



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 22, 2014

BOARD DECISIONS

Appellant: Joan Ryan

Agency: Department of Homeland Security

Decision Number: [2014 MSPB 64](#)

MSPB Docket Number: PH-0752-13-0127-I-1

Issuance Date: August 18, 2014

Appeal Type: Adverse Action

Action Type: Indefinite Suspension

Due Process Rights for Suspensions Based on Security Clearance Employee's Right to Alternative Penalties In Lieu of Suspension

The appellant was indefinitely suspended based on the suspension of her security clearance, which was suspended after she was indicted on federal criminal charges. The appellant appealed her indefinite suspension, and while the appeal was pending, she was acquitted of all of the criminal charges. The administrative judge upheld the suspension. In the decision, the Administrative judge held that the appellant's due process rights were not violated, the agency was not required to consider an indefinite demotion instead of suspension, and that the agency did not have to restore the appellant to work following her acquittal because her indefinite suspension was based on her suspension of her security clearance, which had not been reinstated at the time of the initial decision.

Holding: The Board affirmed the initial decision.

1. The Board rejected the appellant's contention that the agency was required to demonstrate it considered lesser forms of discipline before issuing the indefinite suspension. Per *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989), when an agency is issuing discipline in

cases involving a loss of a security clearance, it only needs to consider the alternative penalty of transferring an employee to a non-sensitive position when a statute, regulation, or agency policy provides the employee with a substantive right to reassignment.

2. Board decisions holding that an agency must demonstrate that reassigning an employee to a non-sensitive position was not possible before affirming an employee's indefinite suspension were issued prior to *Griffin*. Therefore, to the extent they contradict *Griffin*, they are overruled.

3. The appellant was not entitled to be placed on administrative leave following her acquittal. The Board will not impose a condition subsequent for the termination of the suspension different than the one imposed by the agency. Additionally, placing the appellant on administrative leave would be the equivalent of undoing the indefinite suspension, and would improperly intrude on the agency's authority to regulate and manage employees' access to classified information.

Appellant: Gary S. Blatt

Agency: Department of the Army

Decision Number: [2014 MSPB 65](#)

MSPB Docket Number: AT-0752-13-7245-I-1

Issuance Date: August 19, 2014

Appeal Type: Removal

Action Type: Failure to Maintain Condition of Employment

Good Cause Untimely Filed Petition for Review

Harmful Procedural Error in Security Clearance Revocation

The appellant was removed from his GS-9 Physical Security Compliance Inspector position based on a charge of failure to maintain a condition of employment due to the revocation of his security clearance. The appellant challenged the action based on the contention that the agency had not yet made a final determination on his security clearance, and that the matter was still under reconsideration on the effective date of his removal. The administrative judge affirmed the action, and found that the agency did not commit harmful procedural error by not allowing him to pursue or complete additional agency processes to contest his security clearance revocation.

Holding: The Board reversed the initial decision.

1. The agency committed harmful procedural error by failing to comply

with its own procedures requiring a final security clearance decision prior to the issuance of a removal based on a loss of security clearance.

Appellant: Jorge R. Munoz

Agency: Department of Homeland Security

Decision Number: [2014 MSPB 66](#)

MSPB Docket Number: DA-0752-13-0445-I-1

Issuance Date: August 20, 2014

Appeal Type: Adverse Action

Action Type: Indefinite Suspension

Procedure in Suspensions Based on Security Clearance Revocation Employee's Right to Alternative Penalties In Lieu of Suspension

The appellant was indefinitely suspended based on the revocation of his security clearance. The appellant was informed he would remain suspended until a final determination was made by the appropriate deciding official and/or the Security Appeals Board. The administrative judge upheld the suspension, and held that the agency established that the penalty was reasonable and that it bore a nexus to the efficiency of the service.

Holding: The Board affirmed the initial decision as modified.

- 1. The agency's effectuation of the indefinite suspension prior to the final determination on his clearance was allowed because the agency's internal security clearance procedures do not reference adverse actions.**
- 2. In the absence of a statute or regulation requiring the agency to consider reassignment to another position, a traditional *Douglas* factor analysis is not appropriate in disciplinary actions based on the revocation of a security clearance because the Board lacks authority to review whether reassignment would be feasible.**

Appellant: Ricky N. Dawson

Agency: Department of Agriculture

Decision Number: [2014 MSPB 67](#)

MSPB Docket Numbers: AT-0752-13-0217-I-1, AT-0752-13-0317-I-1,
AT-0752-13-0589-I-1

Issuance Date: August 21, 2014

Appeal Type: Adverse Action/VERA

Action Type: Indefinite Suspension/Removal/Denial of VERA Request

Multiple Penalties for Same Misconduct
Notice Requirements of Due Process
Jurisdiction in VERA Denial Cases
Retirement Application Procedure
Application of Unclean Hands

The appellant appealed the agency's decision to indefinitely suspend him, remove him from his position, and deny his Voluntary Early Retirement Authority (VERA) application, due to his conviction for embezzling over \$6,000,000 in government funds. The administrative judge upheld the removal, but reversed the indefinite suspension due to the agency's failure to provide proper notice of the charges to the appellant, and also on the grounds that the suspension occurred simultaneously with the notice of proposed removal period based on the same charges. The administrative judge also reversed the denial of the application for voluntary early retirement, finding that the agency's improper indefinite suspension caused the appellant's untimely filing of his application.

Holding: The Board affirmed the administrative judge's decision regarding the removal, and reversed the decisions relating to the indefinite suspension and VERA application.

- 1. An agency is allowed to impose both a suspension and removal penalty for the same misconduct in situations where the misconduct involved criminal activity. In making this ruling, the Board noted that the administrative judge relied on Board precedent holding the opposite to be true, but that this precedent has not been universally applied by the Board or the Federal Circuit.**
- 2. The agency's proposal notice, which detailed the agency's reasonable cause to believe the appellant committed a criminal offense for which imprisonment could be imposed, provided sufficient notice to the appellant to satisfy his due process rights.**
- 3. The administrative judge's reliance on *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318 (2010), was misplaced because in *Gonzalez*, the investigation was still ongoing and the agency was still waiting for an indictment. In this case, the investigation had ceased because the appellant plead guilty to the charges against him in criminal court.**

4. The Board has jurisdiction over appeals from adverse VERA determinations for employees under the Civil Service Retirement System.
5. Where OPM has delegated to an agency the authority to make decisions on retirement applications, but the agency does not issue a final decision on the application, the Board will deem the agency to have denied the application.
6. The Board invoked the equitable doctrine of Unclean Hands to deny the appellant his VERA application. Although the agency's suspension of the appellant prevented him from learning about the VERA offer in a timely fashion, it was the appellant's criminal activity that caused the suspension.
7. Member Mark Robbins wrote a concurring opinion, and stated that, under the law, the appellant was not eligible for a VERA payment.

The U.S. Court of Appeals for the Federal Circuit Issued the Following Nonprecedential Decisions

Appellant: Arlene Smith

Agency: Office of Personnel Management

Decision Number: [2014-3084](#)

MSPB Docket Number: AT-0831-10-0059-B-2

Issuance Date: August 20, 2014

Appeal Type: Retirement

Action Type: Former Spouse Survivor Annuity

Consideration of Divorce Decree Court Order in Former Spouse Survivor Annuity

The appellant appealed an Office of Personnel Management (OPM) decision denying her application for a Federal Employees' Retirement System (FERS) former spouse survivor annuity. The appellant was divorced in 1987 and her marital property was distributed by court order, including the distribution of the former spouse's federal retirement annuity. That court order was modified in a 1999 order. The administrative judge determined that the 1987 order provided the appellant a former spouse annuity but remanded the case to OPM to consider what effect the 1999 order had on the 1987 order. The Board reversed the AJ's determination that the appellant was entitled to the former spouse annuity based on the 1987 court order because the pertinent

regulations only require consideration of the first order dividing the marital property of the retiree and former spouse.

Holding: The Court vacated and remanded the case to the Board based on a finding that the Board incorrectly determined that it did not have to address the 1999 order.

1. In determining eligibility for a former spouse survivor annuity pursuant to 5 C.F.R. § 838.1004(e)(1)(i) and (ii), a court order must be issued on either a day prior to the date of retirement, or the date of death of the employee, or the order must be the first order dividing the marital property of the retiree and the former spouse. Here, because the 1999 order was issued before the retirement of the appellant's former spouse, it must be considered.

Federal Register Notices

Interim Final Rule and Corrections: On August 19, 2014, the Board issued new rules regarding the removal of Veterans Administration Senior Executive Service employees.

[Interim Final Rule](#)

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