UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 183

Docket No. CB-7121-09-0016-V-1

Carmen Bettis,

Appellant,

v.

Department of Labor,

Agency.

September 9, 2009

John D. Vena, II, Esq., Washington, D.C., for the appellant.

David L. Pena, Esq., Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has requested review of an arbitrator's decision that denied her grievance in part and remanded her grievance in part. For the reasons set forth below, we DISMISS the request for review for lack of jurisdiction.

BACKGROUND

¶2 The agency removed the appellant from the position of Human Resources Specialist, effective June 11, 2004, for absence without leave (AWOL) and

failure to follow leave request procedures.[1] Request for Review File (RFRF), Tab 1, Arbitrator's Decision (AD) at 6, 8-9. The appellant grieved the removal, the grievance was eventually submitted to arbitration, and the arbitrator conducted a hearing on four days in 2007 and 2008,[2] subsequently granting extensions of time to the parties to submit additional post-hearing briefs and replies. *Id.* at 1. On May 4, 2009, the arbitrator issued a decision and order. *Id.*

¶3 The arbitrator found that the issues to be resolved were the following:

> (1) Whether [the appellant] was discharged for Just Cause. If not, what is the appropriate remedy?
>
> (2) Whether the Agency violated the Rehabilitation Act by failing to grant [the appellant] an accommodation?

AD at 1. Concerning the first issue, the arbitrator found that, although the appellant's behavior authorized the agency to charge her with AWOL, remand was appropriate in order for the agency to consider all of the relevant penalty factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). AD at 14-19. Thus, he remanded her grievance to the agency on that issue. AD at 21-22. Concerning the second issue, the arbitrator found that the appellant did not show that the agency violated the Rehabilitation Act by failing to accommodate her because she did not show that she was "disabled" within the meaning of the Act during the time that she was charged with AWOL or that her alleged disability prevented her from complying with the agency's directions. *Id.* at 19-21. Thus, he denied her grievance on that issue. *Id.* at 21-22.

¶4 The appellant has filed a request for review of the arbitrator's decision. RFRF, Tab 1. The agency has filed a response to the request. *Id.*, Tab 5.

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[1] The citations are to the Arbitrator's Decision because neither party submitted documentary evidence, except for the collective bargaining agreements, as opposed to argument.

[2] One of the dates listed is May 23, 2003, which we believe to have been mistyped. The correct date appears to be May 23, 2008. AD at 1.

ANALYSIS

The Board lacks jurisdiction over the appellant's request for review of the arbitrator's decision.

¶5 Under 5 U.S.C. § 7121(d), the Board has jurisdiction to review an arbitrator's decision if the Board has jurisdiction over the subject matter of the grievance, the employee alleges that the action at issue constitutes discrimination under 5 U.S.C. § 2302(b)(1), and the arbitrator has issued a final decision. *See, e.g., Wright v. Department of Commerce*, 110 M.S.P.R. 349, ¶ 6 (2008); *Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶ 7 (2008). The Board has jurisdiction over a removal. 5 U.S.C. §§ 7512(1), 7513(d), 7701. The appellant alleges that the action constituted discrimination based on her disability. RFRF, Tab 1 at 2, 16-24. Thus, the first two criteria for Board review are satisfied.

¶6 The agency asserts that the appellant's request for review should be dismissed for lack of jurisdiction because the arbitrator did not issue a final decision. Thus, it argues, the third criterion for jurisdiction has not been met. In that regard, the agency notes that the arbitrator remanded the removal action to the agency to reconsider the penalty portion of its final decision, directed the agency to appoint a different deciding official to render a new decision on the proposal to remove, and retained jurisdiction to review the agency's action on remand. RFRF, Tab 5 at 1, 11-12, 17.

¶7 We agree with the agency that the Board lacks jurisdiction. The issue of Board jurisdiction may be raised at any time during a proceeding, and the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. Further, the appellant must demonstrate that the Board has jurisdiction by preponderant evidence. *E.g., Russell v. Department of Veterans Affairs*, 108 M.S.P.R. 690, ¶ 4 (2008). Here, as the agency argues, the AD shows that the arbitrator did not issue a final decision as required for Board jurisdiction. Rather, the arbitrator remanded the first issue, the "Issue of Just Cause," for the agency to consider and apply the *Douglas* factors. AD at 21-22.

In doing so, he wrote that, "[i]f necessary, [he] will receive the Agency's decision and evaluate its consistency with the *Douglas* factors." AD at 22. Significantly, he concluded as follows: "The Arbitrator retains jurisdiction over this matter for purposes of clarifying any aspect of this Decision and/or reconsidering the Agency's decision, if necessary." *Id.* Indeed, even the appellant admits that "there is still no final determination in this case," asserting that the arbitrator "averted and circumvented his contractual duty to issue a final, binding determination."[3] RFRF, Tab 1 at 31.

¶8 Accordingly, because the arbitrator has not yet issued a final decision, we dismiss the request for review for lack of jurisdiction.

ORDER

¶9 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 FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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

[3] Because we lack jurisdiction over the request for review, we lack authority to consider the appellant's argument that the arbitrator erred in failing to issue a final decision.

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.