

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2008 MSPB 17**

---

Docket No. CB-7121-07-0014-V-1

---

**Susan FitzGerald,  
Appellant,**

**v.**

**Department of Homeland Security,  
Agency.**

January 29, 2008

---

E. Michael Ruberti, Esquire, Saint Simons Island, Georgia, for the appellant.

Trisha L. Besselman, Esquire, Glynco, Georgia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

Chairman McPhie issues a separate dissenting opinion.

**OPINION AND ORDER**

¶1 The appellant has requested review of an arbitrator's decision finding that the agency removed her for just cause on grounds that she falsified applications for federal employment. For the reasons set forth below, we GRANT her request for review and REVERSE the arbitrator's decision.

**BACKGROUND**

¶2 Prior to her removal, the appellant was a GS-1801-12 Law Enforcement Specialist (Instructor) at the Federal Law Enforcement Training Center in

Glynco, Georgia. Request for Review File (RRF), Tab 1 at 1; *id.*, Subtab C. She was selected for that position in May 2000 pursuant to priority consideration she received as part of an equal employment opportunity (EEO) settlement agreement. *Id.*, Subtab A at 4. After she was rejected for promotion a number of times, the appellant filed a series of EEO complaints against the agency, starting in November 2002. *Id.*, Subtab B at 2-4. In those complaints, she alleged that her non-selection constituted illegal sex and age discrimination and retaliation for her earlier EEO activity. *Id.*

¶3 While the EEO cases were pending, the agency launched an investigation into the appellant's applications for promotion. The agency proposed her removal on September 29, 2005, charging in a total of 14 specifications that she had falsified applications for federal employment based upon her responses to questions on the Optional Form (OF) 612, Optional Application for Federal Employment. *Id.*, Subtab C. She was removed effective November 25, 2005. RRF, Tab 4, Subtab 1.

¶4 The appellant grieved her removal. *Id.*, Subtabs 2-3; RRF, Tab 1. While her grievance was pending, an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) issued a decision dated June 12, 2006, finding that the agency had discriminated against her in regard to several applications for promotion. RRF, Tab 1, Subtab B. The AJ found that the agency's asserted reasons for not promoting the appellant were "pretextual and a mask to hide unlawful discrimination." *Id.* at 38-39. The agency was ordered to pay her the difference between her compensation and the full range of compensation that she would have earned if she had been promoted in November 2002, as well as \$20,000 as nonpecuniary compensatory damages. RRF, Tab 4, Subtab 4 at 25-27.

¶5 When the grievance proceeded to arbitration, an arbitrator found that the appellant had been removed for just cause. RRF, Tab 1, Subtab A at 1-38. The arbitrator found that her removal promoted the efficiency of the service, *id.* at 39-40, and that the agency had shown that the penalty was reasonable and comported

with the Douglas factors, *id.* at 39-45; *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The arbitrator also rejected the appellant's affirmative defense that the agency retaliated against her for EEO activity. RRF, Tab 1, Subtab A at 45-49. The appellant filed a timely request for review, RRF, Tab 1, and the agency filed a timely response, RRF, Tabs 3-4.

### ANALYSIS

The Board has jurisdiction over this appeal.

¶6 The agency argues that the Board lacks jurisdiction over this request because the appellant did not pursue her administrative remedies with the Federal Labor Relations Authority (FLRA). The agency explains that the collective bargaining agreement (CBA) states that an “award rendered by an arbitrator on any issue referred to arbitration under the terms of this Agreement will be final and binding on the parties except that it is agreed and recognized that either party may file an exception to the arbitrator’s award under regulations prescribed” by the FLRA. RRF, Tab 4 at 4-5; *see id.*, Subtab 6 at 13.

¶7 The Board may review an arbitrator’s decision, however, when three conditions are met: (1) the subject matter of the grievance is one over which the Board has jurisdiction; (2) the grievant alleges discrimination as stated in 5 U.S.C. § 2302(b)(1) in connection with the underlying action; and (3) a final decision has been issued in the grievance. 5 U.S.C. § 7121(d); *Hardison v. Department of the Treasury*, 13 M.S.P.R. 175, 176 (1982).

¶8 Here, the appellant has met these conditions. The subject matter of the appeal, her removal, falls within the Board’s jurisdiction. *See* 5 U.S.C. § 7512(1). She alleged reprisal for her EEO activity, and that activity is well-established in the record. The arbitrator issued a decision addressing that issue. *See* RRF, Tab 1, Subtab A at 45-49; *id.*, Subtab B; RRF, Tab 4, Subtab 4. The agency argues that the terms “final and binding” in the CBA mean that the appellant’s avenue for review is the FLRA exception process and subsequent

judicial review, as set forth in 5 U.S.C. §§ 7122-7123. RRF, Tab 4 at 4-5. We disagree. The statutory scheme for administrative and judicial review of agency personnel actions, in particular, section 7122(a), excludes from the FLRA exception process an arbitration award of a removal action. *See American Federation of Government Employees v. Federal Labor Relations Authority*, 850 F.2d 782, 784 (D.C. Cir. 1988).

The arbitrator erred in finding that the agency had just cause to remove the appellant for falsifying an application for federal employment.

¶9 The Board's scope of review of an arbitration decision is limited. An arbitrator's decision is entitled to a greater degree of deference than that of an AJ. *Benson v. Department of the Navy*, 65 M.S.P.R. 548, 554 (1994). The arbitration decision will only be modified or set aside if the appellant establishes error in the arbitrator's interpretation of civil service law, rule, or regulation. *Marenius v. Department of Health & Human Services*, 39 M.S.P.R. 498, 502 (1989). An arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, *e.g.*, by misallocating the burden of proof or employing the wrong analytical framework. *See, e.g., Lisboa v. Department of the Air Force*, 46 M.S.P.R. 6, 8 (1990). Even after reviewing the facts of a case and disagreeing with the arbitrator's decision, the Board cannot, absent legal error, substitute its conclusions for those of the arbitrator. *Edwards v. Department of Veterans Affairs*, 100 M.S.P.R. 437, ¶ 8 (2005), *aff'd*, 180 F. App'x 963 (Fed. Cir. 2006); *Benson*, 65 M.S.P.R. at 554.

¶10 The agency alleged that the appellant falsified applications for federal employment pursuant to 14 different vacancy announcements, based upon her answers to questions 10 and 12 of the OF-612. For each specification, the notice of proposed removal stated as follows:

You completed and submitted an Optional Form 612 (Optional Application for Federal Employment) when you applied for the position of Law Enforcement Specialist (Instructor), GS-1801-13, under vacancy announcement . . . . In response to question 10, you

indicated that the highest level of education you have completed was a Bachelor's degree and you wrote, "I completed my degree and received a Bachelor of Science in Criminal Justice from Hamilton University. April 2002." In response to question 12, you wrote, "B.S. in Criminal Justice Hamilton University April 2002." However, you knew that Hamilton University was not accredited by an accrediting institution recognized by the U.S. Department of Education and that your degree was not legitimate. Thus, you knowingly submitted false information on an application for Federal employment with the intent to mislead the Agency.

RRF, Tab 1, Subtab C. To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). "[A] charge of falsification of a government document requires proof not only that an answer is wrong, but also that the wrong answer was given with intent to deceive or mislead the agency." *Id.* at 978.

¶11 The appellant, a nursing school drop-out, testified that she had always wanted to complete her degree. After inquiring with a local institution and learning that she was ineligible for in-state tuition and that some classes she needed might conflict with her work schedule, she started to look into online distance learning programs. Hearing Transcript (HT), Vol. 2 at 163-64. The referral service she used identified Hamilton University as a program that fit her needs and informed her that, at Hamilton, she would be qualified to receive a degree based in part upon her life and work experience. *Id.* at 165-66. The appellant submitted a lengthy summary of this experience to Hamilton and was accepted as a student. *Id.* at 166-68, 173-77; *id.*, Vol. 3 at 99-103. According to the arbitrator, who examined the appellant's acceptance letter and transcript from Hamilton, she was required to take 4 courses for credit and voluntarily took 5 additional courses. IAF, Tab 1, Subtab A at 6; *see also* HT, Vol. 3 at 104-115. She received a bachelor of science in criminal justice from Hamilton University in April 2002. HT, Vol. 3 at 118. The appellant testified that she found nothing

in her research and examination of the school's materials that would have made her believe the school was unaccredited. Indeed, she noted that Hamilton University claimed to be accredited by the American Council of Private Colleges and Universities. *Id.*, Vol. 2 at 169-72. Her immediate and secondary supervisors signed off on her request for tuition reimbursement, but the agency denied her request. Agency witness John Bartosh testified that he told her that the institution was not accredited by an accreditation body recognized by the U.S. Department of Education. *Id.*, Vol. 1 at 45-49.

¶12 The appellant testified that, before she completed the first of the 14 applications at issue, she asked Janie Oddy, a supervisor in Human Resources, whether she could list the degree. She testified that Oddy told her that, in answering questions 10 and 12, there was no need to distinguish between distance learning institutions and traditional ones, and there was no requirement that she list only accredited institutions. *Id.*, Vol. 3 at 119-23, 128-31. The appellant testified that she asked these questions because she believed that the agency's non-recognition of unaccredited institutions only applied to the tuition reimbursement program. *Id.* at 122, 130.

¶13 The arbitrator found that the appellant's dealings with Hamilton University should have "raised several red flags" for her, RRF, Tab 1, Subtab A at 31, and he concluded that her testimony that she did not know that the school was unaccredited was not credible, *id.* at 33-37. As for her conversation with Oddy, who did not testify, the arbitrator admitted the appellant's concurrent notes into evidence, but found it "improbable" that she could both believe that the school was accredited and ask such questions of Oddy. *Id.* at 37-38. He conceded, however, that the applications the appellant completed did not specify that only degrees from accredited schools could be listed and noted that the Office of Personnel Management had only recently revised its forms to specifically state that schools had to be accredited. *Id.* at 38.

¶14 The appellant argues that the arbitrator applied the *Naekel* standard incorrectly by failing to analyze whether the information she supplied in answer to questions 10 and 12 was actually incorrect. RRF, Tab 1 at 7-13. She explains that she did, in fact, earn a bachelor's degree in criminal justice from Hamilton University in April 2002, but that the arbitrator focused on the *value* of that degree rather than the fact she had earned it. *Id.* at 8. She argues that the arbitrator's reasoning in this respect was conclusory, especially when he described her work at Hamilton as "bogus" and stated that "[s]he did not have a degree." RRF, Tab 1 at 12; *see id.*, Subtab A at 44-45.

¶15 After the arbitrator issued his decision, the Board considered a factually similar case in *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617 (2007). There, the agency removed the appellant based upon allegations that he made false statements on two forms related to his application for employment, including the OF-612. *Id.* ¶¶ 2-3. The appellant's allegedly false statements pertained, *inter alia*, to his educational qualifications. He claimed to have degrees from three institutions that were not accredited according to the U.S. Department of Education. *Id.* ¶ 8. The AJ reversed the removal, finding that the agency had not proven the charges, and the agency filed a petition for review. *Id.* ¶ 4. The Board found that the agency did not establish that the appellant falsified his OF-612. The Board reasoned that, although it was undisputed that the appellant listed bachelor's, master's and doctoral degrees from 3 separate unaccredited institutions, the OF-612 "prompts applicants for federal employment to list 'colleges and universities attended,' but does not indicate that only accredited institutions should be included." *Id.* ¶ 17.

¶16 In the case before us, the circumstances in favor of the appellant are actually stronger than they are in *Guerrero*. In *Guerrero*, the appellant misstated the names of two of the three institutions so that they resembled the names of traditional, well-known institutions. *Id.* ¶ 18. The appellant did no such thing here and apparently inquired as to whether she should list the degree from

Hamilton. Based on our holding in *Guerrero*, and in light of the similarity between the circumstances in that case and those here, we find that the appellant has established that the arbitrator erred in interpreting civil service law when considering the merits of the charges, and we therefore set aside the arbitrator's finding in this regard.

The arbitrator erred in finding that the agency did not retaliate against the appellant.

¶17 For an appellant to prevail on a contention of illegal retaliation for EEO activity, she has the burden of showing that: (1) She engaged in a protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Dobruck v. Department of Veterans Affairs*, 102 M.S.P.R. 578, ¶ 19 (2006), *aff'd*, 212 F. App'x 997 (Fed. Cir. 2007). Where there has been a hearing and the record is complete, as is the case here, the Board will not employ a traditional burden-shifting order of analysis; rather, inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal retaliation. *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005).

¶18 The appellant argues that the arbitrator failed to analyze the retaliation issue in accordance with this legal standard. RRF, Tab 1 at 18. The appellant points out that the arbitrator did not cite this or any other standard for retaliation in the decision. *Id.* at 19. She further argues that the arbitrator failed to consider the temporal proximity between her activity and the removal and the fact that both the proposing and deciding officials admitted that they knew about her activity. *Id.* at 20. The appellant's arguments have merit. The arbitrator did not cite *any* legal standard when he evaluated the evidence, and his analysis did not follow the *Warren* framework. For this reason, we find that the arbitrator has

made a legal error that permits the Board to make its own findings. *See Young v. Department of Justice*, 93 M.S.P.R. 326, ¶ 3 (2003).

¶19 It is undisputed that the appellant engaged in protected activity. The arbitrator found that the deciding official, Bruce Bowen, knew of her EEO activity. RRF, Tab 1, Subtab A at 14, 42. The proposing official, Marie Bauer, also testified that she knew of the activity. *See HT*, Vol. I at 160-61. Because the record is complete, we need not address the third *Warren* criterion, whether the removal action could have been retaliation, and we proceed directly to the fourth criterion, whether the appellant showed that she was removed *because of* her EEO activity. *See Simien*, 99 M.S.P.R. 237, ¶ 28; *see also Dobruck*, 102 M.S.P.R. 578, ¶ 20. This consideration requires the Board to weigh the gravity of the charged misconduct against the intensity of the agency's motive to retaliate. *Warren*, 804 F.2d at 658. The Board may consider circumstantial evidence in making such a determination. *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984).

¶20 To show retaliation using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of retaliation against her. *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7<sup>th</sup> Cir. 1994).

A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. A case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof.'

*Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7<sup>th</sup> Cir. 2006) (quoting *Mataya v. Kingston*, 371 F.3d 353, 358 (7<sup>th</sup> Cir. 2004)). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written

statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Troupe*, 20 F.3d at 736-37; *see, e.g., Culver v. Gorman & Co.*, 416 F.3d 540, 546-47 (7<sup>th</sup> Cir. 2005). Where an employer's motives or state of mind are relevant, the record must be carefully scrutinized for circumstantial evidence that would support an inference of retaliatory animus. *Cooney v. Consolidated Edison*, 220 F. Supp.2d 241, 250-51 (S.D.N.Y. 2002), *aff'd*, 63 F. App'x 579 (2<sup>nd</sup> Cir. 2003).

¶21 The proper perspective when weighing the gravity of the misconduct against the motive to retaliate is to view the gravity of the misconduct as it appeared to the deciding official at the time he took the removal action. *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 69 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002). We note that the appellant was removed prior to the issuance of our decision in *Guerrero*, and the agency did not have the benefit of that precedent. Nevertheless, that decision does not announce a new proposition of law or reverse long-standing precedent. In *Guerrero*, we merely applied existing precedent to facts similar to the facts here. The appellant here told the truth on her applications – that she had earned a degree from Hamilton University. Whether her degree is comparable to a degree earned at an accredited four-year institution is a different question, but not a relevant one here because the OF-612 did not state that the degrees listed must have been awarded by an accredited institution. Thus, as we determined above, she did not engage in the misconduct charged.

¶22 On the other hand, a pattern of circumstantial evidence shows that the agency and Bowen, the deciding official, had a strong motive to retaliate. At the center of that pattern are the findings from the concurrent EEO action. In the EEO decision, the AJ found that the appellant had shown by preponderant

evidence that the agency discriminated against her by “fail[ing] to select her to a series of detail and promotional opportunities and otherwise act[ing] against her in those opportunities, limiting her advancement thereby.” RRF, Tab 1, Subtab B at 1. The decision addressed the agency’s actions in the selection process for 10 different vacancy notices and a few detail assignments. *Id.* The AJ found that a “thread of common actors [were] involved in almost all of these selections.” *Id.* at 31. Two of these actors were Randolph Melvin and Cynthia Atwood. *Id.* For example, in the first selection that the appellant challenged in the EEO action, which was made pursuant to Vacancy Announcement (VA) 02-111MH, she was initially rated by the Rating and Ranking Panel as the number one candidate for the position. *Id.* at 7. The appellant’s number one ranking was later changed, without explanation, so that she was tied with another candidate. *Id.* at 8. Nevertheless, her immediate supervisor, Stephen Brooks, recommended her on the certification sheet that he submitted to Melvin. *Id.* Brooks was the recommending official, and Melvin was acting on behalf of Atwood, who was the approving official. *Id.* At the time, Melvin was also Acting Deputy Assistant Director of Training. HT, Vol. 3 at 18. When Brooks transmitted the certification sheet recommending the appellant to Melvin, Melvin told Brooks that his recommendation would not be considered. RRF, Tab 1, Subtab B at 8. He refused to interview any of the candidates on the certification sheet, including the appellant. *Id.* He destroyed the certification sheet. *Id.* Atwood, who was the Acting Assistant Director of Training at this time, took no action when she learned that Melvin destroyed the selection documents. *Id.* at 7, 9. Brooks later met with Atwood to discuss his recommendation of the appellant. At the time, Atwood asked him if he was recommending the appellant merely to avoid the possible filing of a discrimination complaint, or if he instead recommended her on the basis of her qualifications. Brooks indicated to Atwood that the appellant was truly the preferred candidate for the position; nevertheless, another candidate was selected. *Id.* at 9-10.

¶23 The arbitrator’s decision on the issue of retaliation rested in large part upon his finding that “[t]he management employees who the EEOC judge identified as retaliators played no part in the decision to investigate and terminate” the appellant. RRF, Tab 1, Subtab A at 49. He found the appellant had presented “no evidence” that connected Atwood, Melvin, or any other management official found to have retaliated against her “to any part of the decision to remove her.” *Id.* at 45. The record, however, shows otherwise. Bowen, the deciding official for the removal, was significantly involved in the EEO action. He was the recommending official for VA 03-038SR and the approving official for VA 03-106MD. RRF, Tab 1, Subtab B at 16-17; *cf. Adair v. U.S. Postal Service*, 66 M.S.P.R. 159, 165 (1995) (finding that the AJ erred in finding that the proposing official did not know of the employee’s protected EEO activity for purposes of the employee’s retaliation defense where the employee had been a witness in a disciplinary case against the official, who was later reinstated, and the official knew that the employee had been a witness in several EEO cases). Though he did not testify in the EEO case, he provided an affidavit regarding his involvement in the selection decisions underlying that action. HT, Vol. 1 at 211.

¶24 Further, we note, when the appellant applied for VA 03-38SR, for which Bowen was the recommending official, she received a rating of 100 by the Rating and Ranking Panel. RRF, Tab 1, Subtab B at 16. The Human Resources Division issued two certificates of eligibles on January 30, 2003, including competitive and noncompetitive candidates and those referred under special appointment authority. *Id.* The appellant appeared as a competitive candidate. *Id.* Bowen nevertheless declined to recommend or even interview the appellant. *Id.* Instead, on February 4, he obtained other certificates of eligibles. *Id.* He recommended a noncompetitive candidate from that certificate and forwarded it to Melvin, who was the selecting/approving official and acting for Atwood while she was on medical leave. *Id.*

¶25 Even without this evidence of Bowen's questionable conduct, there exists an identity of interests between Bowen and Melvin and Atwood. Bowen eventually filled Atwood's position as Assistant Director of Training. HT, Vol. 1 at 207. The EEOC Compliance Manual states as follows:

There is no requirement that the entity charged with retaliation be the same as the entity whose allegedly discriminatory practices were opposed by the charging party. For example, a violation would be found if a respondent refused to hire the charging party because it was aware that she opposed the previous employer's allegedly discriminatory practices.

EEOC Compliance Manual, No. 915.003 at 8-9 (May 20, 1998). The arbitrator thus erred when he limited the appellant to introducing evidence of retaliation only where such evidence "could be connected to any of the management officials who played a role in the decision to terminate" the appellant. *See* RRF, Tab 1, Subtab A at 45.

¶26 Additional circumstantial evidence includes the fact that the appellant has a long history of EEO activity, most of it involving claims against the component of the agency from which the appellant was removed, the Federal Law Enforcement Training Center. *See generally id.*, Subtab B at 5 n.3 (identifying seven previous EEO cases in which the appellant was the complainant). Indeed, as mentioned above, she was placed in her position as the result of a settlement in an EEO complaint. *Id.*, Subtab A at 4. It was while her EEO complaints regarding numerous non-selections for promotion were being considered that agency officials began the investigation leading to her removal. The appellant lodged the EEO complaints starting in November 2002. *Id.*, Subtab B at 2-4. The initial days of the hearing for these complaints took place in July 2005. *Id.* at 2. The agency issued the notice of proposed removal in September 2005. RRF, Tab 1, Subtab C. The final part of the hearing took place on November 14 and 15, 2005. *Id.*, Subtab B at 2. The agency issued the decision letter on November 14, 2005. RRF, Tab 4, Subtab 1. Moreover, a comparison of the EEO decision in the

record with the notice of proposed removal shows that the agency removed the appellant on the basis of her application pursuant to *every* vacancy notice addressed in the EEO complaints. *Compare* RRF, Tab 1, Subtab C, *with id.*, Subtab B at 2-4.

¶27 There is also evidence in the record that agency managers resented the appellant's EEO activity. For instance, as stated above, Atwood asked Brooks if his recommendation of the appellant for VA 02-111MH had been based upon her qualifications, or his fear that she would file an EEO complaint if not selected. *Id.* at 8. Melvin openly complained about the appellant's EEO activity:

While C.J. Ross was employed as a Senior Instructor with EOD, sometime between April of 2002, and mid-September 2004, he heard Mr. Melvin make the following comment in his office, "The paperwork is killing me. Susan is killing me with this EEO Complaint. It's just taking up all my time."

*Id.*, Subtab B at 12. Regarding his eventual selection of another female candidate for VA 02-111MH, Melvin was overheard to say, "[I]sn't it a shame that the Complainant can't complain because we selected another female." *Id.* at 34. The AJ also noted that some witnesses reported that Melvin "was pleased" to deny the appellant promotions and used pejorative and profane language to describe her. *Id.* at 34-35.

¶28 When all of the foregoing circumstantial evidence is taken together, a pattern of retaliation emerges. Accordingly, we find sufficient evidence in the record to establish a causal link between the appellant's EEO activity and the action to remove her. We find that the appellant met her burden of proof on the affirmative defense of retaliation, and we set aside the arbitrator's decision on that issue.

**ORDER**

¶29 We ORDER the agency to cancel the removal and to reinstate the appellant to her position of Law Enforcement Specialist (Instructor), GS-1801-12, effective November 25, 2005. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶30 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶31 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. See 5 C.F.R. § 1201.181(b).

¶32 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the Clerk of the Board if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶33 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and

Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

¶34 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the Clerk of the Board.

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at 42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must

file a motion for compensatory damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the Clerk of the Board.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to

file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the

court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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



## **DFAS CHECKLIST**

### **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT  
CASES

### **CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

### **ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:**

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
  - a. Outside earnings with copies of W2's or statement from employer.
  - b. Statement that employee was ready, willing and able to work during the period.
  - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



## **NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES**

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### **Attachments to AD-343**

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

DISSENTING OPINION OF NEIL A.G. MCPHIE

in

*Susan Fitzgerald v. Department of Homeland Security*

MSPB Docket No. CB-7121-07-0014-V-1

¶1 Because I believe that the majority fails to defer to the arbitrator's fact-finding on the falsification claim and misreads the arbitrator's analysis on the retaliation claim, I dissent.

**BACKGROUND**

¶2 In this case, the agency proposed the removal of the appellant from her position as a GS-12 Law Enforcement Specialist (Instructor) on 14 specifications that she had falsified applications for federal employment based upon her response to questions on the Optional Form (OF) 612, Optional Application for Federal Employment. Request for Review File (RRF), Subtab C. She was removed effective November 25, 2005. RRF, Tab 4, Subtab 1. In lieu of a Board appeal, she grieved her removal. As well, while the grievance was pending, an Equal Employment Opportunity Commission (EEOC) administrative judge issued a decision dated June 12, 2006 finding that the agency had discriminated against her in regard to several applications for promotion.\*

¶3 When the grievance proceeded to arbitration, the arbitrator found that the appellant had been removed for just cause, finding the removal promoted the efficiency of the service and that the agency had shown the penalty to be

---

\* As set forth more fully in the Board's Opinion and Order, the appellant answered "yes" on 14 OF 612's to a question as to whether she had a college degree, when, as the arbitrator ruled, she knew that she did not have a degree from an accredited college. Whether appellant knew that the degree was not one from an accredited college is a question of fact, on which the arbitrator made a finding: he found that appellant did know that the degree was not from an accredited institution (and therefore it was not a "real" college degree and should not have been credited as such on the OF 612).

reasonable and comported with the Douglas Factors. The arbitrator also rejected the appellant's affirmative defense that the agency retaliated against her for her EEO activity. The appellant filed a timely PFR.

### DISCUSSION

¶4 On review of the arbitrator's decision, pursuant to 5 U.S.C. § 7121(d), the majority now finds, in conflict with established Board precedent concerning its standard of review, that the arbitrator erred in finding just cause for the removal and therefore reverses the arbitrator's decision. The legal standard, as set forth in the majority opinion is correct: An arbitrator's decision is entitled to deference, and will be modified or set aside only if the arbitrator erred in interpreting a civil service law, rule or regulation. *De Bow v. Department of the Air Force*, 97 M.S.P.R. 5, ¶ 5 (2004); *Means v. Department of Labor*, 63 M.S.P.R. 180, 182 (1994); *Mareus v. Department of Health and Human Services*, 39 M.S.P.R. 498 (1989). While it invokes the proper standard, the majority, in essence takes issue with a finding of fact on an element of the charge of falsification, namely whether the applicant provided inaccurate factual information to the agency. This issue is an issue of fact over which reasonable minds may differ. But the Board may not engage in de novo review of an arbitrator's decision, *Hayes v. Department of Labor*, 65 M.S.P.R. 214, 217 (1994), nor may it reweigh the evidence and make its own findings of fact. *Lisboa v. Department of the Air Force*, 46 M.S.P.R. 6, 7 (1990). The majority does not identify which civil service rule, law or regulation was interpreted incorrectly by the arbitrator. Nor can I.

¶5 Additionally, I dissent as I believe the majority has inaccurately represented the arbitrator's analysis of the affirmative defense of retaliation. The majority opines that because the arbitrator did not specifically recite the retaliation claim burden of proof from *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986), he was incorrect as a matter of law when he concluded that the appellant had not proven retaliation. The majority finds that as a consequence of this "legal error" the Board may make its own findings on this issue. *See Young v. Department of Justice*, 93 M.S.P.R. 326, ¶ 3 (2003). As

the Opinion and Order correctly notes, however, where as here, a case has gone to hearing and the record is complete, the Board will not employ a traditional burden shifting order of analysis; rather the adjudicator should weigh the evidence and make a finding on the ultimate issue of whether appellant has met her overall burden of proving retaliation. *Simien v. United States Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005). But, the arbitrator did take the *Simien* approach in this case. He discussed at great length, the evidence or lack thereof regarding retaliation and found the retaliation claim unproven. He found, *inter alia*, a lack of evidence that the officials who removed the appellant were motivated to retaliate against her; nor did he find any evidence of disparate treatment of other similarly situated employees with degrees from diploma mills or who were engaged in litigation with the Agency. RRF, Tab 1, Ex. A at 45-49. Again, the majority simply reweighs the evidence in a manner different than the arbitrator to come to a contrary conclusion without establishing any clear legal error in the application of *Simien*, namely, on the question of whether the appellant met her overall burden of proof after the conclusion of all of the evidence.

### CONCLUSION

¶6 Because the majority does not find a clear error in interpretation of civil service law, rule or regulation regarding the arbitrator's finding that appellant falsified OF 612's in her applications for federal positions, I find that the majority did not follow established Board precedent regarding the deference due arbitrators. Similarly, I believe that the arbitrator found under *Simien* that the appellant had not met her overall burden of proving retaliation. I would therefore uphold the arbitrator's application of the law to the facts of this case. For these reasons, I dissent.

---

Neil A.G. McPhie  
Chairman