UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DEBORAH G. MORGAN, Appellant, v. UNITED STATES POSTAL SERVICE, Agency, and OFFICE OF PERSONNEL MANAGEMENT, Petitioner.	DOCKET NUMBER PH07528710588 DATE: JUN - 5 1991

Walter Gaines, Jr., Richmond, Virginia, for the appellant.

Thomas J. Blum, Esquire, Philadelphia, Pennsylvania, for the agency.

Steven E. Abow, Esquire, Washington, D.C., for the petitioner.

BEFORE

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

OPINION AND ORDER

The Director of the Office of Personnel Management (OPM) has petitioned for reconsideration of the Board's decision in this case, which was issued on November 9, 1988, MSPB Docket

No. PH07528710588, 38 M.S.P.R. 676 (1988). We hereby DENY the Director's petition and REAFFIRM our previous decision.[1]

BACKGROUND

The appellant was removed from the position of Letter Carrier on July 20, 1987, based on a charge of physical inability to perform the duties of her position. The agency, in effecting the removal, relied upon evidence indicating that the appellant had a permanently disabling back condition which prevented her from engaging in most of the physical activities required in her position. On appeal to the Board's Philadelphia Regional Office, the administrative judge reversed the removal action, finding that the charge of physical inability to perform could not be sustained because the actual reason for the appellant's removal was her erratic and unproductive behavior at work. She further found that the appellant had been discriminated against on the basis of handicap.

The agency petitioned the Board for review. The Board declined to sustain the removal action but for different reasons from those specified in the initial decision, and it vacated the initial decision. The Board found that the appellant had in fact been removed based upon her inability to perform but, relying upon *Street v. Department of the Army*, 23

[1] We find good cause to waive the time limits for OPM's submission of its brief because OPM's delay was brief and the administrative record sent by the Board to OPM was inadvertently misdirected to an incorrect office location. *See Shiflett v. United States Postal Service*, 839 F.2d 669, 672-73 (Fed. Cir. 1988).

M.S.P.R. 335 (1984), it found that the appellant's removal was not "for such cause as will promote the efficiency of the service" under 5 U.S.C. § 7513(a). The Board found that although preponderant record evidence showed that the appellant was incapable of performing the duties of her Letter Carrier position at the time the agency removed her, hearing exhibits submitted by the agency during the processing of the appeal at the Regional Office showed that the appellant's physical condition had improved and that she had been reinstated to her Letter Carrier position on October 19, 1987. Consequently, under these circumstances, the Board concluded that her removal would not promote the efficiency of the service. The Board also found that the appellant had not been discriminated against on the basis of handicap, finding that the appellant failed to meet her burden of establishing a *prima facie* case of handicap discrimination.[2]

In its brief in support of its petition for reconsideration, OPM contends that *Street* should be overrul and that the instant case was wrongly decided. In support of its contention, OPM asserts, *inter alia*, that the Board erred in admitting into the record evidence pertaining to events that occurred after the agency's removal decision (presumably such "events" are the appellant's recovery and reinstatement) because the Board's adjudicatory authority is limited to

[2] The Board is adjudicating OPM's petition for reconsideration on grounds not related to handicap discrimination. Thus, the issue of handicap discrimination is not now an issue before the Board.

review of the agency's decision at the time the removal action was taken. OPM further contends that the proper issue before the Board is whether the agency's removal action at the time it was taken promotes the efficiency of the service and that evidence relating to the issue of the appellant's improved condition is not relevant to this issue. Finally, it contends that the Board's order violated the Back Pay Act, 5 U.S.C. § 5596 *et. seq.*, because the agency's removal action was not erroneous or unjustified, as required under that statute, since the appellant was incapable of performing the duties of her position at the time the agency removed her, and because the appellant was not ready, willing and able to work before the agency reinstated her.

ANALYSIS

The fundamental question presented in this appeal is whether the Board is restricted to reviewing the propriety of the agency's decision when made. As detailed below, under the limited factual circumstances where an individual removed for inability to perform recovers during the time in which an appeal is pending before the Board, we find that OPM has set forth no basis upon which to overrule *Street* or to alter the Board's decision in this case.

At the outset, we note that it is well-settled that the Board has *de novo* review authority. The Board has expressly held that it is not in the position of a Court of Appeals but rather is itself an administrative establishment within the Executive Branch "exercising independent quasi-judicial

functions." Thus, "it is the Board's decision, not the agency's [decision] that constitutes an 'adjudication' . . . which must be articulated in a reasoned opinion providing an adequate basis for review by a Court." *See Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 518 (1980). *See also Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 286-90 (1981).

The Board has rejected the notion that its scope of review is limited to consideration of the administrative record established before the agency. Under 5 U.S.C. § 7701(a) and (b), the Board is mandated to conduct a hearing, if requested by the appellant, and to consider, *de novo*, all the relevant evidence presented by both parties, whether offered at a hearing or transmitted as part of the agency's case record. *See Zeiss v. Veterans Administration*, 8 M.S.P.R. 15, 17-18 (1981), where the Board held that an appellant in an adverse action based on absence without leave, "as in any other adverse action" may rely upon medical evidence not previously submitted to the agency as a defense to the merits of the agency's action. The Board noted that the agency is not restricted to reliance upon its administrative record, but may cross examine or otherwise rebut an appellant's evidence presented for the first time at a hearing before the Regional Office.[3]

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[3] *See also Stewart v. Office of Personnel Management*, 8 M.S.P.R. 289, 294 (1981) (the Board's review is not restricted to the administrative record but is a *de novo* review; the Board may properly consider evidence relating to a period of

The Board's review is not limited to the evidence supporting the agency's decision at the time the removal action was taken. Thus, the Board can rely on evidence of subsequent events that sheds light on the circumstances at the time that the agency acted.

The Board has held that "the efficiency of the service" is the "ultimate criterion" for determining both whether any discipline is warranted and whether a particular penalty may be sustained. *See Goode v. Defense Logistics Agency*, 31 M.S.P.R. 446, 449 (1986); *Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985) ("[a]n adverse action promotes the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest"). Thus, evidence relating to the event of the appellant's improved condition and subsequent reinstatement is relevant to the agency's removal action at the time it was taken because such evidence relates to the ultimate criterion, whether removal promotes the efficiency of the service and, therefore, whether removal is appropriate under the circumstances.

In *Street*, the Board expressly recognized the broad scope of its *de novo* review authority. *Street v. Department of the Army*, 23 M.S.P.R. at 341. It further noted its authority to

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time extending beyond the date of OPM's decision to disqualify an appellant inasmuch as OPM has a full and fair opportunity to cross-examine or otherwise rebut an appellant's evidence at a Board hearing); 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 414 (1981).

render a final determination on whether an agency action was taken "for such cause as will promote the efficiency of the service." *Id.* at 342. Accordingly, the Board found that the administrative judge properly admitted into the record evidence of the appellant's recovery from disability, "although such evidence came into existence subsequent to the removal action and was not considered by the agency in effecting the removal." *Id.* at 340. The Board noted that there had been a "unique intervening substantial change in the appellant's physical condition" after decision at the agency level and upon *de novo* review by the administrative judge. The Board found such evidence "directly material" to the sole charge on which the appellant was removed; namely, his physical inability to perform and found that evidence of his recovery "related to the physical condition which formed the basis for his removal." *Id.* at 342. Thus, although the Board concluded that the agency showed by preponderant evidence that the appellant was physically unable to perform the duties of his position at the time he was separated, due to the "unique circumstances of the case," it concluded that the new evidence was of sufficient weight "to be determinative of the outcome." *Id.* at 342. The Board explicitly found that the agency's action was not, therefore, taken "for such cause as will promote the efficiency of the service." *Id.* at 343.

Similarly in this case, where the agency showed before the Regional Office that it had reinstated the appellant because she could perform the duties of her Letter Carrier

position, the Board considered these events. It again found these events "directly material" to the sole charge on which the appellant was removed, "physical inability to perform" and that her recovery and reinstatement "was related to the physical condition that formed the basis for her removal." *Morgan v. United States Postal Service*, 38 M.S.P.R. at 680. Thus, despite the fact that the appellant was physically incapable of performing the essential duties of her position at the time of her removal, her recovery means that the adverse action can no longer be considered to have been "for such cause as will promote the efficiency of the service." *Id.*

The Board's holdings in *Street* and *Morgan* are based upon the Board's broad *de novo* review authority and its authority to determine whether an agency action promotes the efficiency of the service. The Board, as the "last voice" in the Executive Branch, must avoid the manifest absurdity of upholding a removal for physical incapacitation when intervening events show that the appellant is no longer incapacitated and, thus, removal cannot promote the efficiency of the service.

Both *Street* and *Morgan* are limited to the unique circumstances of each case and simply attempt to avoid a manifestly absurd and inefficient result by taking into consideration the fact that an appellant removed for inability to perform has recovered during the pendency of the appeal before the Regional Office. Under the circumstances of these

cases, the fact that the agency could show that at the time it took the action the appellant was incapable of performing his/her duties, is not determinative of the ultimate outcome of the appeal before the Board. Implicit and inherent in the agency's action in effecting the removal actions based upon inability to perform is its necessary conclusion that such inability will be permanent or at least long-enduring. Otherwise the agency could grant the appellant sick leave or leave without pay to afford the appellant an opportunity to recover. Thus, when it is apparent that the appellant's inability to perform is temporary in nature and, in fact, that the appellant has recovered even before the Board can render an initial decision in an appeal, the Board correctly and properly refuses to hold that the agency's removal action is for the efficiency of the service.[4]

ORDER

This is the final order of the Merit Systems Protection Board regarding OPM's petition for reconsideration.

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*

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[4] We note that the Postal Service is not subject to the Back Pay Act. *See* 5 U.S.C. § 5596(a). We, therefore, find it unnecessary to address OPM's argument that the results in *Street* and *Morgan* violate the Back Pay Act because the appellants were unable to perform the duties of their positions at the time they were removed.

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:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.