

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 196

Docket No. NY-0752-09-0287-I-1

**Anthony D. Viana,
Appellant,**

v.

**Department of the Treasury,
Agency.**

September 23, 2010

Anthony D. Viana, Colonia, New Jersey, pro se.

Parker E. Thoeni, 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 has filed a petition for review of an initial decision that affirmed his 16-day suspension. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for adjudication of the appellant's affirmative defense of discrimination.

BACKGROUND

¶2 The agency suspended the appellant for 16 days without pay from his position as a Labor/Employee Relations Specialist with the Internal Revenue Service (IRS). Initial Appeal File (IAF), Tab 9, Subtab 4a, Subtab 4b at 1-2. The

agency based the action on a charge that he displayed discourteous and unprofessional conduct. *Id.*, Subtab 4e. Specifically, the agency alleged that the appellant contacted an internal agency customer, IRS Manager Lucille Jessey, and “rudely berated her” about her response to a customer survey regarding a case he handled, before he “abruptly” hung up on her. *Id.* at 1. The appellant did not respond to the agency’s notice of proposed adverse action, and the deciding official for the agency issued a final decision sustaining the charge and suspending the appellant. IAF, Tab 9, Subtab 4b.

¶3 On appeal to the Board, the appellant denied the charged misconduct. IAF, Tab 1 at 3. He alleged that the agency committed harmful error by failing to investigate the facts and by incorrectly listing the date of the alleged misconduct in the proposal notice, thereby preventing him from explaining what occurred. *Id.* at 3, 5; IAF, Tab 16, Hearing Tapes. The appellant also alleged that the agency’s action was the result of prohibited discrimination. IAF, Tab 1 at 5. After holding a hearing, the administrative judge affirmed the agency’s action, finding that the agency had proven its charge and the required nexus between its action and the efficiency of the service. IAF, Tab 17, Initial Decision (ID) at 3-10. The administrative judge found, among other things, that “the appellant’s testimony was evasive, equivocal[,] and contradictory,” whereas the testimony of IRS Manager Jessey was “straight-forward,” “consistent,” and “credible.” ID at 9. The administrative judge also found that the appellant failed to meet his burden of proof on his affirmative defense of harmful procedural error and that the 16-day suspension was a reasonable penalty. ID at 10-16. The administrative judge did not address the appellant’s affirmative defense of prohibited discrimination in the initial decision.

¶4 The appellant has filed a timely petition for review of the initial decision. Petition for Review File (PFR File), Tab 1. On review, the appellant denies the charged misconduct, reasserts a harmful error claim, and asserts that the penalty “was extremely harsh for the alleged offense.” *Id.* at 5. He further asserts that

the administrative judge failed to consider his discrimination claim. *Id.* The agency has responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶5 We grant the appellant's petition for review for the sole purpose of addressing his argument that the administrative judge failed to consider his claim of discrimination. *See* PFR File, Tab 1 at 5. The appellant otherwise has failed to show that there is any new, previously unavailable evidence or that the administrative judge committed an error in law or regulation that affects the outcome of this appeal. *See* [5 C.F.R. § 1201.115](#)(d). The appellant claims that he "did not commit" the charged misconduct and implicitly challenges the sufficiency of the agency's evidence, contending that it was "one person's word against mine." PFR File, Tab 1 at 5. These bare assertions, however, are insufficient to establish any error in the administrative judge's explained findings of fact and credibility determinations. *See Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992) (a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record). The appellant's petition also states that the agency proposed his suspension for alleged misconduct "on a day in which I didn't work." PFR File, Tab 1 at 5. The appellant is apparently referencing his harmful error claim based on the agency's admitted typographical error in the proposal notice regarding the date of the alleged misconduct. IAF, Tab 9, Subtab 1 at 1 n.2; IAF, Tab 16, Hearing Tapes. The administrative judge found that the appellant had failed to demonstrate that the typographical error had a harmful effect upon the outcome before the agency because the agency had provided the appellant with supporting documentation for its proposed action that clearly identified the correct date and the appellant had the opportunity to make an informed reply to the notice of proposed action. ID at 11. The appellant's mere reference in his petition for review to the typographical error fails to

establish any basis for disturbing the administrative judge's explained finding that the appellant failed to meet his burden of demonstrating that the typographical error was harmful. ID at 11; *see Tines*, 56 M.S.P.R. at 92; *see also Walcott v. U.S. Postal Service*, [52 M.S.P.R. 277](#), 282 (the Board has held that a mistake in stating the date of an incident of misconduct, absent a showing by the appellant that the misstatement constituted harmful procedural error, does not invalidate the charge), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table); *Palmer v. U.S. Postal Service*, [36 M.S.P.R. 263](#), 266-67 (1988) (the appellant failed to show that an erroneous date for the misconduct in question cited in the proposal notice prejudiced his reply to the agency or likely affected the outcome before the agency where he was aware of the incident to which the notice referred).

¶6 Nevertheless, the Board cannot sustain the agency's action if the appellant shows that the decision was based on any prohibited personnel practice described in [5 U.S.C. § 2302\(b\)](#), which concerns prohibited practices based on unlawful discrimination. [5 U.S.C. § 7701\(c\)\(2\)\(B\)](#); *Erkins v. U.S. Postal Service*, [108 M.S.P.R. 367](#), ¶ 5 (2008). On review, the appellant argues that the administrative judge did not consider his discrimination claim. PFR File, Tab 1 at 5. Although the appellant raised a discrimination claim in his initial appeal, IAF, Tab 1 at 5, the administrative judge did not make any findings of fact or conclusions of law regarding the appellant's allegation of discrimination. The appellant's allegation of discrimination is a material issue of fact that should have been addressed by the administrative judge. *Jones v. Department of the Navy*, [36 M.S.P.R. 593](#), 597 (1988). Because the administrative judge failed to address the appellant's affirmative defense of discrimination in the initial decision, the initial decision failed to conform to the Board's regulations requiring that all material issues of fact and law be addressed and resolved. *See id.*; [5 C.F.R. § 1201.111\(b\)\(1\)](#). Moreover, Congress has specifically mandated, at [5 U.S.C. § 7702\(a\)](#), that the Board render decisions on discrimination allegations raised in connection with otherwise appealable actions. *Jones*, 36 M.S.P.R. at 597. We conclude,

therefore, that the administrative judge erred in failing to address the appellant's allegation of discrimination.

¶7 The agency argues that the appellant abandoned his discrimination claim because he failed to address his discrimination claim during the hearing on his appeal or in his prehearing submission. PFR File, Tab 3 at 3. Based on the record, however, we cannot conclude that the appellant abandoned his discrimination claim. Although a review of the audio-recording of the prehearing conference reveals that the appellant did not discuss his discrimination claim, the administrative judge did not issue a prehearing conference summary identifying the issues on appeal, providing the pro se appellant with notice and opportunity to object if his discrimination claim was not included. IAF, Tab 15, Prehearing Conference CD. Moreover, the appellant mentioned age discrimination during his closing argument, and he referred to an informal equal employment opportunity (EEO) complaint during his examination of the deciding official, Terry Guidt.* IAF, Tab 16, Hearing Tapes.

¶8 Further, the Board has held that when an appellant timely raises a claim of discrimination, the administrative judge must apprise him of the relevant burden and elements of proof. *Sazegari v. Office of Personnel Management*, [101 M.S.P.R. 254](#), ¶ 7 (2006). Because the record contains no indication that the administrative judge apprised the appellant of his burden and the elements of proof on his discrimination claim, this appeal must be remanded for the administrative judge to inform the appellant of his burden of proof on his discrimination claim and explicitly advise him of the kind of evidence he is required to produce. *See Erkins*, [108 M.S.P.R. 367](#), ¶ 11; *Sazegari*, [101 M.S.P.R. 254](#), ¶ 7. On remand, the administrative judge shall permit the parties to conduct

* It is unclear from the hearing tapes whether the informal EEO complaint the appellant discussed during his examination of Mr. Guidt is related to the discrimination claim he raised in his initial appeal. IAF, Tab 16, Hearing Tapes.

discovery and submit additional evidence and argument as necessary on the appellant's discrimination claim. *See Erkins*, [108 M.S.P.R. 367](#), ¶ 11. The administrative judge shall then determine whether the appellant met his burden of proof regarding his discrimination claim, and issue a new initial decision that addresses this affirmative defense and its affect on the outcome of the appeal, if any, giving appropriate consideration to any additional relevant evidence developed on remand. In the new initial decision, if the appellant fails to prove his affirmative defense of discrimination, the administrative judge may adopt his original findings regarding the charge, nexus, penalty, and the appellant's harmful error defense.

ORDER

¶9 Accordingly, the Board VACATES the initial decision, and REMANDS the appellant's discrimination claim to the New York Field Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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