

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LONNIE DUNCAN

v.

U.S. DEPARTMENT OF
EDUCATION

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) DOCKET NUMBER
) DA07528110642
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OPINION AND ORDER

Lonnie Duncan (appellant) was removed from the position of Collection Technician with the U.S. Department of Education's Office of Student Financial Assistance (agency). His removal was based on a charge of unsatisfactory performance, supported by thirteen specifications, and a charge of unacceptable personal conduct in the performance of his duties, supported by fourteen specifications.

Appellant petitioned for appeal of the agency's removal action to the Dallas Regional Office of the Board. He contended that: (1) the agency committed harmful procedural error by processing the removal action during the pendency of his appeal from the denial of his within-grade step increase;^{1/} (2) the agency's action was the result of discrimination on the basis of race (black); (3) the agency's action was taken in reprisal for his filing grievances, complaints, appeals, and for acting as an employee representative in such actions for others; and (4) the action was not in accordance with the law.

^{1/} Appellant filed a petition for review with the Board from the initial decision sustaining the denial of his within-grade step increase. The Board has since held, in that appeal, that the agency's decision to deny him a within-grade step increase was supported by preponderant evidence. Duncan v. U.S. Department of Education, MSPB Docket No. DA531D8110352 (August 11, 1982).

In an initial decision issued January 11, 1982, the presiding official sustained the agency's removal action, finding that: (1) the charge of unsatisfactory performance was supported by preponderant evidence in ten of the thirteen specifications underlying the charge; and (2) the charge of unacceptable personal conduct was supported by preponderant evidence in nine of the underlying specifications. In regard to appellant's affirmative defense of harmful procedural error, discrimination on the basis of race, reprisal for participating in union activities and initiation of a removal action contrary to law, the presiding official determined that appellant had failed to support the allegations by preponderant evidence. After considering the factors set forth by the Board in Douglas v. Veterans Administration, 5 MSPB 313, 330-332 (1981), the presiding official concluded that the penalty of removal for the sustained charges did not exceed the limits of reasonableness.

Appellant has now filed a petition for review of the presiding official's initial decision and the agency has filed a response in opposition to the petition. For the reasons set forth below, the Board hereby DENIES the petition for review for failure to meet the criteria for granting review under 5 C.F.R. § 1201.115.

In support of his petition for review, appellant first contends that the presiding official erroneously applied the preponderant evidence standard in finding that the agency's charges of unsatisfactory performance and unacceptable personal conduct were sustained, contrary to the requirements of ~~5 U.S.C. § 7701(c) (1) (B)~~ and 5 C.F.R. § 1201.56(c) (2).^{2/}

^{2/} Appellant argues in this connection that there was no requirement upon him to introduce evidence to refute the "scanty" evidence presented by the agency to substantiate its specifications in order for the presiding official to determine that the evidence failed to meet the preponderant evidence standard. However, as noted by the agency in its response to the petition for review, appellant did not deny the specifications underlying the charges in testifying at the hearing, offered no testimony, and introduced no evidence with respect to the specifications he now contests. The presiding official, therefore, properly determined that the un rebutted evidence presented by the agency was sufficient to be deemed preponderant evidence.

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INFORMATION HANDLING SERVICES

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, cost, or other security.

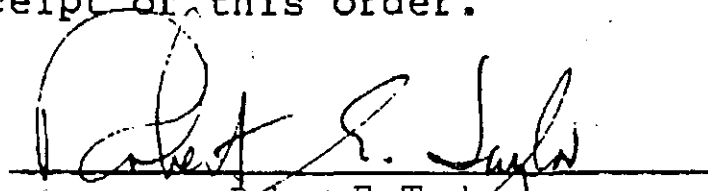
If the appellant chooses not to pursue the discrimination issue before the EEOC a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7702(b)(1) that a petition for such judicial review be filed with the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 8 1983

(Date)

Washington, D.C.


Robert E. Taylor
Secretary