UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 55

Docket No. DC-531D-11-0217-B-1

Svetlana Oulianova,

Appellant,

v.

Pension Benefit Guaranty Corporation,

Agency.

July 22, 2013

Stuart E. Bernsen, Washington, D.C., for the appellant.

Monica Pogula, Esquire, and Raymond Forster, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the remand initial decision that affirmed the Pension Benefit Guaranty Corporation (PBGC)'s reconsideration decision that denied her a within-grade increase (WIGI).[1] For the reasons set forth below, we GRANT the petition for review, REVERSE the remand initial

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

decision to the extent that it affirmed PBGC's reconsideration decision, and AFFIRM the remand initial decision to the extent that it denied the appellant's claim of retaliation for protected equal employment opportunity (EEO) activity.

BACKGROUND

¶2 The appellant is a GS-12-2 Actuary with PBGC's Benefit Administration and Payment Division. Initial Appeal File (IAF), Tab 4 at 69. PBGC rated the appellant's overall performance as "below expectations" (Level 2) for Fiscal Year (FY) 2010, October 1, 2009, to September 30, 2010. *Id*. at 73. PBGC denied her WIGI scheduled for September 12, 2010, on the basis that her overall rating fell below the acceptable level of competence, i.e., the "meets expectations" level (Level 3). The appellant sought reconsideration, and PBGC issued a reconsideration decision sustaining the WIGI denial. *Id.* at 63-68.

¶3 The appellant filed a Board appeal. IAF, Tab 1. The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 19, Initial Decision. However, the Board reversed the initial decision, finding that the Board has jurisdiction over the appeal and remanding the appeal for further adjudication. *Oulianova v. Pension Benefit Guaranty Corporation*, MSPB Docket No. DC-531D-11-0217-I-1, Nonprecedential Final Order (Nov. 9, 2011); Remand File (RF), Tab 1.

¶4 After a hearing, the administrative judge issued a remand initial decision affirming PBGC's reconsideration decision. RF, Tab 14, Remand Initial Decision (RID) at 2, 20. He found that PBGC's performance management program complies with 5 C.F.R. §§ 430.102-.405, the appellant's performance standards are valid, and PBGC communicated the standards to the appellant. RID at 5-9, 14. The administrative judge also found that the PBGC proved that the appellant received a "below expectations" rating for Mission Objective 1, based on her failure to timely and accurately complete two actuarial case reports, and received an overall rating of "below expectations." RID at 9-18. Because he concluded

that PBGC proved by substantial evidence that the appellant's performance during FY 2010 fell below the acceptable level of competence, i.e., the "meets expectations" level, the administrative judge found that PBGC properly denied the appellant a WIGI. RID at 18-19. Finally, the administrative judge found that the appellant failed to prove her affirmative defense of retaliation for EEO activity.[2] *Id.* at 18-19.

¶5 The appellant has filed a petition for review.[3] Petition for Review (PFR) File, Tab 1. PBGC has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

PBGC failed to support its WIGI denial by substantial evidence.

¶6 Under 5 U.S.C. § 5335(a), an employee who occupies a permanent General Schedule position, is paid on an annual basis, and has not reached the maximum rate of pay for the grade of her position is entitled to periodic step increases in pay at set intervals subject to the following conditions: (1) The employee has not already received an equivalent increase in pay from any cause during that period; and (2) the employee is performing at an acceptable level of competence. *See* 5 C.F.R. § 531.404. For the purposes of granting or denying a WIGI, "acceptable level of competence" means that the employee achieved a "fully successful," i.e., a Level 3 rating or better, on her most recent rating of record. 5 C.F.R.

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[2] Regarding the appellant's claims of harmful error, prohibited personnel practices, and acts not in accordance with the law, the administrative judge considered the substance of these claims in analyzing the merits of the WIGI determination instead of treating them as affirmative defenses. RF, Tab 5 at 5.

[3] The appellant alleges, inter alia, that that the administrative judge was biased in favor of PBGC. Petition for Review (PFR) File, Tab 1 at 24 n.17. However, this bare assertion fails to establish a deep-seated antagonism towards the appellant that would make fair judgment impossible, in order to overcome the presumption of the administrative judge's honesty and integrity. *See Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002); *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980).

§§ 531.404(a), .409(b). For agencies not covered by chapter 43 and for employees in positions excluded from 5 U.S.C. § 4301, an acceptable level of competence determination is based on performance appraisal requirements established by the agency. 5 C.F.R. § 531.409(b).

¶7 Although the requirements under 5 U.S.C. chapter 43 apply to executive agencies and the Government Printing Office, 5 U.S.C. § 4301(1), the statute expressly excludes government corporations from the definition of "agency." 5 U.S.C. § 4301(1)(B)(i). A "government corporation" is defined as "a mixed-ownership Government corporation and a wholly owned Government corporation." 31 U.S.C. § 9101(1). PBGC is a wholly owned government corporation under 31 U.S.C. § 9101(3) and therefore is not bound by the requirements under 5 U.S.C. chapter 43. *See* IAF, Tab 4 at 98. Because PBGC did not establish a chapter 43 performance appraisal plan for the appellant,[4] PBGC need only prove by substantial evidence that the appellant failed to perform at an acceptable level of competence, which is determined based upon PBGC's performance appraisal requirements. *See* 5 C.F.R. §§ 531.409(b), 1201.56(a)(1)(i).

¶8 On review, the appellant contends that the administrative judge erred in affirming PBGC's reconsideration decision that denied her a WIGI. PFR File, Tab 1. She alleges, inter alia, that PBGC did not take into consideration all of her work for the performance period in issuing her FY 2010 performance appraisal

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[4] On review, the appellant reasserts that her performance standards are invalid and that her performance standards were not communicated to her. PFR File, Tab 1 at 4-5, 21-24. Although PBGC is not bound by the requirements under chapter 43, PBGC maintains that its performance management program aligns with the requirements under 5 C.F.R. §§ 430.102-.405. IAF, Tab 4 at 98. Under these particular circumstances, we construe the appellant's claims as allegations of harmful error. Nevertheless, because we are reversing the WIGI denial, we do not reach these issues. *See Hejka v. U.S. Marine Corps*, 9 M.S.P.R. 137, 140 (1981) (because the Board reversed the agency's action based on its failure to prove the charges, it did not reach the appellant's arguments regarding harmful error and the appropriateness of the penalty).

and that PBGC failed to rate her on all of her performance objectives and sub-objectives; thus, PBGC failed to prove by substantial evidence that she did not perform at an acceptable level of competence on her most recent rating of record. *See* PFR File, Tab 1 at 4-5, 10-13, 16-21, 24. We agree.

¶9 PBGC Actuaries are rated on a 5-tier performance scale, with 5 being the highest and 1 being the lowest. IAF, Tab 4 at 117-18. This same scale applies at three levels of generality: the overall performance rating, the ratings on three objectives, and the rating on any specified activities that may be required to meet the objectives. The overall performance rating is derived from a weighted average of the employee's ratings on three objectives. *Id*. The ratings on the objectives are, in turn, derived from an average of ratings on any applicable activities. *Id*. at 74-78.

¶10 In this case, the PBGC assigned the appellant an overall rating of 2—"below expectations"—for FY 2010. IAF, Tab 4 at 72-73. PBGC derived this overall rating from ratings of 2, 3, and 3 on Objectives 1, 2, and 3 respectively. *Id*. We find nothing incorrect in this calculation. However, we find no evidence that PBGC calculated the appellant's rating for Objective 1, Case Processing, based on numerical ratings for each of the five underlying activities, as it was required to do: (1) performs early trusteeship actuarial activities; (2) assists with valuation database construction; (3) completes actuarial case report; (4) prepares closeout package; and (5) participates in other actuarial duties. *Id*. at 74-78. Rather, it appears that PBGC based its rating solely on activities 3 and 4 and only with respect to some of the cases that the appellant worked on during the appraisal period. *Id*. at 64-65, 70-71, 83-85, 92, 160. We acknowledge that, if an employee's work plan does not project that she will complete a certain type of activity during the rating period, then that activity will not figure into the calculation. *Id*. at 74. However, the work plans that PBGC submitted indicate that the appellant was assigned projects covering all five activities and covering more cases than PBGC discussed in its final performance review and its decisions

to deny the appellant's WIGI. *Id*. at 83-85, 92, 160. Moreover, PBGC has established a specific mathematical formula for rating its Actuaries on Objective 1. *Id*. at 74-78. Nothing in the record suggests that PBGC even attempted to employ this formula in arriving at its rating much less ascertain the variables that are supposed to figure into it. Rather, PBGC appears to have based its rating for Objective 1 on a vague notion supported by anecdotal examples that the appellant needs to be more accurate and punctual with her work. *Id*. at 83-84. Under the circumstances, we find that PBGC has failed to provide substantial evidence supporting its evaluation of the appellant's performance on Objective 1. *See Carpentino v. Veterans Administration*, 19 M.S.P.R. 138, 140-41 (1984) (the performance standards had specific objective numerical standards, and the agency failed to link the appellant's performance deficiencies to these numerical standards; it therefore failed to support its reconsideration decision by substantial evidence). Consequently, PBGC has failed to provide substantial evidence to support the appellant's overall performance rating for FY 2010 and its decision to deny her WIGI.[5]

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[5] The appellant argues that the administrative judge should not have limited his consideration of the evidence to the two actuarial cases that PBGC cited in its WIGI decisions. PFR File, Tab 1 at 4-5, 16-18, 24; Hearing Transcript Part 1 at 217-223. We agree. The Board's review of WIGI decisions is not limited to the record before the agency. *Mattersdorf v. Department of Health & Human Services*, 11 M.S.P.R. 456, 458-59 (1982). The administrative judge should have considered all of the evidence relevant to the ultimate question of whether the appellant's performance was below an acceptable level of competence for FY 2010. Nevertheless, the appellant's substantive rights have not been prejudiced because the existing record is sufficient to support our determination that PBGC failed to carry its burden. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (an administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights).

¶11 For the reasons explained above, we REVERSE the remand initial decision insofar as it affirmed PBGC's reconsideration decision that denied the appellant a WIGI. PBGC's reconsideration decision is NOT SUSTAINED.[6]

The appellant has not proven her affirmative defense of retaliation for prior equal employment opportunity activity.

¶12 On review, the appellant argues that the administrative judge erred in disallowing her testimony regarding her second-line supervisor's feelings, attitudes, and statements about the appellant's EEO complaints. PFR File, Tab 1 at 5, 25; *see* Hearing Transcript (HT) Part 2 at 243-44, 253-54. Additionally, she reasserts her objection to the administrative judge's exclusion of rebuttal witnesses. PFR File, Tab 1 at 24; RF, Tabs 5, 7. However, it is well established that administrative judges have broad discretion to regulate the proceedings before them, including the discretion to exclude witnesses. *See Fritz v. Department of Health & Human Services*, 87 M.S.P.R. 287, ¶ 15 (2000) (noting "the well-established rule that administrative judges have broad discretion in regulating the proceedings before them"); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (an administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious).

¶13 The appellant had the opportunity to question her second-line supervisor at the hearing regarding these matters, but she apparently failed to elicit the testimony that she desired. *See* HT Part 2 at 78-87. She has not shown any abuse of discretion by the administrative judge in disallowing the appellant's testimony

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[6] As the Board explained in *Degani v. Department of the Air Force*, 1 M.S.P.R. 671, 674-77 (1980), the correct remedy in this situation, where the agency has failed to support its WIGI denial by substantial evidence, is for the WIGI to be granted retroactively. *Accord Nalls v. Department of the Air Force*, 46 M.S.P.R. 603, 608-09 (1991).

regarding her second-line supervisor's feelings, attitudes, and statements about the appellant's EEO complaints and in excluding the appellant's proffered rebuttal witnesses.

¶14 For an appellant to prove retaliation based on her prior EEO activity, she must show that: (1) she engaged in a protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Kohler v. Department of the Navy*, 108 M.S.P.R. 510, ¶ 11 (2008). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Id.*, ¶ 12.

¶15 Here, the appellant has shown no error in the administrative judge's finding that she failed to prove that a genuine nexus exists between her EEO activity and PBGC's WIGI decision. The record evidence supports the administrative judge's findings that: (1) there was no temporal proximity between the two actions because the appellant's EEO activity took place in 2007, she received a WIGI in 2009, and the negative WIGI decision at issue here occurred in 2010; and (2) the manager whom the appellant identified as having a retaliatory motive was not involved in the denial of the appellant's WIGI. *See* IAF, Tab 4 at 162; HT Part 2 at 180; *cf. Ireland v. Department of Health & Human Services*, 34 M.S.P.R. 614, 617-19 (1987) (finding a temporal proximity between the appellant's protected activity in June 1981, his unsatisfactory performance reviews from July through October 1981, and the October 1981 proposed removal action). These findings are supported by the record evidence and the applicable law, and we therefore AFFIRM these findings in the remand initial decision.

ORDER

¶16 We ORDER PBGC to cancel its denial action and to grant the appellant's WIGI retroactive to September 12, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). PBGC must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER PBGC to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in PBGC's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information PBGC requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER PBGC to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

¶18 We further ORDER PBGC 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 PBGC about its progress. *See* 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after PBGC 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 remand initial decision in this appeal if the appellant believes that PBGC did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that PBGC has not fully carried out the Board's Order, and should include the dates and results of any communications with PBGC. 5 C.F.R. § 1201.182(a).

¶20 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by PBGC for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the regional office that issued the remand initial decision.

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 review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

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) and 29 U.S.C. § 794a.

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.