UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHINEETA MCGUIRE, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DC07529010294 DATE: JUN - 7 1991

Metcalfe C. King, Esquire, Ellis, King & Prioleau, Washington, D.C., for the appellant.

Gregg J. Nozum, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision, issued June 27, 1990, that sustained her removal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN the appellant's removal.

BACKGROUND

On March 23, 1990, the agency removed the appellant from her position as a Clerk-Typist, GS-4, with the Drug Enforcement Administration, based on a charge of insubordination. *See* Agency File, Tabs 2, 3, and 5. An administrative judge with the Board's Office of the Administrative Law Judge[1] sustained the charge after finding that the agency proved all three specifications under the charge by a preponderance of the evidence.

The administrative judge recounted the first specification as follows: In October 1989,[2] the appellant's supervisor, Anne T. Murphy, asked her staff members if they were following instructions to identify themselves when they answered the telephone. The appellant responded that she was not doing so and would not do so in the future. Even though Ms. Murphy warned the appellant of possible disciplinary action, she observed the appellant fail to identify herself when she answered the telephone on November 1, 1989. When Ms. Murphy confronted the appellant, the appellant walked

---

[1] This case was transferred from the Board's Washington Regional Office due to a workload imbalance. *See* Initial Appeal File (IAF), Tabs 5 and 6.

[2] The notice of proposed removal stated that this conversation occurred on October 23, not October 18 as indicated by the administrative judge. *See* Agency File, Tab 5. The administrative judge's error, however, does not affect the outcome of this appeal because it did not prejudice the appellant's substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

away, mumbling something under her breath. See Initial Decision (I.D.) at 2-3; Agency File, Tab 5.

The administrative judge found that Ms. Murphy's testimony supporting this specification was more credible than the appellant's general denial of the specification. He found that Ms. Murphy's testimony was specific and supported by detailed notes which were dated on or shortly after the incidents. In addition, he found that the specification was not stale or unwarranted. I.D. at 3-4.

The administrative judge recounted the second specification as follows: On November 28, 1989, Ms. Murphy asked a secretary to tell the appellant to pick up a job application from an individual in the lobby. The appellant twice told the secretary that she wanted Ms. Murphy to give her the instruction personally. When Ms. Murphy went to the appellant's desk and told her to end her telephone conversation and pick up the application, the appellant replied that the task was not in her job description and refused to perform it. I.D. at 4-5; Agency File, Tab 5.

The administrative judge again found that Ms. Murphy's testimony supporting the specification, which was consistent with her notes, was more credible than that of the appellant. He considered the appellant's credibility weakened because she could not recall whether she ultimately refused to pick up the application, and drew an adverse inference from the appellant's failure to deny the allegations in the specification in responding to the notice of proposed removal.

Moreover, the administrative judge found that even if the appellant's version of the incident were accurate, her conduct would still constitute insubordination because she completed the telephone conversation instead of ending it and picking up the application. As with the first specification, the administrative judge also rejected the appellant's assertions that the charge was stale or an attempt to set her up for removal. I.D. at 5-6.

The administrative judge recounted the third specification as follows: On January 9, 1990, the appellant received a memorandum from Paul A. Teresi, Deputy Personnel Officer, stating that she was to begin a detail to the Health Unit on January 10. The appellant told Mr. Teresi on both January 9 and January 10 that she would not report for the detail. On January 10, the appellant also met with Aaron P. Hatcher, III, the Deputy Assistant Administrator, who explained the reasons for the detail and warned her that he would propose disciplinary action if she refused. When they met again on January 18, the appellant refused to report for the detail. I.D. at 7; Agency File, Tab 5.

The administrative judge found that Mr. Teresi's and Mr. Hatcher's testimony was consistent with the allegations in the specification and memoranda they prepared at the time of the incident. In addition, he noted that Kenneth Dickenson, Chief of Recruitment and Placement, testified that he attended the January 10 meeting and that the allegations were true. Moreover, the administrative judge cited the appellant's

admission that she refused to report for the detail. I.D. at 7-8.

The administrative judge rejected the appellant's assertion that she was justified in refusing the detail because it would have placed her in a clearly dangerous situation. He found that the appellant's contention that she was afraid of a doctor in the Health Unit, William E. Wright, lacked credibility, noting that Dr. Wright denied the appellant's allegation that he had been observing her and that the appellant did not provide any specific examples or supporting evidence. He also noted that the appellant did not inform the agency that Dr. Wright's alleged conduct was the reason for her refusal to accept the detail until she replied to the proposal notice. Finally, he found that even if Dr. Wright had observed her, the appellant failed to show why this would have put her in a clearly dangerous situation if she worked in the Health Unit. I.D. at 8-9.

In addition, the administrative judge found no merit to the appellant's claim that working in the Health Unit would harm her. He found that the January 23, 1990 letter from the appellant's doctor, James Shaffer, stated inconsistently that the appellant was unable to work from January 23 to 25, and that she might be able to resume work on February 15. Furthermore, he noted that Dr. Wright wrote a memorandum concerning his conversation with Dr. Shaffer on February 6, 1990, in which he recorded that Dr. Shaffer stated that he believed that the appellant could return to work without

restriction as of January 23. The administrative judge thus concluded that there was no evidence that the appellant had a health problem during January and February which would have prevented her from working. I.D. at 9-10; Initial Appeal File (IAF), Tab 13, Exhibit 30. Citing testimony by Mr. Hatcher, Mr. Teresi, and Mr. Dickenson, he also found that the appellant did not inform them that her health prevented her from working on the detail. I.D. at 10-11.

The administrative judge rejected the appellant's assertions that the agency committed procedural error and removed her in reprisal for filing a discrimination complaint. He treated the latter as an allegation of whistleblowing under *Williams v. Department of Defense*, 45 M.S.P.R. 146 (1990). He found that the appellant showed that her whistleblowing was a contributing factor in her removal because her removal was effected while her discrimination complaint was being adjudicated, and because Ms. Murphy testified that she began to document the appellant's performance problems after the appellant filed a grievance alleging discrimination. However, he concluded that there was clear and convincing evidence that the agency would have removed the appellant absent the disclosure. He noted that the appellant's three separate acts of insubordination convinced him that the agency would have removed her even if she had not filed the complaint. Moreover, he found that the appellant's refusal to accept the detail alone clearly warranted her removal. He noted that the

appellant persisted despite warnings that discipline would be imposed. I.D. at 11-14.

The administrative judge concluded that removal promoted the efficiency of the service and was an appropriate penalty. He found that the appellant's offense was serious and repeated, she was warned several times that discipline would result, and she was given several opportunities to obey the orders. Because she did not, he found that she had little potential for rehabilitation. In addition, he found that she had only 5 years of service with the agency. Thus, he found that her good performance evaluations did not warrant mitigating the penalty. I.D. at 14-15.

ANALYSIS

We find that the appellant's petition does not provide a basis for Board review because it constitutes mere disagreement with the administrative judge's factual findings. The appellant contends that the administrative judge erred in relying "almost exclusively" on Ms. Murphy's notes in upholding the appellant's removal because Ms. Murphy was the alleged discriminating official, the evidence did not show when the notes were written, and the appellant never saw the notes or had an opportunity to dispute them. She further contends that Ms. Murphy's testimony was biased.

The Board must give due deference to the credibility findings of the administrative judge. Mere disagreement with the administrative judge's findings and credibility

determinations does not warrant a full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Here, the appellant's assertions do not provide a basis for declining to defer to the administrative judge's credibility findings. Admittedly, the record does not establish when Ms. Murphy wrote the notes because although most of them bear dates, it is not clear whether they were written on those dates or simply refer to events happening on those dates. *See* Agency File, Tab 5. In addition, the administrative judge acknowledged that Ms. Murphy did not begin to keep the notes until the appellant filed her discrimination complaint. I.D. at 13-14. However, the appellant has provided no basis for discrediting Ms. Murphy's testimony, which the administrative judge found was consistent with these notes and the agency specifications. Rather, she simply states, without support, that "As the discriminating official, Ms. Murphy's testimony is necessarily biased." Petition for Review at 10.

In any event, as previously set forth, the administrative judge cited other bases for sustaining the specifications, including the testimony and memoranda of Mr. Teresi, Mr. Hatcher, Mr. Dickenson, and Dr. Wright. Most significantly, he found that the third specification standing alone was sufficient to justify the appellant's removal. I.D. at 14. Concerning this specification, the administrative judge did not cite any evidence from Ms. Murphy. Moreover, the

appellant admitted that she refused to report for the detail. I.D. at 8. Thus, even if the administrative judge erred in some regard in crediting Ms. Murphy's testimony and notes, the appellant has not shown that any error would warrant a different outcome in her case. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The appellant does argue that the administrative judge erred in sustaining the third specification. She contends that she informed her supervisors that her health would be adversely affected by the detail, and that she submitted medical evidence to support her claim. The appellant, however, has provided no evidence to support her assertions. As previously stated, the administrative judge found that the appellant did not inform the agency that the detail would affect her health until she submitted her written reply to the charges. *See* I.D. at 9-11. Thus, her assertion that the agency was required to refer her for a fitness-for-duty examination because she claimed that she was unable to perform because of health reasons does not show error in the initial decision. In any event, the administrative judge proceeded to find that the appellant failed to submit adequate medical evidence from even her own doctor to support her refusal to report for the detail. I.D. at 10. The appellant's mere disagreement with these findings does not provide a basis for Board review. *Weaver*, 2 M.S.P.R. at 133-34.

We have reopened this case, however, because after the initial decision was issued, the Board reconsidered and

reversed its decision in *Williams*. Specifically, the Board concluded that the filing of an equal employment opportunity (EEO) complaint does not constitute whistleblowing under 5 U.S.C. § 2302(b)(8). *See Williams v. Department of Defense*, MSPB Docket No. NY07529OS0119 at 9 (Jan. 7, 1991). Thus, the appellant's allegation that she was removed in reprisal for filing an EEO complaint should be analyzed under the standard set forth in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

Specifically, the appellant must show that she made a protected disclosure, the accused official knew of the disclosure, her removal could have been retaliation, and there was a genuine nexus between the alleged retaliation and her removal. *Warren*, 804 F.2d at 656-58. Concerning the last element, the appellant must show that her filing of the EEO complaint was a substantial or motivating factor in her removal. *See, e.g., Haine v. Department of the Navy*, 41 M.S.P.R. 462, 473 (1989). As the Board pointed out in *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 659 (1990), the "substantial factor" standard is a higher standard than the "contributing factor" standard. If the appellant makes this showing, the agency must prove that it would have taken the same action even if the protected conduct had not taken place, that is, that it had a legitimate reason for removing the appellant. *See, e.g., Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988); *Gomez v. Department of Justice*, 36 M.S.P.R. 56, 62 (1988).

We find it unnecessary to remand this case for an analysis on this issue. The administrative judge found that the appellant failed to meet the lower standard of proof required for a whistleblowing defense, and nothing in the appellant's petition for review convinces us that the administrative judge erred in this finding. Furthermore, even if we were to find that the appellant's EEO complaint was a substantial factor in the agency's adverse action against her, we would still conclude that the appellant failed to sustain her burden of proving reprisal because we agree with the administrative judge that her repeated misconduct, which was unrelated to her complaint, warranted her removal.

The appellant argues that the administrative judge erred in making this finding. She cites the following as support: She was employed by the agency for 5 years without any complaints about her performance, the agency began documenting her performance only after she filed her discrimination complaint, the agency attempted to remove her on falsification charges after she filed her complaint, one of the reasons for her detail was friction between her and Ms. Murphy, the agency admitted knowledge of her disclosure, and the removal was initiated while the Equal Employment Opportunity Commission was conducting hearings on her discrimination complaint.

However, the administrative judge acknowledged most of these assertions in his initial decision. *See* I.D. at 7, 13-

14.[3] Notwithstanding, he correctly concluded that insubordination was a valid basis for the agency's action. I.D. at 14; *Meads v. Veterans Administration*, 36 M.S.P.R. 574, 584 (1988); *Bassett v. Department of the Navy*, 34 M.S.P.R. 66, 69 (1987); *Shaw v. U.S. Government Printing Office*, 26 M.S.P.R. 664, 669 (1985). Although the appellant contends that the evidence shows that neither the detail nor the charges of insubordination would have been raised but for her disclosure, she has not supported her assertion with evidence. Thus, her mere disagreement with the administrative judge's findings does not show that he erred in sustaining the appellant's removal. *Weaver*, 2 M.S.P.R. at 133-34.

ORDER

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

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See*

---

[3] We note that the exhibit regarding the falsification charge was withdrawn. *See* IAF, Tab 7, Ex. 27. Even if the appellant's contention concerning this charge is considered, however, it does not establish her affirmative defense of reprisal because it does not show that the agency would not have removed her for insubordination. *See, e.g., Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

5 U.S.C. § 7703(a)(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.