UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 59

Docket No. CB-1216-09-0021-T-1

Special Counsel,

Petitioner,

v.

Mikki DeWitt,

Respondent.

March 30, 2010

Erica S. Hamrick, Esquire, Washington, D.C., for the petitioner.

Nicole Eldredge, Esquire, Washington, D.C., for the petitioner.

Mikki DeWitt, Trout Creek, Michigan, pro se.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL DECISION AND ORDER

¶1 The parties filed a Joint Settlement Agreement with the administrative law judge that was signed by the petitioner on November 12, 2009, and by the respondent on November 13, 2009. The administrative law judge recommended that the Board accept and approve the parties' Joint Settlement Agreement and impose a 30-day suspension without pay upon the respondent rather than removal. For the reasons stated below, we ADOPT the administrative law judge's recommendation, and APPROVE the Joint Settlement Agreement. The

respondent's employing agency is ORDERED to SUSPEND the respondent without pay for a period of 30 days.

BACKGROUND

¶2 This case is before the Board on a complaint filed by the Special Counsel against the respondent. The complaint charged the respondent with engaging in prohibited political activity in violation of the Hatch Act, specifically, 5 U.S.C. § 7323(a)(3) and 5 C.F.R. § 734.304, by being a candidate for election to a partisan political office. Complaint File (CF), Tab 1.

¶3 On November 13, 2009, the parties filed a Joint Motion for Approval of Settlement and Settlement Agreement. CF, Tab 18. In the Settlement Agreement, the parties agreed that, at all relevant times, the respondent was an employee of the U.S. Postal Service and was covered by the Hatch Act, and a factual basis exists for the Board to find a violation of 5 U.S.C. § 7323(a)(3) because, in 2008, the respondent ran for Township Clerk in Michigan as a Democratic Party candidate in both the primary and general elections and was elected. *Id*. The parties also agreed that, as mitigating factors, the respondent was the only candidate in the 2008 election for Township Clerk, had a passive candidacy in 2008 for Township Clerk, resigned from elected office once notified by Special Counsel that it was investigating allegations that her candidacy violated the Hatch Act, and has an unblemished record during her over 10 years of service with the Postal Service. The parties agreed that the appropriate penalty is a suspension without pay for 30 consecutive calendar days. *Id*.

¶4 In a Recommended Decision, Administrative Law Judge Arthur J. Amchan, pursuant to 5 C.F.R. §§ 1201.125(c)(1) and 1201.126(c),[*] found that the Board

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[*] 5 C.F.R. § 1201.125(c)(1) provides that "[i]n a Special Counsel complaint seeking disciplinary action against a Federal . . . government employee for a violation of 5 U.S.C. § 7323 . . ., where the administrative law judge finds that the violation does not warrant removal, the administrative law judge will issue a *recommended decision* to the Board in accordance with 5 U.S.C. § 557." Emphasis supplied. Similarly, 5 C.F.R.

has jurisdiction over this case under 5 U.S.C. §§ 1215 and 1216, that the agreement was freely entered into by the parties, and that it was lawful on its face. CF, Tab 19. He further found that the stipulated mitigating factors warranted a penalty less than removal, specifically, a 30-day suspension. *Id*. He thus recommended that the Board grant the parties' joint motion, impose a 30-day suspension, and accept the settlement agreement into the record for enforcement purposes. *Id*. Neither party has filed exceptions to the Recommended Decision.

ANALYSIS

¶5 The Board has jurisdiction over this case under 5 U.S.C. §§ 1215(a) and 1216(a)(1). Under 5 U.S.C. § 7323(a)(3), a federal employee may not "run . . . as a candidate for election to a partisan political office." The Board must order the removal of an employee found to have violated section 7323, unless it finds by unanimous vote that the violation does not warrant removal. 5 U.S.C. § 7326. In the latter case, the Board must order a "suspension without pay" for "not less than 30 days." *Id*.

¶6 We ADOPT the administrative law judge's Recommended Decision, including specifically his findings that strong mitigating factors exist here and that the parties understood the terms of the agreement, the agreement is lawful on its face, and the parties freely entered into it. As noted, the administrative law judge found that the following stipulated facts were mitigating circumstances, i.e., that respondent was the only candidate in the 2008 election for Township Clerk, she had a passive candidacy in 2008 for Township Clerk, she resigned from elected office once notified by Special Counsel that it was investigating allegations that her candidacy violated the Hatch Act, and she has an unblemished record during her over 10 years of service with the Postal Service. *See Brown v.*

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§ 1201.126(c) provides that "[i]f the administrative law judge finds a violation of 5 U.S.C. § 7323 . . . and determines that removal is not warranted, the judge will issue a *recommended decision* . . . ." Emphasis supplied.

Office of Personnel Management, 112 M.S.P.R. 621, ¶¶ 3-4 (2009) (acceptance of settlement agreement into the record for enforcement purposes was appropriate, where agreement was lawful on its face, parties freely entered into it, and subject matter of the appeal was within the Board's jurisdiction under jurisdictional statute and regulation); *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988) (in considering whether removal is warranted, the Board looks to the seriousness of the violation, considering all aggravating and mitigating factors that bear upon the seriousness of the violation; these factors include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received the advice of counsel regarding the activities at issue; (4) whether the employee ceased the activities at issue; (5) the employee's past employment record; and (6) the political coloring of the employee's activities), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp 779 (N.D. Ohio 1989).

¶7 We find that the agreed to and admitted facts in the settlement establish that the appellant violated 5 U.S.C. § 7323. CF, Tab 18; *see* 5 C.F.R. § 1201.126(c). We also find unanimously that the penalty of removal is not warranted in this case and that a 30-day suspension without pay is appropriate. *See Special Counsel v. Walker*, 67 M.S.P.R. 271, 272 (1995); *Special Counsel v. Harkins*, 60 M.S.P.R. 646, 648 (1994); *Special Counsel v. Smith*, 60 M.S.P.R. 176, 177 (1993); *cf. Special Counsel v. Baker*, 69 M.S.P.R. 36, 39-40 (1995) (the Board refused to accept the parties' settlement agreement providing for a 90-day suspension for the respondent's violation of the Hatch Act in 1993, where there were no stipulations regarding any mitigating factors other than her "unblemished" employment record since 1992); *Special Counsel v. Bradford*, 62 M.S.P.R. 239, 240-41 (1994) (the Board refused to accept the parties' settlement agreement providing for a 90-day suspension where the agreement would allow the respondent to retain both her federal government job and her elected partisan office), *modified on recons. on other grounds*, 69 M.S.P.R. 247

(1995). Thus, we find that dismissal of the petitioner's complaint for disciplinary action with prejudice to refiling is appropriate under these circumstances, and we accept the settlement agreement into the record for enforcement purposes.

ORDER

¶8 Accordingly, we ORDER the U.S. Postal Service to suspend the respondent without pay for 30 consecutive calendar days. We ORDER the Office of Special Counsel to notify the Board within 30 days of this Opinion and Order whether the respondent has been suspended as ordered. This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, sections 1201.125(c)(5) and 1201.126(c).

NOTICE TO THE PARTIES OF THEIR ENFORCEMENT RIGHTS

If the petitioner or the respondent has not fully carried out the terms of the agreement, either party may ask the Board to enforce the settlement agreement by promptly filing a petition for enforcement with the Office of the Clerk of the Board. The petition should contain specific reasons why the petitioning party believes that the terms of the settlement agreement have not been fully carried out, and should include the dates and results of any communications between the parties. 5 C.F.R. § 1201.182(a).

NOTICE TO THE RESPONDENT 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.