U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 15, 2023

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BOARD DECISIONS

Appellant: Kenneth W. Erdel
Agency: Department of the Army
Decision Number: 2023 MSPB 27
Docket Number: AT-0752-22-0590-I-1
Issuance Date: December 12, 2023

"EMPLOYEE"
NATIONAL GUARD TECHNICIANS

The appellant, a dual status technician with the South Carolina Army National Guard, was removed for misconduct. The administrative judge found, citing the Fiscal Year 2017 National Defense Authorization Act (NDAA), that the Board had jurisdiction over the appeal. But he dismissed the appeal for failure to state a claim upon which relief could be granted on the grounds that, under *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331 (Fed. Cir. 2001), the Board lacked authority to issue enforceable orders against state adjutants general.

Holding: Statutory amendments under the 2017 NDAA provide the Board with chapter 75 jurisdiction over the removal of dual status National Guard technicians.

1. Prior to the 2017 NDAA, 5 U.S.C. § 7511(b)(5) excluded National Guard technicians from the definition of an "employee" with Board appeal rights, while 32 U.S.C. § 709(f) provided that National Guard technicians' rights to appeal certain employment actions, including removals, did not "extend beyond the adjutant general of the jurisdiction concerned."

2. By striking 5 U.S.C. § 7511(b)(5) and amending portions of 32 U.S.C. § 709(f), the 2017 NDAA afforded Board appeal rights under 5 U.S.C. § 7511, 7512, and 7513 to National Guard technicians when the appeal concerns activity that did not occur while the technician was in a military pay status and does not concern fitness for duty in the reserve components.

3. Because a removal is appealable to the Board under 5 U.S.C. § 7512(1), the appellant otherwise met the definition of an "employee" under 5 U.S.C. § 7511(a)(1), and his removal was based on misconduct while he was not in a military pay status and did not concern his fitness for duty in the reserves, the Board had jurisdiction over his appeal.

Holding: The Board may issue enforceable orders against the Department of the Army or the Department of the Air Force to remedy improper employment actions against National Guard technicians they employ.

4. The Board has statutory authority to order any Federal agency or employee to comply with its orders or decisions. In *Singleton*, the U.S. Court of Appeals for the Federal Circuit found that the Board lacked authority to order a National Guard adjutant general, a state employee, to comply with its orders.

5. The Supreme Court has recognized that state adjutants general can only employ and administer dual-status technicians pursuant to an express designation of authority by the Secretary of the Army or the Secretary of the Air Force, and that in that role, they act subject to the Federal civil service requirements. Because National Guard technicians are ultimately employees of the Department of the Army and the Department of the Air Force, the

Board is authorized to order those agencies to take an employment action, including the provision of relief to the appellant in this appeal. *Singleton* has been abrogated by the 2017 NDAA amendments.

COURT DECISIONS

NONPRECEDENTIAL:

Payne v. Biden, No. 22-1225 (U.S. Dec. 11, 2023) (summary disposition); *Biden v. Feds for Medical Freedom*, No. 23-60 (U.S. Dec. 11, 2023) (summary disposition). The U.S. Supreme Court granted certiorari in these cases pertaining to the rescinded COVID-19 vaccine mandate for executive branch employees, vacated the judgments, and remanded the cases to their respective U.S. Circuit Courts of Appeals. The Supreme Court remanded *Payne* to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the district court's dismissal of a challenge to the mandate on the grounds that the Civil Service Reform Act deprived the court of subject matter jurisdiction, with instructions to dismiss the case as moot. The Supreme Court remanded *Feds for Medical Freedom* to the U.S. Court of Appeals to the Fifth Circuit, which held that employees could challenge the mandate in district court and affirmed a preliminary injunction against the mandate, with instructions to direct the district court to vacate its preliminary injunction order as moot.

Arnold v. Merit Systems Protection Board, No. 2023-1649 (Fed Cir. Dec. 13, 2023) (MSPB Docket No. CB-1216-16-0017-T-1). The court affirmed the Board's decision removing the petitioner for violations of the Hatch Act, finding that he ran as a candidate in partisan political elections.

Lemon v. Office of Personnel Management, No. 2022-2200 (Fed. Cir. Dec. 11, 2023) (MSPB Docket No. PH-0842-22-0006-I-1). The court affirmed the Board's decision affirming the Office of Personnel Management's denial of the petitioner's application for a deferred annuity under the Federal Employees Retirement System, finding that substantial evidence supported the Board's conclusion that the petitioner did not overcome the evidence that he applied for and received a refund of his retirement deductions.

ElHelbawy v. Department of Commerce, No. 2023-1322 (Fed. Cir. Dec. 8, 2023) (MSPB Docket No. DE-1221-15-0438-W-1). The court affirmed the Board's dismissal of a whistleblower reprisal appeal for lack of jurisdiction, finding no reversible error in the Board's determination

that neither of the petitioner's complaints to the Office of Special Counsel made sufficiently precise charges of whistleblowing activity or contributing factor to satisfy the exhaustion requirement.

Rodriguez v. Department of Homeland Security, No. 2023-1833 (Fed. Cir. Dec. 8, 2023) (MSPB Docket No. DC-0752-17-0368-I-1). The court affirmed the Board's decision sustaining the removal of the petitioner for failure to maintain her security clearance, finding, inter alia, that the fact that she was allowed to work while clearance revocation and removal proceedings were occurring did not entitle her to continue working, and that the *Douglas* factors and the nexus requirement do not apply to removals based on failure to maintain a security clearance.

Yomi v. Merit Systems Protection Board, No. 2023-2086 (Fed. Cir. Dec. 8, 2023) (MSPB Docket No. SF-0752-16-0764-I-1). The court affirmed the Board's dismissal of a probationary termination appeal for lack of jurisdiction because the petitioner did not claim he was terminated based on partisan political reasons, marital status, or pre-appointment reasons, as required to establish jurisdiction under 5 C.F.R. § 315.806.