UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

93 MSPR 645

RICKY HIDALGO,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
CB-7121-02-0019-V-1

DATE: August 12, 2003

Ross E. Parrish, Jacksonville, Florida, for the appellant.

Todd Boucher, South Burlington, Vermont, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A.G. McPhie, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's timely request for review of the February 15, 2002 arbitration decision that sustained his removal. For the reasons set forth below, we GRANT the appellant's request for review and SUSTAIN the arbitration decision.

BACKGROUND

¶2 The following facts are not in dispute. The appellant was employed in the position of Border Patrol Agent, GS-11, at the Pembroke Pines Station of the Miami Border Patrol Sector. From April 16 through April 28, 2000, he was temporarily detailed to the Florida Keys in connection with "Operation Red

Light," an ongoing agency activity whose goal was to disrupt alien landings and smuggling into the United States.

¶3 The agency removed the appellant, effective April 21, 2001, based on charges of: (1) making false statements, (2) submitting false Time and Attendance information; and (3) wasting government time. Decision Letter, Arbitration File (AF), Exhibit (Exh.) 2. With regard to the first charge, the agency alleged that the appellant stated under oath that, on April 22, 2000, he used an unmarked government Ford Explorer between 6:00 a.m. and 11:00 a.m. in an attempt to apprehend a South African overstay. Notice of Proposed Removal, *id.*, Exh. 2. The agency alleged that this statement was false because Acting Supervisory Border Patrol Agent Bruce Busby used that vehicle between 8:00 a.m. and 5:30 p.m. that day. *Id.*

¶4 Concerning the second charge, the agency alleged that, on April 17, 2000, although scheduled to work from 6:00 a.m. until 2:00 p.m., the appellant did not begin work until 10:00 a.m., but claimed to have started work at 6:00 a.m. on his Time and Attendance (T&A) Worksheet for that day. *Id.* The agency further alleged that, although scheduled to work until 2:00 p.m. on April 17, 2000, the appellant ate lunch at about 1:30 p.m. and then stopped working for the day. *Id.* The agency alleged that, despite this, the appellant claimed to have worked Administratively Uncontrollable Overtime (AUO) until 4:00 p.m. that day. *Id.* With regard to its third charge, the agency alleged that, although scheduled to work between 6:00 a.m. and 2:00 p.m. on April 17, 2000, the appellant was observed that day at about 9:30 a.m. out of uniform, eating breakfast. *Id.* The agency further alleged that, on that same day, at about 1:30 p.m., he was observed out of uniform, lounging by the hotel pool. *Id.*

¶5 The appellant grieved the matter through the negotiated grievance procedure, culminating in arbitration. Arbitrator's Award, AF, Exh. 1. The arbitrator sustained the agency's removal action, finding that the agency proved its charges, that the removal was for "just and sufficient cause," and that it was

for such reasons as would promote the efficiency of the service. *Id.* The appellant has now requested review of the arbitrator's award. AF, Tab 1, Request for Review. The agency has responded in opposition to the appellant's request for review. AF, Tab 3.

ANALYSIS

Jurisdiction and legal standard for review of arbitrators' awards.

¶6 The Board has jurisdiction to review an arbitrator's award under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleges discrimination under 5 U.S.C. § 2302(b)(1), and a final decision has been issued. *See Hutchinson v. Department of Labor*, 91 M.S.P.R. 31, ¶ 3 (2001). Each of these criteria is satisfied in the present case. The Board has jurisdiction over a removal action under 5 U.S.C. § 7512, the appellant alleged national origin discrimination in violation of 5 U.S.C. § 2302(b)(1)(A), and a final decision was issued denying the appellant's grievance. Thus, we find that the Board has jurisdiction over this case.

¶7 The scope of the Board's review of arbitrators' awards is limited. *See Higgs v. Social Security Administration*, 71 M.S.P.R. 48, 50 (1996). The Board will modify or set aside an arbitrator's award only where the arbitrator has erred as a matter of law in interpreting civil service law, rule or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* For the reasons discussed below, we find that the appellant has failed to establish that the arbitrator committed legal error.

The appellant has not shown that the agency's action was the result of discrimination.

¶8 The appellant did not raise this matter below. An appellant, however, may raise a claim of discrimination for the first time in his request for review of the

arbitration decision. *Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 663 (1997).

¶9 The appellant first alleges disparate treatment discrimination. AF, Request for Review. An employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997).

¶10 Here, the appellant asserts that he is Hispanic, of Costa Rican ancestry, and that he was treated more severely than Dale Rude, Border Patrol Agent, a non-member of that group, for similar misconduct. AF, Request for Review. In support of his allegation, the appellant submits documentation relating to Rude's case. *Id*., Exh. 3. This evidence does not support the appellant's allegation. The proffered submission is a notice of a proposed 30-day suspension issued by the agency to Rude on June 19, 1996. *Id*. There is nothing in the record to show what the agency's final decision was in this case. Further, the appellant has not shown that he was similarly situated to Rude. For comparison employees to be considered similarly situated to an appellant,

> all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparison employee. Among other things, comparative employees must have engaged in conduct similar to the appellant's without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it.

Botto v. U.S. Postal Service, 75 M.S.P.R. 471, 476 (1997) (citations omitted); *see, e.g., Farmer v. U.S. Postal Service*, 80 M.S.P.R. 205, ¶¶ 16-21 (1998). Moreover, the appellant and the comparison employee must have been supervised by the same individual. *See Bell v. Department of the Treasury*, 54 M.S.P.R. 619, 629 (1992). Here, the appellant's submission reflects that Rude was charged

with: (1) unauthorized use of a government vehicle; (2) falsification of government forms and documents; (3) misuse of a government-issued credit card; and (4) use of government property for other than an official purpose. AF, Exh. 3. Of these three charges, only one, the second charge, appears similar to two of the agency's charges against the appellant, i.e., the charge of submitting false Time and Attendance information, and the charge of making false statements. With regard to the latter charge, the agency considered the consequences of such misconduct as an aggravating factor. In its decision letter, the agency noted that, because he made false statements *under oath during an official investigation*, the appellant became vulnerable to impeachment in a legal proceeding, a factor that undermined his ability to testify credibly on behalf of the agency. AF, Exh. 2. The appellant has not shown that this was a factor in Rude's case. Thus, the appellant has failed to show that his misconduct was similar to that of the comparison employee. *Cf. Kindred v. Postmaster General*, EEOC Appeal No. 01961827 (1998) (an employee charged with selling cocaine and an employee charged with possession of marijuana and carrying a concealed weapon were not similarly situated). Moreover, the appellant has not alleged, and the record does not reflect, that the appellant and Rude had the same supervisor. *See Bell*, 54 M.S.P.R. at 629. Accordingly, the appellant has not shown that he was similarly situated to a non-member of his protected group, and thus, he has failed to show disparate treatment.

¶11 As additional support for his discrimination claim, the appellant submits a statement from former Supervisory Border Patrol Agent James P. Orgeck describing a conversation he had in the summer of 2000 with Dean Sinclair, then employed as Patrol Agent in Charge. AF, Exh. 6. In his statement, Orgeck indicated that, during the course of that conversation, Sinclair made reference to another Hispanic employee, Laura Perez, commenting that she presented an unprofessional image, and that she dressed "like a little Latin slut." *Id*. The cited comments demonstrate a discriminatory animus on Sinclair's part. However, the

appellant has failed to show either that Sinclair supervised him during the period in question, or that he was involved in the decision to remove the appellant. *See, e.g., Wilson v. Postmaster General*, EEOC Appeal No. 01985146 (2001) (evidence of intent generally relates to intent, or absence of intent, of individual who recommended and/or took the action complained of).

¶12 The appellant also states that the agency's Miami Sector has shown "a flagrant practice of discrimination against Hispanic employees." AF, Request for Review. To the extent that the appellant is alleging disparate impact discrimination, his allegation lacks merit. In order to make out a prima facie case of discrimination based on a disparate impact theory, the appellant must, as an initial matter, present sufficient statistical evidence to prove that the employment practice at issue fell more harshly on one group than another. *Pigford v. Department of the Interior*, 75 M.S.P.R. 250, 256 (1997). Here, the appellant refers to three cases involving Hispanic employees disciplined by the agency: (1) Ruben Cano, Border Patrol Agent, removed for making false statements under oath and engaging in a prohibited relationship with an alien; (2) Luis Aponte, Special Agent, removed for drug-related misconduct; and (3) Angelo Melendez, Communications Assistant, reprimanded for providing false information on an official government form. AF, Exhs. 4, 5. This recitation is anecdotal at best, and does not constitute statistical evidence sufficient to warrant a finding of discriminatory disparity in the agency's disciplinary practices.

The appellant has failed to show harmful procedural error.

¶13 Harmful procedural error is defined as error by an agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. 5 C.F.R. § 1201.56(c)(3); *Powers v. Department of the Treasury*, 86 M.S.P.R. 256, ¶ 10 (2000). Harmful procedural error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that

the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

¶14 The appellant asserts that, under the relevant provisions of the agency's Administrative Manual, where an investigation is found warranted for alleged employee misconduct, the investigation will be carried out by an official from a Sector or District other than the one in which the alleged offense occurred. AF, Request for Review. He contends that the agency violated its own rules because the investigating official in this case, Joseph Mellia, was a permanent employee in the Miami Sector, the Sector where the charged misconduct took place. *Id*.

¶15 An agency is required to act in accordance with the regulations and procedures it adopts for itself, but an employee will have the burden of proving that the agency committed harmful error by failing to follow those rules. *Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997). The appellant has not submitted a copy of the regulatory provisions relied upon in his request for review. Even assuming, however, that the appellant's assertions are correct, he has failed to show how the agency's assignment of the investigation to an employee within the Miami Sector, without more, likely had a harmful effect upon the outcome of the case before the agency. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984).

¶16 The appellant further alleges that there was an inherent conflict in Mellia's serving both as investigating officer and proposing official. AF, Request for Review. This contention lacks merit. The Board has held that the proposing official and the deciding official may be the same person in a Chapter 75 proceeding. *Davis v. Department of Transportation*, 39 M.S.P.R. 470, 479, *aff'd*, 882 F.2d 1051 (Fed. Cir. 1989) (Table). We see no meaningful difference between that situation and the circumstances of this case, where the agency

designated the same individual to serve as both investigating official and proposing official.

¶17 Moreover, the appellant asserts that: (1) the investigation was supervised by former Deputy Chief Patrol Agent Michael J. Sheehy; (2) Sheehy would have been the proposing official, had he not retired; and (3) Sheehy testified that the appellant's misconduct warranted only a 20-day suspension. *Id*.; Hearing Transcript (H.Tr.) at 320-326 The appellant's reliance on this evidence is misplaced. First, Mellia was the proposing official, not Sheehy, and as such, he was free to make his own recommendations, based on his own assessment of the evidence. Second, whatever recommendations might have been made by Sheehy or Mellia, the ultimate decision as to the appropriate penalty was not made by either, but by the deciding official, Chief Patrol Agent Lynne Underdown. AF, Exh. 2; H.Tr. at 222.

¶18 Last, the appellant cites to Art. 32(G) of the collective bargaining agreement, which states that

> [t]he employer shall furnish employees with notices of proposed disciplinary/adverse actions at the earliest practicable date after the alleged offense has been committed and made known to the employer.

AF, Exh. 10. The appellant alleges that the agency's investigation was completed in June 2000, and that the agency improperly delayed until December 2000 to notify him of its proposed removal action. *Id*., Request for Review. The Board will enforce an employee's rights derived from a collective bargaining agreement. *Campbell*, 75 M.S.P.R. at 279. Here, however, the appellant has failed to show that the agency violated his rights under the collective bargaining agreement because he has not submitted any evidence to show that it was "practicable" for the agency to notify him of its proposed action at any time prior to its issuance of its notice of proposed removal.

¶19 To the extent that the appellant is attempting to raise the defense of laches, his allegations are similarly meritless. To establish the equitable defense of

laches, an appellant must prove both that the delay in bringing the action was unreasonable, and that he was materially prejudiced by the delay. *Jones v. Department of Justice*, 87 M.S.P.R. 91, ¶ 10 (2000). Here, the delay was not lengthy (six months), and it was not unreasonable. Ross E. Parrish, president of the local union, testified that the transcripts of the tapes of the agency's investigatory interviews were not completed until October 2000. H.Tr. at 44-45. Moreover, the appellant has not even alleged, much less shown, that his ability to defend himself against the agency's charges was prejudiced by the delay. Thus, the appellant has failed to establish that the agency's charges should be barred by laches. *See Eikenberry v. Department of the Interior*, 37 M.S.P.R. 438, 447 (1988) (laches will not apply where the agency satisfactorily explains the delay, and the appellant fails to show prejudice to his substantive rights).

The appellant has not shown error in the arbitrator's evidentiary rulings

¶20 The appellant alleges that the arbitrator erred by admitting into evidence a statement from Special Patrol Agent Stephen Brooker because it was hearsay, i.e., because Brooker did not testify at the hearing.[*] AF, Request for Review. This allegation lacks merit. Relevant hearsay testimony is admissible in administrative proceedings before the Board. *Woodward v. Office of Personnel Management*, 74 M.S.P.R. 389, 394 (1997); *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). Here, the agency introduced Brooker's statement to support its allegation that the appellant made a false statement when he swore that, on April 22, 2000, he used an unmarked government Ford Explorer between 6:00 a.m. and 11:00 a.m., when in fact, Brooker and Busby used that vehicle between 8:00 a.m. and 5:30 p.m. that day. Arbitrator's Award at 16. Therefore, it was relevant. Brooker's statement was corroborated by, and consistent with, Busby's live testimony. H.Tr. at 104-05, 136-37, 140, 153-60. Further, the

[*] This exhibit was introduced at the hearing and marked Joint Exhibit 6. H.Tr. at 8. It was not, however, included in the case file.

arbitrator correctly found that no challenge was made to the truthfulness of Brooker's statement. Arbitrator's Award at 19-20. Thus, the appellant has not shown that the arbitrator erred either in admitting Brooker's statement, or in assessing its probative weight. *See Borninkhof*, 5 M.S.P.R. at 83-87.

¶21 The appellant alleges that the arbitrator erred in admitting evidence which had not previously been made available to him. AF, Request for Review. Specifically, the appellant alleges that, on November 4, 2000, the second day of the hearing, the agency submitted telephone records from the hotel where he had been staying while on detail. Arbitrator's Award at 18-19. The telephone records, which cover the period between 6:35 a.m. and 12:33 p.m. on April 22, 2000, were offered by the agency to support its allegation that the appellant was in his hotel room on that date, at a time when he was required to be working. *Id*. In addition, the appellant alleges that the arbitrator improperly excluded documentary evidence which he submitted after the close of the hearing to rebut the evidence of the telephone records. AF, Request for Review.

¶22 These contentions lack merit. The appellant has not submitted with his request for review a copy of the transcript of the second day of the hearing. Therefore, there is no evidence in the record to show that he pled unfair surprise at the hearing, and he may not do so now on review. *See Roof v. Department of the Air Force*, 53 M.S.P.R. 653, 657 (1992); *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583 (1981). The evidence which the appellant sought to submit with his post-hearing brief, i.e., statements from his wife and other relatives, was available before the close of the record, and the appellant does not explain his failure to submit such evidence in a timely manner. Moreover, because the appellant has not submitted the record of the second day of the hearing, there is nothing in the record to show that he requested a continuance to present additional witnesses, or that he requested that the record be kept open for submission of additional statements. Accordingly, the appellant has not shown error here. *See Roof*, 53 M.S.P.R. at 657; *Owens*, 8 M.S.P.R. at 583.

The appellant's other allegations do not present a basis for review

¶23 The appellant contends that a negative inference should be drawn against the agency because investigating official Mellia destroyed the notes of his interviews with the appellant. AF, Request for Review. The appellant contends that his statements would have shown him to be truthful and consistent as to his version of events. *Id*. This contention lacks merit. At the hearing, Mellia did testify that he destroyed his notes of his interviews with the appellant. H.Tr. at 181. He further testified, however, that it was his practice to destroy all his interview notes once he had completed his investigatory report. H.Tr. at 192. The report was made available to the appellant, and Mellia testified in person at the hearing. Thus, the appellant was in a position to cross-examine Mellia as to the accuracy of his report. Moreover, the agency produced sufficient other documentary and testimonial evidence, including the statements and testimony of Brooker and Busby, to prove its charges by preponderant evidence. Therefore, a negative inference is not warranted here. *See Shustyk v. U.S. Postal Service*, 32 M.S.P.R. 611, 613-14, *aff'd*, 831 F.2d 305 (Fed. Cir. 1987) (Table).

ORDER

¶24 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 FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other

issues in your appeal. 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 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.