UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 76

Docket No. CB-7121-09-0004-V-1

Suzanne Pyun,

Appellant,

v.

Social Security Administration,

Agency.

May 11, 2009

Ericka Lewis, Esquire, Raleigh, North Carolina, for the appellant.

Allyson Jozwick, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a request for review of an arbitration decision that affirmed the agency's decision to remove her. For the reasons set forth below, we GRANT the request for review under 5 U.S.C. § 7121(d) and 5 C.F.R. § 1201.154(d), and AFFIRM the arbitration decision.

BACKGROUND

¶2 In June 2005, the appellant and the agency entered into a settlement of an Equal Employment Opportunity (EEO) complaint filed by the appellant against her supervisor, Robert Mannion. Request for Review File (RFRF), Tab 1 at 1; *id.*, Ex. 1 at 2. In January 2006, the appellant was placed on a Performance

Assistance Plan (PAP), which was supervised by Kathleen Tannery and Josephine McLaughlin. RFRF, Tab 1 at 2; *id.*, Ex. 1 at 3-4. The PAP continued until May 2006 when the appellant was placed on a Performance Enhancement Plan (PEP). RFRF, Tab 1 at 2; *id.*, Ex. 1 at 4-5. On May 10, 2006, the appellant filed a formal EEO complaint alleging that she had been subjected to an ongoing pattern of harassment and retaliation based on her race and national origin and in reprisal for her prior EEO activity. RFRF, Tab 1 at 2; *id.*, Ex. 1 at 29. The appellant's PEP ended in August 2006. RFRF, Tab 1 at 2. Shortly thereafter, the agency proposed to remove her from her position as a Service Representative, GS-8, for unacceptable performance in a critical element of her position. *See* RFRF, Tab 1 at 1-2; *id.*, Ex. 2 at 1. In response to the proposal, the appellant asserted that the agency's action was a result of discrimination based on her race and national origin and was in retaliation for her prior protected activity. RFRF, Tab 1 at 2. She was removed effective October 6, 2006. *Id.*

¶3 Through her union, the appellant grieved her removal under the applicable collective bargaining agreement, asserting, among other things, that her removal was in retaliation for her prior EEO activity. *Id.* at 3; *id.*, Ex. 1 at 18-19. During the hearing, the agency objected to any consideration of the appellant's claims of reprisal for protected activity on the basis that the matters were raised in the appellant's EEO complaint. RFRF, Tab 1, Ex. 1 at 29. The arbitration was adjourned while the agency moved to have the Equal Employment Opportunity Commission (EEOC) dismiss the appellant's claim on the basis that her EEO claim was merged with her removal claim and thus constituted a mixed case for the agency. *Id.* at 30. The EEOC denied the motion. *Id.*

¶4 After a hearing, the arbitrator sustained the appellant's removal. *Id.* at 31. He found that the issues of discrimination and retaliatory harassment that the appellant had raised in her EEO complaint were not appropriately raised in the arbitration forum because the claims were pending before the EEOC, which would issue a decision that would be binding on the appellant and the agency. *Id.*

at 31. He further found that the circumstantial evidence of retaliation presented by the appellant related only to the time period prior to the initiation of the PAP and continued only up to the initiation of the PEP, which is the time that the appellant filed her EEO complaint. *See id.* Finding that such evidence could not be considered as the claim to which it related was pending before the EEOC, the arbitrator concluded that the appellant could not prevail on her claim of retaliation. *Id.* He thus denied the grievance, thereby upholding the removal. *Id.* at 31-32.

¶5 The appellant has filed a request for review of the arbitration decision, RFRF, Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.

ANALYSIS

¶6 The Board has jurisdiction to review an arbitrator's decision under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 5 (2006). Each of these conditions has been satisfied in this case. The appellant has alleged that her removal for unacceptable performance was the result of discrimination based on her race and national origin, and the action is otherwise appealable to the Board under 5 U.S.C. § 7702(a)(l). *See* 5 U.S.C. §§ 4303(e), 7701(a); RFRF, Tab 1 at 6, Ex. 1 at 9. The arbitrator issued a final decision on the appellant's grievance on November 14, 2008. RFRF, Tab 1, Ex. 1 at 1. Thus, we find that the Board has jurisdiction over this case. *See Godesky*, 101 M.S.P.R. 280, ¶ 5.

¶7 However, the standard of the Board's review of an arbitrator's award is limited. *See FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 9 (2008). The Board will modify or set aside such an award only when the arbitrator has erred as matter of law in interpreting a civil service law, rule, or

regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, the arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for example, by misallocating the burdens of proof or employing the wrong analytical framework. *Berry v. Department of Commerce*, 105 M.S.P.R. 596, ¶ 5 (2007).

¶8 In her request for review, the appellant asks that the Board substantively review her claims of discrimination and reprisal and reverse the arbitrator's decision. RFRF, Tab 1 at 6, 8. She asserts that the arbitrator erred in failing to consider her affirmative defense of reprisal and concluding instead that her reprisal and discrimination claims were properly before the EEOC and could not be considered in the arbitration proceeding. *Id.* at 5-6.

¶9 The appellant partially mischaracterizes the arbitrator's consideration of her discrimination and reprisal claims. *See id.* The arbitrator recognized that the EEOC "has before it for resolution the issue of discrimination and retaliatory harassment, and its decision on those claims will be binding on both the Agency and [the appellant]." RFRF, Tab 1, Ex. 1 at 31. Therefore, he stated that "[t]hose same issues are . . . not appropriately raised in the arbitration forum." *Id.* He further recognized that the only circumstantial evidence of retaliation presented by the appellant "relates to the time period prior to the initiation of the PAP and continues up to the PEP," at which time the appellant filed her May 10, 2006 EEO complaint, and "[w]ithout that circumstantial evidence here . . . [the appellant] cannot prevail on a claim of retaliation . . . ." *Id.* Thus, the arbitrator did not fail to consider her affirmative defense altogether but rather stated that the only evidence of discrimination or reprisal submitted by the appellant arose during the time period covered by her May 10, 2006 EEO complaint and thus should not be considered since the claims were properly before the EEOC. *See id.*

¶10 The arbitrator's treatment of the appellant's reprisal and discrimination claims in the final decision is consistent with the ruling he made during the hearing, in which he limited consideration of such evidence in light of the issues concurrently before the EEOC. *See* RFRF, Tab 3, Subtab 2 at 5-6. He made clear during the hearing that in order to prevent potentially contradictory decisions he would not consider evidence of retaliation or discrimination occurring prior to the filing of the appellant's May 10, 2006 EEO complaint because such matters remained before the EEOC. *See id.* The appellant does not state in her request for review that she preserved this matter for review by timely objecting to the explicit evidentiary limitations imposed by the arbitrator at the hearing. *See Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, ¶ 13 (2001); *Luna v. Social Security Administration*, 85 M.S.P.R. 301, ¶ 11 (2000); *Taylor v. Department of the Army*, 44 M.S.P.R. 471, 473-74 (1990) (where the appellant stipulated to the narrowing of the charges at the hearing and did not object to or seek clarification of the stipulation, he could not challenge the stipulation on review). Nor does the partial hearing transcript submitted by the agency suggest that the appellant timely objected. *See* RFRF, Tab 3, Subtab 2. Therefore, the appellant may not now object to the arbitrator's ruling that limited consideration of evidence of discrimination and reprisal to such events that occurred after the date on which the appellant filed her EEO complaint. *See Gustave-Schmidt*, 87 M.S.P.R. 667, ¶ 13; *Luna*, 85 M.S.P.R. 301, ¶ 11; *Taylor*, 44 M.S.P.R. at 473-74. In light of the appellant's failure to object to the arbitrator's ruling below, we will not address whether the arbitrator erred in excluding the evidence.

¶11 Moreover, even if we were to address the issue and find error in the arbitrator's refusal to consider the evidence that was also before the EEOC, the current record does not support a finding of reprisal by the agency.[1] *See*

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[1] The appellant's request for review does not ask the Board to remand the case to the arbitrator for further presentation of reprisal evidence; rather, she "seeks the Board's substantive review." RFRF, Tab 1 at 6. With her request for review, the appellant

generally RFRF, Tab 1. For an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that: (1) A protected disclosure was made; (2) the accused official knew of the disclosure; (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.[2] *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

¶12 The arbitrator found that there is no dispute that the appellant engaged in protected activity when she filed and settled her EEO complaint in 2005 and that Mr. Mannion knew of her protected activity. *See* RFRF, Tab 1, Subtab 1 at 29. However, even assuming that retaliation could have been the motive for the removal action, *see Warren*, 804 F.2d at 658 (if agency officials have knowledge of prior protected activity, and are also involved in the process of removing the employee, an inference is raised of a retaliatory motive sufficient to meet the third prong of the test), the appellant has failed to establish the last prong of the test. To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Murry v. General Services Administration*, 93 M.S.P.R. 560, ¶ 6 (2003). This requires the Board to weigh the inadequacy of the appellant's performance of her duties against the intensity

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submitted only the arbitration decision, the proposal to remove her, and the position description. *See* RFRF, Tab 1, Subtabs 1-2.

[2] The Board has recognized that in cases where, because there has been a hearing, the evidentiary record is complete, rather than inquiring whether the appellant has made out a prima facie case of retaliation, the ultimate question is whether, upon weighing all of the evidence, the appellant has met her overall burden of proving retaliation under 5 U.S.C. § 2302(b)(9). *See Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005). Here, however, even though there was a hearing, the arbitrator limited the evidence of retaliation that could be presented, and thus the evidentiary record is not complete on this issue. Accordingly, in the Board's record review of this claim, it is appropriate to assess first whether the appellant has made out a prima facie case of retaliation. *See Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 24 n.* (2005).

of the agency's motive to retaliate. *See Warren*, 804 F.2d at 658; *Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 26 (2005). The Board may consider circumstantial evidence in making such a determination. *See Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984).

¶13 As circumstantial evidence of retaliation, the appellant asserts that in the six years prior to filing her 2005 EEO complaint Mr. Mannion provided no indication that he was dissatisfied with her performance. RFRF, Tab 1 at 7-8. She further asserts that during her detail to the agency's Jenkintown office, which was negotiated in the settlement of her 2005 EEO complaint, she was supervised by Josephine Pielocik, who knew Mr. Mannion. *Id.* She asserts that Ms. Pielocik stressed to other employees that the appellant would only temporarily be at the site, even though the settlement agreement stated that the appellant would remain in the Jenkintown office permanently if her performance was satisfactory after 120 days. *Id.* at 1, 8. She also asserts that Ms. Pielocik immediately began auditing her work and continued to do so until she "eventually documented enough problems to present to Mr. Mannion and his boss to have the appellant returned to Mr. Mannion's supervision." *Id.* at 8. She claims that Mr. Mannion then placed her on a PAP before personally observing any performance deficiencies, that he failed to provide her with training, and that her request for a mentor was denied. *Id.*

¶14 In this case, the arbitrator found that the removal action was supported by substantial evidence. According to the arbitrator's decision, three supervisors who witnessed the appellant's performance—i.e., Ms. Pielocik, Ms. Tannery, and Ms. McLaughlin—consistently identified the appellant's difficulties with obtaining and clarifying appropriate information from customers, accurately explaining technical provisions to customers, and taking appropriate actions to adjudicate proper payment. *See* RFRF, Tab 1, Subtab 1 at 2-8, 12. The arbitrator also found that the appellant was provided with one-on-one training in which Ms. McLaughlin or Ms. Tannery observed the appellant's interviews with customers

and provided immediate feedback. *Id.* at 24, 26. Further, he indicated that the appellant's ongoing difficulties were summarized in numerous performance discussion memoranda, *id.* at 5-8, 25-26, which the appellant rebutted primarily by denying she had performance problems, *id.* at 7-9, 27. The appellant has not shown error in any of these findings. In light of the ongoing deficiencies in the appellant's performance and the consistency with which three supervisors described such deficiencies as well as the appellant's apparent resistance to improvement, the inadequacy of the appellant's performance substantially outweighs the intensity of the agency's motive to retaliate, of which the appellant seems to have provided little evidence. *See Warren*, 804 F.2d at 658. Therefore, the appellant has failed to establish a genuine nexus between the retaliation and her removal and has thus failed to establish a prima facie case of retaliation. Accordingly, we AFFIRM the arbitration decision.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this request for review. 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 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, www.cafc.uscourts.gov. 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:

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