

No. 20-167

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court of the U.S.
AUG 10 2020
OFFICE OF THE CLERK

Lilibeth Michelson - Petitioner

v.

The Department of the Army – Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Lilibeth Michelson
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Dated: August 10, 2020

QUESTION PRESENTED

1. Whether the Federal Circuit erred by reviewing a Merit System Protection Board Administrative Judge's decision that a medical note provided after the discipline was proposed on a substantial evidence instead of de novo standard and thus affirming the decision rather than remanding for consideration under the de novo standard.
2. Whether the provision of administratively acceptable evidence of incapacitation after a decision is made on a charge of absence without leave precludes the Merit Systems Protection Board from sustaining the charge of absence without leave.

PARTIES TO THE PROCEEDING

Petitioner Lilibeth Michelson was a petitioner in the court of appeals. Respondent Department of the Army was also the respondent in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no related cases to the case in this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lilibeth Michelson respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion below is unpublished and is available at *Michelson v. Dep't of the Army*, No. 2019-1811, 2020 U.S. App. LEXIS 14952 (Fed. Cir. May 11, 2020). The opinion of the Merit Systems Protection Board is available at *Michelson v. Dep't of the Army*, No. AT-0752-18-0424-I-1, 2018 MSPB LEXIS 4843 (Dec. 21, 2018)

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2020. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. § 7703(c) provides

In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

INTRODUCTION

The Court should grant review to correct the Federal Circuit's departure from the accepted standard of review and to resolve the split in authority concerning whether the submission of sufficient evidence of incapacitation *after* an agency takes action on proposed discipline for AWOL precludes MSPB from sustaining a charge of AWOL.

Petitioner was removed from federal service based partially on a charge of AWOL. In sustaining the AWOL charge, the MSPB Administrative Judge found that a medical excuse for the absence submitted with close of record briefs at the MSPB did not excuse a charge of AWOL because it was not submitted prior to Petitioner's removal and because it did not comply with leave restrictions the Agency had placed on Petitioner. Pet. App. 19a-20a. Petitioner appealed to the Court of Appeals for the Federal Circuit based on MSPB precedent establishing that the submission of administratively acceptable evidence of an employee's incapacitation even after the discipline is imposed precludes MSPB from sustaining a charge of AWOL.

The Federal Circuit incorrectly affirmed the Administrative Judge's determination by applying 5 U.S.C. Section 7703(c)(3)'s substantial evidence standard of review rather than Section 7703(c)(1)'s "not in accordance with law," standard.

Additionally, in sustaining the MSPB decision under the substantial evidence standard, the Federal Circuit did not resolve the question of whether the submission

of administratively acceptable evidence of incapacitation after the discipline precludes MSPB from sustaining a charge of AWOL.

Petitioner respectfully requests that this Court correct the Federal Circuit's departure from established judicial process and resolve the question concerning administratively acceptable evidence.

STATEMENT OF THE CASE

Petitioner, Lilibeth Michelson, was an employee of the respondent, U.S. Department of the Army ("Respondent" or "Agency"). The Agency issued Michelson a Notice of Proposed Removal on March 16, 2018, alleging 9 counts of Absent without Leave ("AWOL"), two counts of failure to follow directions, and one count of failure to follow direction and creating a disturbance. Pet. App. 10a. On April 16, 2018, the Agency issued a decision letter removing Michelson from her position. Pet. App. 10a-11a. On December 21, 2018, an Administrative Judge of the U.S. Merit Systems Protection Board ("MSPB" or "Board") sustained all charges, upholding the decision to remove. Pet. App. 30a.

Background

Michelson was a member of the federal workforce for almost twenty-five years. Pet. App. 29a. In 2005, Michelson began working as a Supply Technician, with her duty location at Embry Riddle Aeronautical University. Pet. App. 2a.

During her tenure with the Agency, Michelson developed several medical conditions, including diagnosed generalized anxiety disorder resulting in panic attacks necessitating medical care. Pet. App. 13a. On December 13, 2017,

Michelson went to her doctor and noted that she was feeling stressed and overwhelmed. Pet. App. 15a. Due to her reported symptoms, and her change in medication, Michelson's medical provider wrote a note stating that she would need to be out of work until January 19, 2018. Pet. App. 16a. On Friday, December 15, 2017, Michelson provided the note to her supervisor and requested sick leave from January 9, 2018 through January 19, 2018. Pet. App. 16a.

Agency Charges Michelson with AWOL

Michelson already had scheduled annual leave from Monday, December 18, 2017 until January 8, 2018. Pet. App. 16a. She was unable to access her email remotely and thus could not access her email while on leave. Pet. App. 18a. It was only upon her return on January 22, 2018 that Michelson learned that her doctor's note had been rejected for not complying with the leave restriction letter, and that the Agency charged her with AWOL for January 9, 2018 through January 19, 2019. See Pet. App. 18a.

Michelson is Placed on a 7-Day Suspension

On January 25, 2018, Michelson received a Notice of a Seven Day Suspension, effective beginning January 29, 2018, which was not based upon the charge of AWOL from January 9 to 19, 2018. Pet. App. 21a. The decision stated that an SF-50 "documenting your suspension will be forwarded separately." Pet. App. 21a. Based upon previous experience, Michelson believed that she needed a copy of the SF-50 for the suspension to be effective. Pet. App. 21a. Therefore, on Friday, January 26, 2018, Michelson emailed the point of contact for CPAC in the

Brigade, Ms. Doris Sales, requesting a copy of her SF-50, explaining: “Last time, CPOL told me that I was not allowed to start until I had an official copy of the SF-50.” Pet. App. 21a. Michelson did not receive any response from Sales before she left work that day. Pet. App 21a.

Events of January 29, 2018

Over the weekend Michelson could not access her emails remotely and she feared that if the SF-50 was not obtained, then the Agency would charge her with AWOL again. Pet. App. 21a. Therefore, Michelson decided to go to work for the sole purpose of checking her email, and obtaining a copy of the SF-50 to ensure that she was in fact suspended, to prevent the Agency from charging her with AWOL. Pet. App. 21a.

Michelson was at her computer drafting a reply email to Sales when, her supervisor, CPT Adam Karlewicz, came into the supply room at 09:15am. Pet. App. 22a. Karlewicz refused to listen to her explanation as to why she was at work, and told Michelson to “close shop and leave.” Pet. App. 22a. Michelson promptly complied with the directive, and left the supply room. Pet. App. 23a. On her way out of the building, Michelson went to the Computer Lab Room, a common area for faculty, staff, and students, to finish the email she had started drafting to Sales to obtain a copy of the SF-50. Pet. App. 23a.

After confirming that Michelson’s car was still in the lot, at approximately 09:22am, Karlewicz called security to help determine Michelson’s whereabouts; Officer Randy Collins arrived around 09:30am. Pet. App. 24a. Karlewicz also

informed Michelson's second-line supervisor, Col Todd D. Mitchell, that Michelson had come into work, and Mitchell also looked for Michelson. Pet. App. 24a. During their search, Karlewicz and Collins requested that Ms. Christian VanLaarhoven look in the women's bathrooms for Michelson. Pet. App. 24a. VanLaarhoven looked in the first and second floor bathrooms, after which another employee, Marie Rolff, informed VanLaarhoven that Michelson was in the computer lab. Pet. App. 24a. VanLaarhoven informed Mitchell, Karlewicz, and Collins that Michelson was in the computer lab and returned to her office. Pet. App. 24a. Michelson had no reason to know that people were looking for her while she was in the computer lab trying to obtain a copy of her SF-50.

Mitchell, Karlewicz, and Collins approached Michelson in the computer lab. Pet. App. 24a. Michelson then "left the campus without incident." Pet. App. 24a.

Michelson is Removed from Federal Service

On March 16, 2018, Mitchell proposed Michelson's removal based upon the charges of AWOL from January 9, 2018 through January 19, 2018, failure to follow directions, and failure to follow directions and creating a disturbance based upon the events of January 29, 2018.¹ Pet. App. 16a. On April 16, 2018, Col. Nelson Kraft removed Michelson after almost twenty-five years of service, sustaining all three charges by preponderant evidence. Pet. App. 17a.

¹ In her decision, the Administrative Judge merged the charge of "failure to follow" in Charge 3 with the "failure to follow instructions in Charge 2, resulting in the following charges: AWOL, Failure to Follow Instructions, and Creating a Disturbance. Pet. App. 7a-25a.

Michelson's Appeal to the Merit Systems Protection Board

On April 29, 2018, Michelson appealed the Agency's decision to remove her to the Board. Pet. App. 17a. On October 25, 2018, Michelson withdrew her hearing request, and requested to brief the matter on paper. Michelson filed her close of record brief on November 19, 2018, disputing that the Agency could prove all three charges by preponderance of the evidence. As part of her submission, Michelson submitted a doctor's note from the same medical provider, obtained after Michelson's removal, addressing the cause of Michelson's incapacitation, as well as the duration of her incapacitation. Pet. App. 19a.

The Administrative Judge affirmed Michelson's removal and sustained all charges. Pet. App. 30a. Upon sustaining all three charges and finding a nexus between the actions and the efficiency of the service, the Administrative Judge determined that the penalty of removal was reasonable under the *Douglas* Factors. Pet. App. 30a.

Federal Circuit Decision

Michelson then appealed the Administrative Judge's decision to the United States Court of Appeals for the Federal Circuit. Pet. App. 2a. The Federal Circuit affirmed the Administrative Judge's sustaining of the AWOL charge. Pet. App. 2a-3a. The Federal Circuit determined that sustaining the AWOL was supported by substantial evidence because the Administrative Judge had determined that the October 25, 2018 medical note Michelson submitted to MSPB was not administratively acceptable evidence of incapacitation. Pet. App. 2a. The Federal

Circuit found that “[b]ecause the letter was found not to be administratively acceptable, we need not address whether the letter, dated after Michelson’s removal, was properly considered.” Pet. App. 2a.

The Federal Circuit also affirmed the charges of failure to follow instructions and creating a disturbance. Pet. App. 4a-5a. Last, the Federal Circuit upheld the penalty of removal. Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to correct a clear departure from the accepted standard of review.

The Federal Circuit improperly applied the substantial evidence standard to the question of law of whether to affirm the Administrative Judge’s determination that the Petitioner’s provision of the October 25, 2018 medical note did not preclude a finding of AWOL.

a. A federal employee who fails to follow leave requesting procedures is not necessarily guilty of AWOL. For example, in *Atchley v. Department of the Army*, an administrative judge sustained the federal employee’s removal on an AWOL charge based only upon appellant’s failure to follow leave procedures, without determining whether the appellant presented administratively acceptable evidence of his incapacitation. 46 M.S.P.R. 297, 299 (1990). But the Board reversed the administrative judge’s decision, holding that a failure to follow leave procedures “cannot serve as a basis to sustain an AWOL charge” and that the administrative judge should have determined whether the employee presented administratively acceptable evidence of incapacitation. *Id.* at 301.

Importantly, the Board also reiterated that it can review an agency's decision on the grounds solely invoked by the agency, and cannot substitute what it considers to be a more sufficient basis for the action. *Id.* at 302 (citing *Gottlieb v. Veterans Admin.*, 39 M.S.P.R. 606, 609 (1989)). Therefore, while an agency may charge an employee with failure to follow leave procedures, it must do so in a separate charge, *i.e.* an AWOL charge cannot be sustained due to a failure to follow leave procedures by the employee. *Id.* at 301.²

b. In assessing the October 25, 2018 medical note, the Administrative Judge made an error of law by conflating the requirements for proving AWOL with the requirements for proving failure to follow leave requesting procedures. Nowhere in the opinion did the Administrative Judge determine whether the October 25, 2018 note was administratively acceptable. Instead, the Administrative Judge determined that the note “does not comply with the leave restriction letter. . . .” Pet. App. 20a-21a. However, despite only determining that the October 25, 2018 note did not comply with the leave restrictions on Petitioner and not reaching the issue of whether the note was administratively acceptable, the Administrative Judge sustained the AWOL charge. Pet. App. 20a-21a.

c. 5 U.S.C. § 7703(c) provides that the Federal Circuit must review and set aside MSPB findings that are

² The Board has consistently held that even though the charge of AWOL may be “justified based on the information that the agency had at the time it placed the appellant on AWOL, a charge of AWOL can be defeated by the submission of evidence of incapacitation, *even if that evidence is submitted for the first time at the hearing before an AJ.*” *Grubb v. Dep’t of the Interior*, 96 M.S.P.R. 377, P.36 (2004) (emphasis added); see *Baker v. Dep’t of the Army*, 2014 MSPB LEXIS 8474, at *11 (M.S.P.B. Dec. 12, 2014).

- “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; **or**
- (3) unsupported by substantial evidence. . . .”

5 U.S.C. § 7703(c) (emphasis added).

The Federal Circuit reviews MSPB’s factual findings for substantial evidence, meaning “such relevant evidence as a reasonable mind might accept to support such a conclusion.” *Parrott v. Merit Sys. Prot. Bd.*, 519 F.3d 1328, 1334 (Fed. Cir. 2008); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted) (defining substantial evidence).

The Federal Circuit affirms MSPB’s legal determinations unless they are not in accordance with law. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). This means that the Federal Circuit’s review of legal determinations is *de novo*. *Id.*; *Vassallo v. DOD*, 797 F.3d 1327, 1330 (Fed. Cir. 2015).

d. In this case, the Federal Circuit incorrectly applied the substantial evidence standard based on its mistaken conclusion that the Administrative Judge had determined that the note was not administrative acceptable. The initial decision is clear that the Administrative Judge did not make any determination as to administrative acceptability of the October 25, 2018 letter and instead explicitly analyzed whether the note complied with the heightened leave restriction procedures the Agency placed on Petitioner. Pet. App. 19a-20a. The Administrative Judge thus

applied the wrong law, using the standards for failure to follow leave requesting procedures instead of the standards for whether an individual is guilty of AWOL.

The Federal Circuit's use of the far more burdensome substantial evidence standard in this case warrants correction because it is a significant departure from the usual course of judicial proceedings. *See, e.g., Vanieken-Ryals v. OPM*, 508 F.3d 1034, 1043 (Fed. Cir. 2007) (Federal Circuit correcting MSPB's erroneous application of the law and remanding for consideration on the proper standard); *Reilly v. OPM*, 571 F.3d 1372, 1382 (Fed. Cir. 2009) (same); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1377 (Fed. Cir. 2012) (same).

II. The Court should grant certiorari to resolve a split in MSPB authority concerning whether the MSPB may sustain charges of AWOL when administratively acceptable evidence of incapacitation is provided after the Agency acts on the proposed discipline.

a. Because of its incorrect finding that the Administrative Judge determined the October 25, 2018 note was not administratively acceptable, the Federal Circuit declined to reach the issue of whether the provision of administratively acceptable evidence of incapacitation after an agency imposes discipline precludes MSPB from sustaining a charge of AWOL. Pet. App. 2a. The Administrative Judge held that administratively acceptable evidence of incapacitation must be provided prior to an agency's decision on AWOL to defeat the AWOL charge. Pet. App. 21a.

As explained above, however, many other MSPB cases have determined that AWOL charges can be defeated by the production of administratively acceptable

evidence of incapacitation after the discipline is decided and imposed by the Agency. *Grubb v. Dep't of the Interior*, 96 M.S.P.R. 377, P.36 (2004); see *Baker v. Dep't of the Army*, 2014 MSPB LEXIS 8474, at *11 (M.S.P.B. Dec. 12, 2014); *Valenzuela v. Dep't of Army*, 107 M.S.P.R. 549, P.9 (2007);

b. The Court should resolve this split in authority. Regardless of how the Court decides this issue, providing clarity to federal agencies and employees will assist agencies in determining how to process discipline for potentially unexcused absences. Further, if the Court sides with the weight of authority and resolves this issue in favor of permitting sufficient information to be presented after an employee is removed, this would ensure that seriously incapacitated employees would have the ability to overturn AWOL discipline in instances of absence beyond their control.

CONCLUSION

The petition for writ of certiorari should be granted.

Date: August 10, 2020

Respectfully submitted,

By: 