GEORGE L. KARAPINKA
v.
DEPARTMENT OF ENERGY

Docket No.
PH07528010382

OPINION AND ORDER

The appellant was removed from the position of Research Chemist with the Department of Energy ("agency") effective August 8, 1980, based upon charges of inefficient performance of his duties.

The appellant filed a timely appeal of the agency action with the Philadelphia Field Office of the Board. He alleged as basis for his appeal that the removal action was not supported by a preponderance of the evidence and asserted several affirmative defenses. He contended, *inter alia*, that : (1) the removal action was the result of discrimination based on national origin; (2) the action was reprisal for his disclosure of waste and gross mismanagement of funds; (3) the agency had abrogated his right to free speech in violation of his constitutional rights; and (4) his right to privacy had been violated by the agency opening his mail.

The presiding official sustained the agency removal action after a full hearing. He found that the agency had supported its charges by a preponderance of the evidence and that the removal was for such cause as will promote the efficiency of the service.

The appellant then filed the instant petition for review. He now alleges that the presiding official committed several errors in arriving at his conclusions in this matter. Specifically, the appellant contends that the presiding official committed procedural errors by failing to sustain appellant's objections and failing to comply with the time limits established by the Board at 5 C.F.R. § 1201.111 and 5 C.F.R. § 1201.22(b).[1]

The appellant also contends that the presiding official acted improperly in his conduct of the hearing by failing to control witnesses and failing to overrule agency objections to appellant's questions. Finally, the appellant objects to the presiding official's conclusions on the substantive charges and his rejection of appellant's claim of reprisal for alleged disclosure of agency waste and mismanagement.

Under 5 C.F.R. § 1201.115, the Board will grant a petition for review when it is established that new and material evidence is available that was not available when the record was closed or that the initial decision is based on an erroneous interpretation of statute or regulation. Appellant's petition for review meets neither criterion.

[1]5 C.F.R. § 1201.111 requires the presiding official to issue an initial decision within 25 days of the closing of the record. 5 C.F.R. § 1201.22(b) requires an agency response to a petition for appeal to be filed within 15 days of receipt of the appellant's petition.

Our review of the record in this case discloses no error by the presiding official in his ruling on appellant's objections. Further, in regard to the appellant's allegations that the presiding official violated the Board's time limits by granting a time extension to the agency to reply to the appeal, the Board's regulations provide at 5 C.F.R. § 1201.12 that "a presiding official may waive a Board regulation in an individual case for good cause shown if application of the regulation is not required by statute." Factors for consideration in determining whether good cause has been shown for extending time limits include the existence of circumstances beyond the control of the movant which affected his or her ability to comply with time limits and the degree to which negligence has been shown to be present or absent. *See generally Alonzo v. Department of the Air Force*, 4 MSPB 262 (1980).

In the instant case the presiding official granted the agency a two-week extension of time within which to respond to appellant's petition for appeal. The extension of time was necessitated by the absence of its representative due to a massive heart attack. The presiding official did not abuse his discretionary authority in granting the two-week continuance under these circumstances.

5 C.F.R. § 1201.111 requires a presiding official to issue an initial decision within 25 days of the closing of the record. The appellant urges the Board to reverse the initial decision, in part, because of the failure of the presiding official to comply with this time limit.

While the Board does not have a regulation which directly addresses the issue of harmful error by a presiding official, Rule 61 of the Federal Rules of Civil Procedure sets forth the standard applicable to federal courts regarding the issue. That rule provides, in pertinent part, that:

> The court at every stage of the proceeding must disregard an error or defect in the proceedings which does not affect the substantial rights of the parties.

The issue before the Board, then, is not whether there was delay by the presiding official in the issuance of the initial decision contrary to the provisions of 5 C.F.R. § 1201.111 but whether the delay has been such as to effect the substantive rights of the appellant. *See Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 1243, 1244 (1946); *Sisto v. Civil Aeronautics Board*, 179 F.2d 47 (D.C. Cir. 1949); *Hadigan v. Board of Governors*, 463 F. Supp. 437, 443 (D.C.D.C. 1978). Additionally, a mere deviation from the best procedure does not constitute reversible error. *See Gutshall v. Wood*, 123 F.2d 174, 177 (D.C. Cir. 1941).

Although the initial decision was issued more than 25 days after the closing of the record which is contrary to the provisions of 5 C.F.R. 1201.111, the evidence of record indicates that the hearing in this matter

lasted for four (4) full days and the transcript of those proceedings contained in excess of 800 pages of testimony and exhibits.[2]

Under these circumstances, the Board finds that good cause existed for the waiver of the regulation. *See* 5 C.F.R. 1201.12. Additionally, the appellant has failed to show any prejudicial error denigrating the appellant's substantive rights resulting from the presiding official's failure to comply with this time limit. *See Gutshall, supra.*

The Board also finds no indication of impropriety by the presiding official in his conduct of the hearing in this matter. The mere fact that a presiding official does not accept the assertions of an appellant or interpret testimony in the fashion appellant would desire does not constitute impropriety. *See Prime v. U.S. Postal Service,* 5 MSPB 110 (1981).

The appellant has also objected to the findings of the presiding official on the issue of reprisal. In this regard the Board has previously determined that a claim of reprisal constitutes an allegation of prohibited personnel practice under 5 U.S.C. § 2302(b)(9). *In the Matter of Frazier,* 1 MSPB 159 (1979). Although the appellant now alleges that the defense should not have been considered by the presiding official, it was raised implicitly by the appellant in his defense of the removal action and was therefore correctly ruled upon by the presiding official. *See* Initial Decision at 9.

To establish a violation of section 2302(b)(9) an appellant must demonstrate that he or she engaged in an activity protected by the section; that he or she subsequently was treated in an adverse fashion by the employer; that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity; and that there is a causal connection between the protected activity and the adverse action. *In the Matter of Frazier, supra.*

In the instant case, although appellant alleged that he had complained about waste and mismanagement, there is no indication in the record that the deciding official had any knowledge of such a complaint nor that the adverse action was the result of a retaliatory motive. The presiding official, therefore, correctly concluded that the appellant failed to establish that the agency action was the result of reprisal.

The remaining allegations made by the appellant relate primarily to the factual determinations made by the presiding official on the substantive charges. The appellant has merely stated his disagreement with the presiding official's conclusions and reiterated the arguments he made before the presiding official to support his position. The appellant has

[2]The Board notes that the appellant has objected to the authenticity of the transcript. However, 5 C.F.R. § 1201.53(b) provides for any alleged errors to be brought to the attention of the presiding official by motion within 10 days of the receipt of the transcript. There is no indication in the record or in the petition for review that such a motion was made and subsequently denied by the presiding official. Accordingly, this allegation will not be considered further by the Board.

identified no evidence tending to show error by the presiding official in his conclusions on the substantive charge. We wll not, therefore, disturb the findings made by the presiding official. *See Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

The Board, therefore, having examined the appellant's petition for review and finding that it fails to meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court not later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *May 8, 1981*