

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

DAVID C. FREELAND,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2020-1344

Petition for review of the Merit Systems Protection Board in No. CH-0752-18-0077-I-2.

Decided: August 7, 2020

DAVID C. FREELAND, Belle Plaine, MN, pro se.

JIMMY MCBIRNEY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by ETHAN P. DAVIS, ROBERT EDWARD KIRSCHMAN, JR., PATRICIA M. MCCARTHY.

Before LOURIE, O'MALLEY, and CHEN, *Circuit Judges*.

PER CURIAM.

Pro se appellant David Freeland appeals from a decision of the Merit Systems Protection Board (Board) affirming the Department of Homeland Security's (DHS or Agency) decision to remove Mr. Freeland from his position for lack of candor. For the reasons set forth below, we *affirm*.

BACKGROUND

Mr. Freeland formerly worked for DHS as a supervisory human resource specialist in the Recruitment and Placement Branch of a DHS Human Resources Operations Center (HROC). Mr. Freeland was conditionally appointed to this position on September 20, 2015. His appointment was subject to the completion of a background investigation conducted by the Office of Personnel Management (OPM).

Prior to his appointment with DHS, Mr. Freeland was a supervisory human resources specialist with the Army Civilian Human Resources Agency (ACHRA). He resigned in May 2015, after he had been issued a proposed 14-day suspension for negligent performance of duties. Additionally, at the time of his resignation, he was the subject of a workplace sexual harassment investigation.

After Mr. Freeland received a tentative offer from DHS, he was required to complete an employment background questionnaire for a position of public trust, known as an SF-85P. Question 12 of the SF-85P asks:

Has any of the following happened to you in the last 7 years?

- 1 – Fired from a job.
- 2 – Quit a job after being told you'd be fired.
- 3 – Left a job by mutual agreement following allegations of misconduct.
- 4 – Left a job by mutual agreement following allegations of unsatisfactory performance.

5 – Left a job for other reasons under unfavorable circumstances

Appellant's First S.A. F-2.¹ Mr. Freeland completed and signed his SF-85P form on two occasions, once on July 18, 2015, and again on September 23, 2015. In both instances, Mr. Freeland answered "no" to Question 12, without providing any further details in the corresponding comments section. *Id.* at F-1–F-2.

On January 26, 2016, in the course of the background investigation, an OPM investigator interviewed Mr. Freeland after obtaining additional information regarding Mr. Freeland's separation from ACHRA. During this interview, Mr. Freeland initially denied any issues with ACHRA until being confronted by the interviewer directly that ACHRA had proposed a disciplinary action against him. Mr. Freeland also initially denied the sexual harassment allegation until he was directly confronted by the interviewer with the allegation. After completing the investigation, OPM issued its findings to the Agency's Office of Security and Integrity, Investigations Division (OSI). OSI reviewed OPM's investigation, which reflected the discrepancies that OPM had uncovered in Mr. Freeland's SF-85P responses and that OPM had rated such an issue a D-issue, indicating that a significant impediment existed for obtaining background clearance. On August 18, 2016, OSI sent its review and excerpts from the OPM background investigation to the Chief of the HROC.

On August 18, 2017, DHS issued a proposed notice of removal based on lack of candor, which was supported by

¹ "Appellant's First S.A." refers to the initial appendix submitted by the Appellant, "Appellant's Second S.A." refers to the appendix attached to the Appellant's reply brief, and "Appellee's S.A." refers to the appendix attached to the Appellee's response.

three specifications. Two of the specifications were based upon Mr. Freeland's response to Question 12 on the two SF-85P forms he completed in July and September of 2015. The third specification was based on the follow-up interview in which Mr. Freeland initially denied having any problems or issues in his prior employment with ACHRA. On September 8, 2017, Mr. Freeland provided an oral reply and written response along with supporting documentation to the deciding official. On November 9, 2017, the deciding official issued a decision letter sustaining the charge and supporting specifications, noting that Mr. Freeland's misconduct cast significant doubt regarding his ability to uphold the Agency's mission in an honest manner. Mr. Freeland's removal became effective November 13, 2017.

On November 20, 2017, Mr. Freeland appealed his removal. After a hearing, on October 9, 2019, the administrative judge affirmed the DHS's decision to remove Mr. Freeland. In sustaining the charge, the administrative judge found that the Agency had established by preponderant evidence that Mr. Freeland had engaged in the charged conduct of lack of candor—based on the totality of the circumstances, Mr. Freeland “could not reasonably have believed” the circumstances surrounding his resignation from ACHRA were not unfavorable. The administrative judge's decision became the final decision of the Board on November 13, 2019. Mr. Freeland timely appealed to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our review is limited and requires this court to affirm a decision of the Board unless it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the 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). Substantial evidence is “relevant evidence” that “a reasonable mind might accept as adequate to support a conclusion.”

Simpson v. Office of Pers. Mgmt., 347 F.3d 1361, 1364 (Fed. Cir. 2003) (internal citation omitted).

The requirements for sustaining a charge for lack of candor include: (1) that the employee gave incorrect or incomplete information and (2) that he did so knowingly. *Ludlum v. Dep't of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). “Lack of candor . . . is a . . . flexible concept whose contours and elements depend upon the particular context and conduct involved. It may involve a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete.” *Id.* In this case, substantial evidence supports the Board’s lack of candor finding. Mr. Freeland makes a number of arguments regarding the Board’s decision. For the reasons that follow, we do not find that any of these arguments justify reversing the Board’s decision.

First, Mr. Freeland argues that the Board failed to consider the reasons that OPM decided to close Mr. Freeland’s background investigation. We disagree. The Board credited uncontroverted “agency testimony that per policy, OPM referred the matter back to the agency to take further action in its discretion based on the appellant’s conditional appointment and pending EEO activity.” Appellant’s First S.A. H-17. In the instant case, we see no reason to overturn the Board’s determination.

Next, Mr. Freeland notes that he had a pending EEO case against the Department of the Army (Army) and that his SF-50 from the Army states simply that he resigned without referencing any pending discipline or investigations. The SF-50 states that he “gave no reason for resignation.” Appellant’s S.A. 15. “[T]he SF-50 is not a legally operative document controlling on its face an employee’s status. . . .” *Grigsby v. Dept. of Commerce*, 729 F.2d 772, 775–76 (Fed. Cir. 1984). While it is true that the SF-50 does not state that Mr. Freeland resigned due to pending discipline or investigation, this lack of information does not

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