UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 151

Docket No. DC-0752-09-0594-I-1

Marisa E. Diggs,

Appellant,

v.

Department of Housing and Urban Development,

Agency.

July 22, 2010

Marisa E. Diggs, Washington, D.C., pro se.

Tresa A. Rice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed her removal for misconduct. For the reasons set forth below, we find that the petition does not meet the criteria for review under 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118 to consider the appellant's arguments on review, and AFFIRM the initial decision.

BACKGROUND

¶2 The agency removed the appellant from her GS-343-09 Management Analyst position based upon the charges of rude, disruptive, aggressive, or intimidating behavior, and misrepresentation. Initial Appeal File (IAF), Tab 4, subtabs 4g, 4j. Both charges stemmed from incidents that occurred on January 17, 2008. *Id*. at subtab 4j. The first charge alleged that the appellant verbally berated her supervisor, approached her in a hostile manner and told the supervisor that she (the supervisor) "would be sorry." *Id*. The agency further specified that, later that day, the appellant raised her voice in a meeting with her second-level supervisor, was inappropriately rude and threatening to a co-worker, and disobeyed an instruction from her second-level supervisor. *Id*. The agency's second charge alleged that the appellant then misrepresented some of these events to other agency officials. *Id*.

¶3 On appeal, the appellant alleged that the removal constituted reprisal for prior equal employment opportunity (EEO) activity, and sought to raise the substance of those prior EEO complaints in the appeal. IAF, Tab 1; Tab 3; Tab 13, subtab A. These claims alleged that the agency treated her differently than a similarly situated male employee with respect to work assignments, that the agency did not select her for a vacancy in retaliation for prior EEO complaints, that the agency subjected her to a hostile work environment, and that the agency placed her on administrative leave. *Id*. The appellant also objected to the actions of the agency's EEO counselor. IAF, Tab 3 at 2-3; Tab 13, subtab A.

¶4 The administrative judge informed the appellant that the appeal was limited to issues related to the merits of her removal, whether the removal constituted reprisal for engaging in prior EEO activity, and the appropriateness of the penalty. IAF, Tab 14. Following the hearing, the administrative judge sustained the appellant's removal, finding that the agency proved its charges, that the appellant did not prove her affirmative defense of reprisal for engaging in EEO

activity, and that the removal penalty was within the bounds of reasonableness. IAF, Tab 23.

¶5 In her petition for review and revised petition for review, the appellant asserts that the administrative judge committed various procedural and fact-finding errors. Petition for Review (PFR) File, Tabs 1, 3. She also attempts to reargue her claim that various agency actions before the incident in question were relevant to her reprisal claim, asserts that the administrative judge was biased against her, generally reargues her version of the facts, and asserts that the removal penalty exceeds the bounds of reasonableness. *Id*. The agency has filed a response in opposition to the appellant's petition. *Id.*, Tab 7.

ANALYSIS

¶6 The appellant's petition fails to provide a basis for granting review. The appellant first argues that the administrative judge erred in limiting the issues, denying her witness requests, and limiting examination of witnesses at the hearing. PFR File, Tab 3 at 1-2, 4-6. These claims all pertain to the appellant's insistence that she be allowed to litigate the issues underlying her prior EEO complaints. *Id*. As the administrative judge explained to the appellant both in the prehearing conference report and the initial decision, however, these matters are not properly before the Board unless the appellant could show how they pertain to the merits of her appeal or her affirmative defense. IAF, Tab 14 at 1-2; Tab 23 at 2-3. The appellant, however, did not make this showing. Specifically, her witness request did not identify any witnesses who would testify about the relevant issues in this appeal -- whether the appellant committed the charged misconduct, whether the agency removed the appellant in reprisal for her prior EEO complaints, and whether the removal penalty was reasonable. IAF, Tab 13, subtab C. Instead, the appellant's request merely referred to other disputes with the agency and with the agency's processing of her prior EEO complaints, without showing that these matters bore any connection with the removal action

at issue. *Id*. The administrative judge, therefore, properly denied these requests, and properly limited the scope of the proceeding. IAF, Tab 14; *see Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (an administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious).

¶7 The appellant next asserts that the administrative judge erred in finding that she did not establish her EEO reprisal defense. PFR File, Tab 3 at 3-4. The appellant claims that she showed that a causal connection exists between her EEO complaints and various agency actions occurring between that activity and her removal, and that her supervisors' actions were a pretext for reprisal. *Id*. at 4-9. The appellant further asserts that the administrative judge ignored certain evidence, and improperly assessed credibility and weighed the evidence in finding that the appellant did not prove her affirmative defense. *Id*. at 7-12.

¶8 It is well-established that the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). In this appeal, the appellant's assertions fail to provide a basis for granting review because they constitute mere disagreement with the administrative judge's credibility determinations and fact findings. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). The administrative judge thoroughly discussed and analyzed the testimonies surrounding the misconduct at issue and found the appellant's version of the incidents incredible. IAF, Tab 23 at 3-10. Specifically, the administrative judge found that the agency's witnesses' versions were consistent with each other, while the appellant's version was both uncorroborated and inconsistent with the appellant's

own prior statements. *Id*. at 9-10. The administrative judge then found that the agency's witnesses' credible testimony established that their decision to remove the appellant was based entirely on her misconduct and was unrelated to the appellant's prior EEO activity. *Id*. at 12. While the appellant asserts that the administrative judge failed to consider certain evidence in reaching this conclusion, an administrative judge's failure to mention all of the evidence of record does not mean that she did not consider it in reaching her decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Further, the appellant has not shown that considering the evidence would warrant a different result in the appeal, in light of the administrative judge's credibility determinations and findings that are entitled to deference. PFR File, Tab 3; *see Weaver*, 2 M.S.P.R. at 133-34.

¶9 The appellant's next claim that the administrative judge was biased is also without merit. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). Further, an administrative judge's conduct during the course of a Board proceeding will warrant a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Here, the appellant asserts that the administrative judge's alleged erroneous fact-findings evidence her bias. PFR File, Tab 3 at 12-13. However, disagreement with the administrative judge's evidentiary findings is not sufficient to show bias. *See Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶¶ 10-11 (2004). In addition, the appellant has failed to show on review that any comment or action by the administrative judge revealed a deep-seated favoritism or antagonism against her, nor has she otherwise made a

showing sufficient to overcome the presumption of honesty and integrity to be afforded the administrative judge.

¶10 Finally, the appellant asserts that the agency erred in considering her prior discipline in selecting the removal penalty. PFR File, Tab 3 at 14-17. The record shows that the proposing and the deciding official considered a 2001 21-day suspension for similar misconduct, in selecting the removal penalty for the misconduct here. IAF, Tab 4, subtabs 4g, 4j. The appellant asserts that the agency could not properly consider this suspension because it occurred more than 3 years before the misconduct at issue. PFR File, Tab 3 at 13-17. Contrary to the appellant's claim, however, the agency may consider prior discipline occurring more than 3 years before the misconduct at issue in cases of serious misconduct. IAF, Tab 11, subtab 5 (Agency Handbook at 4-3). Here, the agency considered the appellant's misconduct to be serious. IAF, Tab 4, subtabs 4g, 4j. In any event, the agency properly considered the prior discipline as notice that the appellant had been warned about the type of conduct that it deemed to be unacceptable and serious. IAF, Tab 4, subtab 4j; *see Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 25 (2007). Accordingly, the appellant has failed to show on review that the administrative judge made any error in law or regulation in adjudicating this appeal. Therefore, we AFFIRM the initial decision.

ORDER

¶11 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 77960
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:

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