UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES KENDRICKS, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER CB-7121-98-0003-V-1 DATE: SEP 16 1998

Charles Kendricks, Warrensville Heights, Ohio, pro se.

Janice Moore, Brecksville, Ohio, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a request for review under 5 U.S.C. § 7121(d) of an arbitrator's decision that denied his grievance. For the reasons set forth below, we GRANT the appellant's request and SUSTAIN the arbitrator's decision.

BACKGROUND

¶2 In a September 25, 1996 notice, the agency informed the appellant that he was being removed effective October 4, 1996, pursuant to a March 19, 1996 "firm choice letter." Under the terms of the letter, the agency had held a previous removal action in abeyance, so long as the appellant fulfilled certain conditions, including maintaining satisfactory attendance. The appellant filed a grievance

and the arbitrator, after affording him a hearing, issued a decision finding that the appellant breached the firm choice letter, that he did not establish his affirmative defenses of harmful error or discrimination, and that the removal was a reasonable penalty. Request for Review File (RRF), Tab 1.

¶3 On October 9, 1997, the appellant filed a request for review of the arbitrator's decision. *Id*. Because the arbitrator's decision was dated July 18, 1997, the Clerk of the Board issued a notice to the appellant informing him that his request appeared to be untimely and ordering him to submit evidence and argument to show that the request was timely or that good cause to waive the filing deadline existed. RRF, Tab 2. The appellant timely responded to the show cause notice. RRF, Tab 4. The agency timely responded in opposition to the appellant's request for review. RRF, Tab 3. Before the close of the record, the appellant submitted additional argument regarding his request for review of the arbitrator's decision. RRF, Tab 5. On November 18, 1997, the agency submitted a reply in opposition to the Board's acceptance of the appellant's additional argument on the basis that it was untimely. RRF, Tab 6.

ANALYSIS

The Board has jurisdiction over this request for review of the arbitrator's decision.

¶4 The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) where the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleges discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 662 (1997). The appellant's removal was the subject of a final arbitrator's decision and he has alleged discrimination. Thus, his request for review is within the Board's jurisdiction.

The appellant's request for review of the arbitrator's award is timely.

¶5 The Board's regulations require that a request for review of an arbitrator's decision be filed within 35 days of the issuance of that decision. 5 C.F.R. § 1201.154(d). In his response to the Board's order to show that the request was timely or that good cause to waive the time limit existed, the appellant stated that, although the arbitrator's decision was dated July 18, 1997, it was actually issued on September 8, 1997. He explained that the arbitrator informed the parties at the hearing that she requested payment of the balance of her fee when the decision was ready. The appellant submitted copies of a July 29, 1997 letter from the arbitrator to the parties informing them that the decision was ready, and a September 8, 1997 letter from her stating that payment had been received and the decision was issued. RRF, Tab 4. The agency does not dispute the appellant's proof that his request for review was timely. Based on the uncontroverted evidence that the arbitrator's decision was issued on September 8, 1997, we find that the appellant's October 9, 1997 request for review of that decision was timely. Also, the appellant's additional argument, filed before the close of the record, is timely and we have considered it.

The record does not establish that the arbitrator erred in interpreting civil service law, rule, or regulation in this case.

¶6 The scope of the Board's review of an arbitrator's decision is limited and the arbitrator's findings are given greater deference than an administrative judge's initial decision. The Board will modify or set aside an arbitrator's decision only when the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. Absent legal error, the Board will not substitute its conclusions for those of the arbitrator, even if it would disagree with the arbitrator's decision. *Colon*, 73 M.S.P.R. at 663.

¶7 The arbitrator stated that the parties stipulated that the matter before her was "[w]hether there was a breach of the Firm Choice/Last Chance Agreement? If not, what shall the remedy be?" Arbitrator's decision at 6. She made the same statement of the issue before her at the hearing and neither party objected. Hearing Transcript (TR) at 3. The arbitrator found that the appellant breached the agreement when he was absent without approved leave from August 22 until his October 4, 1996 removal and did not comply with the leave request procedures specified in the firm choice letter.

¶8 In its March 19, 1996 firm choice letter, the agency decided to remove the appellant based on charges of absence without leave (AWOL) but stated that it would hold the removal action in abeyance under certain conditions: the appellant was to successfully complete a substance abuse program, refrain from engaging in alcohol/drug related misconduct or having alcohol/drug related performance deficiencies, maintain satisfactory attendance, and refrain from engaging in any acts of misconduct. In order for attendance to be satisfactory, the appellant was required for each absence to "obtain approval in advance, or in case of illness or emergency, approval as early as practicable, and to the extent possible, at the beginning of [his] tour but not later than two hours thereafter ...." RRF, Tab 1, March 19, 1996 letter.

¶9 On September 25, 1996, the agency notified the appellant that it was reinstating the March 19, 1996 removal because the appellant was AWOL on August 23, 26, 27, 28, 29, and 30, 1996, and had not requested leave in advance or as soon as practicable for those dates and for August 22, as required by the firm choice letter. RRF, Tab 1, September 25, 1996 letter. The arbitrator, in finding that the appellant did not request leave in advance or as soon as practicable, considered his September 5, 1996 request for leave without pay (LWOP) but found that it did not conform to the agency's requirements because it had no expiration date, was accompanied by medical information consisting of a

slip labeled "To be filled in VA pharmacies only," was not on physician letterhead, and had an illegible signature, thus making its source undetermined and its reliability uncertain. Arbitrator's decision at 7-8. The arbitrator also noted that, when his request for LWOP was refused because of insufficient medical information, he did not immediately try to correct the deficiencies and his second request for LWOP was no more complete. *Id*. at 8-9.

¶10 In his request for review of the arbitrator's decision, the appellant does not allege that he was not absent on the days specified in the September 25, 1996 removal decision. Rather, he argues that he requested leave for the absences in August 1996, that he was unaware that his requests were denied, and that the agency knew of the reason for his absence. The record shows that agency physician Danny Tinman saw the appellant on August 15, 1996, and recommended that he have surgery to remove a soft tissue mass on his forearm. The surgery was scheduled for August 20 and the appellant requested annual leave and LWOP for August 19, 20, and 21. He informed his supervisor, Jerry Gill, that he did not know when he could return to work after the surgery. The appellant came to the workplace on August 21 but did not report to Gill to request further leave or present any medical documentation in support of a leave request. The appellant did not report for work at his scheduled time of 8:00 a.m. on August 22 but telephoned Gill at 10:15 a.m. to request LWOP. According to the appellant, he requested LWOP until September 13 in that conversation. Gill stated "OK" but asked for the doctor's name so that Gill could speak to him. The appellant gave Gill the doctor's name. The appellant next called Gill on August 27, requesting light duty. Gill replied that light duty was unavailable and that the appellant should not return to work until he was fully capable of performing his regular duties. On September 5, the appellant's doctor told him not to return to work for 30 days. The appellant then requested extended leave. RRF, Tab 1, Appellant's statement of the case, issues, and facts.

¶11 The appellant has not shown that the arbitrator erred as a matter of law in finding that he did not request leave as soon as practicable, i.e., on August 21 or before 10:00 a.m. on August 22. The fact that Gill knew that the appellant had outpatient surgery on August 20 does not indicate that Gill should have known that the appellant would be incapacitated for work on August 22 and the days following. Furthermore, the appellant was aware of the leave request procedures and we see no reason to disturb the arbitrator's finding that the appellant failed to follow the procedures specified in the March 19, 1996 firm choice letter. Thus, we agree with the arbitrator that the appellant breached the firm choice letter by failing to timely request leave.

¶12 We also agree that the appellant was AWOL on August 23, and 27-30. The appellant asserted before the arbitrator that he requested LWOP from Gill on August 22, but even his version of the conversation does not show that the request was granted. Gill told the appellant that he needed to speak to the appellant's doctor, implying that no decision had been made.

¶13 The appellant asserts that the arbitrator erred by stating in her decision that he received two return to work letters when the parties agreed that they had not been sent. RRF, Tab 1. The appellant had argued earlier that he was not informed until September 5, 1996, that he was being carried in an AWOL status from August 22, 1996. We find that, even if we accept the appellant's version of the facts in this regard, the evidence does not show that the agency should have granted his request for LWOP. The authorization of LWOP based on medical reasons is ordinarily within the agency's discretion and its denial must be reasonable under the circumstances. *See Joos v. Department of the Treasury*, 69 M.S.P.R. 398, 403 (1996); *Joyner v. Department of the Navy*, 57 M.S.P.R. 154, 159 (1993). The medical documentation that he presented was insufficient because its authenticity could not be verified. He never came forward with any better documentation, *e.g.*, a letter from his treating physician setting forth the

dates that he was incapacitated and explaining the limitations on his ability to perform his duties. At the arbitration hearing, he offered the testimony of Dr. Tinman, who sent him for the surgery but who had no specific knowledge of the appellant's condition following the surgery. Nor has the appellant submitted any further medical documentation with his request for review to show that, had he been aware that his medical documentation was insufficient, he would have corrected the deficiencies. We find, therefore, that the arbitrator's finding that the appellant received the letters notifying him that his requests for LWOP were denied was not error that prejudiced the appellant's substantive rights. We find no legal error in the arbitrator's determination that the appellant breached the firm choice letter by being AWOL.

¶14 In regard to the March 19, 1996 removal decision that was reinstated by the September 25, 1996 notice, the appellant does not argue that he was not AWOL as specified in the charge on which the March 19 removal decision was based. Instead, he argued that the agency committed harmful error when it considered prior discipline in the September 18, 1995 notice of proposed removal that preceded the March 19, 1996 removal decision. The appellant further argues that the arbitrator erred in considering prior discipline in her decision because the earlier discipline should have been purged from his record. RRF, Tab 1.

¶15 The September 18, 1995 notice of proposed removal cited three prior suspensions for leave-related misconduct, i.e., a February 10-23, 1991 suspension, an August 18-31, 1991 suspension, and a September 14-16, 1992 suspension. In the March 19, 1996 firm choice letter, the deciding official, Medical Center Director Krista Ludenia, acknowledged that one of the suspensions, February 10-23, 1991, had been rescinded. The record also contains a copy of an arbitrator's decision overturning the August 18-31 suspension. There is no documentation or testimony to show that the remaining suspension was rescinded.

¶16 To the extent that Ludenia considered the rescinded and overturned suspensions, it was error to do so. However, the appellant has not shown that the error was harmful. *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983) (reversal of an action is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984). The March 19, 1996 firm choice letter informed him that removal would be the penalty for further violations of leave requesting procedures. Glenn Costie, Chief of Engineering Service and an upper-level manager in the department where the appellant worked, recommended that the March 19, 1996 removal action be reinstated and he testified that he would have recommended removal in the absence of any prior discipline. TR at 213. Also, although the arbitrator made reference to the prior suspensions, she did not state that she considered them in her analysis of the reasonableness of the penalty. We agree with the arbitrator that removal is a reasonable penalty under the circumstances and that any consideration given to the rescinded prior discipline was not harmful to the appellant's substantive rights.

¶17 The appellant also argued before the arbitrator and in his request for review that the September 18, 1995 proposal notice should have been withdrawn and a new notice issued because of the references to prior discipline. For the same reason, we disagree with the appellant. The appellant has presented no evidence to show that the issuance of a new proposal notice would likely have resulted in a different outcome before the agency; removal would be a reasonable penalty without consideration of the two instances of prior discipline.

¶18 The appellant asserted that the March 19, 1996 removal decision notice constituted harmful error because it cited, without prior notice and an opportunity to reply, absences that had occurred since the issuance of the September 18, 1995 proposal notice. The appellant has not shown that the March 19, 1996 removal

decision was harmful to his substantive rights. Although the agency noted additional absences, the decision to remove him was based on the misconduct specified in the September 18, 1995 removal notice, and as stated, removal would be reasonable for that misconduct.

¶19 The appellant contends that the arbitrator erred in finding that he was not the victim of discrimination and reprisal. Specifically, he objects to the arbitrator's failure to mention his numerous witnesses and their testimony. The Board has long held that a failure to mention all of the evidence alone will not afford a reason to disturb the decision below. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984) (the administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). In finding that the appellant was not a victim of discrimination based on race or political affiliation, the arbitrator considered that the record contained no evidence that anyone was aware of the appellant's letter writing in favor of former Director Ludenia, that Costie testified without rebuttal he only used a racially derogatory word as an example of language that was offensive, that an equal employment opportunity investigation regarding use of racial slurs concluded that no discrimination occurred, that the appellant's accusations against co-workers were the likely cause of hostility toward him, and that the two comparison employees were not similarly situated so that no disparate treatment was shown. On the basis of those circumstances, the arbitrator found that no discrimination occurred. Arbitrator's decision at 12-13. On review, the appellant does not offer any specific argument or evidence to refute the arbitrator's finding. The appellant's argument represents mere disagreement with the arbitrator's findings and provides no reason to disturb the decision.

¶20 Accordingly, we find no basis on which to set aside or modify the arbitrator's decision.

ORDER

¶21 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, 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 should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). 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. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.