S.P.R. 64 (2011), which held that a removal based on a negative suitability determination could be adjudicated under chapter 75, were both decided prior to Congress amending 5 U.S.C. § 7512(F) to exclude suitability actions from the list of appealable adverse actions under chapter 75.

Holding: Remand to OPM is necessary because only one of OPM's two charges is sustained and the Board lacks jurisdiction to review or modify the ultimate action taken as a result of a suitability determination.

Appellant: Javier Soto
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 6
Docket Number: AT-1221-15-0157-W-1

WHISTLEBLOWER REPRISAL
PROTECTED ACTIVITY
CLEAR AND CONVINCING EVIDENCE

The appellant, a reemployed annuitant, was separated from Federal service by a notice stating that his "services [were] no longer required." He filed an individual right of action (IRA) appeal with the Board, alleging that his separation constituted reprisal for his protected disclosures and activity. After a hearing, the administrative judge denied corrective action. The appellant filed a petition for review, asserting that the administrative judge should have found that he engaged in two additional activities protected under 5 U.S.C. § 2302(b)(9)(B) and that the agency failed to show by clear and convincing evidence that it would have separated him in the absence of his protected activity.

Holding: The appellant did not engage in additional protected activity under 5 U.S.C. § 2302(b)(9).

1. The appellant's reply to a proposed admonishment of another bargaining-unit member was not protected activity because there is no law, rule, or regulation granting a right to reply to a proposed admonishment. Therefore, the appellant did not assist another employee in an appeal, complaint, or grievance right granted by law, rule, or regulation.

2. The appellant's memorandum to the deciding official objecting to a response from Human Resources Management regarding a request for information from the union did not constitute protected activity under 5 U.S.C. § 2302(b)(9)(B). The memorandum was part of the union's effort to obtain information regarding the performance improvement plans of two bargaining-unit members, not a complaint lodged in a formal adjudicatory process, and therefore, did not meet the definition of an "exercise of any appeal, complaint, or grievance right."

Holding: The at-will status of reemployed annuitants does not alter the agency's clear and convincing burden in an IRA appeal.

1. While an agency may lawfully separate a reemployed annuitant with relative ease, it is not sufficient for the agency to establish that its action was justifiable, rather, it must show it would have taken the same action absent the protected activity.

Holding: Remand was necessary for the administrative judge to conduct a new analysis of whether the agency met its clear and convincing burden applying the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

1. The administrative judge took too narrow a view of the second *Carr* factor—the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision—by failing to consider all of the record evidence, including the tense relationship between the union and agency management and management's frustration with the volume of union activity, which could have extended to the appellant's protected activities made in his capacity as Executive Vice President of the American Federation of Government Employees Local 1594.

2. Court decisions instruct that, in assessing *Carr* factor two, the Board avoid an overly restrictive analysis and fully consider whether agency officials involved possessed a "professional retaliatory motive" because the disclosures implicated agency officials and employees in general.

3. Contrary to the findings in the initial decision, *Carr* factor three—any evidence that the agency takes similar actions against employees who do not engage in protected activity but who are otherwise similarly situated—did not weigh in the agency's favor because it failed to introduce complete and fully explained comparator evidence and, thus, the record was incomplete regarding whether the agency has taken action against individuals who committed misconduct but did not engage in protected activity.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: David A. Rickel
Respondent: Department of the Navy
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2020-2147
Petition for Review from AT-1221-19-0576-W-1
Issuance Date: April 18, 2022

WHISTLEBLOWER REPRISAL
CLEAR AND CONVINCING EVIDENCE

The agency removed Mr. Rickel based on a charge of failure to follow instructions after he repeatedly failed to update training records as instructed by his supervisors. Mr. Rickel filed a Board appeal challenging his removal and raised an affirmative defense of whistleblower reprisal. The Board found that

the agency proved its charge and the penalty of removal was reasonable. The Board further found that Mr. Rickel proved that he had engaged in protected activity and made protected disclosures that were a contributing factor in the agency's decision to remove him, but that the agency proved by clear and convincing evidence that it would have removed him absent his whistleblowing activity. Considering the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), the Board concluded that the strength of the agency's evidence in support of the removal action outweighed the relative weakness of any motive to retaliate against him. Because neither party offered evidence relevant to the third *Carr* factor—any evidence that the agency takes similar actions against employees who did not engage in protected activities but who are otherwise similarly situated—the Board found it appropriate to remove that factor from consideration. On appeal before the Court, the petitioner challenged the Board's decision with respect to the third *Carr* factor.

Holding: The Court affirmed the Board's decision that the agency met its clear and convincing burden of proof.

1. The Board did not err in its determination that there was an absence of evidence relevant to the third *Carr* factor, which is focused on evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

2. The testimony of the deciding official that he had not previously removed an employee for one charge of failure to follow instructions and he was not aware of any other supervisor removing an employee for a single charge of failure to follow instructions was not pertinent to the third *Carr* factor because:

    A. it did not address or identify an actual comparison employee who had engaged in misconduct similar to Mr. Rickel's; and

    B. it suggested only that there was no record evidence regarding whether the agency had taken similar actions against similarly situated nonwhistleblowers.

NONPRECEDENTIAL:

Cruz v. Merit Systems Protection Board, No. 2022-1418 (Fed. Cir. Apr. 21, 2022) (MSPB Docket No. DC-3443-22-0015-I-1) (dismissing the petition for

review for failure to prosecute).

Coppola v. Department of Veterans Affairs, No. 20-70361 (9th Cir. Apr. 19, 2022) (MSPB Docket No. SF-1221-17-0027-M-1). The court dismissed as moot the petition for review in which the petitioner argued that the administrative judge was defectively appointed under *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), because the Board now has a quorum and has duly appointed a new administrative judge to adjudicate the petitioner's case.