UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 43

Docket No. SF-0752-11-0465-I-1

Lavake Cowart,

Appellant,

v.

United States Postal Service,

Agency.

March 27, 2012

Mai P. Cowart, Inglewood, California, for the appellant.

Ayesha Mahapatra, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that reversed the agency's removal action. For the following reasons, we GRANT the appellant's petition, AFFIRM the initial decision's reversal of the removal action, and REMAND the appeal for adjudication of the appellant's affirmative defenses.

BACKGROUND

¶2 The agency removed the appellant from his Electronic Technician position. Initial Appeal File (IAF), Tab 5 at 27-30. On appeal, the appellant alleged marital status discrimination, prohibited personnel practices, and retaliation for whistleblowing and equal employment opportunity (EEO) activity. IAF, Tab 1

at 5, 7-13; *see* IAF, Tabs 6, 12, 14. The appellant sought compensatory and consequential damages. IAF, Tab 1 at 6-7, 11.

¶3 In an Order and Summary of Status Conference, the administrative judge noted, among other things, that the appellant had raised the affirmative defenses of retaliation for whistleblowing and marital status discrimination, noted that the appellant's other claims of discrimination – on the basis of conduct that does not adversely affect performance, and taking or failing to take personnel actions that would violate a law, rule, or regulation implementing or concerning the merit system principles – were unclear, and permitted the appellant to address these claims in detail in his prehearing submissions. IAF, Tab 10 at 4-7.

¶4 In a subsequent Order and Summary of Prehearing Conference, the administrative judge set forth the agency's burden of proof and identified the appellant's affirmative defenses as retaliation for whistleblowing, marital status discrimination, and retaliation in contravention of 5 U.S.C. § 2302(b)(8) and (9). IAF, Tab 17 at 4. The administrative judge noted that the parties would be limited to those issues unless a party established that the issue could not have been previously known despite due diligence. *Id*. The administrative judge also informed the parties that any objections to the above summary had to be submitted in writing and received by close of business on June 13, 2011. *Id*. at 7.

¶5 After a hearing, the administrative judge reversed the removal action. IAF, Tab 26 at 2, 16. The administrative judge found that the agency did not satisfy its burden of showing that it afforded the appellant procedural due process, and that it was therefore not necessary to address the merits of the case or the appellant's affirmative defenses. *Id*. at 9-15. The administrative judge ordered the agency to cancel the removal and provide the appellant with interim relief if either party filed a petition for review. *Id*. at 16-17.

ANALYSIS

¶6 On petition for review, the appellant asserts that the administrative judge did not address the merits of his discrimination and retaliation claims and that this deprived him of a full and fair ruling on evidence in the record. Petition for Review (PFR) File, Tab 1 at 3. The agency has not filed a petition for review of the initial decision or filed a response to the appellant's petition for review.*

¶7 Because the agency has not filed a petition for review, that portion of the initial decision wherein the administrative judge reversed the agency's removal action is unchallenged and remains the Board's final decision on that issue. *See Shingles v. U.S. Postal Service*, 90 M.S.P.R. 245, ¶ 8 (2001). Although, as set forth below, we find it necessary to remand this appeal for further adjudication, we nonetheless deem it appropriate that the agency now cancel the removal. *Id*. The continued processing of, and ultimate decision on, the remanded issues has no effect on the appellant's entitlement to appropriate relief. *Id*.

¶8 In *Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987), the Board held that 5 U.S.C. § 7702(a) gives an appellant the right to a decision on a claim of discrimination even when the Board has already determined that the action must be reversed on other grounds. *See also, e.g., Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 11 (2005). Although the administrative judge correctly found that the appellant's claims of marital status discrimination and reprisal for whistleblowing do not fall under 5 U.S.C. § 7702, the Board has held that it must address allegations of prohibited personnel practices even

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* The appellant asserts that the agency has not provided him with complete interim relief. PFR File, Tab 4. We need not address this assertion because the appellant did not raise this issue in his petition for review or before the record closed on review and did not show that it was based on information not readily available before the record closed. *See Forma v. Department of Justice*, 57 M.S.P.R. 97, 102, *aff'd*, 11 F.3d 1071 (Fed. Cir. 1993) (Table); 5 C.F.R. § 1201.115(b)(3). In any event, the agency's compliance with the interim relief order is now moot because the appellant has received a final Board order on the merits in his favor. *See Gannon v. U.S. Postal Service*, 61 M.S.P.R. 41, 48 (1994).

though the agency action cannot be sustained. *See Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62, 73 (1992); *Morey v. Department of the Navy*, 34 M.S.P.R. 97, 100 (1987) (extending the rule in *Marchese* to all cognizable claims of prohibited personnel practices given that such claims constitute material issues of fact and law presented on the record under 5 C.F.R. § 1201.111(b)(1)).

¶9 Moreover, the appellant's allegation of retaliation for EEO activity is an issue of discrimination, falling under both 5 U.S.C. § 7702 and the Equal Employment Opportunity Commission's regulations, that must be adjudicated even if the appellant has prevailed on other grounds. *See White v. Department of the Treasury*, 45 M.S.P.R. 475, 479 (1990), *overruled on other grounds by Mitchell v. Department of the Navy*, 51 M.S.P.R. 103, 114 n.5 (1991); *Bartel v. Federal Aviation Administration*, 30 M.S.P.R. 451, 457 (1986) (reprisal for engaging in an EEO complaint process is discrimination prohibited under 5 U.S.C. § 2302(b)(9) and 42 U.S.C. § 2000e). Thus, when an appealable action is reversed on procedural grounds the Board must still decide a claim of retaliation for protected EEO activity. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105 (1997); *Johnson v. Department of the Interior*, 56 M.S.P.R. 549, 551, 553 (1993); *Stanford v. Department of the Army*, 53 M.S.P.R. 96, 97 (1992).

¶10 Although some of the appellant's allegations, including his claims of prohibited personnel practices and retaliation for EEO activity, were not specifically identified by the administrative judge in the Order and Summary of Prehearing Conference, and although the appellant did not object to that Order, the appellant raised those allegations below and the administrative judge did not address them in the Order as required by *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 10 (2010). Thus, because the record does not establish that the appellant abandoned or withdrew the affirmative defenses not mentioned in the administrative judge's Order, we remand this appeal for adjudication of all of

the appellant's claims of prohibited personnel practices, including his claims of marital status discrimination, retaliation for whistleblowing and EEO activity, and other prohibited personnel practices. *See Doran v. Department of the Treasury*, 115 M.S.P.R. 604, ¶¶ 8-12 (2011); *Burroughs v. Department of Health & Human Services*, 49 M.S.P.R. 644, 651-52 (1991) (adjudication of the appellant's allegation that the agency removed him in reprisal for protected activity may rest on credibility determinations, which should be made by the administrative judge).

ORDER

¶11 Accordingly, this appeal is remanded for adjudication of all of the appellant's claims of prohibited personnel practices. *See Schibik*, 98 M.S.P.R. 591, ¶ 13; *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 15 (2000).

¶12 Notwithstanding the remand proceedings on the appellant's discrimination claim, we ORDER the agency to cancel the appellant's removal and retroactively restore him effective March 31, 2011. *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.

¶13 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, 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.

¶14 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).

¶15 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).

¶16 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.

FOR THE BOARD:

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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.