UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 190

Docket No. DA-0752-09-0457-I-1

Bernadette Hodge,

Appellant,

v.

Department of Homeland Security,

Agency.

September 15, 2010

Thomas E. Tierney, Esquire, Brooklyn, New York, for the appellant.

Carolyn D. Jones, Esquire, Williston, Vermont, and Gwen Anderson, Esquire, East Point, Georgia, 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 sustained her indefinite suspension. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the part of the initial decision that sustained the appellant's suspension, and AFFIRM the part in which the administrative judge found the appellant's discrimination claim unsubstantiated AS MODIFIED by this Opinion and Order. The appellant's suspension is NOT SUSTAINED.

BACKGROUND

¶2 The appellant is a GS-12 Deportation Officer with the agency's Immigration and Customs Enforcement office in New Orleans, Louisiana. Initial Appeal File (IAF), Tab 1 at 4; Tab 4, Subtab 4d at 1. On March 16, 2009, the agency issued her written notice of its proposal to suspend her without pay indefinitely, pending an investigation by the agency's Office of Professional Responsibility (OPR) into an incident of alleged off-duty misconduct that occurred on February 24, 2009, which, the agency asserted, resulted in the appellant's arrest on charges of battery and criminal trespass. *Id.*, Tab 4, Subtab 4d at 1. The notice stated that "these issues raise the possibility of criminal prosecution. However, this action is not being proposed based upon a reasonable cause to believe that you have committed a crime for which a sentence of imprisonment may be imposed." *Id.* at 2. The agency advised the appellant that she had been placed on administrative leave and would remain in that status pending a decision on the proposal. *Id.* at 1. The appellant made a written reply to the indefinite suspension proposal notice. *Id.*, Subtab 4c.

¶3 On April 15, 2009, the agency provided the appellant with written notice of its decision to indefinitely suspend her without pay beginning April 20, 2009. *Id.*, Subtab 4b. The deciding official found that, until the OPR could conduct a thorough examination into the facts and circumstances surrounding the incident which formed the basis for the action, he could not return the appellant to her position, and that an indefinite suspension was in the government's best interest. *Id.* at 1-2. The deciding official reasoned that an indefinite suspension would promote the efficiency of the service because the appellant's retention in a duty status would be potentially detrimental to government interests or potentially injurious to the appellant, agency employees, or the public. *Id.* at 2. The decision letter indicated that the suspension would last until such time as the agency concluded its investigation into the matter or there was sufficient

evidence either to return the appellant to duty or to support an administrative action against her. *Id.*

¶4 In her appeal, the appellant admitted that she was involved in the incident in question, but she challenged the agency's version of what transpired and argued that the agency lacked reasonable cause to indefinitely suspend her. *Id.*, Tab 1 at 6. She further claimed that the agency committed harmful procedural error by requiring her to give a written statement regarding the incident without allowing her to consult with a union representative. *Id.* at 8, 10. She also alleged that the action was the result of discrimination based on her "national origin (U.S. Virgin Islands)," and that, in suspending her, the agency had also violated her rights as a veteran under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *Id.* at 8, 10. Subsequently, the appellant argued that she was not, in fact, arrested but instead given "a summons to appear" in court, that when she did so on May 5, 2009, the charges against her were dismissed, *id.*, Tab 23 at 2-3, and that, under these circumstances, it is unreasonable for the agency to continue the indefinite suspension, *id.*, at 5. The agency asserted that the action was based on an examination into, and not proof of, the appellant's misconduct. *Id.*, Tab 20 at 8. The agency further argued that, because it had provided the appellant the procedural entitlements of 5 U.S.C. § 7513(b), it was not required to prove that there was reasonable cause to believe that she had committed a crime for which a sentence of imprisonment may be imposed. *Id.* at 8-9. Finally, the agency argued that the suspension has an ascertainable end, *id.* at 10, that it promotes the efficiency of the service, *id.* at 10-11, and that it is reasonable inasmuch as a lesser sanction would be ineffective, *id.* at 11.

¶5 In her initial decision affirming the action, the administrative judge found that the indefinite suspension promotes the efficiency of the service because the agency showed a nexus between the charge, the appellant's ability to perform in her position, and the agency's ability to carry out its mission. IAF, Tab 26 at 4-6.

(Initial Decision (ID)). The administrative judge found that the appellant received the procedural protections provided by 5 U.S.C. § 7513, *id.* at 6, that the indefinite suspension was reasonable inasmuch as a lesser penalty would have proven ineffective, *id.* at 6-7, and that it has an ascertainable end, i.e., the end of the ongoing administrative investigation, *id.* at 7-8. Finally, the administrative judge found that the appellant did not establish her claims of harmful procedural error, *id.* at 8-10, discrimination based on national origin, *id.* at 10-12, or discrimination based on military service, *id.* at 12-13.

¶6 In her petition for review, the appellant essentially repeats the arguments she raised below, Petition for Review (PFR) File, Tab 1 at 3, 7-14.[1] She also specifically requests that the agency end the indefinite suspension on the basis that it has remained in effect for an unreasonable length of time. *Id.*, Tab 6 at 3. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 7.

ANALYSIS

The agency may not indefinitely suspend the appellant merely because it has a pending investigation into allegations regarding her conduct.

¶7 The express basis for the action in this case is that the agency has an open investigation into allegations regarding the appellant's off-duty conduct, in order to determine whether grounds exist to take an administrative action. IAF, Tab 4, Subtabs 4b, 4d. The agency did not charge the appellant with the alleged conduct, *id.*, Subtab 4d; nor did it determine whether, in fact, the conduct occurred, *id.*, Subtab 4b. Moreover, as noted, the agency specifically stated that it was not proposing the action based on the "crime provision" of 5 U.S.C. § 7513(b)(1), i.e., based on reasonable cause to believe that the appellant had

[1] The appellant does not, however, challenge the administrative judge's finding that she did not establish her claim that, in taking this action, the agency discriminated against her based on her prior military service in violation of USERRA. PFR File, Tab 1 at 11.

committed a crime for which a sentence of imprisonment may be imposed. IAF, Tab 4, Subtabs 4b at 1, 4d at 2.

¶8 The Board has recently considered whether an agency may, in fact, suspend an employee indefinitely pending investigation into allegations regarding the employee's conduct. In *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010), the Board first noted that it and its reviewing court have only approved of the use of indefinite suspensions in three limited situations: (1) When the agency has invoked the crime provision; (2) when the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate – pending a determination that the employee is fit for duty; and (3) when an employee's access to classified information has been suspended and the employee must have such access to perform his job – pending a final determination on the employee's access to classified information. The Board found that the Office of Personnel Management's regulations do not provide support for the position that an agency may indefinitely suspend an employee merely because it has a pending investigation into allegations regarding his conduct. *Id.*, ¶¶ 14-17. The Board further held that an agency may take an adverse action against an employee only for "cause," that it must prove the specific alleged "cause" by a preponderance of the evidence when an employee seeks Board review of the action, *see* 5 U.S.C. §§ 7513(a), 7701(c)(1)(B), and that there is no valid basis in statute, regulation, or case law for allowing an agency to preliminarily suspend the employee based on a lesser standard of proof while it gathers additional evidence to support an action based on the underlying alleged misconduct. *Gonzalez*, 114 M.S.P.R. 138, ¶¶ 24-27. Concluding that an agency charge based on the mere fact that it has an open investigation into allegations regarding an employee's conduct is not "cause" for taking an action under subchapter II of chapter 75, the Board ordered the agency to cancel the indefinite suspension that it imposed on that basis. *Id.*, ¶ 28.

¶9 The agency in this case imposed an indefinite suspension against the appellant under circumstances virtually identical to those in *Gonzalez*. As noted above, it based its action solely on the fact that it was investigating allegations of misconduct by the appellant, and it made no determination that the appellant actually engaged in any misconduct. Like the action in *Gonzalez*, therefore, the appellant's suspension cannot be sustained. [2]

The appellant failed to establish that the agency discriminated against her on the basis of her national origin.

¶10 Even though the Board has determined that the indefinite suspension must be reversed, the appellant has a right to a decision on her claim of discrimination. *See Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987).

¶11 The appellant argued below that her suspension was discriminatory because the agency treated more favorably three employees who committed various acts of off-duty misconduct and who she believed were from the United States. Hearing Transcript at 119-25. The administrative judge found that the appellant failed to establish a prima facie case of discrimination based on disparate treatment because she did not show that the comparator employees were similarly situated to her. ID at 11-12. Specifically, she found that one of the comparator employees was not supervised by anyone involved in the agency action taken against the appellant, and that, as to the other two comparator employees, there was no evidence that the same management officials were involved. *Id.* at 11.

¶12 Because this case had gone to hearing and the record was complete, the administrative judge should not have analyzed the appellant's discrimination claim by determining whether the appellant had established a prima facie claim of discrimination. *See Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 51-52 (1998). Instead, she should have proceeded directly to the issue of whether the

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[2] Because of this disposition, with the exception of her discrimination claim, we need not address the appellant's remaining claims on petition for review.

appellant demonstrated that the agency's reason for its action was a pretext for discrimination. *See id.*

¶13 Because the record is fully developed, the Board may make such a finding without remanding this appeal. Our review of the record shows that the administrative judge found that the appellant's claim of disparate treatment failed largely because one comparator "was not supervised by anyone involved in the agency action against the appellant," and because there was "no evidence that the same management officials were involved in" the remaining two comparators' cases. ID at 11-12. While these factors are relevant to the issue of whether the appellant established discrimination based on disparate treatment, there are other relevant factors as well, including the similarity of the comparators' alleged misconduct to that of the appellant. *See Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 20 (2006), *aff'd*, 218 F. App'x 1001 (2007); *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003). The record shows that the appellant's alleged misconduct differs materially from that of the three individuals she identified as having received more favorable treatment than the appellant. Specifically, the appellant allegedly was involved in an incident with New Orleans police officers wherein she challenged their authority when they asked her to leave a car wash, resisted arrest, refused their attempts to handcuff her, and struck one of them in the face with her fist. IAF, Tab 4, Subtab 4(d) at 1. The misconduct of the three comparator employees consisted, respectively, of: being intoxicated and firing his weapon; having an affair with the wife of a man who was the subject of an investigation; and being the subject of domestic violence charges filed against him by the comparator's wife. *See* Hearing Transcript at 120-21, 124. The conduct of the comparator employees clearly conflicts less directly with the duties of a law enforcement officer than the appellant's direct and public confrontation with other law enforcement officers.

¶14 For these reasons, we AFFIRM the administrative judge's findings concerning the appellant's discrimination claim AS MODIFIED by this Opinion and Order.

ORDER

¶15 We ORDER the agency to cancel the appellant's indefinite suspension, and to restore the appellant effective April 20, 2009. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶17 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶18 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶19 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.