U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 13, 2017

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BOARD DECISIONS

Petitioner: Special Counsel
Respondent: Katherine Coffman
Decision Number: 2017 MSPB 3
Docket Number: CB-1215-14-0012-T-1
Issuance Date: January 6, 2017
Appeal Type: Complaint for Disciplinary Action

Prohibited Personnel Practices

Pursuant to 5 U.S.C. §§ 1214(a)(1)(A) and 1215(a), the Special Counsel filed a complaint for disciplinary action against the respondent, the Deputy Assistant Commissioner for Human Resources Management at Customs and Border Protection (CBP), Department of Homeland Security (DHS). The Special Counsel charged the respondent with eight counts of prohibited personnel practices under 5 U.S.C. §§ 2302(b)(1)(E) and 2302(b)(6) based on her participation in CBP's efforts to hire three candidates, favored by the recently appointed CBP Commissioner (Commissioner), for career appointments. The Special Counsel alleged that the respondent discriminated in favor of these individuals, who previously had been political appointees working with the

Commissioner in his former role at DHS, by approving and certifying the results of three improperly manipulated competitive service packages with knowledge that the actions were intended to convert the noncareer political appointees to career appointments. The case against the respondent focused on: (1) the respondent's signatures on three cover letters forwarding the proposed competitive hiring actions to the Chief Human Capital Officer at DHS, who disallowed the appointments; and (2) the respondent's role in a subsequent effort to hire one of the three individuals, Applicant A, using a noncompetitive Schedule A authority.

Following a hearing, the administrative law judge (ALJ) assigned to the case declined to impose disciplinary action, finding that the Special Counsel did not prove any of the counts in its complaint by preponderant evidence. He found that the respondent's actions were ministerial in nature, and that even if she should have taken a more detailed review of the application packages before signing them, the Special Counsel had proven, at most, that she was negligent in her duties, not that she acted intentionally to advance the applications for improper reasons. The ALJ found that that these events were actually directed and accomplished by other persons, who were "apparently outside the reach of [OSC] or the Board's jurisdiction," and concluded that he was "left with the unmistakable impression that Respondent was charged solely because she was the last woman standing."

On review, the Special Counsel did not contest the ALJ's findings regarding the alleged violations of 5 U.S.C. § 2302(b)(1)(E), but again argued that the respondent granted unlawful hiring preferences in violation of 5 U.S.C. § 2302(b)(6).

Holding: The Board denied the Special Counsel's petition for review and affirmed the initial decision, finding no basis for disciplinary action.

1. **Section 2302(b)(6) of title 5 provides:**

   > **Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.**

2. **To establish a violation of 5 U.S.C. § 2302(b)(6), the Special Counsel must establish an intentional or purposeful taking of a personnel action**

in such a way as to give a preference to a particular individual for the purposes of improving his prospects. This standard is consistent with the plan text of the statute, which specifies that the preference must be given "for the purpose of" providing the improper advantage. Thus, whether the respondent violated 5 U.S.C. § 2302(b)(6) turns on whether she *intended* to afford preferential treatment to the three applicants in question.

3. **The Board found that, while the respondent's actions amounted to possible error or negligence, they did not rise to the level of intentionally committing an unlawful hiring practice. The Board stressed that its decision did not resolve whether illegal hiring practices did or did not happen. They may have, but the Special Counsel failed to prove that the respondent's actions showed that she intentionally granted an unlawful hiring preference in violation of 5 U.S.C. § 2302(b)(6).**

4. **The Board went on to provide a detailed, highly fact-specific explanation of its findings. In doing so, the Board rejected the Special Counsel's challenges to the ALJ's credibility determinations.**

Appellant: Robin Sabio
Agency: Department of Veterans Affairs
Decision Number: 2017 MSPB 4
Docket Number: NY-315H-13-0277-I-1
Issuance Date: January 6, 2017
Appeal Type: Probationary Termination

Discrimination
Board Procedures

After the appellant filed a Board appeal of her purported probationary termination, the agency determined that the appellant had completed her probationary period just before the effective date and time of her termination. Because the agency had improperly terminated the appellant without providing her the notice and opportunity to respond that is due a tenured Federal employee, the agency agreed to rescind the removal notice, return the appellant to her term position, and restore her to the status quo ante. Although the agency rescinded her termination, the appellant continued pursuing her hostile work environment and race-based discrimination claims with the Board.

After affording the appellant an opportunity to clarify her affirmative defenses, the administrative judge struck her hostile work environment affirmative defense, finding that she had failed to make a nonfrivolous allegation that she was subjected to a hostile work environment that resulted in her unacceptable performance. However, the administrative judge found that the appellant had sufficiently alleged discrimination based on race and held the appellant's requested hearing on this claim. In the initial decision, the administrative judge found that the appellant failed to show by preponderant evidence that her rescinded termination was motivated in any part by race discrimination and that she failed to show that the agency's reasons in support of its action were a mere pretext for race discrimination. Thus, he denied the appellant's affirmative defense. The appellant petitioned for review of the initial decision.

Holding: The Board affirmed the initial decision as modified, to clarify when an administrative judge must hold a hearing on a discrimination claim raised in connection with an otherwise appealable action and to clarify the administrative judge's analysis of the race discrimination claim consistent with *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015).

1. **In asserting her hostile work environment defense, the appellant did not allege that she had been personally harassed on the basis of her sex, but rather that she was subjected to a hostile work environment when she observed inappropriate behavior of a sexual nature between two senior employees who were married to other individuals. The Board agreed with the administrative judge that the appellant was not entitled to a hearing on this defense.**

2. **In reaching that conclusion, the Board clarified the distinction between summary judgment and dismissal for failure to state a claim. Although the Board's procedures do not allow for summary judgment, *Savage*, 122 M.S.P.R. 612, ¶ 46 & n.10, the Board held that an administrative judge nonetheless may dispose of a discrimination claim raised in connection with an otherwise appealable action when the appellant's factual allegations in support of the discrimination claim are deficient as a matter of law. In other words, if an appellant fails to allege a cognizable claim of discrimination in connection with the otherwise appealable action, the claim may be disposed of without a hearing.**

3. **To the extent the administrative judge struck the appellant's hostile work environment defense for failure to establish a genuine issue of material fact in dispute by providing insufficient detail, he improperly**

rendered summary judgment on this issue. Nonetheless, the Board found that he properly struck the defense because, taking her allegations as true and drawing all reasonable inferences in her favor, she could not prevail on her hostile work environment as a matter of law. Her allegation that she and others in close proximity to her cubicle—without regard to their sex—were generally exposed to distracting office flirtation is not the type of situation covered by Title VII. Because the appellant's hostile work environment was facially deficient, a hearing on the claim would have been an empty ritual.

4. **Regarding the appellant's race-based discrimination affirmative defense, the Board found that the administrative judge improperly applied the *McDonnell Douglas* burden-shifting analytical framework, which the Board in *Savage* held has no application in Board proceedings. The Board thus modified the portion of the initial decision that applied the burden-shifting framework and supplemented the administrative judge's analysis consistent with *Savage*. After conducting its own analysis consistent with *Savage*, the Board agreed with the administrative judge's conclusion that the appellant failed to establish her race discrimination claim.**

Appellant: Lawrence Little, Jr.
Agency: United States Postal Service
Decision Number: 2017 MSPB 5
Docket Number: DC-0752-15-0108-I-1
Issuance Date: January 6, 2017
Appeal Type: Adverse Action by Agency
Action Type: Suspension – Enforced Leave

Mixed-case appeals
Timeliness

The appellant filed an equal employment opportunity (EEO) complaint alleging discrimination based on race, age, and disability, and in August 2013, the agency amended the complaint to include the appellant's receipt of a notice of proposed placement on enforced leave. Subsequently, in October 2013, the agency issued a decision sustaining the proposed enforced leave action. On January 8, 2016, the agency issued a final agency decision (FAD) finding no merit to the appellant's discrimination claims, and the FAD was delivered to the appellant's post office box on January 13, 2016.

The appellant filed a Board appeal on February 13, 2016. The administrative

judge issued a show cause order notifying the appellant that his appeal appeared to be untimely by 1 day, and that the Board appeared to lack jurisdiction, because the EEO complaint had not been amended to include the October 2013 enforced leave action. In response, the appellant argued, inter alia, that his appeal was timely filed because he did not receive the FAD until he checked his post office box on January 16, 2016. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's EEO complaint encompassed only the proposed enforced leave action. Having dismissed the appeal on jurisdictional grounds, the administrative judge did not reach the issue of timeliness. The appellant petitioned for review.

Holding: On review, the Board vacated the initial decision and instead dismissed the appeal as untimely filed with no good cause shown.

1. **The Board's regulations provide that when an appellant has filed a timely formal complaint of discrimination with the agency, a subsequent Board appeal must be filed within 30 days after the appellant receives the FAD. 5 C.F.R. § 1201.154(b). Under a prior version of the regulation, the 30-day time period began to run from the date of the appellant's actual receipt of the FAD, even in situations in which the appellant's receipt was delayed by his own negligence. However, under the current regulation, which became effective November 13, 2012, the date the appellant received the FAD is determined according to the standard set forth at 5 C.F.R. § 1201.22(b)(3), which provides for constructive receipt in certain circumstances. The rule provides several illustrative examples, including the following: "An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision."**

2. **Because the FAD was delivered to the appellant's post office box on January 13, 2016, he is deemed to have received it on that date, notwithstanding his assertion that he did not check his box every day. Thus, the deadline for filing a Board appeal was February 12, 2016. Because the appellant provided no evidence or argument regarding any additional circumstances that affected his ability to timely file his appeal, the Board dismissed the appeal as untimely filed without a showing of good cause for the 1-day delay.**

3. **Having found the appeal to be untimely filed, the Board declined to make a finding on the jurisdictional issue.**

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Victoria Calhoun
Respondent: Department of the Army
Tribunal: U.S. Court of Appeals for the Federal Circuit
Docket Number: **2016-2220** (MSPB Docket No. PH-0752-13-5389-I-1)
Issuance Date: January 12, 2017

Furloughs
Harmful Procedural Error
Due Process

At the time of the 2013 sequestration order, the appellant was employed by the U.S. Army Cyber Command (ACC). The Commander of ACC, who was the designated deciding official for the resulting furloughs of ACC employees, delegated his authority to his Chief of Staff. After receiving the notice of proposed furlough, the appellant made an oral presentation to an official whom the Chief of Staff had in turn designated to hear oral replies. In addition, she made a written response, which included budget proposals she asserted would prevent furloughs. The agency ultimately furloughed the appellant for 6 nonconsecutive days.

On appeal to the Board, the appellant argued that the furlough did not promote the efficiency of the service, that the agency committed harmful error by failing to consider her budget proposals, and that the Commander of ACC had improperly delegated his deciding official authority to his Chief of Staff. The administrative judge sustained the furlough action, and the appellant petitioned for review of the initial decision. On review, the appellant renewed her argument that the agency erred in delegating the responsibilities of deciding official to the Chief of Staff, and further asserted that the agency denied her due process because the Chief of Staff did not receive a written summary of her oral reply prior to issuing the decision letter. The Board found that the delegation did not introduce harmful procedural error, and further found no due process violation because the Chief of Staff received and considered the appellant's written reply and the summary of her oral reply would not have altered the furlough decision. The appellant then appealed to the Federal Circuit.

Holding: The Federal Circuit affirmed the Board's decision to uphold the furlough action.

1. **Although the appellant contended that her budget proposals would have averted furloughs, the Board correctly declined to second-guess agency management and spending decisions in applying the efficiency of the service standard.**

2. **Substantial evidence supported the Board's finding that the Chief of Staff reviewed the appellant's proposals prior to issuing the notice of decision. The Chief of Staff made a sworn declaration to that effect, and there was no contrary information.**

3. **The court next considered the appellant's argument that the agency improperly delegated deciding official authority because DOD furlough policies prohibited "further delegations" and the Chief of Staff was not at the identified minimum rank. The court agreed with the Board that the policy cited by the appellant contemplated that deciding official authority could be delegated several times, provided the deciding official was "no lower than a local Installation Commander, senior civilian or equivalent." In addition, substantial evidence supported the Board's determination that the Chief of Staff was no lower than a "local Installation Commander."**

4. **The court also rejected the appellant's contention that the agency deprived her of a meaningful reply because the Chief of Staff lacked authority to review and act on her budget proposals. While the deciding official must possess authority to take or recommend action, due process does not require unfettered discretion to take any action he or she believes is appropriate, nor does it require consideration of alternatives that are prohibited, impracticable, or outside of management's purview. Here, the authority of the deciding official—which was limited to determining whether the appellant was within one of the DOD-prescribed categories of exempted employees and whether a reduction in her furlough hours was necessary to the agency's mission—was commensurate with the nature of the furlough decisions.**

5. **The court rejected the appellant's contention that the two-member Board that issued the final decision was improperly constituted. The regulations contemplate that a Board may be composed of two members, 5 C.F.R. § 1200.3(e), and that two-member Board panels may issue final decisions when both members are in agreement, 5 C.F.R. § 1200.3(b)-(d).**

The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following cases:

Jones v. Merit Systems Protection Board, No. 2016-1711 (Jan. 10, 2017) (MSPB Docket No. DC-315I-12-0847-I-1)

The appellant in this case sought to appeal the Clerk of the Board's letter denying his third request to reopen his appeal. The court dismissed the case, finding that the Clerk's letter was not final order or decision of the Board, but rather an administrative response, over which the court lacks jurisdiction. The court distinguished the facts from those in *McCarthy v. Merit Systems Protection Board*, 809 F.3d 1365 (Fed. Cir. 2016), in which the Board's denial of a request to reopen was found to be reviewable because the Board had not previously considered an intervening change of law.

Weathersbee v. Department of the Treasury, No. 2016-2628 (Jan. 12, 2017) (MSPB Docket No. SF-0432-16-0634-I-1)

Following his performance-based removal, the appellant filed a Board appeal in which he alleged, inter alia, that he had not received any letter or official notice regarding his removal or appeal rights. The administrative judge affirmed the action and concluded that the appellant's purported failure to receive a copy of the final decision did not constitute harmful error. In particular, the administrative judge found that the agency had sent the appellant three copies of its decision—one by first class mail, another by first class certified mail, and the third by UPS overnight delivery—and that the appellant had rejected both the Postal Service and UPS deliveries as "Receiver did not want, refused delivery." The full Board affirmed the initial decision. On appeal, the court concluded that substantial evidence supported the Board's finding that the appellant was properly served with a copy of the termination decision, and that any harm suffered by the appellant because of his failing to read the letter or to acknowledge its receipt was not due to any action or inaction by the agency.

Barnes v. Department of Defense, No. 2016-1754 (Jan. 10, 2017) (MSPB Docket No. DC-0752-13-0357-M-1) (Rule 36 affirmance)