UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 76

Docket No. SF-0752-10-0884-I-1

Joseph Martinez,

Appellant,

v.

Department of Homeland Security,

Agency.

August 17, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

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

Kimberly A. Jones, Esquire, Laguna Niguel, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a separate concurring opinion.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant

[1] This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

The administrative judge properly sustained the charge of Conduct Unbecoming.

In his petition for review, the appellant asserts that the administrative judge abused her discretion in denying his motion to compel the agency to produce email messages regarding the charges against the appellant. Petition for Review (PFR) File, Tab 1 at 2. Specifically, the appellant argues that the administrative judge's failure to require the agency to produce the requested emails in conjunction with her subsequent denial of the appellant's request to add Don Martone to the witness list, "had the effect of denying the Appellant a fair hearing as it eliminated his ability to procure evidence that would have supported his claims." *Id.* We discern no abuse of discretion by the administrative judge in her finding that producing the emails would be unduly burdensome or in her rationale for reaching that finding, and the appellant has failed to show that the administrative judge's decision prejudiced his substantive rights. *See* Initial Appeal File (IAF), Tab 23 at 2-3. As the administrative judge noted, the appellant's assertion that Christine Poulos' emails would reveal evidence of retaliation is merely speculative as he failed to point to any other evidence whatsoever supporting his assertion. *See id.* at 3. We also discern no abuse of discretion in the administrative judge's denial of the appellant's request to add Mr. Martone to the witness list as Mr. Martone's knowledge of the agency's email system is not relevant to the agency's charge. IAF, Tab 26 at 3; *id.*, Tab 31 at 2.

In his petition for review, the appellant complains that the administrative judge denied his motion requesting that she recuse herself from the case based on

her bias against him.[2] PFR File, Tab 1 at 2. In determining whether an administrative judge should be disqualified on grounds *other than bias*, the Board's policy is to follow the standard set out at 28 U.S.C. § 455(a). *See Lee v. Environmental Protection Agency*, 115 M.S.P.R. 533, ¶ 20 (2010). Accordingly, the administrative judge erred in applying 28 U.S.C. § 455(a) to deny the appellant's request that she recuse herself. *See* IAF, Tab 31 at 1-2. Such error did not prejudice the appellant's substantive rights, however, because the appellant's assertions that the administrative judge should recuse herself based on her rulings on discovery issues and her history as a representative of another federal agency are without merit and they fail to overcome the presumption of honesty and integrity that accompanies an administrative judge. *See Garst v. Department of the Army*, 56 M.S.P.R. 371, 377 (1993), *recons. granted on other grounds*, 60 M.S.P.R. 514 (1994); *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980); IAF, Tab 26 at 8.

In his petition for review, the appellant also asserts that he was prejudiced by the administrative judge holding a videoconference hearing rather than an in-person hearing. PFR File, Tab 1 at 2. As the appellant concedes, he never objected to the administrative judge's decision to hold the hearing by videoconference. The fact that the appellant asked the administrative judge to recuse herself in no way constituted an objection to the holding of the hearing by videoconference. *See* PFR File, Tab 1 at 3; IAF, Tab 11; *id.*, Tab 26 at 8. Having failed to preserve an objection on this issue below, the appellant may not raise it now on petition for review. *See Abakan v. Department of Transportation*, 98 M.S.P.R. 662, ¶ 4 n.* (2005). Second, even assuming, arguendo, that the

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[2] The appellant also asserts that the administrative judge failed to rule on his motion seeking certification of an interlocutory appeal based on her denial of his request that she withdraw as the administrative judge. PFR File, Tab 1 at 2. However, the record shows that the administrative judge denied the appellant's motion in an order dated October 19, 2010. IAF, Tab 34.

appellant preserved his objection, he has not established that the October 20, 2010 hearing failed to satisfy his right to a hearing. *See Koehler v. Department of the Air Force*, 99 M.S.P.R. 82, ¶¶ 10-13 (2005); *Vicente v. Department of the Army*, 87 M.S.P.R. 80, ¶¶ 6-9 (2000). While the appellant references "numerous technical glitches during the video hearing, including the picture freezing during testimony, and at times the connection being lost altogether," *see* PFR File, Tab 1 at 3, the appellant has failed to show that such glitches were numerous and pervasive to the point that they reasonably would have interfered with the administrative judge's ability to make credibility determinations. Our review of the hearing CD did not reveal any reason to conclude otherwise.

Apart from his assertion throughout the proceedings that the agency has conducted a vendetta against him to deny him Office of Workers' Compensation Programs (OWCP) benefits, *see* Initial Decision at 12; PFR File, Tab 1 at 5, the appellant does not otherwise specifically contest the administrative judge's findings that the agency proved by preponderant evidence each of the five specifications of its Conduct Unbecoming charge. Our review of the record and the evidence reveals that the administrative judge's factual findings and credibility determinations on the charge and accompanying specifications are consistent with the weight of the evidence, and we thus find no reason to disturb the administrative judge's conclusions on those matters. *See* Initial Decision at 12-20.

<u>The administrative judge properly found that the appellant failed to prove his affirmative defenses.</u>

In his petition for review, the appellant asserts that the agency failed to engage in an interactive dialog following his request for a reasonable accommodation and that the administrative judge erred in finding that he is not a qualified individual with a disability. PFR File, Tab 1 at 4-5. The parties stipulated below that neither accommodation requested by the appellant would have imposed an undue burden on the agency's operations. *See* Hearing CD

(preliminary matters). However, we discern no error in the administrative judge's finding that the appellant failed to prove that he is an individual with a disability that substantially limits a major life activity. *See* Initial Decision at 22. As the administrative judge found, while the appellant submitted documentation of a lower back injury, the appellant did not produce any medical documentation that would credibly rebut Dr. Kim's March 1, 2010 supplemental report or the appellant's inconsistent off-duty conduct captured in the photographs. *See* Initial Decision at 23; IAF, Tab 8, Subtab 4C at 3-8 (request for surgical authorization from Dr. David Propst, dated May 27, 2010, noting "severe tenderness," "severely restricted flexion, extension, and lateral bend," traumatic annular tear L5/S1, and internal disc derangement L5/S1); *id.*, Subtab 4H at 5 (August 31, 2009 report noting that the appellant was totally temporarily disabled); *id.*, Tab 18 at 11-14 (January 13, 2009 letter from Dr. Lawler noting the appellant's lower back pain and sciatica); *id.*, Tab 8, Subtab 4F at 1 (March 1, 2010 supplemental report noting the significant discrepancy between the photographs of the appellant and the appellant's complaints and indicating that the appellant is a symptom magnifier or malingerer). While the appellant submitted medical documentation dated May 27, 2010, with his response to the notice of proposed removal that requested OWCP authorization for a L5/S1 decompression and fusion, the document does not address the appellant's ability to work or state that he is disabled. *See id.*, Subtab 4C at 3-8.

The appellant asserts that the administrative judge erred in finding no evidence that the agency retaliated against him. PFR File, Tab 1 at 5. While the administrative judge failed to make an explicit finding regarding whether the proposing or deciding officials were aware of the appellant's equal employment opportunity (EEO) complaint, *see* Initial Decision at 24, we assume, arguendo, that Brett Gregg and Ms. Poulos were aware of the protected activity. We discern no error, however, in the administrative judge's finding that the appellant failed to provide any motive for Ms. Poulos to retaliate against him by removing him

more than a year after he filed an EEO complaint or to show that the removal could have been retaliation under the circumstances. *See* Initial Decision at 24. Beyond his bare assertion, the appellant has not established that either Mr. Gregg or Ms. Poulos had any motive to retaliate against him due to his prior EEO complaint. Moreover, the appellant has failed to explain how any potential demotion of Ms. Poulos following her decision to remove the appellant is relevant to the issue of retaliation or any other issue in his appeal.

The evidence submitted on review, even if new, is not material.

On February 15, 2011, following the close of the record on review, the appellant submitted several emails allegedly sent between agency officials in March and April 2008. PFR File, Tab 4 at 4-5. In a cover letter, the appellant's representative stated that he had recently[3] received the emails in a fax "from an anonymous source" and that, if true, the emails "help explain why the Agency fought so hard to st[o]p the release of emails from Agency officials during the discovery process." *Id.* at 1. The agency asserts that the emails are not new, are fictitious, and are not relevant to the appellant's case. PFR File, Tab 5 at 5-7. Even assuming, arguendo, that these emails are new, they are not of sufficient weigh to warrant reversing the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). They are not relevant to whether the appellant engaged in the charged misconduct, and, we discern no reason to disturb the administrative judge's finding that the penalty of removal is reasonable in light of the proven misconduct.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made

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[3] While the appellant's representative states in his February 15, 2011 letter that the fax was "recently received," the fax indicates that it was sent to the appellant's representative on December 7, 2010. PFR File, Tab 4 at 1, 3.

no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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 Code, 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 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:

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

CONCURRING OPINION OF ANNE M. WAGNER

in

Joseph Martinez v. Department of Homeland Security

MSPB Docket No. SF-0752-10-0884-I-1

¶1 I agree with the majority that the administrative judge properly sustained the Conduct Unbecoming charge and affirmed the removal penalty. I also agree that the appellant's evidence submitted on review, even if new, does not warrant a change in the outcome of this appeal.

¶2 I write separately, however, to address the agency's response to, and the administrative judge's handling of, the appellant's discovery request and motion to compel. According to the motion, the appellant requested "[a]ny and all notes, memoranda, email messages, cc:Mail messages and/or documentation created, maintained, and/or received by any Agency employee regarding the charges against the appellant." Initial Appeal File (IAF), Tab 12. The appellant explained in his motion that the agency only provided a single email from the deciding official, Christina Poulos; that it failed to provide any emails from any other proposed witnesses or other employees involved in obtaining evidence against the appellant; and, that, based upon information and belief, it had other emails that would fall within this request, but such emails were not produced. [1] *See id.*

¶3 The administrative judge granted the appellant's motion to compel, explaining that each agency is required to maintain records within its records disposition schedule and the agency should have kept such emails in accordance with its policy. *See* IAF, Tab 14. The administrative judge specifically ordered the agency to retrieve and produce within 7 days any emails that were

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[1] According to the appellant, during Ms. Poulos's deposition, she testified that other email records existed, but said that she had erased them. *See id.*

prematurely deleted, noting that the order applies to any other individual, aside from Ms. Poulos, who was included in the appellant's original discovery request, and warning the agency that failure to comply may result in sanctions. *See id.* The administrative judge subsequently issued an order that acknowledged that the agency searched the computers of a number of individuals for responsive email messages, and she again ordered the agency to search for emails that had been deleted, even if the emails were no longer on the individual's computer. *See* IAF, Tab 17.

¶4 The agency indicated that it complied with the administrative judge's first order because no emails were prematurely deleted, since the agency "has no records retention requirement for [email] messages" and "substantially complied with the order by twice searching the computers of five pertinent people." *See* IAF, Tab 21. The agency also filed a request to reconsider the administrative judge's second order, explaining, among other things, that it produced 1400 pages of discovery, allowed four depositions, and that the appellant's reason for continued pursuit of the emails was speculative. The agency further asserted that the request to search back-up tapes for deleted emails was "too burdensome and expensive and outweighs the benefit." *See id*. As support for this last assertion, the agency offered two declarations from Dan Martone, Branch Chief, Incident Response and Digital Analysis in the Office of the Chief Information Officer, Information Security Division, United States Citizenship and Immigration Services, United States Department of Homeland Security. Mr. Martone explained that it would cost the agency 5880 hours of work, at a cost of $588,000, to find, restore and search for emails pertaining to the appellant, during the timeframes of April 1, 2009, through September 30, 2009, and March 1, 2010, to April 30, 2010.[2] *See id.* (declarations).

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[2] During the October 5 and October 7, 2010 prehearing conferences, the parties apparently discussed this outstanding discovery issue, and the appellant indicated that he was interested in emails to and from Ms. Poulos during these timeframes, *see* IAF,

¶5 Based on a discrepancy in these declarations, the administrative judge found, instead, that it would only cost the agency 12.25 weeks and $49,000.00 to produce the emails in question. *See* IAF, Tab 23. Even so, she determined that the agency had shown that production of the emails in question would be unduly burdensome and expensive. She therefore granted the agency's request for reconsideration regarding the appellant's motion to compel, thus relieving the agency of its obligation to produce any documentation in response to the appellant's discovery request. *See id*.

¶6 I recognize that, as a general rule, the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). However, under the circumstances of this appeal, I would reverse the administrative judge's ruling granting the agency's motion for reconsideration of her previous order on the appellant's motion to compel. Specifically, the appellant's electronic discovery request was fairly standard in the employment law context and reasonable when originally made, but even more so once he limited it both in time and in scope, as discussed above.[3] Moreover, the agency did not object to the request when made and did

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Tab 23 at 2, which appears to be a considerable narrowing of his original discovery request.

[3] Although the appellant's original discovery request asked for documentation "regarding the charges" against him, the record reflects that his request for emails primarily sought information relating to his affirmative defenses of disability discrimination and reprisal for equal employment opportunity activity. *See, e.g.*, IAF, Tabs 13 (identifying these affirmative defenses), 23 at 3 (the administrative judge noted in the Order and Summary of Prehearing Conference that "the appellant has failed to submit information that any of the witnesses deposed testified that the deciding official sent e-mails of a retaliatory nature concerning the appellant" and she found that, "although the appellant claims that the nature of the e-mails will show that the deciding official was retaliating against the appellant, it is simply speculation."); Petition for Review File, Tab 1 at 2 (explaining that the administrative judge's decision, that the agency did not have to produce the requested discovery, among other things, "had the

not respond or object to the appellant's motion to compel. In fact, the first time it formally raised the objection that the request was unduly burdensome and expensive was in its motion for reconsideration. In addition, although the administrative judge appeared to recognize in her initial order compelling discovery that agencies are required to retain records, including electronic mail, according to certain schedules, *see* IAF, Tab 14, she subsequently accepted, without explanation, the agency's contention that it had no records retention policy with regard to emails. IAF, Tab 23. In fact, the agency's assertion that it lacked an email retention policy does not appear to comport with current federal records management statutory and regulatory provisions.[4]

¶7 The foregoing factors, coupled with the agency's inconsistent claims as to the number of hours and expense required to retrieve these emails, significantly undercut the reasonableness of the administrative judge's decision to relieve the agency of its duty to comply with the discovery process in this case. While such a conclusion might normally warrant a remand for purposes of reopening the record and ordering further discovery, I would not do so in this case because the record evidence of the appellant's misconduct amply supports the conclusion that the agency removed him based on his misconduct, and thus, any error with regard to discovery relating to his affirmative defenses did not affect his substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is

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effect of denying the Appellant a fair hearing as it eliminated his ability to procure evidence that would have supported his claims").

[4] *See, e.g.*, 44 U.S.C. chapter 31 (records management by federal agencies); 36 C.F.R. part 1220, subpart B (agency records management responsibilities); 36 C.F.R. parts 1222 (creation and management of federal records), 1236 (procedures for electronic records management).

shown to have adversely affected a party's substantive rights). Therefore, I would affirm the administrative judge's findings as to the charge and penalty.

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Anne M. Wagner
Vice Chairman