UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 65

Docket No. NY-0752-10-0180-I-2

Wesley K. Brown,
Appellant,
v.
Social Security Administration,
Agency.

April 27, 2012

Daniel Kravetz, New York, New York, for the appellant.

Thomas Gray and Tracy Udell, New York, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for a review of an initial decision sustaining his removal and debarment from employment with the Social Security Administration for a period of 3 years. For the reasons discussed below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order and SUSTAIN the appellant's removal and debarment.

BACKGROUND

¶2 Prior to his appointment with the Social Security Administration (SSA), the appellant was employed by the U.S. Postal Service (USPS). Petition for Review (PFR) File, Tab 1 at 1, Tab 7 at 24-26; MSPB Docket No. NY-0752-10-0180-I-2,

Initial Appeal File (IAF-2), Tab 6 at 2. On July 19, 2009, the appellant was hired by SSA as a Contact/Teleservice Representative (TSR), GS-07. MSPB Docket No. NY-0752-10-0180-I-1, Initial Appeal File (IAF-1), Tab 5 at 33.[1]

¶3 As a TSR, the appellant had access to information on "virtually every citizen and large numbers of non-citizens," including an individual's social security number, date of birth, place of birth, mother's name, father's name, and Internal Revenue Service data including records of earnings and where the individual was working. IAF-2, Tab 13, Hearing Transcript (HT) at 86 (testimony of deciding official), 16 (testimony of proposing official); IAF-1, Tab 5 at 20. If the individual were an SSA beneficiary using direct deposit, the appellant could also access that person's bank account information. HT at 16 (testimony of proposing official). As a TSR, the appellant had the ability to make changes to Social Security records without supervisory approval. HT at 86 (testimony of deciding official). The Standard Form 50 (SF-50) pertaining to the appellant's appointment indicated that the appointment was "subject to satisfactory completion of [a] required security and/or suitability investigation." IAF-1, Tab 5 at 33. Accordingly, the agency requested a background check on the appellant from the Office of Personnel Management (OPM), which ran a National Agency Check with Inquiries (NACI). HT at 23, 29-30 (testimony of proposing official).[2]

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[1] MSPB Docket No. NY-0752-10-0180-I-1 was dismissed without prejudice on May 27, 2010, because the administrative judge believed that the Board's then-pending decisions in *Aguzie v. Office of Personnel Management* and *Barnes v. Office of Personnel Management* might be pertinent to this case. IAF-1, Tab 11, Initial Decision at 2-3. However, she ultimately found that the appellant failed to establish that he was an "employee" under 5 U.S.C. § 7511(a)(1). IAF-2, Tab 14, Initial Decision at 8 n.6. The appellant has not challenged this finding on review.

[2] SSA procedures require that employees be fingerprinted when they enter on duty and that the FBI check the individual's fingerprints to determine if the individual has a criminal history. IAF-2, Tab 9 at 26. This is consistent with Executive Order No. 10450 § 3(a), which states that: "The appointment of each civilian officer or employee

¶4 The background check performed on the appellant revealed that, prior to beginning his employment with SSA, the appellant applied for a position with the Federal Bureau of Investigation (FBI). IAF-2, Tab 9 at 5, Tab 12 at 3. As part of the FBI application process, the appellant agreed to undergo polygraph testing, which was conducted on July 14, 2008. IAF-2, Tab 9 at 5, Tab 12 at 3. During the 2008 polygraph, the appellant gave answers that were determined to be "indicative of deception." IAF-1, Tab 5 at 37. In a post-test interview with the FBI, the appellant signed statements admitting to the following conduct:

(1) The appellant's relative allowed the appellant to register his vehicle at the relative's residence in Albany, NY instead of Manhattan so that the appellant's insurance rates would be lower.

(2) The appellant's cousin obtained credit cards fraudulently and gave the appellant a $100 gift card on one occasion which the appellant then gave to a friend.

(3) While in graduate school, the appellant would obtain other students' identification information and use this information to obtain fraudulent credit cards. The appellant did this on three to five occasions and applied for credit cards in the names of the other students. He used these cards to purchase merchandise.

(4) During college, when the appellant went shopping at the mall, he would shoplift items. He also shoplifted since leaving college, including one event as recently as a week before the polygraph exam.

(5) In 2007, the appellant was sued by a creditor for $11,000. At one point, the creditor attempted to collect the debt, and the debt eventually went to civil

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in any department or agency of the Government shall be made subject to investigation… [I]n no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation …."

court. "All along [the appellant] knew this debt was truly [his] but [he] did not want to pay it. [He] told the creditor via an affidavit that this debt was NOT [his] when it actually was."

(6) In the pre-test interview and application with the FBI, the appellant stated that another particular debt was not his "due to 'identity theft'" but following the polygraph the appellant admitted that the debt was actually his. IAF-1, Tab 5 at 37-39.

¶5 The agency placed the appellant on administrative leave starting on February 16, 2010. IAF-2, Tab 9 at 5, 16. On February 19, 2010, the agency proposed the appellant's removal and debarment from employment with SSA for a period of three years under 5 C.F.R. § 731 for "dishonest conduct." IAF-1, Tab 5 at 27-28. In his response to the notice of proposed action, the appellant alleged that he had been the subject of discrimination based upon race (black) and sex (male) and that the agency's request for the polygraph results was part of a management official's "campaign of sexual harassment" towards him. *Id* at 15. The appellant also contended that, because no other SSA employees were the subject of an FBI polygraph, he had been subjected to disparate treatment. *Id*. In the agency's notice of decision, the deciding official explained why he found the appellant's arguments unpersuasive. *Id*. at 18-19. The appellant was then informed that he was removed effective April 2, 2010, and barred from employment with SSA until March 25, 2013. *Id*. at 19, 21.

¶6 The appellant filed a timely appeal, asserting race and sex discrimination and that he was subjected to a more extensive background check than was warranted. IAF-1, Tab 1 at 5, 7-8. In response to the administrative judge's order to provide information regarding his assertions of race and sex discrimination, the appellant stated that, because he came to the SSA from another "Federal agency," there was no reason for SSA to perform the background check and "specifically no need" to obtain the FBI report from his polygraph. IAF-1. Tab 6 at 2. In his pre-hearing submission, the appellant

asserted that the issues before the Board were whether: (1) the agency acted properly in requesting and obtaining the FBI report; (2) the agency acted properly in removing the appellant from his position based on the information in the FBI report; and (3) the agency's use of the FBI report was part of a campaign of sexual harassment. IAF-2, Tab 10 at 3.[3]

¶7 Following a hearing, the administrative judge determined that the agency proved by preponderant evidence that the appellant was unsuitable for employment with SSA and that the appellant failed to prove his affirmative defenses of race or sex discrimination. IAF-2, Tab 14, Initial Decision (ID). The administrative judge addressed whether the background investigation and use of the FBI report were discriminatory, but did not address whether the agency's investigation and possession of the report was improper for other reasons. ID at 17.

¶8 The appellant filed a timely Board appeal in which he asserts that the administrative judge: (1) failed to address whether it was appropriate for SSA to perform the background check in light of the appellant's previous employment with USPS; (2) failed to address whether SSA was authorized to receive the FBI report; and (3) erred in relying on the testimony of Ms. Freeburn (the proposing official) to conclude that the agency's actions were not the result of sexual harassment. PFR File, Tab 1; *see* IAF-1, Tab 5 at 28. The agency filed a timely response in opposition. PFR File, Tab 3.

¶9 In October 2011, the Clerk of the Board issued a notice and order regarding the appellant's affirmative defense, specifically providing information about background checks permitted under 5 C.F.R. Part 731. PFR File, Tab 4. The

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[3] The prehearing conference memorandum did not address the appellant's affirmative defenses other than race and sex discrimination, and the administrative judge did not discuss why she did not include as a defense the appellant's assertion that the agency acted improperly in conducting the investigation or requesting and obtaining the FBI report. IAF-1, Tab 1 at 5, 8; IAF-2, Tab 12.

order afforded the appellant the opportunity to provide evidence to show that the agency's decision to conduct a background investigation and its possession and use of the FBI report were improper. The Board also ordered the agency to reply to any submissions by the appellant on this issue. *Id*. The parties responded to this order.[4] PFR File, Tabs 4-7.

ANALYSIS

A background check to determine the appellant's suitability was required by Federal regulations.

¶10 Once properly instructed with respect to his affirmative defenses, an appellant bears the burden to prove by preponderant evidence any affirmative defense. 5 C.F.R. § 1201.56(a)(2)(iii); *see Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 12 (2010) (holding that an appellant must be given notice of the burdens and elements of proof for any affirmative defenses).[5] The federal regulations in place at the relevant time stated that an investigation was required when a person was hired into a covered position unless the person had already undergone a background investigation and one of four additional criteria was met. 5 C.F.R. § 731.104(a) (2009).[6] A "[c]overed position means a position in the

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[4] The agency was provided 10 calendar days after service of the appellant's submission in which to respond, but because the appellant was granted additional time to respond, the agency waited until the appellant's new deadline expired in order to address any new submissions, and then filed its response 5 calendar days after the appellant's new deadline. PFR File, Tab 5, Tab 7 at 5. The agency's response is therefore deemed timely.

[5] While the administrative judge erred when she failed to inform the appellant of how he could prove his affirmative defense of harmful procedural errors, the Clerk of the Board's October 7, 2011 order provided the requisite instructions and an opportunity to submit evidence and argument on that issue. PFR File, Tab 4; *see Wynn*, 115 M.S.P.R. 146, ¶ 12.

[6] The language from 5 C.F.R. Part 731 used here was in effect at the time the appellant was hired and the background investigation was performed. *See* 73 Fed. Reg. 66492 (Nov. 10, 2008); *but see* 76 Fed. Reg. 69608 (Nov. 9, 2011) (modifying 5 C.F.R.

competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service." 5 C.F.R. § 731.101(b). The appellant's position with SSA was in the competitive service and thus was a covered position. IAF-1, Tab 5 at 33.

In response to the order from the Clerk of the Board, the appellant admits that he is unable "to provide specific evidence… of the background check that was conducted by the Postal Service when he was hired by them." PFR File, Tab 6 at 2. However, the appellant has provided evidence that when the Postal Service performs background checks it uses OPM's services. *Id*. at 2, 5-8, 10.

¶11 In the absence of clear evidence to the contrary, public officials are presumed to have properly discharged their official duties. *U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) (holding "that a presumption of regularity attaches to the actions of Government agencies"); *Dow v. General Services Administration*, 109 M.S.P.R. 342, ¶ 11 (2008). Thus, if OPM had previously performed a background check on the appellant for the Postal Service and under its own regulations a new check of the appellant's record was not warranted, we presume that OPM would not have performed this check and would have notified the agency that such a check was not warranted. The agency has provided evidence that it is OPM's practice to provide such notifications. PFR File, Tab 7 at 22. Because the regulations require that a background check must have been conducted in order to exempt an individual from a new check, and the appellant has not shown that a background check occurred prior to his employment with SSA, the appellant has not shown that the background check performed in 2009 was improper. *See* 5 C.F.R. § 731.104 (2009).

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§ 731.104 to add a fifth criteria). We note that under the regulations that took effect in 2011, the outcome of this case would not differ.

Because SSA was authorized by the appellant to obtain the FBI's information about the appellant, its use of this information cannot constitute harmful procedural error.

¶12 Harmful procedural error is defined as error by an agency in the application of its procedures that is 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. 5 C.F.R. § 1201.56(c)(3). Thus, by definition, a harmful procedural error by the agency cannot be found if the agency has not erred. *Id*. The record shows that the appellant signed an OF-306, Declaration for Federal Employment, which stated: "**I consent** to the release of information about my ability and fitness for Federal employment by employers, schools, law enforcement agencies, and other individuals and organizations to investigators, personnel specialists, and other authorized employees or representatives of the Federal Government." PFR File, Tab 7 at 19 (emphasis in original). The appellant also signed an SF-85 release form, which stated:

> **I Authorize** any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

PFR File, Tab 7 at 16 (emphasis in original).

¶13 Thus, the record indicates that on two separate occasions the appellant expressly authorized the FBI, as a law enforcement agency or a criminal justice agency, to release information about his fitness for employment to investigators, personnel specialists, and other authorized Government employees. *Id*. at 16, 19. Therefore, there was nothing improper about OPM—as the agency investigating the appellant—obtaining information about the appellant's suitability from the FBI or providing that information to SSA's personnel specialists. Similarly, there

was nothing improper about SSA using the information to determine if the appellant was suitable for employment, as that was the express reason for the appellant's authorization. *Id*. at 19. As there was no error by the agencies involved in SSA obtaining and using this information, by definition there could not be harmful error in the acquisition and use of this information. 5 C.F.R. § 1201.56(c)(3).

The administrative judge did not err when she determined that the appellant failed to prove the affirmative defenses of racial discrimination, sex-based discrimination, or sexual harassment.

¶14 The appellant asserted that he was subjected to disparate treatment on account of his race (black) and sex (male) when the agency requested a copy of the FBI's investigative polygraph report. IAF-2, Tab 6; PFR File, Tab 1. The appellant asserts that the administrative judge erred in evaluating these assertions because she "relied excessively" on the testimony of Ms. Freeburn. PFR File, Tab 1 at 2. However, the initial decision indicates that the administrative judge did not rely upon Ms. Freeburn's conclusions regarding the appellant's allegations but that she noted Ms. Freeburn's testimony and relied upon the record as a whole in evaluating the appellant's discrimination claims. ID at 13-21. Furthermore, we discern no error by the administrative judge with respect to her own conclusions that the appellant failed to prove his allegations of hostile work environment or quid pro quo sexual harassment. ID at 18-20; IAF-2, Tab 10, Ex. B at 1-2. Accordingly, the appellant's removal and debarment are 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 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 20013

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. § 2000e-5(f); 29 U.S.C. § 794(a).

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:

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