UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 185

Docket No. CB-7121-09-0017-V-1

Wayne Adams,

Appellant,

v.

Department of Labor,

Agency.

September 10, 2009

Mona Lyons, Esquire, Washington, D.C., for the appellant.

Rolando N. Valdez, 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 request for review of an arbitration decision that affirmed the agency's decision to remove him. 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 The agency removed the appellant from his position as a Support Services Assistant for failure to follow leave requesting procedures, resulting in absence without leave (AWOL), and for failure to complete a work assignment. Request for Review File (RFRF), Volume (Vol.) III, Tab 1, Subtab 11 at 1-9. The

appellant grieved his removal under the Collective Bargaining Agreement, pursuing the matter through arbitration. *Id.*, Subtab 12 at 1-3. He asserted that the agency failed to take his substance abuse into account, imposed unduly harsh leave restrictions, and discriminated against him based on his race and disability. *Id.* at 1-2.

¶3 Following three days of hearing, the arbitrator denied the appellant's grievance. RFRF, Vol. I, Tab 1, Arbitration Decision (Decision) at 26. She first noted that it was undisputed that the appellant committed the violations charged by the agency in the Notice of Proposed Removal. *Id.* at 14. She found that an employee's failure to report to work on a regular basis "necessarily has an adverse impact on operations," and that the availability of leave has no bearing on noncompliance with the agency's leave requirements. *Id.* at 16-17. Accordingly, she found that a nexus existed between the charged violations and the efficiency of the service. *Id.* at 17. The arbitrator rejected the appellant's assertion that the agency failed to give appropriate weight to relevant factors in assessing the penalty of removal, noting that Board precedent established that an agency may properly discipline an employee for being AWOL during the time the employee is suffering from drug problems, especially when the employee has prior disciplinary actions for similar offenses. *Id.* at 18-19.

¶4 The arbitrator found that the appellant failed to substantiate his claim of disability discrimination as he did not present evidence showing that his failure to comply with his leave restriction was caused by his drug addiction or that the agency removed him because of his addiction. *Id.* at 22-23. She further found that the appellant did not request an accommodation for his drug addiction, and thus the agency had no duty to accommodate him. *Id.* at 24. The arbitrator also found that the appellant failed to substantiate his claim of racial discrimination as he did not show that the agency's stated reasons for his removal were a pretext for discrimination and he did not identify any comparably situated employees outside his protected class who received more favorable treatment. *Id.* at 24-25.

¶5 The appellant has filed a request for review of the arbitration decision, RFRF, Vol. I, Tab 1, Request for Review (RFR), and the agency has filed a response in opposition, *id.*, Tab 6.

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 his removal for failure to follow leave requesting procedures resulting in AWOL and for failure to complete a work assignment was the result of discrimination based on his race and disability, and the action is otherwise appealable to the Board under 5 U.S.C. § 7513(d). *See* RFRF, Vol. I, Tab 1, RFR at 1-2. The arbitrator issued a final decision on the appellant's grievance on May 13, 2009. RFRF, Vol. I, Tab 1, Decision 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 a 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 her 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).

The agency established a nexus between the charges and the efficiency of the service.

¶8 In his request for review, the appellant asserts that the agency failed to establish a nexus between his unapproved leave and the efficiency of the service, that he had annual leave available to cover his 40 hours of AWOL, and thus that the agency "must be deemed to have expected him to use it." RFRF, Vol. I, Tab 1, RFR at 4. An agency may establish nexus by showing that the employee's conduct (1) affected the employee's or his coworkers' job performance, (2) affected management's trust and confidence in the employee's job performance, or (3) interfered with or adversely affected the agency's mission. *Johnson v. Department of Health & Human Services*, 86 M.S.P.R. 501, ¶ 1 (2000), *aff'd*, 18 F. App'x 837 (Fed. Cir. 2001).[1] Any sustained charge of AWOL is inherently connected to the efficiency of the service as an essential element of employment is to be on the job when one is expected to be there. *See Davis v. Veterans Administration*, 792 F.2d 1111, 1113 (Fed. Cir. 1986). We accordingly discern no error in the arbitrator's finding that the agency established a nexus between the appellant's conduct and the efficiency of the service. *See* RFRF, Vol. I, Tab 1, Decision at 16.

¶9 The Notice of Proposed Removal indicated that the appellant's absences forced his supervisor to find a replacement to complete his work assignments at the last minute and placed an "undue burden" on his co-workers who were forced to complete their assignments as well as the appellant's assignments. RFRF, Vol. III, Tab 1, Subtab 11 at 1, 3. It also stated that the appellant's conduct was "a detriment to effective workplace operations" and that the appellant's supervisor lost "all confidence in [the appellant] and believe[s] that [he] can no longer be relied upon to serve in a position" in the agency. *Id.* at 4. Moreover, even if the

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[1] *Johnson* includes two paragraphs numbered 1. The paragraph cited above, and in ¶ 10 of this Opinion, is the second of those paragraphs.

appellant had 40 hours of annual leave as he asserts, such fact does not necessarily mean that the agency would have approved its use on the occasions at issue here. Nor does it change the fact that the appellant repeatedly failed to follow leave requesting procedures. Accordingly, we discern no error in the arbitrator's finding that the agency established a nexus between the charges and the efficiency of the service. *See* RFRF, Vol. I, Tab 1, Decision at 16-17; *see also Davis*, 792 F.2d at 1113; *Johnson*, 86 M.S.P.R. 501, ¶ 1.

The appellant failed to demonstrate that the agency discriminated against him on the basis of his race.

¶10 On review, the appellant asserts that his removal was a result of discrimination based on his race. RFRF, Vol. I, Tab 1, RFR at 26. As evidence, he asserts that two of the three African American men working under the appellant's supervisor, including the appellant, were disciplined by her and that the other asked to be reassigned. *Id.* Further, he asserted that "*all* of the other nine Caucasian and female federal employees . . . were afforded less harsh treatment . . . ." *Id.* at 27.

¶11 To establish a claim of prohibited employment discrimination or retaliation under Title VII, the employee first must establish a prima facie case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination or retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). An employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Here, as with most appeals of adverse actions taken under 5 U.S.C., chapter 75, the agency has already

articulated a nondiscriminatory reason for its action, i.e., the charged misconduct. Accordingly, the agency has done everything that would be required of it if the respondent had made out a prima facie case, and whether he in fact did so is no longer relevant. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). Thus, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id.*

¶12 The question to be resolved then is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against him. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993); *Marshall*, 111 M.S.P.R. 5, ¶ 17. The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc).

¶13 The appellant failed to produce sufficient evidence to demonstrate that the charged misconduct was not the actual reason for the agency's decision to remove him and that the agency instead intentionally discriminated against him. As the arbitrator stated, the appellant does not dispute that the violations charged in the Notice of Proposed Removal occurred. *See* RFRF, Vol. I, Tab 1, Decision at 14, 25; *id.*, Tab 1, RFR at 4. Moreover, the appellant failed to identify a similarly situated employee who received more favorable treatment. The Board has held that, for other employees to be deemed similarly situated, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees. *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13

(2003). Thus, to be similarly situated, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. *Id*. While the appellant asserts that "*all* of the other nine Caucasian and female federal employees under Ms. Burger's supervision were afforded less harsh treatment," the appellant failed to identify an employee who was not in his protected class and who had a similar extensive history of engaging in the misconduct with which the appellant was charged. *See* RFRF, Vol. I, Tab 1, RFR at 26-27. Accordingly, we discern no error in the arbitrator's finding that the appellant failed to show that the agency's stated reasons for his removal were a pretext for racial discrimination. *Id.*, Decision at 25.

The appellant failed to demonstrate that the agency discriminated against him on the basis of a disability.

¶14 The appellant also asserts that his removal was a result of discrimination based on his disability. RFRF, Vol. I, Tab 1, RFR at 27-29. He claims that it is undisputed that he suffers from a drug addiction and that his condition has been diagnosed as a permanent disability. *Id.* at 28. He asserts that the agency refused to accommodate him when he requested one year of leave without pay for treatment. *Id.* He also asserts that "it is beyond genuine dispute that [his] disability contributed to time and attendance problems . . . ." *Id.*

¶15 While we concur with the arbitrator's finding that the appellant failed to show that the agency discriminated against him on the basis of a disability, we first address a threshold issue that the arbitrator did not. Under the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by the Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, "a qualified individual with a disability" does not include "any employee or applicant who is currently engaging in the illegal use of drugs . . . ." 42 U.S.C. § 12114. The ADA amended the Rehabilitation Act to define "drug" to mean "a controlled substance, as defined in schedules I-V of section 202 of the Controlled Substances Act (21

U.S.C. 812)." *See* 42 U.S.C. § 12111(6)(B). It further defined the "illegal use of drugs" to mean the use of drugs, "the possession or distribution of which is unlawful under the Controlled Substances Act . . . ." *Id.* § 12111(6)(A). This does not include the use of drugs "taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act, or other provisions of Federal law." *Id.* The appellant must establish his affirmative defense of disability discrimination by preponderant evidence.

¶16 The appellant did not specify the drug or drugs to which he was addicted. He asserted, however, that he entered a drug treatment program in January 2006 and again in November 2007 after his removal. RFRF, Vol. I, Tab 1, RFR at 11-12, 14. He also testified that he enrolled in Narcotics Anonymous, RFRF, Vol. II, Tab 1, Hearing Testimony (HT) at 733. He, however, has not asserted that his addiction was to prescription drugs taken under supervision by a licensed healthcare professional or used as authorized by the Controlled Substances Act or other provisions of Federal law, or in any way indicated that it was not to a controlled substance. In view of his participation in at least two rehabilitation programs and his enrollment in Narcotics Anonymous, we find that he has not met his burden of proving by preponderant evidence that he was addicted to drugs that are not disqualifying under the ADA. *See Little v. U.S. Postal Service*, 66 M.S.P.R. 574, 583 (1995).

¶17 Under 42 U.S.C. § 12114(b), an individual is not excluded from Rehabilitation Act protection under certain circumstances: successful completion of a supervised drug rehabilitation program where such individual is no longer engaging in the illegal use of drugs; or such individual has otherwise been rehabilitated successfully and is no longer engaging in such use; or such individual is participating in a supervised rehabilitation program and is no longer engaged in such use; or such individual is erroneously regarded as engaging in such use. Nothing in the record shows that the appellant met any of these criteria prior to the date his removal was proposed or effected as he testified that he

returned to a drug treatment program after his removal in January 2007 and was not sober until November 2007. RFRF, Vol. II, Tab 1, HT at 773-74. Accordingly, the appellant has not shown that he was entitled to the protections of the Rehabilitation Act.

¶18 Even assuming that the appellant was covered under the Rehabilitation Act, we discern no error in the arbitrator's conclusion that he failed to show disability discrimination. *See* RFRF, Vol. I, Tab 1, Decision at 22-24. As noted by the arbitrator, the appellant failed to demonstrate that he was removed on the basis of his drug addiction rather than on the basis of the charged misconduct, *see* RFRF, Vol. I, Tab 1, Decision at 22, and the appellant did not present evidence that the agency tolerates the sort of misconduct that he committed from the non-disabled. *See Fitzgerald v. Department of Defense*, 85 M.S.P.R. 463, 468-69 (2000) (the Rehabilitation Act does not require an agency to excuse a disabled employee's violation of uniformly-applied, job-related rules of conduct). Moreover, he did not show that he was unable to comply with his leave restriction as a result of his drug addiction. *See id.* Further, even if the appellant made a request for an accommodation, he did not show that a reasonable accommodation existed. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 24 (2006) (an appellant cannot prevail on a disability discrimination claim based on denial of a reasonable accommodation merely by "articulating" a reasonable accommodation; ruling for an appellant on that basis would relieve him of his burden of proof, and could lead to an unenforceable decision). We therefore conclude that, under the Board's limited authority pursuant to 5 U.S.C. § 7121, there is no basis to reverse the arbitrator's award.

The penalty of removal is reasonable.

¶19 The appellant asserts that the agency failed to give appropriate weight to important factors in its penalty determination, including his drug addiction, prior years of satisfactory service, lack of disciplinary record under previous supervisors, and potential for rehabilitation given his treatment for addiction and

improved attendance record, and he asserts that the penalty of removal was unduly harsh and unreasonable. RFRF, Vol. I, Tab 1, RFR at 4-5, 29-30. In determining the appropriate penalty for misconduct, arbitrators are required to apply the same rules that the Board applies. *Taylor v. Department of the Army*, 107 M.S.P.R. 638, ¶ 15 (2008). The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

¶20 The Notice of Proposed Removal addressed ten relevant factors in recommending the appellant's removal, and the decision letter incorporated this penalty analysis by reference. RFRF, Vol. III, Tab 1, Subtab 11 at 3-4, 8. We discern no error in the arbitrator's finding that the appellant's removal was justified and reasonable. *See* RFRF, Vol. I, Tab 1, Decision at 20. Despite the appellant's assertion that the agency failed to give appropriate weight to various mitigating factors, the Notice of Proposed Removal shows that, in fact, the agency considered that the appellant had an acceptable past work record, received either Fully Successful or Minimally Successful ratings in the previous three years, and had eight years of federal experience. RFRF, Vol. III, Tab 1, Subtab 11 at 3. Further, while the Notice of Proposed Removal and the decision letter suggest that the agency did not take the appellant's battle with addiction into account in imposing the penalty of removal, the appellant did not explain how his failure to follow leave requesting procedures and his failure to complete a work assignment were caused by his drug addiction. *See Sherlock v. General Services Administration*, 103 M.S.P.R. 352, ¶ 18 (2006) (the appellant never explained how her use of Vicodin contributed to her absences or failure to comply with leave requesting procedures).

¶21 In addition, while removal may seem like a harsh penalty given the apparent improvement in the appellant's attendance, it is particularly significant that the appellant was on express notice that this kind of conduct was

unacceptable. *See Viens v. Department of the Interior*, 92 M.S.P.R. 256, ¶ 17 (2002) (the clarity with which an employee was on notice of the policy violated and whether he had been warned about the conduct are considerations in assessing a penalty). As the Notice of Proposed Removal indicated, the appellant was repeatedly put on notice that his conduct was unacceptable as evidenced by the leave restrictions—and three subsequent extensions—imposed on him as a result of his extensive use of leave and failure to follow leave requesting procedures, and by the 7-day and 25-day suspensions imposed for failure to follow the leave requesting procedures set forth in his leave restrictions. *See* RFRF, Vol. III, Tab 1, Subtabs 7, 9; *id.*, Subtab 10 at 1-10; *id.*, Subtab 11 at 3-4. While the request for review states that it was "unclear whether [the appellant] understood that he was expected to submit additional documentation supporting his absences," RFRF, Vol. I, Tab 1, RFR at 19-20, the initial leave restriction explicitly stated that the appellant was required to submit a "doctor certificate" on the first day after he returned to duty following an absence due to illness or "written documentation supporting [his] request for unscheduled [annual] leave upon [his] return to duty."[2] *See* RFRF, Vol. III, Tab 10 at 5-6. It also described acceptable forms of such documentation. *See id.* Accordingly, the appellant has not shown that the arbitrator committed reversible error in sustaining the penalty of removal. *See* RFRF, Vol. I, Tab 1, Decision at 20-21.

¶22 The appellant also asserted that the arbitration decision should be set aside because the deciding official did not testify and his decision did not identify any mitigating factors. RFRF, Vol. I, Tab 1, RFR at 30. Given that the agency presented the decision letter of the deciding official, which noted that he reviewed the factors identified in the Notice of Proposed Removal and

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[2] On October 2, 2006, the appellant's leave restriction was revised, in accordance with new regulations, to provide him with 15 calendar days to submit a doctor's certificate to support his absence due to illness. *See* RFRF, Vol. III, Tab 1, Subtab 10 at 1.

incorporated such consideration by reference, *see* RFRF, Vol. III, Tab 1, Subtab 11 at 8, the appellant has not shown that the deciding official's testimony was necessary to sustain the penalty determination.

ORDER

¶23 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 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.