UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 170

Docket No. PH-0752-09-0193-I-1

Luis A. Guzman,

Appellant,

v.

Department of Veterans Affairs,

Agency.

August 20, 2010

Luis A. Guzman, Hyattsville, Maryland, pro se.

Kenyatta McLeod-Poole, Esquire, 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 seeks review of an initial decision affirming his removal from a position with the Department of Veterans Affairs on grounds that the administrative judge erroneously dismissed an affirmative defense pursuant to the Whistleblower Protection Act (WPA). For the reasons set forth herein, we GRANT the petition for review, AFFIRM IN PART and VACATE IN PART the initial decision, and REMAND the appeal to the Northeastern Regional Office for further adjudication.

BACKGROUND

¶2 The appellant was employed by the Office of the Nurse Executive, Maryland Health Care System, Department of Veterans Affairs, as a Program Support Assistant, GS-0303-06. Initial Appeal File (IAF), Tab 1 at 2, 15, 16. An agency employee for less than two years, he was removed on four charges, including providing false information on the Optional Form (OF) 306, Declaration for Federal Employment; absence without leave (three specifications); failure to follow leave procedures (three specifications); and disrespectful conduct (two specifications). *Id.* at 2; IAF, Tab 4, Subtabs 4A, 4B, 4D.

¶3 He appealed his removal. IAF, Tab 1. In his initial pleading before the Board, the appellant raised an affirmative defense under the WPA. *See id.* at 5-13. The appellant alleged that he had witnessed "mistreatment, abuse, neglect and downright apathy" by some employees towards patients and "corruption, fraudulent acts, [and] conflict of interest" perpetrated by management. *Id.* at 5. He alleged that he "had no choice but to bring these issues to the attention of the facility's Director and The Veterans Administration Inspector General," and he had been "in communication with the Special Counsel as [he had] experienced mistreatment, abused [sic], harassment, and retaliation" resulting from his disclosures. *Id.*

¶4 The acknowledgment order, however, did not address the elements of proof for any affirmative defense, and the appellant's response to the acknowledgment order, filed after the administrative judge's order regarding prehearing submissions, likewise failed to address whistleblowing issues in substance. IAF, Tabs 2, 6. Rather, the appellant's response included only a cursory reference to his whistleblower claim, stating that his termination was "an attempt to retaliate," and the pleading largely focused on the agency's charges against the appellant. IAF, Tab 6 at 5. The remainder of his 30-page response addressed the merits of the charges, *id.* at 4-5; his equal employment opportunity complaint against a

prior employer, Workforce Alliance, which he initiated in 2005, *id.* at 6-27; and a broad discovery request, including for the employment records of several individuals involved in the case, *id.* at 28-29.

¶5 On January 30, 2009, the administrative judge issued an order setting forth the date and time for the hearing and for a status conference. IAF, Tab 5. This order stated that the administrative judge would "address any problems dealing with discovery, consider any motions either party has made, and review settlement efforts," at the prehearing conference. *Id.* at 2. The order also gave instructions for filing prehearing submissions. *Id.* at 3. During the telephonic prehearing conference held on April 7, 2009, the appellant asked to file a motion to compel the agency to respond to his discovery requests. IAF, Tab 10. At that time, the appellant had not filed any other discovery motion, nor had he filed any prehearing submissions. *Id.* Conversely, the agency filed prehearing submissions on March 24, 2009, and discovery responses on April 7, 2009. IAF, Tab 7, Tab 10 at 2. The appellant told the administrative judge that he did not know the procedures for filing discovery motions or prehearing submissions. IAF, Tab 10 at 2. The administrative judge responded that, despite the appellant's assertion that he did not know the Board's procedures and rules of discovery, he had been informed of the discovery procedures in the acknowledgment order and the procedures for filing prehearing submissions in the hearing order. *Id.* The administrative judge denied the appellant's discovery motion and his request for witnesses. *Id.* She further stated that the delay in holding the prehearing conference and hearing had already given him more time than he otherwise would have had to prepare for the prehearing conference.[1] *Id.* Although the appellant

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[1] The administrative judge originally scheduled the hearing for April 7, 2009, with prehearing submissions due on March 24, 2009. IAF, Tab 5 at 1, 3. Prior to the prehearing conference, the hearing was rescheduled for April 14, 2009, and then rescheduled again for April 21, 2009. IAF, Tabs 8, 9. The prehearing conference was held on April 7, 2009. IAF, Tab 10. The hearing itself was ultimately held on May 21, 2009, after two additional rescheduling orders were issued. *See* IAF, Tabs 19, 23.

responded to the administrative judge's summary of the telephonic prehearing conference, his comments did not address these rulings, but instead addressed other matters, including the agency's list of witnesses and exhibits for the hearing. IAF, Tab 11. He likewise did not address the administrative judge's discovery rulings in any subsequent filing. IAF, Tabs 17, 21, 25, 26.

¶6 After a hearing, the administrative judge found that the agency had proven its charges by preponderant evidence. Initial Decision (ID) at 5-12. The administrative judge likewise found that the agency established a nexus between the charges and the efficiency of the service, and that the penalty of removal was within the bounds of reasonableness. ID at 12-17. The administrative judge affirmed the agency action. ID at 17.

¶7 In a footnote to the initial decision, the administrative judge explained that, although the appellant appeared to have been raising a claim of retaliation for whistleblowing in his initial appeal, he had not, at the time of the prehearing conference, filed any discovery motions or prehearing submissions. ID at 4 n.3. "Despite his claim that he did not know the procedures," the administrative judge stated, "the appellant was informed of the procedures in the acknowledgment order and the hearing order" and "had no reason for his failure to file the appropriate submissions . . . or his failure to ask for clarification or extensions of time." *Id.* Because the appellant had failed to file prehearing submissions, the administrative judge deemed his affirmative defenses to have been waived. *Id.*

¶8 The appellant filed a petition for review. Petition for Review File (PFR File), Tab 1. The agency did not file a response, and the record on review closed on November 10, 2009. PFR File, Tab 2.

ANALYSIS

¶9 On review, the appellant argues that the administrative judge erred by dismissing his affirmative defense of reprisal for whistleblowing.[2] PFR File, Tab 1 at 4. Because he is correct in his contention that the administrative judge erroneously found that he had waived his whistleblowing claim, we GRANT his petition for review. We AFFIRM the administrative judge's findings that the agency proved the charged conduct, the action promoted the efficiency of the service, and the penalty was reasonable. However, we can sustain the agency's decision to remove the appellant only if he fails to prove his affirmative defense of reprisal for whistleblowing. We VACATE the administrative judge's determination that the appellant had waived that defense. We also find that the administrative judge erroneously gave the appellant notice of mixed-case appeal rights, and we VACATE that part of the initial decision. We REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

The agency established that the appellant committed the charged conduct, the removal action promoted the efficiency of the service, and the penalty of removal was reasonable.

¶10 Because the initial decision accurately and thoroughly addressed the agency's evidence with regard to the charged conduct, nexus, and penalty

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[2] In support of his petition for review, the appellant submitted two documents, a commendation letter dated February 16, 2007, from his employment with the Department of the Air Force and a performance evaluation dated June 12, 2006. PFR File, Tab 1 at 9-10. Under 5 C.F.R. § 1201.115(d)(1), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Both of these documents pre-date the close of the record before the administrative judge, and the appellant has not argued that they were unavailable at that time despite his due diligence. Even if they could be considered new, they do not go to the issue of the appellant's misconduct in the position from which he was removed and would not affect the outcome of this appeal. They are thus not material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

determination, we affirm the administrative judge's findings sustaining the agency's decision under 5 U.S.C. § 7701(c)(1). However, the agency's decision is ultimately sustainable under 5 U.S.C. § 7701(c)(2) only if, on remand, the appellant cannot establish his entitlement to corrective action on his whistleblower reprisal claim.

The administrative judge abused her discretion when she found that the appellant had waived his whistleblower reprisal claim.

¶11 On review, the appellant primarily argues that the administrative judge abused her discretion by dismissing his whistleblower claim. PFR File, Tab 1 at 4-6. The appellant alleges that he disclosed gross mismanagement to his supervisor and subsequently to the agency's Inspector General. *Id.* at 4. He alleges that prior to these disclosures, the agency had not taken any disciplinary actions against him. *Id.* at 6. The appellant also addresses the merits of his whistleblower defense. *Id.* at 4-5.

¶12 The Board has given its administrative judges broad discretion pursuant to 5 C.F.R. § 1201.41(b). Such discretion includes the authority to rule on discovery motions, to ensure that the record on significant issues is fully developed, and to impose sanctions as necessary to serve the ends of justice. 5 C.F.R. §§ 1201.41(b)(4), (5)(ii), (11); 5 C.F.R. § 1201.43. As to sanctions:

> When a party fails to comply with an order, the administrative judge may:
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> (1) Draw an inference in favor of the party requesting sanctions with regard to the information sought;
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> (2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
>
> (3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
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> (4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

5 C.F.R. § 1201.43(a). Likewise, when a party fails to make a timely filing, the administrative judge "may refuse to consider any motion or other pleading that is not filed in a timely fashion . . . ." 5 C.F.R. § 1201.43(c). An administrative judge should not impose sanctions, however, unless they are necessary to serve the ends of justice. *Robinson v. Department of Veterans Affairs*, 94 M.S.P.R. 509, ¶ 10 (2003); 5 C.F.R. § 1201.43. The Board will not ordinarily disturb an administrative judge's determination to impose a sanction, unless it is shown that the administrative judge abused her discretion or that her erroneous ruling adversely affected a party's substantive rights. *Simon v. Department of Commerce*, 111 M.S.P.R. 381, ¶ 11 (2009).

¶13 Sanctions were not requested here, nor did the administrative judge use the term "sanctions." Nevertheless, in a sanction-like ruling, the administrative judge found that the appellant had waived his affirmative defense of whistleblowing. ID at 4 n.3. In *Simon*, the Board found that the administrative judge essentially imposed a sanction in light of the appellant's failure to respond timely to an order regarding affirmative defenses, even though, as here, she used the term "waived"and did not use the term "sanctions." *Simon*, 111 M.S.P.R. 381, ¶ 10 & n.3. The Board found the sanction of striking the appellant's affirmative defenses was excessive for the appellant's failure to timely respond to the administrative judge's orders without good cause. *Id.*, ¶¶ 11-15.

¶14 As in *Simon*, the appellant here did not waive the defense. Instead, he asserted his whistleblower defense in the initial appeal form and, in summary fashion, in the response to the acknowledgment order, and he never expressed any intent to withdraw that defense. *See id.*, ¶ 15; IAF, Tab 1 at 5, 7-13, Tab 6 at 5. Further, the administrative judge here allowed some testimony from the appellant that would go to the whistleblowing issue. *See, e.g.*, Hearing Transcript (HT) at 134, 143.

¶15 Additionally, during the prehearing conference, the administrative judge already effectively sanctioned the appellant by precluding him from conducting

discovery or requesting witnesses. IAF, Tab 10 at 2. The administrative judge's ruling in the initial decision striking the appellant's whistleblower defense is thus an additional sanction that was unwarranted. *See, e.g.*, *Wildberger v. Small Business Administration*, 63 M.S.P.R. 338, 343 (1994) (holding that the appellant's failure to file prehearing submissions by the deadline ordered by the administrative judge did not warrant a sanction denying the employee a hearing, where the administrative judge had already sanctioned the appellant for failing to file a prehearing submission).

¶16 We also find that the order and summary following the prehearing conference did not state that the whistleblower defense was waived. IAF, Tab 10; *see* ID at 4 n.3. Instead, the order and summary stated: "I denied his request to allow him to conduct discovery at this time or request witnesses." IAF, Tab 10 at 2. The administrative judge further stated in the order and summary that the appellant was to contact the administrative judge with any objections to the agency's exhibits and location of the hearing, but it did not purport to set forth an exhaustive list of the issues that would be examined at the hearing or indicate that no issues other than the single issue listed would be considered. *Id.* at 2.

¶17 The Board has held that when an administrative judge issues a prehearing order or a status conference summary in which the judge identifies an exhaustive list of issues to be decided in the appeal and affords the parties an opportunity to object to the order or summary, an appellant is generally deemed to have abandoned any issues that were not identified by the judge unless the appellant raises an objection. *Varner v. Department of Veterans Affairs*, 101 M.S.P.R. 155, ¶ 6 (2006); *see, e.g.*, *Smart v. Department of the Army*, 105 M.S.P.R. 475, ¶ 11 (2007) (the appellant was not deemed to have abandoned his discrimination and retaliation claims where the administrative judge failed to place him on notice in the prehearing conference summaries that his claims would not be considered because the summaries did not purport to be exhaustive regarding the issues to be decided), *aff'd*, 289 F. App'x 393 (Fed. Cir. 2008). Because the order and

summary neither set forth a list of issues to be decided, nor gave the appellant notice that his affirmative defenses had been waived, it did not on its face bar the appellant from raising his whistleblower defense. For these reasons, we find that the administrative judge abused her discretion when she imposed the sanction of waiver on the appellant, precluding him from presenting his whistleblower defense.

The Board remands the appeal for the appellant to receive notice of his burden and elements of proof for the whistleblower reprisal claim.

¶18 Under some circumstances, the Board might be able to adjudicate a whistleblower claim such as this without remand. Here, however, because the administrative judge never informed the appellant of his burden and elements of proof for establishing such a claim, we must remand the appeal so that the appellant might receive such notice. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Burwell v. Department of the Army*, 78 M.S.P.R. 645, ¶¶ 6-10 (1998) (remanding the appeal of two non-appealable personnel actions because the administrative judge failed to give *Burgess* notice regarding the appellant's allegations of whistleblowing). The appellant initially alleged that he was a whistleblower in his petition for appeal, claiming that he had been "in communication with the Special Counsel" concerning retaliation for disclosures he made to the facility Director and to the agency's Inspector General. IAF, Tab 1 at 5-13. The administrative judge failed to address the burdens and elements of proof for establishing such a claim in the acknowledgment order. IAF, Tab 2. The administrative judge likewise did not address the burdens and elements in any further order issued, despite the appellant's mention of whistleblower retaliation in his response to the acknowledgment order. *See* IAF, Tabs 5, 8, 9, 10, 13, 15, 16, 18, 19, 22, 23; IAF, Tab 6 at 5. Although the agency briefly addressed the whistleblower claim in its narrative response in the agency file, IAF, Tab 4, Subtab 1 at 8, it did not set forth the burdens and elements of proof for establishing this affirmative defense

and thus, its response was insufficient to inform the appellant of what he needed to allege regarding jurisdiction. *See Burwell*, 78 M.S.P.R. 645, ¶ 8 (citing *Bell v. U.S. Postal Service*, 66 M.S.P.R. 32, 35 (1994)). Because the error was prejudicial to the appellant's substantive rights, it was harmful and must be corrected. *Burwell*, 78 M.S.P.R. 645, ¶ 8 (citing *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984)).

¶19 On remand, the administrative judge must provide proper *Burgess* notice, hold a new hearing regarding this affirmative defense, and allow the appellant to conduct limited discovery and present prehearing submissions, witnesses and exhibits solely pertaining to the whistleblowing issue. *See Smart*, 105 M.S.P.R. 475, ¶¶ 12-13; *Varner*, 101 M.S.P.R. 155, ¶¶ 8-9. We note here that the appellant was appropriately sanctioned below regarding his failure to timely conduct discovery or request witnesses, and he is therefore precluded from conducting any discovery or presenting any evidence or arguments with respect to the merits of his removal.

The appellant should not have received the notice of appeal rights for a mixed-case appeal.

¶20 Finally, in issuing this decision, we find that the administrative judge erred when she provided the appellant mixed-case appeal rights, and we now correct that error. Although the appellant asserted claims of illegal discrimination, his assertions pertained to the actions of his supervisors at Workforce Alliance, and not to any person at the agency. *See* IAF, Tab 6 at 4-5. The appellant argued that his supervisors at Workforce Alliance discriminated against him and had motive to provide false information to the agency. *Id.* His documentation included discrimination complaint forms from the Florida Agency for Workforce Innovation, Office of Civil Rights, and the Florida Commission on Human Relations, all of which alleged that Workforce Alliance discriminated against him based on age and race in February and March 2005 in connection with his application for a different position with Workforce Alliance. *Id.* at 6-14. He also

submitted a letter from the Florida Agency for Workforce Innovation accepting his complaint and that agency's final determination that no discrimination had occurred. *Id.* at 15-16, 22-27. The appellant, however, did not allege in this appeal that the Department of Veterans Affairs or its managers discriminated against him pursuant to any of the provisions listed in 5 U.S.C. § 7702(a)(1)(B). This case thus would not be considered a mixed-case appeal pursuant to 5 U.S.C. § 7702, and the appellant was therefore not entitled to have received mixed-case appeal rights. *See, e.g.*, *Bonney v. Department of the Navy*, 60 M.S.P.R. 196, 197 (1993), *aff'd*, 36 F.3d 1115 (Fed. Cir. 1994) (Table). The administrative judge must provide the Board's standard appeal rights in the remand decision. *See* 5 U.S.C. § 7703(b)(1).

ORDER

¶21 Accordingly, we remand this appeal to the Northeastern Regional Office for further processing. On remand, the administrative judge must provide proper *Burgess* notice regarding the burdens and elements of proof for establishing a whistleblower retaliation claim, allow the appellant to present witnesses and exhibits pertaining to the whistleblower retaliation claim, and hold a new hearing regarding this affirmative defense. The administrative judge shall issue a newinitial decision with her findings, including a restatement of her findings on

the merits if she does not order corrective action for whistleblower reprisal, and also setting forth non-mixed case appeal rights.

FOR THE BOARD:

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