UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 211

Docket No. CB-7121-10-0015-V-1

Benjamin Agbaniyaka,
Appellant,
v.
Department of the Treasury,
Agency.

October 29, 2010

John Ziv, Hoboken, New Jersey, for the appellant.

Robert J. Steeves, Jr., New York, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has requested review of an arbitrator's decision that denied his grievance concerning his removal. For the reasons set forth below, we GRANT the appellant's request for review and AFFIRM the arbitrator's decision.

BACKGROUND

¶2 Effective April 15, 2008, the agency removed the appellant from his GS-13 Revenue Agent position for willfully understating his federal tax liability for tax years 2001 through 2004, in violation of section 1203(b)(9) of the Restructuring Reform Act of 1998 (RRA) and/or the agency's rules and regulations. Request

for Review (RR) File, Tab 1 at 3, 19-20, 26-27. The appellant, through his Union, filed a grievance and challenged the action, the grievance was denied by the agency, and the Union sought arbitration. *Id.* at 20. Following a hearing, the arbitrator issued a decision, finding that the agency met its burden of proof regarding the charge, finding that there was "no evidence" to support the Union's contention that the agency's action was in retaliation for the appellant's prior equal employment opportunity (EEO) and grievance filings, and upholding the removal. *See id.* at 18, 41-47.

¶3 On June 9, 2010, the appellant electronically filed an "appeal" with the New York Field Office in which he challenged the arbitrator's decision and included only a copy of that decision.[1] *Id.* at 2-47. Recognizing that the "appeal" was a request for review of the arbitrator's decision that should have been filed with the Clerk of the Board, the New York Field Office forwarded the request for review to the Clerk of the Board. *Id.* at 1. The Clerk of the Board notified the parties that the request had been filed. RR File, Tab 2. The agency filed a response. RR File, Tab 3.

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[1] A request for review must contain:

> (1) A statement of the grounds on which review is requested;
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> (2) References to evidence of record or rulings related to the issues before the Board;
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> (3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and
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> (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

5 C.F.R. § 1201.154(d). The appellant's request for review does not comply with this regulation because it does not include arguments that refer specifically to relevant documents, or relevant citations of authority, nor does it include the agency's decision and other relevant documents, including a transcript or tape of the hearing. Despite the appellant's failure to comply with this regulation, we will analyze his claims based on the information contained in his request for review and the arbitration decision itself.

ANALYSIS

¶4 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. First, the appellant's grievance concerns his removal, a subject matter over which the Board has jurisdiction. RR File, Tab 1 at 5, 20; 5 U.S.C. § 7512(1). Second, the appellant alleges in his request for review that the agency's action was taken in retaliation for filing prior EEO complaints and grievances and was based on race and national origin discrimination. *See* RR File, Tab 1 at 6, 8, 12-13; *see Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 12 (2005). Although it does not appear that the appellant raised the discrimination issues before the arbitrator,[2] the Board has jurisdiction to review an issue of prohibited discrimination, even if the appellant did not raise the issue before the arbitrator. *See Keller v. Department of the Army*, 113 M.S.P.R. 557, ¶ 5 (2010) (citing *Jones v. Department of the Navy*, 898 F.2d 133, 135 (Fed. Cir. 1990)). Finally, the arbitrator has issued a final decision. *See* RR File, Tab 1 at 18-47.

¶5 In his request for review, the appellant claims that the arbitration decision was "contrary to law and regulation," and he states that the arbitrator violated "5 CFR 1201.56," misapplied the burden of proof, exceeded his authority by making tax law determinations, and failed to consider his harmful error arguments. *Id.* at 8-9, 11. He further alleges that the agency committed harmful error by failing to

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[2] The appellant alleges in his request for review that he made allegations of race discrimination "in the context of the arbitration." RR File, Tab 1 at 8. However, the arbitration decision does not reflect that he made such an allegation. *See id.* at 18-47.

investigate, by shifting the burden of proof to the employee and by failing to consider mitigation. *Id.* at 9-10.

¶6 The Board's standard of review of an arbitration decision is deferential. *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 9 (2008). The Board will modify or set aside an arbitration decision only when the arbitrator has erred 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, an arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for instance, by misallocating the burdens of proof or employing the wrong analytical framework. *See id.* (internal citations omitted).

The appellant has not shown that the arbitrator erred in interpreting a civil service law, rule or regulation.

¶7 The arbitration decision reflects that the arbitrator considered the evidence, which included several days of hearing testimony, the Tax Court decision, which found that the appellant and his wife "failed to carry their burden of establishing that they are entitled for each of their taxable years 2001 through 2004 to the Schedule C net loss that they claim for each such year," the agency's subsequent proposal and removal notices, and relevant statutory and regulatory provisions. *See* RR File, Tab 1 at 18-47.

¶8 The appellant's arguments on review do not explain how the arbitrator erred in his analysis and/or decisionmaking. For instance, as noted above, the appellant states that the arbitrator misapplied the burden of proof and violated "5 CFR 1201.56," but he provides no explanation as to whether the arbitrator misapplied the burden of proof with respect to the charge or the affirmative defense of reprisal for EEO activity or both. We have reviewed the arbitration decision and the arbitrator appropriately placed the burden of proving the charge on the agency and the burden of proving the affirmative defense on the appellant/Union. *See id.* at 46 (explaining that the agency "clearly met its burden

of proof" on the charge and that there was no support for the Union's contention that the agency's actions were in retaliation for his prior EEO and grievance filings); *see also* 5 C.F.R. §§ 1201.56(a)(1), (2). Accordingly, this argument is without merit.

¶9 The appellant also claims on review that the arbitrator exceeded his authority by making tax law determinations. RR File, Tab 1 at 9. However, the appellant did not explain how the arbitrator exceeded his authority in this respect. We note that the arbitrator relied in part on the findings of the Tax Court judge who concluded that the appellant had failed to establish his entitlement to the net losses he had claimed on his tax returns. RR File, Tab 1 at 26, 44. In any event, we see no error in the arbitrator's analysis, nor has the appellant specified any. Thus, this argument is without merit.

¶10 During the arbitration, the appellant claimed that the agency committed harmful procedural error when it: 1) failed to conduct an investigation; 2) conceded in part some of the specifications underlying the charge of failure to properly file a personal federal income tax return; 3) improperly shifted the burden of proof; and 4) failed to mitigate the penalty. *See id.* at 34. The arbitrator did not explicitly rule on the appellant's harmful procedural error claim. *See id.* at 41-47 (analysis and opinion). We note, however, that the appellant did not apparently identify harmful error as a specific issue for the arbitrator to determine. *See id.* at 27 (describing the Union's suggested issues as: 1) whether the agency's decision to terminate the Grievant was for such cause as to promote the efficiency of the service, and if not, what is the remedy; 2) whether the agency's decision to terminate the Grievant was taken in retaliation for filing EEO grievances or cases, and if so, what is the remedy; and 3) was the agency's decision to terminate the Grievant taken in retaliation for the Grievant filing grievances and if so, what is the remedy).

¶11 Assuming that the appellant properly preserved this issue for review, the Board has held that, where an arbitrator has failed to make findings and

conclusions on issues such as harmful procedural error, "the Board will examine the submissions on review to determine whether resolution of these questions renders the award contrary to law, rule, or regulation." *Appling v. Social Security Administration*, 30 M.S.P.R. 375, 380 (1986). Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). The appellant has not provided any evidence to support his allegation that the agency failed to conduct a proper investigation, what specifications it allegedly conceded (and if so, how such a concession affected the decision to sustain the charge, if at all), how it improperly shifted the burden of proof and/or how its failure to mitigate the penalty was improper, nor has he shown that the alleged procedural error(s) would have caused the agency to reach a different conclusion than it would have reached in the absence or cure of the error(s).[3] Thus, we conclude that he has not met his burden to show harmful procedural error or that the arbitration decision is contrary to law, rule, or regulation in this regard.

The appellant failed to demonstrate that the agency discriminated against him on the bases of his race or national origin or that its action was in retaliation for protected EEO activity.

¶12 In his request for review, the appellant states that he is an "African immigrant (naturalized American citizen)," that "the agency discriminated against him previously by denying him promotions," but that he filed grievances alleging discrimination based on race and national origin, and that he was later promoted.

[3] We separately discuss the penalty determination at *infra* at ¶¶ 18-19.

RR File, Tab 1 at 13. He also alleges that the agency's action was in retaliation for filing prior EEO complaints and EEO grievances.[4] *Id.*

Race and/or national origin discrimination

¶13 To establish a claim of prohibited employment discrimination, the employee first must establish a prima facie case;[5] 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. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). An employee may establish a prima facie case of prohibited discrimination under a disparate treatment theory by introducing preponderant evidence to show that he (1) is a member of a protected group; (2) suffered an appealable adverse employment action; and (3) that the unfavorable action gives rise to the inference of discrimination. *See Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010). With respect to this last element, the Board has held that "an employee may rely on *any* evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination." *Id.* (internal citations omitted; emphasis in original).

¶14 Although the appellant is a member of a protected group(s), he has not otherwise satisfied his burden with regard to his discrimination claims. Specifically, he has not introduced *any* evidence that would give rise to an

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[4] The appellant also alleges that the agency committed a prohibited personnel practice against him. *See id.* at 14 (the appellant checked a box indicating that the agency took or failed to take a personnel action as reprisal for the exercise of any appeal, complaint or grievance, among other things).

[5] Because the appellant did not appear to raise the discrimination issues before the arbitrator, this level of analysis is proper. *See Dobruck v. Department of Veterans Affairs*, 102 M.S.P.R. 578, ¶ 19 n.3 (2006) (explaining that the Board would not normally evaluate if an appellant met his prima facie case of retaliation when a hearing has been held and the record is complete, but that it was appropriate to do so because the appellant did not raise such a claim before the arbitrator), *aff'd*, 212 F. App'x 997 (Fed. Cir. 2007).

inference that his removal was based on race and/or national origin discrimination. Notably, he has not alleged, and the arbitration decision does not show, that he was similarly situated to an individual who was not a member of the protected groups, and/or that he was treated more harshly or disparately than an individual who was not a member of his protected groups. Thus, these allegations are without merit.

Retaliation for protected EEO activity

¶15 For an appellant to prevail on a contention of illegal retaliation for EEO activity, he has the burden of showing that: (1) he engaged in a protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *FitzGerald*, 107 M.S.P.R. 666, ¶ 17. "Because a hearing has been held and the record is complete, the Board will proceed to the ultimate question, which is whether, upon weighing the evidence presented by both parties, the appellant has met his overall burden of proving retaliation." *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 42 (2006) (citing *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005)).

¶16 The Board has held that, to show retaliation through circumstantial evidence, an appellant must demonstrate a "convincing mosaic" of retaliation against him. *FitzGerald*, 107 M.S.P.R. 666, ¶ 20 (citing *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). Such a mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Id.*

¶17 The arbitrator addressed the Union's claim that the agency's action was in retaliation for the appellant's protected EEO activity and grievances:

> The Union claims that the Agency's actions were in retaliation for his prior EEO and grievance filings. I find no evidence to support such a conclusion. The Agency has gone to great lengths to advise its employees that it would require its employees to abide strictly by the tax laws. It particularly emphasized the potential abuse of Schedule C filers. Therefore, there was every reason for the Agency to question the Grievant's tax return. The Union does not point to anything, other than the fact that the Grievant made some complaints, to establish that the audit was in retaliation for his filings. There is simply no support, in the record of this case, for that claim.

RR File, Tab 1 at 46. Accordingly, the arbitrator concluded that the agency's decision to terminate the appellant was not taken in retaliation for the appellant filing an EEO claim or for filing grievances. *Id.* at 47. Given the arbitrator's indication that the Union presented no evidence, other than the fact that the appellant filed EEO complaints, to support the claim of retaliation for protected EEO activity, and the fact that he presented no evidence on review regarding this claim, we cannot conclude that the arbitrator erred as a matter of law.

Penalty

¶18 There is no discussion of the arbitrator's penalty determination or his analysis of the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981) in the arbitration decision. The arbitrator explained that the RRA "imposes mandatory termination for any [agency] employee found to have willfully understated his[] federal tax liability," that only the agency's Commissioner is statutorily authorized to mitigate the penalty of removal, and that, in this matter, the Commissioner decided not to mitigate the penalty. *See* RR File, Tab 1 at 41.

¶19 The appellant does not appear to challenge the arbitrator's penalty determination in his request for review. Moreover, the arbitrator's recitation of the law regarding mitigation in this context is accurate. *See* 26 U.S.C.A. § 7804

note (pursuant to Pub. L. 105-206, tit. I, §§ 1203(a), (b)(9), (c)(1)-(3), the agency Commissioner has the sole discretion to terminate an employee, or take other action against him, for willfully understating federal tax liability). The Federal Circuit and the Board have held that the Board does not have the authority to mitigate removals imposed under section 1203 of the RRA, such as the removal at issue here. *James v. Tablerion*, 363 F.3d 1352, 1360 (Fed. Cir. 2004) ("The statute sets forth a strict rule of conduct: if any of the prohibited acts are committed, removal is the penalty, *subject only to amelioration by the agency itself*, with no judicial review of the decision to grant or withhold relief from the default penalty of removal.") (emphasis added); *Akers v. Department of the Treasury*, 100 M.S.P.R. 270, ¶ 8 (2005) (the mandatory removal penalty under section 1203 of the RRA is not reviewable by the Board), *aff'd*, 941 F. App'x 941 (Fed. Cir. 2006); *see Underwood v. Department of the Treasury*, 206 F. App'x 999, 1000 (Fed. Cir. 2006) (finding that the appellant's willful understatement of his federal tax liability was subject to the statutorily-prescribed penalty of removal under section 1203 of the RRA, absent mitigation by the Commissioner of the agency)[6]. Thus, the Board does not have authority to mitigate the removal in this matter.

ORDER

¶20 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)).

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[6] Although *Underwood* is an unpublished decision, the Board may rely on unpublished Federal Circuit decisions if it finds the court's reasoning persuasive. *E.g.*, *Herring v. Department of the Navy*, 90 M.S.P.R. 165, ¶ 13 n.* (2001), *review dismissed*, 35 F. App'x 887 (Fed. Cir. 2002). Given the similarities between this appeal and *Underwood*, we find the court's reasoning persuasive.

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.