UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 17

Docket No. DA-0752-10-0529-I-1

Maria Bair,

Appellant,

v.

Department of Defense,

Agency.

February 16, 2012

John Arambula, San Antonio, Texas, for the appellant.

Rachael L. Orejana, Esquire, Fort Lee, Virginia, 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 her removal. For the reasons set forth below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant, effective May 29, 2010, from her Store Associate position because of excessive absences commencing on or about September 17, 2008. Initial Appeal File (IAF), Tab 10 at 17, 22, 33-34. The

appellant filed a Board appeal, wherein she acknowledged that she was unable to return to work because of "the damaging and destructive effects of her compensable injury," but she contended that the agency could not discipline a disabled employee who was receiving workers' compensation benefits under the Federal Employees' Compensation Act (FECA). *See* IAF, Tab 13 at 1, 10. The appellant further argued that the agency committed a number of harmful procedural errors in taking the removal action. IAF, Tabs 1, 6, 11, 13.

¶3 The appellant did not request a hearing, and the administrative judge issued a close of record order. IAF, Tab 3. In the summary of the status conference, the administrative judge made a finding that, because the appellant admitted that she had not worked since January 8, 2009, the agency's charge of excessive absences would be sustained, and the only issue left to be adjudicated was whether the agency's removal action was appropriate and promoted the efficiency of the service. IAF, Tab 12 at 1. Regarding the appellant's harmful error claims, the administrative judge ordered the appellant to submit additional evidence and argument to support her claims that the agency's actions violated a rule or regulation and that she was harmed by these alleged violations. IAF, Tab 12 at 1-2. The appellant provided a timely response to the order. IAF, Tab 13.

¶4 Based upon the written record, the administrative judge affirmed the removal action, finding the agency proved that the appellant had excessive absences, that a nexus exists between the proven misconduct and the efficiency of the service, and that the penalty of removal was reasonable. IAF, Tab 14, Initial Decision (ID). The appellant filed a petition for review of the initial decision.[1] Petition for Review (PFR) File, Tab 1.

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[1] On review, the appellant submits two flow charts, which were allegedly created by Food Safety and Inspection Services, reflecting the alleged procedures used to assess work-related injuries, reasonable accommodations, and disability retirement. Petition for Review File, Tab 1 at 2, 13-14. As she has not shown that these documents were unavailable prior to the close of the record below, despite her due diligence, the Board

ANALYSIS

¶5 As a general rule, an adverse action cannot be based on an employee's use of approved leave. *See Combs v. Social Security Administration*, 91 M.S.P.R. 148 (2002). However, the Board has held that an agency may bring an adverse action against an employee for excessive approved absences if the following criteria have been met: (1) The employee was absent for compelling reasons beyond her control so that the agency's approval or disapproval was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. *Gartner v. Department of the Army*, 104 M.S.P.R. 463, ¶ 9 (2007) (citing *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984)). Furthermore, in determining that removal based on an employee's incapacitation from duty promotes the efficiency of the service, the Board has found that "an absence for which no foreseeable end is in sight constitutes a burden which no employer can efficiently endure." *Ward v. General Services Administration*, 28 M.S.P.R. 207, 209 (1985); *see also Edwards v. Department of Transportation*, 109 M.S.P.R. 579, ¶ 17 (2008) (when an employee has been removed for unavailability for duty because of incapacitation, the Board relies on the absence of a foreseeable end to the unavailability).

¶6 Here, the administrative judge failed to analyze whether the agency satisfied the *Cook* criteria to prove the charge of excessive approved absences. Instead, she sustained the charge because it was undisputed that the appellant had not worked for a period of more than a year. *See* ID at 2-3; IAF, Tab 12 at 1.

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need not consider them for the first time on review. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1).

Nevertheless, the undisputed record shows that the agency met the *Cook* criteria because the appellant had been absent for compelling reasons beyond her control for more than a year, and the appellant's own medical documentation established that she could not perform the essential functions of her position, that she was unable to return to duty, and that her absence had no foreseeable end. IAF, Tab 10 at 37-42. Additionally, the agency clearly notified the appellant in a return to work letter on November 20, 2009, that she held a key position and that her continued absence from work would leave the agency no choice but to take a removal action in order to insure that its operational needs were met. *Id.* at 35. Thus, the record shows that the agency proved all of the factors required by *Cook*, that the appellant's removal promoted the efficiency of the service, and that removal was a reasonable penalty under the circumstances.

¶7 On review, the appellant does not argue that the administrative judge erred in sustaining the charge. Rather, she reiterates that the agency committed harmful error in the application of its procedures in deciding to remove her. PFR File, Tab 1; IAF, Tabs 11, 13. The appellant claimed that the agency committed harmful procedural error below because: (1) the charge failed to identify the specific time period considered to be excessive; (2) the deciding official should not have considered the *Douglas* factors in determining the penalty because these factors were inapplicable to this action; (3) the agency failed to meet its obligation to submit a disability retirement application on behalf of the appellant; (4) although the appellant objected to processing the removal action as any type of disciplinary action, the action should have been analyzed as "enforced leave" under *Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed. Cir. 1987); and (5) the agency was not authorized to take either a disciplinary or a performance-based action against the appellant because her absences were properly authorized by her receipt of Office of Workers' Compensation Programs (OWCP) benefits. PFR File, Tab 1; IAF, Tab 13. We note that, although the

administrative judge did not identify harmful error as the issue being determined below, she addressed many, but not all, of these claims in the initial decision.

¶8 In any event, since the appellant did not request a hearing and the record is fully developed, the Board will now examine the appellant's harmful error claims on review. Harmful error under 5 U.S.C. § 7701(c)(2) 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. *Agbaniyaka v. Department of the Treasury*, 115 M.S.P.R. 130, ¶ 11 (2010). With regard to her first claim, the appellant has not shown that the agency's charge failed to identify the time period considered excessive in sufficient detail to allow her the opportunity to make an informed reply. An agency is required to state the reasons for a proposed adverse action in sufficient detail to allow a charged employee the opportunity to make an informed reply. 5 U.S.C. § 7513(b)(1); *Plath v. Department of Justice*, 12 M.S.P.R. 421, 424 (1982). Here, the notice of proposed removal informed the appellant that she had been absent since September 17, 2008, and that her excessive absences lasting more than one year were unreasonable. IAF, Tab 10 at 33. In addition, the record shows that the appellant submitted a detailed reply to the proposal notice. *Id.* at 24-31. Therefore, there is no indication of a lack of specificity in the charge or that the appellant was hindered by a lack of specificity in the charge. *See Bias v. Equal Employment Opportunity Commission*, 20 M.S.P.R. 216, 219 (1984) (where an appellant comes forward and refutes a charge made against him, the Board cannot find that he was not given notice of the charge). As such, we find no harmful error in the agency's formulation of the charge in this case.

¶9 The appellant has failed to provide any legal or factual basis for her claim that the agency committed harmful error by applying the *Douglas* factors in determining the reasonableness of the penalty of removal. We are unaware of any requirement for finding that an agency should not consider the pertinent

mitigating and aggravating factors in determining the reasonableness of the penalty when an employee is charged with excessive approved absences under *Cook*. Indeed, in *Gartner*, the Board specifically held that the administrative judge erred in failing to assess the reasonableness of the penalty under *Douglas*. 104 M.S.P.R. 463, ¶¶ 12-14. The agency clearly had an obligation to determine the reasonableness of the penalty of removal before taking action here. Similarly, the appellant has failed to prove that the agency had any obligation to initiate a disability retirement application on her behalf. Federal retirement regulations require that an agency must file a disability retirement application for a disabled employee only under very limited circumstances, which are not present in this appeal. *See* 5 C.F.R. §§ 831.1205, 844.202. Therefore, the appellant has failed to prove harmful error in these claims.

¶10 In addition, the undisputed facts in this appeal do not support the appellant's contention that the agency's removal action should have been analyzed as a type of enforced leave under *Pittman*. The Board has recognized that two general situations give rise to enforced leave/constructive suspension claims. The first situation is when an agency places an employee on enforced leave pending an "inquiry" into her ability to perform. In such a case, the issue is whether the agency or the employee initiated an absence lasting more than 14 days. *See Johnson v. U.S. Postal Service*, 85 M.S.P.R. 184, ¶ 5 (2000); *McIver-Smith v. U.S. Postal Service*, 74 M.S.P.R. 464, 467 (1997). The second situation is when an employee is absent from work for medical reasons and requests to return to work with altered duties, and the agency denies that request, even though it is obligated to offer the employee available light-duty work. *See Hardy v. U.S. Postal Service*, 94 M.S.P.R. 539, ¶ 12 (2003); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996). There is no suggestion in this appeal that the appellant's absences were affected by either of these situations. In fact, the appellant has acknowledged that she left work because of work place injury and

that she remains unable to return to work; therefore, the appellant has failed to meet her burden to show harmful error in this claim.

¶11 With regard to the appellant's claim that the agency was not authorized to remove her based on absence during a period for which she was receiving FECA benefits, it is true that the Board has long recognized that an adverse action based on an AWOL charge cannot be sustained if OWCP determines that the employee was entitled to compensation benefits as a result of a work-related injury for the entire time period charged as AWOL. *See Sambrano v. Department of Defense*, 116 M.S.P.R. 449, ¶ 7 (2011); *Brown v. National Archives and Records Administration*, 92 M.S.P.R. 95, ¶ 6 (2002); *Parkinson v. U.S. Postal Service*, 55 M.S.P.R. 552, 554-55 (1992); *Stith v. Department of Housing & Urban Development*, 21 M.S.P.R. 328, 331-32 (1984). However, the Board has never held that an agency is, therefore, prohibited from implementing an adverse action predicated upon leave-related charges pending a final determination from OWCP. *Sambrano*, 116 M.S.P.R. 449, ¶ 7. Rather, we have said that it does so at the risk of having the action overturned if OWCP subsequently finds that the employee was entitled to compensation for the absent period, requiring the employee's retroactive placement in a leave without pay (LWOP) status and the invalidation of the AWOL charge. *Id.; see also Hardin v. Department of the Army*, 18 M.S.P.R. 42, 45 (1983).[2] Moreover, we have also recognized that an agency may discipline an employee for failure to follow leave procedures even when a related AWOL charge is invalidated as a result of OWCP's finding. *Hardin*, 18 M.S.P.R. at 45; *cf. Somuk v. Department of the Navy*, 117 M.S.P.R. 18, ¶ 8 (2009) (agency may bring charge of failure to follow leave procedures during period that appellant was on approved leave under the Family and Medical Leave Act

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[2] We also note that under regulations issued by the Office of Personnel Management (OPM), an employee absent because of a compensable injury may be carried on leave without pay or *separated* unless the employee elects to use sick and annual leave. *See* 5 C.F.R. § 353.106(b) (emphasis added).

(FMLA) but must show that it did not thereby interfere with his rights under the FMLA.)

¶12 Furthermore, and most significantly for resolution of this appeal, we long ago acknowledged that an agency need not carry an employee receiving workers' compensation benefits on its employment rolls indefinitely. *Stith*, 21 M.S.P.R. at 331 n.3. In reaffirming that principle today, we recognize that under 5 U.S.C. § 8151(b)(1),[3] a compensably injured employee[4] who fully recovers within one year after the date of commencement of compensation has an unconditional right to return to his former or equivalent position. *See also* 5 C.F.R. § 353.301(a). The plain language of this statutory provision clearly evidences congressional intent to ensure job security for one year to compensably injured employees. Therefore, terminating such an individual's federal employment based on leave use during this statutory one-year period would be inappropriate insofar as it would effectively deprive the individual of this statutory right to job restoration. *See McCauley v. Department of the Interior* 116 M.S.P.R. 484, ¶ 11 (2011) (because the FMLA unambiguously promises job security to employees who take FMLA leave, use of such leave as grounds for removal is "inappropriate"); *Gross v. Department of Justice*, 77 M.S.P.R. 83, 90 (1997) ("If an agency bases an adverse action on its interference with an employee's rights under the FMLA, the adverse action is a violation of law and cannot be sustained."); *see also Hardin*, 18 M.S.P.R. at 45 (an agency should normally carry compensably injured employees in a LWOP status for the one-year period because employees who

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[3] This provision is part of FECA, 5 U.S.C. § 8101 *et seq.*, which is a comprehensive statutory scheme providing federal and postal employees who are injured in the performance of their duties, including those who suffer from occupational disease, with workers' compensation benefits, including wage and medical benefits, as well as with rights to job restoration under certain circumstances.

[4] A "compensably injured individual" refers to a federal or postal employee who incurs an injury in the performance of his duties which is covered under FECA. *See* 5 C.F.R. § 353.102.

fully recover within that period have a right to immediate and unconditional restoration to their prior position or an equivalent one).

¶13 However, Congress did not provide job security to compensably injured employees who do *not* fully recover within the statutory one-year time frame. *See* 5 U.S.C. § 8151(b)(2) and 5 C.F.R. § 353.301(b)-(d). Consequently, an action to remove a compensably injured employee after expiration of the statutory one-year period based on excessive absence does not run afoul of the unconditional right to restoration under FECA. In the instant appeal, the appellant admitted that she had not worked since January 8, 2009. Thus, when the agency effected the appellant's removal on May 29, 2010, she had been absent from the work for over 16 months. Because the record reflects that the one-year period of time during which the appellant arguably would have been entitled to return to her position under 5 U.S.C. § 8151(b)(1) had expired by the effective date of appellant's removal, we find that the agency did not commit harmful error in bringing this removal action.

¶14 Accordingly, the appellant's removal is affirmed.

ORDER

¶15 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)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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.