UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 44

Docket No. AT-4324-09-0264-I-4

Stephen Strausbaugh,
Appellant,
v.
Government Printing Office,
Agency.

March 27, 2012

Stephen Strausbaugh, Carriere, Mississippi, pro se.

Thomas Kelly, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that denied his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The agency appointed the appellant to the position of electrician at its Secure Production Facility at the Stennis Space Center in Mississippi, effective March 17, 2008. AT-315H-09-0034-I-1 Appeal File (I-1 AF), Tab 13, Subtab 1. It terminated the appellant's employment effective September 26, 2008, before

the end of his 1-year probationary period, citing his personal conduct and failure to follow instructions. *Id.*, Subtab 3. The appellant thereafter sought to appeal his termination and requested a hearing, claiming, inter alia, that the agency's action was based on discrimination because of his military service. I-1 AF, Tab 1.[1]

¶3 After a hearing,[2] the administrative judge made the following findings of fact, which, except as discussed below, were based on undisputed testimony and evidence introduced below: During the last week of August 2008, the Gulf Coast was preparing for Hurricane Gustav. AT-315H-09-0034-B-3 AF, Tab 31, Initial Decision (B-3 ID) at 3. The appellant was on military reserve duty during the period from August 17 to August 31, 2008, but was on an excused absence due to the imminent hurricane. *Id.* at 3 n.*. Although the Secure Production Facility was not designated as an approved shelter at the Space Center, the agency had created a "rideout crew" consisting of employees who, along with certain family members, were permitted to remain at the facility during the hurricane. *Id.* at 3-4; Hearing Compact Disc (HCD) (testimony of Johanna M. Dixon, Administrative Officer for the Secure Production Facility). Dixon told the appellant during a telephone conversation on August 29, 2008, that his name was on the rideout crew list. B-3 ID at 4; HCD (Dixon). The appellant asked Dixon whether he could bring his fiancée and 3-year old son to the Secure Production Facility, and she informed him that young children and persons with special needs were not allowed to stay at the facility because it was not a NASA-

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[1] The administrative judge also docketed a separate probationary termination appeal, which was the subject of a separate petition for review. The Board issued a decision in that appeal on March 5, 2012. *See Strausbaugh v. Government Printing Office*, MSPB Docket No. AT-315H-09-0034-B-3.

[2] A hearing was conducted in the appellant's probationary termination appeal immediately prior to the hearing in this case. AT-4324-09-0264-I-4 AF, Tab 40, Initial Decision (I-4 ID) at 2. The parties agreed that testimony in that hearing would be considered as evidence in the instant appeal. I-4 AF, Tab 28 at 3.

approved shelter. B-3 ID at 4; HCD (Dixon). The appellant began arguing with her, so she told him that he should contact David Spiers, Manager of the Secure Production Facility. B-3 ID at 4; HCD (Dixon).

¶4 The appellant testified below and contends on review that he then telephoned Spiers and that Spiers told him that he could bring his son to the facility. HCD (appellant); Petition for Review (PFR) File, Tab 1 at 1. Based on Spier's hearing testimony, however, the administrative judge found that the appellant called Spiers on August 29, 2008, and asked whether the appellant could bring his 3-year old son with him to the Secure Production Facility, that Spiers told the appellant that he could not because the facility was not safe for small children, that the appellant repeated his request numerous times during the conversation and argued the point, and that Spiers again told the appellant that young children were not allowed. B-3 ID at 4; HCD (Spiers).

¶5 The administrative judge found, and the appellant does not dispute, that on August 31, 2008, the night of the storm, the appellant arrived at the Secure Production Facility with his 3-year old son, his fiancée's 20-year old son and 80-year old mother, along with a truck, camping trailer, and three more vehicles, that two members of the ride-out crew informed him that young children were not permitted at the facility and that they would have to go to a NASA-approved shelter, and that the appellant replied that Spiers had given him permission to bring his son with him. B-3 ID at 5; *see also* AT-315H-09-0034-B-1 AF, Tabs 2f-g (statements of rideout crew members William Garber and Rachel Trussel).

¶6 The administrative judge also found, and the appellant also does not dispute, that the appellant again called Spiers on August 31, 2008, to discuss allowing his 3-year old son, as well as an 80-year old woman, to stay at the Secure Production Facility. B-3 ID at 5. Spiers testified, and the administrative judge found, that Spiers told the appellant again that his answer was "no" and that the appellant should go to the main NASA facility which could accommodate them. B-3 ID at 5; HCD (Spiers). The appellant testified that, during this phone

call, Spiers told him that, "if you were married to her [the fiancée] you wouldn't be having these problems," or words to that effect. B-3 ID at 6; HCD (testimony of the appellant). The administrative judge determined that the appellant's testimony in this regard was not credible, and instead credited Spiers's testimony that he did not make such a statement. B-3 ID at 7; HCD (Spiers).

¶*7* Spiers further testified, and the appellant does not dispute, that the appellant later telephoned him again, informing him that the main NASA shelter was unacceptable and he wanted part of his group to stay at the Secure Production Facility. B-3 ID at 5-6; HCD (Spiers). Spiers stated that he told the appellant that he didn't want anybody from the appellant's party staying at the facility because a member of the rideout crew told Spiers that the appellant had been behaving in a threatening manner and that the members of the crew were scared by his behavior. B-3 ID at 6; HCD (Spiers). Spiers also testified that after the Secure Production Facility reopened, he notified his superiors as to what had transpired, that they recommended that the appellant be terminated during his probationary period, and that Spiers followed that recommendation. B-3 ID at 6; HCD (Spiers).

¶*8* Based on the foregoing, the administrative judge denied the appellant's request for corrective action, finding that the agency terminated the appellant because he failed to follow instructions and engaged in improper and disruptive conduct, and further, that the appellant failed to prove that his military service was a basis for his termination. I-4 ID at 4. The appellant now seeks review of administrative judge's initial decision. PFR File, Tab 1.

ANALYSIS

The parties' additional submissions on review

¶9 As an initial matter, we note that the administrative judge advised the parties in the initial decision that absent the filing of a petition for review by June 29, 2011, the initial decision would become the final decision of the Board. I-4

ID at 5. The appellant submitted four substantive documents prior to that date, which we have considered together as his petition for review. PFR File, Tabs 1, 3-4, 7. After the close of the record on review, the appellant filed additional substantive submissions. PFR File, Tabs 15-17. He has not shown that these submissions contain evidence and/or argument that was not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i). Thus, the Board has not considered these additional submissions.

¶10 We further note that the agency's response to the appellant's petition for review was untimely filed. PFR File, Tab 11. Although the agency filed a request for an extension of time to submit its response by July 20, 2011, which was granted, it did not file until July 21, 2011, 1 day late. PFR File, Tabs 9-10. The agency included in its response a request to waive the filing deadline for good cause shown. PFR File, Tab 11. Under the Board's regulations, any response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, and the motion must include, inter alia, an affidavit or sworn statement that includes a specific and detailed description of the circumstances causing the late filing. 5 C.F.R. § 1201.114(f). Here, the agency's explanation fails to meet the foregoing requirements. Where a party's explanation for the untimeliness is not submitted in the form of an affidavit or a statement signed under penalty of perjury, it is insufficient to establish the assertions it contains. *See Cantrell v. U.S. Postal Service*, 32 M.S.P.R. 248, 250 (1987). Accordingly, we DENY the agency's motion and have not considered the agency's submission on review.

The administrative judge properly denied corrective action under USERRA.

¶11 In USERRA actions, there must be an initial showing by the employee, by preponderant evidence, that the employee's military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, also by preponderant evidence, that the action would have been taken for a valid reason despite the protected status. *Sheehan v. Department of the Navy*, 240

F.3d 1009, 1013 (Fed. Cir. 2001). Under 38 U.S.C. § 4311, "military service is a motivating factor for an adverse employment action if the employer 'relied on, took into account, considered, or conditioned its decision' on the employee's military–related absence or obligation." *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009).

¶12 Here, the administrative judge correctly determined that the appellant presented no evidence to show that his military service was a motivating factor in his termination. I-4 ID at 3. In this case, the agency's decision to terminate the appellant was based not on his military service, but rather on conduct that occurred while he was on a pass during his active military duty status with the U.S. Air Force Reserves. *Strausbaugh v. Government Printing Office*, MSPB Docket No. AT-315H-09-0034-I-1 AF, Tab 13, Subtab 3. USERRA, however, only prevents discrimination on account of service in the military; it does not prohibit an agency from considering events which occur during an employee's service. *See Daniels v. U.S. Postal Service*, 88 M.S.P.R. 630, ¶¶ 6-9, *aff'd*, 25 F. App'x 970 (Fed. Cir. 2001). Acceptance of the appellant's position would result in an agency having to disregard misconduct, however egregious, if it occurred during an employee's military service. Nothing in USERRA requires such a result. Therefore, although there is no dispute that the conduct at issue occurred while the appellant was on active military duty status, it does not follow that the agency's decision to terminate him for that conduct establishes that its decision was motivated by his military status.

¶13 Further, to establish USERRA discrimination, an appellant must show he was treated more harshly than non-veterans. *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶ 18 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001). The appellant, however, does not make such a claim, and there is no evidence in the record to support it. Indeed, the administrative judge concluded that the appellant would have been terminated for his conduct at the Secure Production Facility regardless of whether he was an Air

Force Reservist. I-4 ID at 4. We find no error in the administrative judge's determination that the appellant failed to establish discrimination because of his military service. To the extent the appellant disagrees with the administrative judge's credibility findings and weighing of the evidence, the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. Consequently, we discern no reason to re-weigh the evidence or substitute the Board's own judgment on credibility issues. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987).

¶14 Finally, the appellant claims that the administrative judge erred in failing to notify him prior to the close of the record that he had not met his burden under USERRA and allowing him an additional opportunity to do so. PFR File, Tab 1 at 4. The appellant's contention lacks merit. Here, the administrative judge properly informed the appellant of the elements and burdens of proof in establishing his USERRA claim. I-4 AF, Tab 28 at 4. The administrative judge had no obligation, prior to issuance of the initial decision, of advising the appellant that he had failed to establish such a claim.

¶15 After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the appellant's petition for review.

ORDER

¶16 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.