



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 22, 2024

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BOARD DECISIONS

Appellant: Eric Terrell Bryant
Agency: Department of Veterans Affairs
Decision Number: [2024 MSPB 16](#)
Docket Number: AT-0714-23-0137-I-1
Issuance Date: November 18, 2024

VA ACCOUNTABILITY ACT DUE PROCESS

The agency removed the appellant under 38 U.S.C. § 714 based on his alleged improper behavior towards officers of a local police department when they attempted to serve the appellant with a temporary protective order. An administrative judge issued an initial decision that sustained the removal. The appellant sought review of the Board decision in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit issued a precedential decision, *Bryant v. Department of Veterans Affairs*, 26 F.4th 1344 (Fed. Cir. 2022), vacating the Board's decision in this case and remanding the appeal for the Board to address the deciding official's review of the charge under too low of a burden of proof. The Federal Circuit also directed the Board to apply the relevant factors in

assessing the penalty, consistent with *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

The Board remanded the appeal to the administrative judge, who remanded the matter to the agency for the deciding official to analyze the charge under the preponderant evidence burden of proof and to apply the *Douglas* factors to the removal penalty, consistent with the Federal Circuit's instructions. The deciding official issued a new decision finding that the charge was supported by preponderant evidence and included an analysis of the *Douglas* factors supporting the removal penalty. The appellant appealed the new removal decision, arguing in part that the agency violated his constitutional due process rights. The administrative judge subsequently issued a new initial decision affirming the removal action.

Holding: The agency violated the appellant's due process rights by failing to provide him with notice and an opportunity to respond to all of the aggravating factors the deciding official considered in determining the penalty.

1. Due process requires that a tenured Federal employee be provided with advance notice of a deciding official's intention to rely on aggravating factors as the basis for an imposed penalty so that the employee has a fair opportunity to respond to those factors before the deciding official.
2. Although the Board has applied these due process requirements to appeals of actions taken under 5 U.S.C. chapter 75 and 5 U.S.C. chapter 43, due process requirements are equally applicable to actions taken under 38 U.S.C. § 714, like the appellant's removal.
3. The deciding official completed a *Douglas* factor worksheet following remand of the appeal that included consideration of some aggravating factors that were not included in the appellant's proposed removal, and therefore were ex parte. These factors included a potential future and broader conflict between the agency and local police departments as a whole based on the appellant's behavior during the incident for which he was removed; whether alternative sanctions could serve as a deterrent; and the consistency of the penalty with agency's table of penalties.
4. The appellant was not aware that the deciding official would consider these factors and did not have an opportunity to respond to them. Further, these factors influenced the deciding official's decision. The Board concluded that the deciding official's consideration of the ex parte information was so substantial and so likely to cause prejudice that it rose to a due process violation and

reversed the removal action on this basis.

Appellant: Tammie Morley
Agency: Department of Veterans Affairs
Decision Number: [2024 MSPB 17](#)
Docket Number: CH-0714-22-0256-A-1
Issuance Date: November 20, 2024

**ATTORNEY FEES - PREVAILING PARTY
ATTORNEY FEES - INTEREST OF JUSTICE**

The agency removed the appellant from her position under 38 U.S.C. § 714, based on a charge of failure to meet position requirements. The administrative judge issued an initial decision finding that the agency proved its charge but failed to give bona fide consideration to the relevant *Douglas* factors in determining the removal penalty. After that initial decision became final, the appellant filed a motion for attorney fees for her removal appeal. The administrative judge issued an addendum initial decision denying the appellant's fee request, finding that the appellant did not qualify as a prevailing party, and alternatively, that she had not shown that an award of attorney fees was warranted in the interest of justice.

Holding: The administrative judge correctly concluded that the appellant was not a prevailing party.

1. A party that has prevailed in a case may be entitled to attorney fees only if she obtains an enforceable order resulting in a material alteration of the legal relationship of the parties.
2. The appellant argued below and on review that she obtained a "material alteration of the legal relationship" between herself and the agency because the agency was forced to rescind its prior decision and to reissue a decision that applied the *Douglas* factors.
3. However, as the administrative judge correctly explained, the initial decision did not direct the agency to vacate the appellant's removal outright and did not provide her with any of the relief she had requested.
4. As a result, the Board agreed with the administrative judge that the appellant had not established that she received "actual relief on the merits of [her] claim," considering the case as a whole, and instead the appellant still found herself in the exact same position at the end of her appeal as she was in at the beginning of her appeal; therefore, she was not a "prevailing party" for the purpose of an award of attorney fees.

Holding: The administrative judge correctly determined, in the alternative, that the appellant failed to show that attorney fees were warranted in the interest of justice.

1. An award of attorney fees may be warranted in the interest of justice when: (1) the agency engaged in a prohibited personnel practice; (2) the agency action was clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges; (3) the agency initiated the action in bad faith; (4) the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.
2. The administrative judge provided the appellant with notice of how to establish that attorney fees were warranted in the interest of justice and he correctly determined that she failed to make any argument on this point.
3. The appellant argued on review that this case “involved a finding” that the agency engaged in a prohibited personnel practice under 5 U.S.C. § 2302(b)(12). The Board was not persuaded by this argument. The appellant failed to raise it below and, in any event, there was no such finding.

COURT DECISIONS

NONPRECEDENTIAL:

Thurston v. Office of Personnel Management, [2024-1519](#) (Fed. Cir. November 15, 2024) (CH-844E-18-0480-I-1) (per curiam). The court affirmed the Board’s decision affirming the Office of Personnel Management’s (OPM) reconsideration decision denying the petitioner’s application for disability retirement benefits under Federal Employees’ Retirement System (FERS), concluding that the Board had not erred in its disability determination by declining to provide the petitioner with a hearing on her appeal after she withdrew her hearing request, by concluding that her neck and back conditions were not included in her application, or by failing to consider the additional evidence the petitioner submitted with her petition for review.

Coppola v. Department of Veterans Affairs, [2022-2192](#) (Fed. Cir. November 18, 2024) (SF-1221-17-0027-M-2). The court affirmed the Board’s decision denying the petitioner’s request for corrective action in his individual right of action (IRA) appeal. The court found no error in the Board’s findings that even though the petitioner proved his *prima facie* case of whistleblower retaliation, the agency nevertheless proved

by clear and convincing evidence that it still would have terminated the petitioner from his temporary position and declined to select him for a permanent position even in the absence of his protected disclosures based, in part, on the strength of the agency's evidence supporting its decisions.

McLean v. Department of Veterans Affairs, [2024-1812](#) (Fed. Cir. November 19, 2024) (DE-1221-22-0142-W-2) (per curiam). The court affirmed the Board's decision denying the petitioner's request for corrective action in his IRA appeal. The court rejected the petitioner's allegations of factual and procedural errors in the Board's decision denying corrective action and determined that substantial evidence supported the Board's conclusion that the agency proved by clear and convincing evidence that it would have suspended and subsequently removed the petitioner following his loss of operating privileges in the absence of his protected whistleblowing activity. The court also found no error in the Board's finding that the petitioner had not been subjected to a personnel action in connection with his claim that he was restricted from working with and evaluating or instructing surgical residents.

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