

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 63**

Docket No. CH-0752-07-0449-I-1

**Stephen R. Erkins,
Appellant,
v.
United States Postal Service,
Agency.**

March 14, 2008

William Kirkland, Cincinnati, Ohio, for the appellant.

Daniel F. McLaughlin, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed the agency's action removing him from the position of Mail Handler. For the reasons discussed below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, AFFIRM the part of the initial decision sustaining the charge, VACATE as to the penalty, and REMAND the case for the adjudication of the appellant's affirmative defenses of retaliation for protected activity and discrimination.

BACKGROUND

¶2 The appellant appealed the agency's action removing him from the position of Mail Handler. Initial Appeal File (IAF), Tab 1. The agency based the action

on a single charge of “Improper Conduct.” IAF, Tab 5, subtabs 4(b), 4(c). Specifically, the agency alleged that on eight days between September 13, 2006, and January 8, 2007, the appellant requested and used sick leave for times he was obligated to appear as a party in court proceedings. *Id.*, subtab 4(c).

¶3 The administrative judge (AJ) found it undisputed that the appellant used sick leave on the dates specified in the proposal notice, and that, on seven of the eight specified dates, the appellant appeared as a party in a court proceeding during time he was on sick leave. The AJ found that the appellant presented evidence of a pre-existing back injury and that he had been assigned to a sedentary limited-duty position. Nevertheless, the appellant provided no medical evidence to support his claim that, although he was able to get to court and engage in trial-related proceedings, his injury prevented him from working during times set out in the agency’s proposal notice. Initial Decision (ID) at 2. The AJ found that the appellant knew he was required to take leave for his court appearance, and he did not request leave in advance, but instead waited until right before his court date and falsely told his supervisor that he had a doctor’s appointment or that he had a prescription to pick up. ID at 4. Immediately after the conclusion of the court proceedings, the appellant returned to work and on some occasions worked substantial overtime. *Id.* Thus, the AJ found that the agency proved seven of the eight specifications and he sustained the agency’s charge. *Id.* The AJ found that the agency proved nexus and that the penalty of removal is reasonable. ID at 5.

ANALYSIS

¶4 We grant the appellant’s petition for review (PFR) for the sole purpose of addressing his arguments that the agency’s action was retaliation for participating in protected equal employment opportunity (EEO) activity and discrimination. The remainder of the appellant’s allegations in his PFR are without merit because they do not concern any new, previously unavailable evidence and they do not show any error in law or regulation by the AJ that affects the outcome of this

appeal. *See* 5 C.F.R. § 1201.115(d). Thus, we are affirming the AJ's findings with regard to the charged misconduct.

¶5 Nevertheless, even if an agency proves its charges by a preponderance of the evidence, the Board cannot sustain the agency's action if the appellant shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. § 2302(b). 5 U.S.C. § 7701(c)(2)(B); *Miles v. Department of the Navy*, 102 M.S.P.R. 316, ¶ 14 (2006). In this case, the appellant has filed a PFR in which he alleges, inter alia, that the AJ erred by dismissing his claim of retaliation for prior EEO activity without ever addressing or deciding it. Petition for Review File (PFRF), Tab 1. We agree. The appellant's submissions indicate that he was attempting to raise affirmative defenses. Specifically, in his initial appeal form, the appellant stated that the removal decision was "retaliat[i]on for participating in protected EEO activity." IAF, Tab 1 at ¶ 18. He also checked the box on the form to indicate that he was raising a claim of discrimination. *Id.* at ¶ 30. In his statement of fact, issues and defenses, the appellant clarified as an issue, "Was the appellant's removal discrimination or retaliation for participating in EEO activity." IAF, Tab 1.

¶6 Just before the start of the hearing, the AJ held a discussion with the parties, which he then summarized on the record. Hearing Transcript (HT) at 1-11 (pages 1-37). In this summary, the AJ stated that he had held a prehearing conference earlier in the week but, because he had given extensions of time for the parties to supplement the record, it "became impossible" to do a summary of it. The AJ stated further that, for all functional purposes, the pre-hearing conference "ended about a minute and a half" before the start of the hearing. HT at 2 (pages 4-5). With regard to the issues in the case, the AJ stated that "the only defense that we have in this case is retaliation." HT at 5 (page 16) (emphasis added). The AJ then discussed the burden of proof with regard to the retaliation claim, and found it undisputed that the appellant had engaged in EEO activity and that the deciding official knew about it. HT at 7 (pages 22-23). The

AJ advised the appellant that he had the burden of showing that the deciding official removed him based on retaliation rather than because of the nature of the offense. The AJ further advised the appellant that the expected testimony from his proffered witnesses did not address his retaliation claim. HT at 7 (pages 23-24). The summary of the prehearing conference makes no mention of a discrimination claim.

¶7 The appellant correctly asserts that the initial decision does not address his retaliation claim. In the initial decision, the AJ stated as follows:

[The a]ppellant alleged that his removal was the result of discrimination. He stated that he would provide the details of his claim at a later date. He never provided any details of his claim of discrimination and, eventually abandoned this claim at the prehearing. Thus, his discrimination claim was dismissed.

ID at 5 n.3. However, the summary of the prehearing conference does not reflect that the AJ dismissed any retaliation claim or that the appellant abandoned any claim.

¶8 Moreover, the Board has consistently required AJs to apprise an appellant of the applicable burdens of going forward with the evidence and of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden. *Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶ 14 (2006); *Carlisle v. Department of Defense*, 93 M.S.P.R. 280, ¶ 11 (2003). When an AJ fails to inform the parties of their burden and methods of proof, the Board typically remands the appeal so the AJ can afford such notice and an opportunity to submit evidence and argument under the proper standard. *See Carlisle*, 93 M.S.P.R. 280, ¶¶ 11-13.

¶9 Here, the appellant, whose designated representative is not an attorney, both below and on review raised the issue of retaliation for participating in protected EEO activity and may have attempted to raise a claim of discrimination. IAF, Tabs 1, 10. The record is devoid of any notification of the appellant's burdens regarding his discrimination claim and the only indication in the record

that the AJ provided the required notice for his retaliation claim is contained in the prehearing summary. However, because the AJ apparently summarized two separate prehearing conferences in one summary, we are unable to determine when the AJ actually advised the appellant of his burden and methods of proof as to his retaliation claim. Because there is no evidence in the record that the appellant was provided explicit notice of the burdens of proof prior to the prehearing conference, notice during the conference held immediately before the hearing was insufficient because the appellant had no real opportunity to obtain the necessary evidence or prepare relevant arguments prior to the start of the hearing.

¶10 Furthermore, although the agency's submissions below mention the appellant's retaliation claim, the agency did not explain what was required in order for the appellant to prove retaliation for participating in protected EEO activity. IAF, Tabs 5, 6, 8, 9, 16. Thus, the agency's submissions did not place the appellant on notice of his burdens and the necessary evidence to prove them. *Cf. Brasch*, 101 M.S.P.R. 145, ¶¶ 14-16 (the Board declined to remand a case where the record shows that the appellant understood the burden and methods of proof and there was no evidence that the AJ's failure to advise him of his burden and methods of proof harmed the presentation or adjudication of his case).

¶11 We, therefore, remand this appeal for the AJ to inform the appellant of his burdens of proof on both his retaliation claim and his discrimination claim, and to explicitly advise him of the kind of evidence he is required to produce to meet his burden. On remand, the AJ shall permit the parties to conduct discovery and submit additional evidence and argument as necessary on the appellant's claims of retaliation for participating in protected EEO activity and discrimination. *Carlisle*, 93 M.S.P.R. 280, ¶ 13. The AJ shall then determine whether the appellant has met his burden of proof regarding these claims, and issue a new initial decision that addresses these affirmative defenses.

ORDER

¶12 Accordingly, we AFFIRM the part of the initial decision sustaining the charge, but we VACATE the initial decision as to the penalty, and we REMAND the appellant's affirmative defenses of retaliation and discrimination to the Central Regional Office for further adjudication consistent with this Opinion and Order. On remand, the AJ shall apprise the appellant of the applicable burdens and elements of proof on his retaliation and discrimination claims. Further, the AJ shall afford the appellant an opportunity for additional discovery on his affirmative defenses, and a supplemental hearing on the defenses if the appellant requests one. The AJ shall then issue a new initial decision addressing these defenses. In the new initial decision, the AJ may adopt his original findings with respect to the issue of nexus, and, in the event that the AJ determines that the appellant fails to prove any of his affirmative defenses, the reasonableness of the penalty of removal. Unless the appellant withdraws his affirmative defenses, the new initial decision should also advise the appellant of his mixed-case appeal rights. *See Parnell v. Department of the Army*, 58 M.S.P.R. 128, 131 (1993) (a claim of reprisal for filing a discrimination complaint is cognizable under 5 U.S.C. § 2302 (b)(1)).

FOR THE BOARD:

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