

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

AFIFA A. AFIFI,
Appellant,

v.

DEPARTMENT OF INTERIOR,
Agency.

DOCKET NUMBER
DC531D8610254

Date: APR 16 1987

David H. Williams, Esq., Williams & Eoannou,
Washington, D.C., for the appellant.¹

Grant L. Vaughn, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant appealed the agency's decision to deny her a within-grade salary increase (WIGI) for failure to perform at an acceptable level of competence (ALOC) under 5 C.F.R. Part 531, alleging, *inter alia*, that the decision was the result of discrimination against her on the basis of sex and national origin (Egyptian). In an initial decision of August 13, 1986, the Board's designated administrative judge affirmed the agency's decision. The appellant has petitioned for review of that initial decision. For the

¹ The appellant was represented by counsel at the oral hearing in this matter, but submitted her petition for review on a pro se basis.

reasons set forth below, the petition for review is DENIED for failure to meet the criteria for review under 51 Fed. Reg. 25,158 (1986) (to be codified at 5 C.F.R. § 1201.115)². The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

ANALYSIS

The applicable burden of proof in ALOC appeals containing an allegation of prohibited discrimination

In the initial decision, the administrative judge clearly stated that he was applying the substantial evidence standard of proof, rather than the preponderance of the evidence test, to the agency's denial of the appellant's WIGI, citing *Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 513 (1980). Initial Decision at 2-3. This holding is in accordance with *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985), in which the Federal Circuit Court of Appeals held that "substantial evidence" is the appropriate standard for reviewing an agency's determination to deny an employee a within-grade pay increase.

² On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

In *White v. Department of the Army*, 720 F.2d 209 at 212-214 (D.C. Cir. 1983), however, the United States Court of Appeals for the District of Columbia Circuit concluded that 5 U.S.C. § 7701(c)(1) (1982) mandates application of a preponderance of the evidence standard, rather than a substantial evidence standard, when the Merit Systems Protection Board reviews agency denials of within-grade salary increases. See also *Ommaya v. National Institutes of Health*, 726 F.2d 827 (D.C. Cir. 1984).

In cases such as this one, in which an allegation of prohibited discrimination has been raised by the appellant in connection with the agency action, the appellant has the right to appeal an adverse decision to the appropriate U. S. District Court for a *de novo* review of the entire case. 5 U.S.C. § 7703(b)(2). In this instance, given the multiple options available to plaintiffs under the special venue provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), the appropriate district court could be that for the District of Columbia, which, of course, applies the law of the United States Court of Appeals for the District of Columbia Circuit. Consequently, the precedent set forth in *White* and *Ommaya* would be applicable to an appeal of this case filed by the appellant in that court.

In the past, when deciding cases involving both an ALOC determination and an allegation of prohibited discrimination, it has been the policy of the Merit Systems

Protection Board to apply the law of the United States Court of Appeals for the particular circuit to which the appellant may ultimately appeal the Board's decision. See *Wade v. Department of Health and Human Services*, 20 M.S.P.R. 683, 685 (1984). Under that policy, we would have vacated the initial decision in this case and remanded this "mixed ALOC" appeal to the administrative judge for readjudication applying the preponderant evidence standard adopted by the District of Columbia Circuit. See *Ommaya*, 726 F.2d at 830-31.

Upon further consideration, however, we believe that the Board is obliged to follow the precedent of the Federal Circuit Court of Appeals in this and all other mixed ALOC appeals, even though another appellate court may actually review our decision. As in other mixed cases, the Board will apply its own body of law to those aspects of mixed ALOC appeals that turn on civil service law. Cf. *Ignacio v. United States Postal Service*, 30 M.S.P.R. 471 (Spec. Pan. 1986).

This policy is necessary to the Board's further development of a coherent, uniform civil service jurisprudence. As noted above, an appellant in a mixed case has a variety of options by which to appeal a discrimination claim; under our previous policy, it was often unclear to which court the appellant would appeal and, thus, which circuit's precedent we would apply. By applying the law of the Federal Circuit in this and all such future cases, the

Board will bring a measure of consistency to a traditionally inconsistent area of federal employment law. .

The Board, thus, will apply the substantial evidence burden of proof in mixed ALOC appeals, pursuant to the Federal Circuit's *Romane* precedent. The opinions in the cases of *Wade v. Department of Health and Human Services*, 20 M.S.P.R. 683 (1984), and similar appeals, therefore, are overruled insofar as they stand for the proposition that the Board will apply the law of the circuit to which an appeal lies in mixed cases involving denials of within-grade salary increases.

The merits of the agency's denial of the appellant's within-grade salary increase

The appellant was denied her WIGI for failure to meet the performance standards of a non-critical element of her position, i.e., "Supervision Received--Communicates with Supervisor." Because of that failure, she was rated "minimally satisfactory" at the end of 1985.

She was to complete and submit to her supervisor two research papers by the end of 1985, and affirmatively was to keep the supervisor informed of her progress and estimated completion date. The administrative judge found, based to a great degree on the relative credibility of the appellant and of her supervisors, that she did not initiate communication with her supervisor during the last few months of 1985, and, when her supervisors inquired of her progress,

she said that the papers were coming along sufficiently. She did not notify the supervisors that she could not complete the papers on time until after the deadline passed, and did not finally submit the papers until March of 1986. Thus, the administrative judge found that the charges of failure to communicate were established by the agency by substantial evidence. As noted, this finding is consistent with *Romane* in its application of the substantial evidence standard.

The administrative judge also found that the appellant failed to support her claims of reprisal for prior grievances, and of national origin discrimination (Egyptian).

In her petition for review, the appellant essentially urges her preferred version of the facts of the case, as she did before the administrative judge, yet provides no new and material evidence or demonstration of interpretative error. Nor does she persuasively demonstrate, with references to the record, error by the administrative judge in assigning weight and credibility to the agency's case made at the hearing. She contends that the administrative judge did not properly "weigh the provided evidence," but does not specify what evidence she feels was erroneously considered. In sum, she does not show that the administrative judge erred in concluding that the agency proved its charges by substantial evidence.

ORDER

We therefore affirm the administrative judge's initial decision as modified by this Opinion and Order. This is the final decision of the Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 2401 E Street, N.W., Washington, D.C. 20506. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an

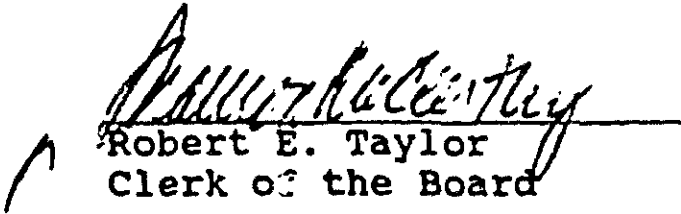
appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 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 handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is

represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, DC