

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 61**

Docket No. DC-0752-07-0729-I-1

**Robert O. White, Sr,
Appellant,
v.
Government Printing Office,
Agency.**

March 14, 2008

J. Michael Hannon, Esquire, Washington, D.C., for the appellant.

Neal H. Fine, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of the initial decision that affirmed his 14-day suspension and demotion. For the reasons discussed below, we GRANT the petition for review. We AFFIRM the part of the initial decision that finds that the agency proved its charge and that the appellant did not prove his affirmative defenses of harmful error and reprisal for union activity. We VACATE the part of the initial decision that addresses the appellant's affirmative defense of race discrimination and the penalty. We REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Effective May 27, 2007, the agency suspended the appellant for 14 days and demoted him from Lead Police Officer, PQ-06, to Police Officer, PQ-05. Initial Appeal File (IAF), Tab 4, Subtabs 4a, 4b, 4c. The appellant was detailed as an Acting Supervisory Police Officer on October 29, 2006, the date of the charged misconduct. *See id.*, Subtabs 4g at 1 and 4p. The agency charged the appellant with failure to follow Post Orders by permitting two women to enter and remain in the lobby of a secure agency building without verifying that they had the required identity badges and without examining, either visually or by x-ray, the bag carried by one of them. *Id.*, Subtab 4g at 1-2. The appellant filed a timely Board appeal, asserting that he did not violate the post orders and that the agency committed harmful error, discriminated against him on the basis of his race, and retaliated against him for his prior union activity. IAF, Tab 1. Prior to the hearing requested by the appellant, he filed a motion to compel the agency to more fully comply with his discovery request concerning his affirmative defense of race discrimination. IAF, Tab 14. The administrative judge (AJ) denied the appellant's motion to compel based on her determination that discovery had concluded. IAF, Tab 16.

¶3 After the hearing, the AJ found that the agency had proven its charge by preponderant evidence, that the appellant had failed to prove his affirmative defenses of harmful error, race discrimination, and retaliation for union activity, and that the agency's unitary penalty of a 14-day suspension and demotion was reasonable and promoted the efficiency of the service.¹ Initial Decision (ID) at 4-7, 9-13. The appellant has filed a petition for review arguing that the agency

¹ Generally, the Board lacks jurisdiction over suspensions of only 14 days; however, it does have jurisdiction over reductions in grade and pay. 5 C.F.R. § 1201.3(a)(2). Where, as here, both actions are part of a unitary penalty arising from the same set of circumstances, the Board has jurisdiction over both actions. *See Brewer v. American Battle Monuments Commission*, 779 F.2d 663, 665 (Fed. Cir. 1985); *Campbell v. Department of Veterans Affairs*, 93 M.S.P.R. 70, ¶ 8 (2002).

did not show by preponderant evidence that he violated any post orders because it did not prove that he was in control of Post 41 at the time, and that the AJ erred by denying his motion to compel discovery. Petition for Review File (RF), Tab 1 at 4-8. The agency has responded in opposition to the petition. RF, Tab 3.

ANALYSIS

The agency proved its charge

¶4 The post orders for Post 41 require that the police officer in charge of Post 41 screen all persons entering the lobby of the Government Printing Office (GPO) building 4 by magnetometer, verify that all have GPO identification, and x-ray all bags. *See* IAF, Tab 4, Subtab 4j at 2-4. The appellant essentially admitted that those post orders were violated when two women entered Post 41, where the appellant was stationed, and neither he nor Officer Everett, who was accompanying the women, verified whether they had GPO identification, checked them with a hand-held magnetometer after they set off the walk-through magnetometer, or inspected the bag one of the women was carrying either visually or through the x-ray machine. Hearing Transcript (HT) at 168-71. The appellant asserted below that he had been relieved by Officer Everett upon Everett's arrival and so was no longer responsible for Post 41 and the screening of the two women. *Id.* He argues that the agency did not prove its charge because it did not produce any post orders concerning the transfer of control of the post and so did not show that he, and not Everett, was still responsible for the post. RF, Tab 1 at 5-6.

¶5 The AJ acknowledged that the agency has no formal procedures for how one officer relieves another from an assigned post and found that Everett's statement, "I got it," was insufficient to transfer responsibility for the post to Everett because at that time Everett was still outside the post area and so was not in a position to effectively view and control the post. ID at 4-5. We agree with the AJ that, at the time, Everett was not in a position to exercise control of the post

and the appellant has identified no evidence to undermine the AJ's findings in this regard. The appellant argues that the absence of post orders concerning the transfer of control of a post means that the agency did not prove its charge. RF, Tab 1 at 5-6. However, the appellant is not charged with violation of post orders regarding how he transferred control of the post; he is charged with failure to screen the two women as required by the post orders. The evidence in the record amply establishes that the appellant took none of the actions to screen the two women, as required by the post orders. He abdicated his responsibility, passing it to Everett, who was not in a position to take up control of the post. Therefore, the agency proved its charge.

¶6 The appellant does not raise any objection to the AJ's findings with regard to his affirmative defenses of harmful error and reprisal for union activity and we find no reason to disturb them. Accordingly, we affirm the initial decision with regard to the charge and the affirmative defenses of harmful error and reprisal for union activity.

The AJ abused her discretion by denying the appellant's motion to compel

¶7 The Board will not reverse an AJ's rulings on discovery matters absent an abuse of discretion. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). The AJ denied the appellant's motion to compel "because discovery has concluded." IAF, Tab 16. As the AJ noted in the initial decision, she had set August 6, 2007, as the date for a telephonic prehearing conference and also the date for discovery to be completed. ID at 12 n.3; IAF, Tab 5 at 3. That telephonic prehearing conference was subsequently delayed until August 13, 2007, although the AJ did not specify whether the date for the conclusion of discovery was delayed also. IAF, Tab 9 at 1. The appellant's motion to compel was filed on August 15, 2007. IAF, Tab 14. The rules governing discovery in Board proceedings are set out in the Board's regulations at 5 C.F.R. §§ 1201.71-.75. These regulations require that "[d]iscovery must be completed within the time limit the judge designates."

5 C.F.R. § 1201.73(d)(5). Regardless of whether the date for conclusion of discovery set by the AJ remained August 6 or extended to August 13, the appellant's motion to compel was filed after the deadline set by the AJ.

¶8 Initial discovery requests must be served within 25 days of the AJ's ordering the agency to produce its file and response. 5 C.F.R. § 1201.73(d)(1). The appellant's initial discovery request, dated July 17, 2007, was submitted within 25 days of the AJ's acknowledgment order of June 22, 2007. *See* IAF, Tabs 2, 6. The agency was required to respond to this request within 20 days, or by August 6, 2007. *See* 5 C.F.R. § 1201.73(d)(2). This was the date the AJ set for the conclusion of discovery. Any motion to compel must be filed with the AJ within 10 days of either the date of service of the objections of the responding party or the date of the expiration of the time to respond. 5 C.F.R. § 1201.73(d)(4). The appellant filed his motion to compel on August 15, 2007, arguing that the agency's responses and objections regarding the issue of race discrimination were insufficient and including with his motion a copy of his original discovery request and a copy of the agency's response, dated August 6, 2007. IAF, Tab 14. As the agency's response to the appellant's discovery request was not served until the last day it was due, August 6, the deadline for discovery, set for the same day by the AJ, effectively denied the appellant any opportunity to contest any of the agency's objections, file a motion to compel, or follow up with requests for further discoverable material based upon the agency's initial response.

¶9 The appellant's motion to compel was timely filed in accordance with the Board's regulations; therefore, the AJ erred by setting a more restrictive deadline and by denying the motion for the sole expressed reason that "discovery has concluded." However, the Board will not find reversible error in an AJ's discovery rulings absent an abuse of discretion that prejudiced the appellant's substantive rights. *See Davis v. Department of Defense*, 103 M.S.P.R. 516, ¶ 13 (2006); *McGrath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 9 (1999). The

appellant's initial discovery request and subsequent motion to compel sought discovery of the disciplinary records of other agency Police Officers for the purposes of proving his affirmative defense of race discrimination. IAF, Tab 14 at 6. The appellant alleged in his motion to compel that other officers of a different race received lesser or no discipline for similar offenses. *Id.* at 7. This discovery request is on its face directed at evidence that could be relevant and admissible concerning the appellant's affirmative defense of race discrimination and the appellant, as the party bearing the burden of proof on the claim, is entitled to obtain such evidence to support his claim. *See Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶ 15 (2006). As the appellant's motion to compel was reasonably calculated to lead to the discovery of admissible evidence, he was prejudiced in his ability to present his affirmative defense of race discrimination. Therefore, the AJ abused her discretion and committed reversible error by denying the appellant's motion to compel. *See id.*; *McGrath*, 83 M.S.P.R. 48, ¶¶ 9, 11, 14; *Beam v. Office of Personnel Management*, 71 M.S.P.R. 629, 632-33 (1996); *Kiser v. Department of Education*, 66 M.S.P.R. 372, 381-82 (1995).²

ORDER

¶10 Accordingly, we VACATE the initial decision with regard to the appellant's affirmative defense of race discrimination and the penalty; the remainder of the initial decision is AFFIRMED. We REMAND the appeal to the Washington Regional Office for further adjudication, consistent with this opinion, regarding the appellant's affirmative defense of race discrimination. The AJ shall allow the appellant to complete discovery on his race discrimination claim and, if the

² The appellant also sought to compel the depositions of Officer Corey Richardson and Sergeant William Wilson. IAF, Tab 14 at 5-6. However, the appellant's proffer as to the testimony of these witnesses does not establish that they are relevant fact witnesses concerning the charged misconduct or the appellant's defenses, and so the AJ did not abuse her discretion in denying the appellant's motion to compel with regard to these depositions.

appellant requests it, determine whether a hearing is warranted.³ The AJ shall issue a new initial decision addressing the discrimination claim and, if discrimination is not proved, may incorporate her prior findings with regard to the penalty.

FOR THE BOARD:

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

³ When there is no genuine dispute of material fact regarding discrimination, an evidentiary hearing on discrimination need not be conducted. *Redd*, 101 M.S.P.R. 182, ¶ 13.