

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 218

Docket No. CH-0752-05-0551-I-1

**Anthony Ledbetter,
Appellant,**

v.

**Department of the Treasury,
Agency.**

July 18, 2006

Anthony Ledbetter, Saint Louis, Missouri, pro se.

Aaron J. Bennett, Esquire, Dallas, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned, and agency has cross petitioned, for review of an initial decision sustaining his removal. For the reasons set forth below, we DENY the appellant's petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115, GRANT the agency's petition, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the appellant's removal.

BACKGROUND

¶2 Effective March 18, 2005, the appellant was removed from his GS-11 Senior Associate Advocate position in the Taxpayer Advocate Service with the Internal Revenue Service (IRS) based on the following charges: (1) Failure to properly file his personal federal income tax return for the 2001 tax year; and (2) failure to timely and properly satisfy his tax obligations. Initial Appeal File (IAF), Tab 9, Subtabs 4a, 4b, 4g. In the notice of proposed removal, the agency identified three specifications or reasons in support of the first charge: Willfully understating his 2001 federal income tax liability; incorrectly claiming “Head of Household” filing status; and incorrectly claiming his son as both a dependent and an exemption. *Id.*, Subtab 4g. These specifications also stated that, even if the appellant had not willfully understated his tax liability, he had failed to accurately state his tax liability on his 2001 federal income tax return. *Id.* The specification under the second charge stated that an adjustment was made to his 2001 federal income taxes resulting in an additional assessment of \$4,234.72, which was paid after the due date. *Id.* The agency informed the appellant that with regard to these charges he had violated subsection 1203(b)(9) of the IRS Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, tit. I, § 1203, 112 Stat. 720 (codified at 26 U.S.C.A. § 7804 note), and section 2635.809 of the Office of Government Ethics’s (OGE’s) Standards of Ethical Conduct. *Id.*

¶3 After the appellant presented an oral reply, the Section 1203 Commissioner’s Review Board determined that the penalty of removal was appropriate and consistent with section 1203 of the RRA and section 2635.809 of OGE’s Standards of Ethical Conduct. IAF, Tab 9, Subtabs 4c, 4d. Subsequently, Christopher Wagner, Deputy National Taxpayer Advocate, issued a decision sustaining all of the charges and specifications as violations of both subsection 1203(b)(9) of the RRA and section 2635.809 of OGE’s Standards of Ethical Conduct. *Id.*, Subtab 4b. Noting that removal is mandatory for violations of subsection 1203(b)(9), and that the Commissioner’s Review Board had

determined that mitigation was inappropriate, Wagner found that the action was warranted. *Id.*, Subtabs 4b, 4c. Additionally, Wagner found that removal was warranted under section 2635.809 of OGE's Standards of Ethical Conduct. *Id.*, Subtab 4b. Finally, Wagner concluded that the action would promote the efficiency of the service and that a lesser penalty would be inadequate. *Id.*

¶4 The appellant filed an appeal with the Board, contesting the merits of the removal action and the penalty and raising the affirmative defenses of race and gender discrimination and harmful error regarding the agency's alleged delay in processing his 1040 tax return for 2001. IAF, Tabs 1, 6, 11, 13, 18. Based on the parties' submissions, the administrative judge (AJ) issued an initial decision affirming the appellant's removal. Initial Decision (ID) at 1-2, 18. The AJ found the charges and all of the specifications proven. ID at 6-12. The AJ also found that the appellant did not prove his race or gender discrimination claims or his harmful error claim. ID at 13-15. The AJ additionally found that the action promoted the efficiency of the service. ID at 15-16. The AJ further found that the agency's removal penalty is reviewable under the RRA, but that, after a consideration of possible mitigating factors, it was reasonable. ID at 16-18. Finally, the AJ informed the appellant that the initial decision would become final on September 2, 2005, unless a petition for review (PFR) was filed by that date. ID at 19.

¶5 On September 16, 2005, the appellant filed a PFR, PFR File (PFRF), Tabs 3-4, and subsequently he filed a motion for the Board to accept his PFR as timely filed or set aside the time limit for good cause, *id.*, Tab 7.* The agency has timely filed a cross PFR contesting the AJ's review of the penalty. *Id.*, Tab 8. The appellant has timely filed a response in opposition to the cross PFR. *Id.*, Tab 11.

* Because we find, as discussed below, that the appellant has not met the criteria for review, we have denied his PFR without deciding whether it was timely filed or whether he has shown good cause to waive the time limit.

ANALYSIS

¶6 After fully considering the filings in this appeal, we find that the appellant has not presented any significant new evidence and he has not shown that the AJ made an error in interpreting a law or regulation that affects the outcome of this appeal. Therefore, he has not met the criteria for review under 5 C.F.R. § 1201.115. Accordingly, we deny the appellant's PFR.

¶7 On cross PFR, the agency argues that the AJ erred in determining that the Board has the authority to review the removal penalty in this case. PFRF, Tab 8. We agree. In *Akers v. Department of the Treasury*, 100 M.S.P.R. 270, ¶ 8 (2005), *aff'd*, No. 06-3076 (Fed. Cir. 2006) (NP), a decision that was issued after the initial decision in this appeal, we found that essentially identical sustained misconduct was subject to a mandatory removal penalty, which was not reviewable by the Board. In that case, an employee with the IRS was removed for: (1) Willfully understating his individual tax liability; and (2) failing to submit a request to participate in an outside business activity. *Id.*, ¶ 2. The agency informed the employee that, with regard to the first charge, he had violated subsection 1203(b)(9) of the RRA. *Id.* After the deciding official sustained all but one specification of the charges, she forwarded the employee's case to the Commissioner's Review Board for consideration of any appropriate mitigation. *Akers*, 100 M.S.P.R. 270, ¶ 3. The Commissioner's Review Board found that mitigation was inappropriate and, accordingly, the deciding official ordered the appellant's removal. *Id.* On appeal, the AJ sustained all of the charges and specifications and found that subsection 1203(b)(9) of the RRA required the agency's removal action as a mandatory penalty. *Akers*, 100 M.S.P.R. 270, ¶ 4.

¶8 On PFR, the Board reopened the *Akers* appeal on its own motion to find that the AJ erred in sustaining the specification not sustained by the deciding official. *Id.*, ¶¶ 6-7. The Board stated that, since the AJ found that a section 1203 violation had occurred, the Board's authority to review the penalty was

limited. *Id.*, ¶ 8. The Board noted that the Court of Appeals for the Federal Circuit in *James v. Tablerion*, 363 F.3d 1352, 1359 (Fed. Cir. 2004), had reviewed section 1203 of the RRA and found that the Commissioner of the IRS is required to impose the penalty of removal for the specified forms of misbehavior unless the Commissioner in his sole discretion determines that removal is inappropriate, and that, by statute, the Commissioner's determination on the penalty is final and not subject to administrative or judicial review. *Akers*, 100 M.S.P.R. 270, ¶ 8. The Board thus found that, although the AJ erred in sustaining the specification not sustained by the deciding official, his error did not prejudice the appellant's substantive rights because the sustained misconduct was subject to a mandatory removal penalty, which is not reviewable by the Board. *Id.*

¶9 Likewise, here, the appellant was charged with, among other things, willful violation of subsection 1203(b)(9) of the RRA, in this case for failure to properly file his individual federal income tax return for the 2001 tax year and failure to timely and properly satisfy his tax obligations. IAF, Tab 9, Subtab 4g. The Commissioner's Review Board determined, among other things, that the penalty of removal was appropriate and consistent with section 1203 of the RRA, and, accordingly, the deciding official ordered the appellant's removal. *Id.*, Subtabs 4b, 4c. The AJ properly found that the appellant willfully violated subsection 1203(b)(9) with regard to the charged misconduct and sustained the charges. ID at 6-12. The AJ also found, among other things, that the agency's removal penalty is reviewable under the RRA, but that, after consideration of possible mitigating factors, it was reasonable. ID at 16-18. However, since the AJ found that a subsection 1203(b)(9) violation had occurred and the Commissioner's Review Board determined that the penalty of removal was appropriate and consistent with section 1203 of the RRA, the removal penalty was mandatory and not reviewable by the Board. *See* 26 U.S.C.A. § 7804 note; *Tablerion*, 363 F.3d at 1359; *Akers*, 100 M.S.P.R. 270, ¶¶ 3, 8; *see also* *Tablerion*, 363 F.3d at 1358 (a subsection 1203(b)(9) violation "mandate[s]

termination for off-duty conduct"). Therefore, the AJ erred in determining that the Board has the authority to review the removal penalty in this case. *Id.*

¶10 Accordingly, we modify the initial decision with regard to the penalty determination and otherwise affirm the initial decision and the agency's removal action.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, 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 must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. 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 do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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, <http://fedcir.gov/contents.html>. 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:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.