UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 68

Docket No. DA-0752-10-0450-I-2

Herman J. Gath,

Appellant,

v.

United States Postal Service,

Agency.

April 27, 2012

Allen C. Miller, Esquire, Daniel E. Davillier, Esquire, and George Weatz, Esquire, New Orleans, Louisiana, for the appellant.

Paul C. Wolf, Esquire, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal and found that he failed to prove his affirmative defense of retaliation for equal employment opportunity (EEO) activity. For the reasons set forth below, we VACATE the initial decision and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency employed the appellant, a preference eligible, as a City Carrier at the agency's Central Carrier Station in New Orleans, Louisiana. Initial Appeal

File (IAF), Tab 6 at 74. On September 28, 2009, the agency issued the appellant a notice of proposed removal based on the charges of "Unsafe Work/Driving Practice" and "Unacceptable Conduct" after the appellant was involved in a motor vehicle accident on August 12, 2009. *Id.* at 81. The appellant did not respond to the notice of proposed removal. *Id.* at 75. On October 28, 2009, the agency informed the appellant that he was removed effective October 31, 2009. *Id*. at 75-76.

¶3 The appellant filed both a grievance on October 17, 2009, and a formal EEO complaint of discrimination based on color (fair-skinned Black) and retaliation (prior protected EEO activity) on December 1, 2009, regarding his removal. *Id.* at 46, 53. On April 12, 2010, the agency issued a final agency decision on his EEO complaint finding no discrimination or retaliation. *Id.* at 72, 73. Thereafter, on April 28, 2010, following an arbitration hearing, the arbitrator issued a decision denying the grievance and finding that the agency had just cause to remove the appellant based upon the alleged misconduct. *Id.* at 29-45.

¶4 On May 18, 2010, the appellant filed an appeal of his removal with the Board. IAF, Tab 1. Thereafter, on June 14, 2010, the agency moved to dismiss the appeal for lack of jurisdiction, asserting that the appeal was barred by the doctrine of collateral estoppel. IAF, Tab 6 at 6-9. The appellant replied in opposition to the agency's motion to dismiss, primarily claiming that his appeal was not barred by the doctrine of collateral estoppel because the arbitrator did not address the main issue in his appeal, i.e., whether his removal from the agency was retaliation for his prior protected EEO and union activities. IAF, Tab 9 at 4-6, 16-17.

¶5 On January 11, 2011, the administrative judge held a telephonic prehearing conference and issued a summary regarding the contents of that conference. Refiled Appeal File (RAF), Tab 8 at 1. The administrative judge determined that, based on the doctrine of collateral estoppel, the hearing would focus solely on the reasonableness of the penalty and the appellant's affirmative defenses. *Id.* at 2.

She therefore determined that the following issues were in dispute and that all others would be precluded from consideration: (1) whether the penalty of removal was appropriate and promoted the efficiency of the service; (2) whether the appellant's removal was based on prohibited consideration of his color (fair complexion); and (3) whether the appellant's removal was in reprisal for his prior protected EEO activity. *Id.* at 1. The administrative judge indicated that the appellant confirmed he was not raising any affirmative defenses in addition to those already specified in the summary, and informed the parties that, if either party disagreed with the summary, an objection or motion to supplement must be submitted by January 25, 2011. *Id.* at 2, 5. Neither party submitted a reply. At the start of the hearing, the appellant withdrew his affirmative defense of color discrimination. Hearing Compact Disc (CD). After holding the requested hearing via videoconference, the administrative judge found that the appellant failed to establish the agency removed him in retaliation for his prior protected EEO activity and that the removal penalty was within the bounds of reasonableness. RAF, Tab 20.

¶6 The appellant has filed a petition for review. Petition for Review File (PFR File), Tab 1. The agency has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

¶7 In his petition for review, the appellant argues that the deciding official, in selecting the penalty of removal, improperly considered the appellant's past disciplinary record of a 30-day suspension and failed to properly consider the *Douglas* factors. PFR File, Tab 1. He also argues that the administrative judge erred in finding that he failed to establish his affirmative defense of retaliation. *Id.*

¶8 The appellant fails to set forth any reason to disturb the administrative judge's finding that the deciding official correctly considered the appellant's

30-day suspension in assessing the penalty. Notably, the appellant relies on *Jones v. U.S. Postal Service*, 103 M.S.P.R. 561 (2006), to support his position that the agency was precluded from considering the suspension as an aggravating factor in the disciplinary action at issue based upon language in a grievance decision that reduced a previous removal penalty to the aforementioned 30-day suspension. PFR File, Tab 1 at 18-19. We find, however, that *Jones* supports the finding of the administrative judge in this matter because there is no indication that the agency intended the 30-day suspension to be non-punitive in nature and, thus, non-citable in subsequent disciplinary actions. *See Jones*, 103 M.S.P.R. 561, ¶ 18. Accordingly, the appellant's argument is without merit.

¶9 We agree with the administrative judge that the deciding official's choice of penalty does not exceed the bounds of reasonableness. Specifically, the deciding official conscientiously considered all appropriate factors in selecting the penalty of removal, including the nature and seriousness of the offense, the appellant's work record, his length of service, the consistency of the penalty with those imposed upon other employees for the same or similar offenses, and his potential for rehabilitation. IAF, Tab 6 at 75-76; Hearing CD. Therefore, the administrative judge did not err in assessing the penalty.

¶10 We have also reviewed the administrative judge's finding that the appellant failed to establish his claim of retaliation for prior EEO activity, and we find no reason to disturb that finding. Despite our conclusions that the administrative judge did not err in assessing the penalty or in finding that the appellant failed to establish retaliation for prior EEO activity, we must nonetheless vacate the initial decision in its entirety because the agency's decision is ultimately sustainable under 5 U.S.C. § 7701(c)(2) only if, on remand, the appellant cannot establish his affirmative defenses. *See Guzman v. Department of Veterans Affairs*, 114 M.S.P.R. 566, ¶ 10 (2010).

¶11 When an appellant raises an affirmative defense in an appeal either by checking the appropriate box in an appeal form, identifying an affirmative

defense by name, such as "race discrimination," "harmful procedural error," etc., or by alleging facts that reasonably raise such an affirmative defense, the administrative judge must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 10 (2010). If an appellant expresses the intention to withdraw such an affirmative defense, the administrative judge must, at a minimum, in the close of record order or prehearing conference summary and order, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to withdrawal of the affirmative defense. *Wynn*, 115 M.S.P.R. 146, ¶ 10.

¶12 Here, we find that the appellant clearly alleged below that the agency removed him in retaliation for engaging both in protected EEO activity as well as protected union activity. IAF, Tab 9; RAF, Tab 7. However, the administrative judge did not consider the appellant's affirmative defense of retaliation for protected union activity in her initial decision, and there is no indication in the record that the administrative judge addressed the affirmative defense in a close of record order or prehearing conference summary and order. Thus, the record does not establish that the appellant withdrew or abandoned that affirmative defense, and remand for further adjudication of the affirmative defense is necessary.

¶13 On remand, the administrative judge shall afford the appellant an opportunity for discovery on his affirmative defense of retaliation for protected union activity and a supplemental hearing on that affirmative defense if he requests one. Because we are remanding the case for further proceedings regarding the appellant's affirmative defense of retaliation for protected union activity, the administrative judge must "issue a new initial decision that addresses this affirmative defense and its effect on the outcome of the appeal, if any, giving appropriate consideration to any additional relevant evidence developed on remand." *Viana v. Department of the Treasury*, 114 M.S.P.R. 659, ¶ 8 (2010);

see Guzman, 114 M.S.P.R. 566, ¶ 9 (if the appellant prevails on the affirmative defense(s), the agency action cannot stand). However, if the appellant does not prevail on that affirmative defense on remand, the administrative judge may adopt her prior findings in her new initial decision. *See Viana*, 114 M.S.P.R. 659, ¶ 8.

ORDER

¶14 Accordingly, we REMAND the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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