

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

85 M.S.P.R. 565

LYLE A. TURNER,

Appellant,

DOCKET NUMBER

SF-0752-98-0705-I-1

v.

UNITED STATES POSTAL SERVICE,

Agency.

DATE: March 29, 2000

Norman F. Nivens, Esquire, Fair Oaks, California, for the appellant.

Anthony W. DuComb, Esquire, San Francisco, California, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman

Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This appeal is before the Board on the appellant's timely petition for review of the May 18, 1999 initial decision that affirmed the agency's action demoting and reassigning the appellant. For the reasons discussed below, the Board GRANTS the petition, REVERSES the initial decision, and DOES NOT SUSTAIN the agency's action.

BACKGROUND

¶2 On June 9, 1998, the agency proposed the appellant's removal from his EAS-17 Maintenance Manager position, Redding, California, on a charge of Conduct Unbecoming of a Postal Manager/Creating a Hostile Work Environment. Initial

Appeal File (IAF), Tab 4, Subtab 4D. The charge was based on 9 separate incidents of alleged misconduct. On July 28, 1998, the deciding official sustained each incident of misconduct, but mitigated the removal to a demotion to a PS-3, Step O Custodial/Laborer position and a reassignment to the agency's Sacramento Processing and Distribution Center. *Id.*, Subtab 4A. The agency subsequently amended the effective date of the action, and further amended the penalty to a demotion to an MPE Level 7, Step O position at the Marysville Processing and Distribution Facility. *Id.*

¶3 The appellant filed a timely Board appeal in which he denied committing the misconduct and asserted that the agency's action constituted discrimination based on his disabilities (diabetes and hypertension). *Id.*, Tabs 1 & 11. After holding a hearing, the administrative judge (AJ) issued an initial decision affirming the agency's action. *Id.*, Tab 21 (Initial Decision). The AJ found that the agency had proven 6 of the 9 specifications, and that the appellant had failed to establish his affirmative defenses of disability discrimination and harmful procedural error.¹ *Id.* at 2-13. She reviewed the relevant factors pertaining to the penalty, and found that the demotion and reassignment fell within the bounds of reasonableness. *Id.* at 13-16.

¶4 In his petition for review, the appellant reiterates most of the arguments he made below and claims that the AJ made a number of errors in the initial decision. Petition for Review (PFR) File, Tab 3.² Among those errors, he

¹ The appellant actually made two distinct arguments that asserted harmful procedural error on the part of the agency. In the initial decision, the AJ only addressed his claim that the agency had initially charged him with sexual harassment, and had subsequently and improperly changed its characterization of the charge. Initial Decision at 13.

² In his petition for review, the appellant asserts that he is withdrawing his claim of disability discrimination. PFR File, Tab 3 at 1. In its response to the petition, the agency acknowledges the appellant's withdrawal and does not oppose it. *Id.*, Tab 4 at 3 n.1. Accordingly, we accept the appellant's clear, unequivocal withdrawal of his disability discrimination claim and give it full force and effect. *Cf. Appell v. U.S.*

asserts, is the AJ's failure to address his argument that the deciding official committed harmful procedural error in considering "uncharged conduct" in reaching his decision. *Id.* at 14-20. The agency has responded in opposition to the petition. *Id.*, Tab 4.

ANALYSIS

¶5 Under 5 U.S.C. § 7701(c)(2)(A), the Board cannot sustain an agency's decision in any case if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Reversal of an agency's action is warranted where the appellant establishes that the agency committed a procedural error, whether regulatory or statutory, that likely had a harmful effect on the outcome of the case before the agency. 5 C.F.R. § 1201.56(c)(3); *see Santos v. Department of the Navy*, 58 M.S.P.R. 694, 697 (1993). In order to show harmful error, an appellant must prove that any procedural error substantially prejudiced his rights by possibly affecting the agency's decision. *Stephen*, 47 M.S.P.R. at 681.

¶6 In 5 C.F.R. Part 752, Subpart D, the Office of Personnel Management has set forth the procedural requirements an agency must follow when it takes certain adverse actions, including removals and reductions in grade or pay.³ Section 752.404(f) states: "In arriving at its decision, the agency shall not consider any reasons for [the] action other than those specified in the notice of proposed action." In his closing argument submitted to the AJ, the appellant argued that the deciding official's testimony at the hearing made it clear that he had based his

Postal Service, 69 M.S.P.R. 363, 365 (1996) ("The relinquishment of one's right to appeal to the Board must be by clear, unequivocal, and decisive action.").

³ Subpart D clearly applies here because the agency initially proposed the appellant's removal, and then mitigated that decision to a reduction in grade and pay, as well as a reassignment.

decision to sustain the charge on statements from employees regarding conduct that had not been included in the proposal notice. IAF, Tab 19 at 10. The AJ did not address this argument in the initial decision. On review, the appellant reiterates his argument.

¶7 The agency's June 9, 1998 Notice of Proposed Removal stated that the action was being taken for "CONDUCT UNBECOMING OF A POSTAL MANAGER/CREATING A HOSTILE WORK ENVIRONMENT." IAF, Tab 4, Subtab 4D. The notice went on to set out 9 specific incidents in support of the charge, each with an approximate or an exact date on which the incident allegedly occurred. In the July 28, 1998 Letter of Decision, the deciding official stated generally that he had reviewed the appellant's statements, as well as "all the evidence of record," and found that all of the "charges"⁴ in the proposal letter were fully supported by the evidence. *Id.*, Subtab 4A. In its response file submitted before the AJ, the agency included a number of statements and notes of investigative interviews from the appellant's subordinates and other employees regarding the appellant's conduct. *Id.*, Subtabs 4H, 4J, 4L, 4M, 4N, 4O, 4P, & 4Q. Some of the statements and notes dealt, at least in part, with the specific incidents with which the appellant was charged, and were from individuals who were directly involved in those alleged incidents and who testified at the Board hearing, *id.*, Subtabs 4K (May 11, 1998 statement by Murphy Atwood) & 4M (August 13, 1997 statement by Gary Hooper and May 10, 1998 statement by Dick Wolcott); others, however, clearly concerned alleged occurrences of misconduct that were not referenced by the agency in its proposal letter. *See, e.g. id.*, Subtabs 4J (May 20, 1998 interview with Darrold Bott), 4K (May 18, 1998 interview with Jerry Garrotte), 4L (May 12, 1998 statement of Jerry Weston), 4N (May 11 statement of Susan Russell).

⁴ It is clear that, when he referred to the "charges," the deciding official was referring to the individual incidents listed in the proposal notice that supported the agency's sole charge.

¶8 At the Board hearing, the deciding official testified that, in making his decision, he reviewed the aforementioned notes of the interviews, as well as the handwritten statements from employees. Transcript (Tr.) 328, 353. During his testimony, he continually referred to a "double-digit number of people," who were witnesses or who had made allegations against the appellant. Tr. 323, 365. When the appellant's attorney sought clarification by pointing out that it did not appear that there were a double-digit number of witnesses to the incidents set out in the proposal notice, the deciding official made it clear that he had considered *all* of the statements and interview notes in reaching his decision. Tr. 366. He further admitted that he had not made any particular findings that the appellant had committed the specific acts of misconduct in the letter of proposed removal, but rather had based his decision that the appellant had created a hostile work environment on the weight of all of the evidence that he reviewed. Tr. 377, 379. In response to specific questions as to whether the statements and interview notes not involving incidents in the proposal notice had "influenced [his] determination that [the appellant] had committed [the charged] offenses," and whether they "also were important to him in [his] decision about what penalty to impose," the deciding official responded in the affirmative. Tr. 366-67.

¶9 In light of the deciding official's testimony, we find that the agency committed procedural error by considering reasons for its action that were not referenced in the proposal notice, in violation of 5 C.F.R. § 752.404(f). *See Payne v. Department of the Army*, 6 M.S.P.R. 693, 696 (1981). Moreover, inasmuch as the deciding official admitted that his consideration of the incidents not mentioned in the proposal letter played a part in his decision to sustain the charge, and to impose the penalty of demotion and reassignment, we further find that the appellant has shown that the agency's procedural error substantially prejudiced his rights by possibly affecting the agency's decision. *Stephen*, 47 M.S.P.R. at 681. Under these circumstances, pursuant to 5 U.S.C. § 7701(c)(2)(A), we must REVERSE the agency's action.

ORDER

- ¶10 We ORDER the agency to cancel the appellant's demotion and reassignment and restore the appellant effective August 15, 1998. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.
- ¶11 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service regulations, as appropriate no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.
- ¶12 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).
- ¶13 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).
- ¶14 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 other related material at our web site,
<http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.