UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

77 M.S.P.R. 83

Docket Number DE-0752-96-0427-I-1

FLOYD J. GROSS, III, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: October 29,1997

Patricia T. Nighswander, National Border Patrol Council, Washington, D.C., for the appellant.

Thomas Michael O'Leary, Esquire, Tucson, Arizona, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

This case is before the Board upon the appellant's timely petition for review of the October 9, 1996 initial decision that affirmed the agency's action suspending him for 20 days from his position. For the reasons discussed below, the Board GRANTS the petition for review under 5 C.F.R. § 1201.115 and REVERSES the initial decision. The agency's suspension action is NOT SUSTAINED.

BACKGROUND

The appellant appealed the agency's April 23, 1996 action suspending him for 20 days from his GS-9 Border Patrol Agent position, Immigration and Naturalization Service, Naco Station, Naco, Arizona, based on a charge of failure to comply with the agency's leave-request policy. Appeal File (AF), Tab 1, Appeal Form at 2-3 and Tab 5, Subtabs 4a, 4c. The record indicates that the agency suspended the appellant after placing him in an absence without leave (AWOL) status for 5 unspecified days of the first week of agency pay period 26 of 1995. *See* AF, Tab 5, Subtab 4c at 1-2, 8. In imposing the 20-day suspension, the agency considered, as a penalty enhancing factor, a prior 3-day suspension against the appellant for failure to comply with its leave-request policy, unauthorized use of government property, and misuse of a government vehicle. *Id*., Subtabs 4a, 4c, 4d. The appellant asserted that the agency violated the Family and Medical Leave Act of 1993 (FMLA), codified at 5 U.S.C. §§ 6381-87, by improperly denying him leave to care for an ill family member. AF, Tab 1, Appeal Form

at 3. The appellant requested a hearing but subsequently withdrew that request. *Id.*, Tab 1, Appeal Form at 4; AF, Tab 16 at 1.

In an initial decision based on the documentary evidence of record, the administrative judge affirmed the agency's action, finding that the agency properly placed the appellant in an AWOL status because he failed to follow acceptable leave procedures and that the appellant was not entitled to leave under the FMLA because, at the time of his leave request, the agency was operating under a furlough in which the appellant's position was designated "excepted." The administrative judge further found that the agency's action promoted the efficiency of the service and that the penalty was within the tolerable limits of reasonableness in view of the intentionality of the appellant's conduct and his past disciplinary record. Initial Decision (ID) at 2-8.

In his petition for review, the appellant contends that the administrative judge erred by finding that, because the agency was operating under a furlough, the FMLA did not apply to his situation. Petition for Review File, Tab 1.[1] The agency has timely responded in opposition to the petition for review. *Id*., Tab 3.

ANALYSIS

The appellant's family medical emergency situation was covered by the FMLA.

Under the FMLA, an "eligible" employee of a covered employer is entitled to unpaid leave, or paid leave, if earned, for a period of 12 weeks in any 12-month period because of the birth of a child or the placement of a child for adoption or foster care, or because the employee is needed to care for a covered family member, including a parent, with a serious health condition, or because the employee's own serious health condition renders him unable to perform his job. 5 U.S.C. § 6382(a)(1); *see also Ramey v. U.S. Postal Service*, 70 M.S.P.R. 463, 466 (1996), *modified on other grounds*, *Ellshoff v. Department of the Interior*, MSPB Docket No. CH-0752-95-0549-I-1, slip op. at 17-18 (July 29, 1997). A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves -- (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider[.]" 5 U.S.C. § 6381(5).

The agency bears the burden of proving that it properly denied FMLA leave in taking an AWOL-based action against an employee who is eligible for leave under the FMLA. *See Ellshoff*, slip op. at 17-18. Here, it is undisputed that the appellant is an "eligible" employee under the FMLA. *See* 5 U.S.C. § 6381(1).

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[1] The appellant initially raised below the issue of reprisal based on whistleblowing. AF, Tab 1, Appeal Form at 5. The administrative judge found, however, that he "implicitly dropped" this affirmative defense. *See* ID at 8 n.3. The appellant has not pursued his reprisal claim on review. Therefore, we will not consider it.

Under the applicable interim regulations promulgated by the Office of Personnel Management (OPM),[2] if the need for leave is foreseeable, the employee is required to provide the agency with not less than 30 days' notice. 5 C.F.R. § 630.1206(a). "If the need for leave is not foreseeable -- e.g., a medical emergency ... the employee shall provide notice within a reasonable period of time appropriate to the circumstances involved." 5 C.F.R. § 630.1206(c). The FMLA places no additional notice obligation on the employee. *See Ellshoff*, slip op. at 20-21. However, "[i]f the need for leave is not foreseeable and the employee is unable, due to circumstances beyond his or her control, to provide notice of his or her need for leave, the leave may not be delayed or denied." 5 C.F.R. § 630.1206(c). While an agency may apply its own leave procedures to FMLA leave requests, an agency may not apply a more restrictive leave policy than that provided under the FMLA, and it may not deny an employee leave under the FMLA for failure to follow the agency's leave procedures. 5 C.F.R. § 630.1206 (e). The agency may, of course, require that the employee provide administratively acceptable documentation to support an FMLA leave request. 5 U.S.C. § 6383(a); 5 C.F.R. § 630.1206(f).

Here, the facts as alleged by the parties are essentially undisputed. On December 5, 1995, the appellant submitted a request for annual leave from December 21, 1995, to December 31, 1995. The request was approved by Patrol Agent In Charge, John Munch. On December 18 or 19, 1995, Munch informed the appellant that, because the continuing resolution under which the agency was operating had expired on December 15, 1995, all previously approved leave was cancelled. By memorandum dated December 22, 1995, the agency officially notified employees that, because the continuing resolution under which it was operating had expired and another continuing resolution had not been enacted, it had no funding as of midnight on December 15, 1995, and it was imposing a furlough. The agency stated that it was cancelling leave because leave could not be granted for a nonworkday. AF, Tab 5, Subtab 4b. During the furlough, the appellant's position was designated "excepted" and he was required to report for duty. AF, Tab 1 and Tab 5, Subtab 4b at 5-6 and Subtab 4c at 4-5, 7.

On December 23, 1995, the appellant telephoned his immediate supervisor, Nick Leonard, regarding his situation. Because Leonard was preoccupied with other matters, it was agreed that the appellant would submit a memorandum to Leonard explaining his situation. Later that day, the appellant went to see Leonard, who was preparing to leave work for the day. The appellant did not have the memorandum ready but stated that he would leave it for Leonard. On December 24, 1995, when Leonard returned to

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[2] Since this cause of action arose, OPM has issued final FMLA regulations effective January 6, 1997. *See* 61 Fed. Reg. 64,441 (1996) (to be codified at 5 C.F.R. parts 630 and 890). However, the applicable regulations here are the interim regulations issued by OPM on July 23, 1993, that were in effect at the time of the agency's April 23, 1996 action. *See*, *e.g.*, *Ellshoff*, slip op. at 19 n.3; *Hill v. Department of the Air Force*, 42 M.S.P.R. 187, 190 (1989). Thus, the FMLA regulations cited in this Opinion and Order are the interim regulations.

work, he found the appellant's memorandum. AF, Tab 5, Subtab 4c at 5. The signed memorandum, entitled "Renewing Leave Request," stated in pertinent part:

This memo is written to "renew my leave." This Leave would enable me to visit my mother for Christmas. My mother was stricken by congestive heart failure as determined by her attending physician at the Pioneer Hospital in Brawley, California., [sic] within the last two weeks.

The Cardiologist forecasted [sic] that this will be my mother's last Christmas, because of her failing condition; therefore, I find it absolutely necessary to be there for my mother this Christmas to visit, to take care of her affairs, and to make arrangements for her personal care before it's too late.

I respectfully request that I be put on Furlough since no leave is being approved due to the lack of a Continuing Resolution or passed Budget that would've permitted me to take my Annual Leave as pre-approved earlier this month by PAIC John E. Munch for this Christmas.

AF, Tab 1 and Tab 5, Subtabs 4b at 4, 4c at 6 (emphasis supplied).

As previously noted, the agency placed the appellant in an AWOL status for 5 calendar days during his absence. AF, Tab 1, Tab 5, Subtab 4c at 1-3, 8. In response to the suspension proposal notice, the appellant stated that he initially requested annual leave for the purpose of visiting his mother, who was ill and had suffered a heart attack on December 7, 1995. He stated that, initially, he was not disturbed by the cancellation of his annual leave because "his mother had recovered significantly from her heart attack of December 07, 1995." AF, Tab 5, Subtab 4b at 1. He stated, however, that, late in the evening of December 21, 1995, his brother telephoned him and informed him that his mother's condition had taken a turn for the worse and that he was needed in California "to assist in providing support, arrange for his mother's care, and to attempt to get her affairs in order." *Id*. The appellant stated that he was in an off-duty status for 4 days and, when the agency failed to contact him, he left for California on December 25, 1995, to visit his mother. AF, Tab 1 at 9. Additionally, the appellant submitted below medical documentation confirming that his mother, who was 67 years old at the time, and lived alone, had suffered acute congestive heart failure and had been hospitalized on December 7, 1995, in Pioneers Memorial Hospital, Brawley, California, and discharged on December 8, 1995. AF, Tab 1, at 20-23. Therefore, he established that she had a "serious health condition" within the meaning of 5 U.S.C. § 6381(5).

The Board has held that an employee is not required to explicitly invoke the FMLA in requesting covered leave. *Ellshoff*, slip op. at 21. The agency has not disputed the appellant's allegation that he was needed to care for his seriously ill mother or the urgency or unforeseeability of the appellant's December 24, 1995 leave request for this purpose. The agency also has not, at any time, required the appellant to submit medical certification regarding his mother's condition. *See* 5 U.S.C. § 6383(a); 5 C.F.R. §§ 630.1206(f), 630.1207(a). We find that the appellant's actions in telephoning Leonard on December 23, 1995, regarding his mother's situation, visiting him the same day, and then leaving him a signed memorandum on December 24, 1995, as agreed, stating that the appellant was needed to care for his ill mother, explaining that she had

suffered congestive heart failure and that her condition was serious were sufficient under the circumstances to satisfy the notice requirements of the FMLA and to invoke entitlement to leave under it even though the appellant did not explicitly invoke it.

The appellant was entitled to be placed on leave without pay (LWOP) under the FMLA.

The Antideficiency Act, 31 U.S.C. § 1341, provides in pertinent part:

(a)(1) An officer or employee of the United States Government

or of the District of Columbia Government may not --

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law ....

In its December 22, 1995 Furlough Decision Notice, the agency stated that, "[u]nder the Antideficiency Act, no obligations may be incurred in the absence of appropriations except for the protection of human life or property, the orderly suspension of operations, or as otherwise authorized by law," and, thus, it was cancelling previously approved leave. AF, Tab 5, Subtab 4b and Tab 1, December 22, 1995 Furlough Decision Notice at 1.

We note, however, that the record demonstrates that, notwithstanding the furlough and the resulting cancellation of all leave, the agency retained some discretion in granting leave to "excepted" employees such as the appellant, as indicated in additional information the agency apparently provided its supervisors, i.e.:

The granting of paid leave to "excepted" (essential) or fee account employees is discretionary. However, in view of the situation, supervisors should be cautious about approving non-emergency leave which may be perceived as contrary to the intent of the furlough.

AF, Tab 1 at 19. It follows logically then that, if the agency had the discretion to grant "excepted" employees paid leave, it also had the discretion to grant them LWOP because such grant did not require the agency to make or authorize an expenditure or obligation. *See Carrow v. Veterans Administration*, 9 M.S.P.R. 630, 633 (1982) (LWOP is a temporary nonpay status and absence from duty granted upon the employee's request). As we noted in *Ellshoff*, slip op. at 15, "[a]bsent a specific statutory or regulatory right to LWOP, an employee is not entitled to it as a matter of right, and the grant of LWOP is a matter committed to an agency's administrative discretion." Nevertheless, where disciplinary action results from an agency's denial of LWOP, the Board will review the circumstances to determine if the denial was reasonable. *Joyner v. Department of the Navy*, 57 M.S.P.R. 154, 159 (1993); *Fisher v. Department of Defense*, 54 M.S.P.R. 675, 679 (1992); *Johnson v. Defense Logistics Agency*, 54 M.S.P.R. 370, 372 (1992).

Here, the appellant did not request paid leave. He requested in his December 24, 1995 memorandum received by Leonard to be placed on furlough. We find that the appellant's request to be placed on furlough to care for his seriously ill mother, which he

supported by specific information regarding her medical circumstances in his signed memorandum to Leonard -- *see* AF, Tab 1 and Tab 5, Subtabs 4b at 4, 4c at 6 -- was tantamount to a request for emergency medical LWOP under the FMLA and was sufficient to place the agency on notice that the appellant was invoking the leave provisions of the FMLA. *See Ellshoff*, slip op. at 21. Therefore, we find that the agency's failure to grant the appellant LWOP under these circumstances was unreasonable. *See Joyner*, 57 M.S.P.R. at 159; *Fisher*, 54 M.S.P.R. at 679; *Johnson*, 54 M.S.P.R. at 372. We further find under these circumstances that the agency's denial of LWOP violated the provisions of the FMLA. *See* 5 U.S.C. § 6382(a)(1); 5 C.F.R. §§ 630.1203(a), 630.1205(a), 630.1206(c), 630.1206(e).

If an agency bases an adverse action on its interference with an employee's rights under the FMLA, the adverse action is a violation of law and cannot be sustained. *See Ramey*, 70 M.S.P.R. at 467. Here, we find that by failing to grant the appellant LWOP to care for his seriously ill mother, and then placing him in AWOL status[3] and suspending him, the agency interfered with his rights under the FMLA. *See id*. Therefore, the agency's action cannot be sustained. *See id*.; *see also Joyner*, 57 M.S.P.R. at 159; *Fisher*, 54 M.S.P.R. at 679; *Johnson*, 54 M.S.P.R. at 372.

ORDER

We ORDER the agency to cancel the appellant's suspension and to restore him effective April 23, 1996. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, 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 compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

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[3] We note that the administrative judge initially adjudicated the appellant's claim that he was improperly placed on AWOL as a separate claim warranting a jurisdictional showing. *See* ID at 2-3. We find, however, that the agency's placement of an employee in AWOL status must be examined where the employee claims entitlement to leave under the FMLA. *See Ramey*, 70 M.S.P.R. at 469. Thus, in such a situation, AWOL need not be considered as a separate charge requiring a showing of Board jurisdiction. Because, however, the administrative judge ultimately considered the appellant's placement in AWOL status in determining whether the agency proved by preponderant evidence that it properly placed the appellant in such status, *see* ID at 3-6, any error by the administrative judge in regard to the AWOL jurisdictional issue did not prejudice the appellant's substantive rights, *see Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

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* 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,
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
Washington, D.C.