UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 36

Docket No. PH-0752-13-2242-I-1

Roger Dean Dye,[1]
Appellant,
v.
Department of the Army,
Agency.

May 23, 2014

Roger Dean Dye, Gaithersburg, Maryland, pro se.

Kathleen L. Kadlec, Baltimore, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed the agency's furlough action. For the following reasons, we GRANT the petition

[1] Pursuant to 5 C.F.R. § 1201.36(a), this appeal was part of a consolidation, *ACE Balt Pro Se No Hearing v. Department of the Army*, MSPB Docket No. PH-0752-13-5926-I-1.

under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND this case for further adjudication consistent with this Opinion and Order.[2]

BACKGROUND

¶2 The agency furloughed the appellant for 6 days from his GS-12 Construction Control position with the agency's U.S. Army Corps of Engineers (USACE). Initial Appeal File (IAF), Tab 1 at 1, 4; *ACE Balt Pro Se No Hearing v. Department of the Army*, MSPB Docket No. PH-0752-13-5926-I-1, Consolidation File (CF) Tab 6 at 7 n.2, Tab 7 at 853-59.[3]

¶3 On appeal to the Board the appellant asserted, among other things, that the agency's policy during the furlough was to exempt from the furlough personnel whose labor costs were 100% from Civil Works and/or from Intelligence Community funding sources, and that for the "eligibility period in question 100% of my labor costs were from either Civil Works projects and/or Intelligence Community projects." IAF, Tab 1 at 5. Thus, he asserted that the agency should have excepted him from the furlough action. *Id*. at 4-5.

¶4 After consolidating this case with other appeals, CF, Tab 2, and based on the written record because the appellants did not request a hearing, IAF, Tab 1 at 2; CF, Tab 8 at 2, the administrative judge affirmed the furlough actions, CF, Tab 10, Initial Decision (ID) at 1. The administrative judge found that the maximum number of furlough days to be served by employees of the Department of Defense (DoD) was 6 workdays. ID at 2. The administrative judge further

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[2] Our determination in this case to vacate the initial decision and remand the appeal for further adjudication applies only to the appellant and the docket number set forth above, not to the other appellants who were part of the consolidation in this case.

[3] The record does not include a copy of the agency's decision notice furloughing the appellant. However, the parties do not dispute that the agency furloughed the appellant for 6 days. *See* IAF, Tab 1 at 4; CF, Tab 6 at 7 n.2, Tab 7 at 853-59. A sample notice of the proposed furlough is included in the record. CF, Tab 7 at 1675-76.

noted that an agency may demonstrate that a furlough promotes the efficiency of the service by showing that it was a reasonable management solution to the financial restrictions placed on it and that it determined which employees to furlough in a fair and even manner. ID at 3. Here, the administrative judge held that the agency: (1) addressed in detail, with citations to the record, the factual basis for the furlough actions, including how it determined which employees would be furloughed; (2) asserted that the furloughs constituted a reasonable management solution to the impact of sequestration and promoted the efficiency of the service; and (3) addressed the arguments made by the appellants on appeal. ID at 3-4. The administrative judge found that none of the appellants submitted any evidence or argument beyond what they provided in their appeals and that, after reviewing the record and considering the appellants' arguments, the agency proved by preponderant evidence the factual basis for the furloughs and that the furloughs promoted the efficiency of the service. ID at 4.

ANALYSIS

¶5 The appellant asserts on review that, although the Unit Identification Code (UIC) on his Standard Form 50 is W2SD01, which is a Military Functions UIC, from April 2008 through October 2012 he worked exclusively (100%) on a Washington Aqueduct project that was a Civil Works project funded entirely with non-DoD funds. Petition for Review (PFR) File, Tab 1 at 4. He contends that from October 2012 through the present he has worked exclusively (100%) on projects that were funded solely with National Intelligence Program resources. *Id*. The appellant identifies the labor codes from his payroll for the above projects and notes that the agency rescinded the proposed furloughs of five other employees after a review determined that they were 100% funded with National Intelligence Program appropriations. *Id*. at 4-5; *see* CF, Tab 7 at 1665-74 (decision notices rescinding furloughs of employees who met the criteria for the National Intelligence Program funded exception). Thus, the appellant contends

that the furlough action taken against him did not promote the efficiency of the service. PFR File, Tab 1 at 5. The appellant does not challenge any other findings in the initial decision. *See* 5 C.F.R. § 1201.115 (the Board normally will consider only issues raised in a timely filed petition or cross petition for review).

¶6 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). The administrative judge did not address the appellant's contention that the agency improperly furloughed him because it incorrectly characterized the funding sources for his work. Accordingly, we address that allegation here.

¶7 One of the categorical exceptions to the furlough for DoD employees applied to employees who were not paid directly by accounts included in the DoD-Military (subfunction 051) budget. CF, Tab 9 at 28, 30 (declaration of Col. Luis B. Crespo, Deputy Director of Resource Management for USACE). For example, this categorical exception would apply to those employees funded by Civil Works (various non-051 budget functions) programs. *Id*. at 30-31. This exception was the result, in part, of a USACE request to Headquarters, Department of the Army, that all USACE Civil Works employees be excepted from the furlough because sufficient Civil Works funding existed to avoid a furlough of Civil Works employees, and Civil Works funds are not part of DoD-Military appropriations. *Id*. at 31. USACE installations were instructed to conduct an annual review of the assigned Army Management Structure Code (AMSC) for each employee in comparison with the work the employee performs. *Id*. at 33. If appropriate, the assigned AMSC (and possibly UIC) should be changed to be consistent with the preponderance of the work the employee performs or plans to perform for the next fiscal year. *Id*. at 33-34. In applying these principles, USACE employees with a UIC matching a "Civil Works

Function UIC," as indicated on block 44 of an employee's Standard Form 50, were considered funded by a non-050 (National Defense) or non-051 (Department of Defense-Military) Budget Function and were excepted from the furlough. *Id*. at 34. Likewise, USACE employees with a "Military Function" UIC were considered funded by the DoD-Military (subfunction 051) budget and were furloughed. *Id*.

¶8 The Commander of the Baltimore Engineer District, North Atlantic Division of the USACE indicated that he directed personnel from Resource Management and Human Resources to identify employees potentially eligible for the Civil Works exception based on their labor charge reports for the previous four fiscal quarters to ensure proper UIC classification in anticipation of the furlough. CF, Tab 9 at 368 (declaration of Col. Joseph R. Jordan). Employees who billed or charged any of their labor hours to projects funded with a military appropriation within that time period were determined to be subject to the furlough and all others were eligible to receive the Civil Works exemption. *Id*. If an employee had charged 100% of the employee's time to Civil Works accounts but had a military UIC, that employee's UIC was switched to Civil Works. *Id*. at 368-69. In addition, the furloughs of Baltimore Engineer District employees who were 100% funded with National Intelligence Program appropriations for the prior four quarters of the year were rescinded. *Id*. at 369. According to the Commander, throughout the process "there was an ongoing review of all employees' status and funding appropriation, in a continuing effort to ensure that all employees were treated in a similar [manner] and to ensure that only those employee[s] who were required to be furloughed were, in fact, subject to the furlough process." *Id*.

¶9 Under 5 U.S.C. §§ 7512(5) and 7513(a), an agency may furlough an employee for 30 days or less "only for such cause as will promote the efficiency of the service." An agency meets its burden of proving that a furlough promotes the efficiency of the service by showing, in general, that the furlough was a

reasonable management solution to the financial restrictions placed on it and that the agency applied its determination as to which employees to furlough in a fair and even manner. *Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶ 8 (2013). Before the Board reaches the issue of whether an action promotes the efficiency of the service, however, an agency must first establish that there is "cause" under 5 U.S.C. § 7513(a). *See Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 25 (2010). If the agency fails to allege or prove "cause" for the action, the Board's inquiry stops there. *Id.* "Cause" under 5 U.S.C. § 7513(a) generally connotes some specific act or omission on the part of the employee that warrants disciplinary action. *Id.*, ¶ 10. Nevertheless, furloughs are unique among adverse actions because by definition they are taken for nondisciplinary reasons and are generally used to address work or funding shortages or other matters that are not personal to the affected employee. *Chandler*, 120 M.S.P.R. 163, ¶ 8. Thus, we find that the concept of "cause" in the context of a furlough appeal encompasses, for purposes of this appeal, whether the appellant met the criteria established by the agency for being subject to, and not excepted from, the furlough. *See Clark v. Office of Personnel Management*, 24 M.S.P.R. 224, 225 (1984) (addressing whether the agency established that the appellant did not meet a stated furlough exemption for employees who did not cause an expenditure of salary and expenses funds).[4]

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[4] We have held in the context of a reduction in force that an agency has broad management discretion to take action to avoid a budget deficit. *See Schroeder v. Department of Transportation*, 60 M.S.P.R. 566, 570 (1994). The same is true in the context of a furlough. The majority of the Board held that it will not scrutinize an agency's decision to determine whether the agency has structured a furlough in a manner that second-guesses the agency's assessment of its mission requirements and priorities. *Department of Labor v. Avery*, 120 M.S.P.R. 150, ¶ 10 (2013). *But see* Vice Chairman Wagner's dissent in *Avery*, 120 M.S.P.R. 150. However, once an agency has exercised its management discretion in formulating the manner in which it will institute a furlough, the agency must treat similar employees similarly, and must justify any deviations with legitimate management reasons. *Chandler*, 120 M.S.P.R. 163, ¶ 8; *see* 5 C.F.R. § 752.404(b)(2).

¶10 Here, the appellant does not contest on review the validity of the furlough in general. *See id.* at 224 (the validity of the furlough, in general, was not at issue). Rather, he contends that he should not have been subjected to the furlough because he met the criteria for an exception. The record is unclear, however, as to whether the agency correctly determined that the appellant was not excepted from the furlough. Therefore, it is unclear whether the agency demonstrated "cause" for its furlough action against the appellant.

¶11 The parties did not adequately present evidence and argument relating to the above issue and were not placed on notice that this would be the dispositive issue in this case. *See Somuk v. Department of the Navy*, 117 M.S.P.R. 18, ¶¶ 12-13 (2011) (remanding when the parties were not placed on notice of the material issues of fact and law in the case); *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 74 (1997) (the administrative judge has the responsibility to develop the record evidence as necessary and appropriate); *Powers v. Department of Health, Education, and Welfare*, 3 M.S.P.R. 342, 345 (1980) (remanding when potentially dispositive issues were not adequately developed below).

ORDER

¶12 Accordingly, we VACATE the initial decision and REMAND this appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.