

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

99 M.S.P.R. 428

ZOE FEARON,

Appellant,

DOCKET NUMBER

CB-7121-04-0024-V-1

v.

DEPARTMENT OF LABOR,

Agency.

DATE: August 19, 2005

Blake H. Smith, American Federation of Government Employees,
Washington, D.C., for the appellant.

Alex Bastani, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman

Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant requested Board review of an arbitrator's decision that affirmed the agency's decision to suspend her but mitigated the length of the suspension from 20 days to 5 days. For the reasons set forth below, we GRANT her review request and SUSTAIN the arbitrator's decision.

BACKGROUND

¶2 The agency suspended the appellant from a Program Specialist position for 20 days based upon charges that she excessively used a government-issued cellular phone for unofficial business and failed to follow instructions. Initial

Appeal File (IAF), *Fearon v. Department of Labor*, MSPB Docket No. DC-0752-04-0639-I-1, Tab 4, Arbitrator's Decision. The appellant challenged the suspension through the negotiated grievance procedure, arguing that she minimally used the government-issued cellular phone for personal calls and did not intentionally disregard her supervisor's orders. *Id.* Alternatively, the appellant argued that the agency's penalty was too harsh. *Id.* The arbitrator held a 3-day hearing between July and October 2003. *Id.* On June 3, 2004, the arbitrator issued a decision. *Id.* He sustained only the charge that the appellant excessively used a government-issued cellular phone and mitigated the agency's penalty to a 5-day suspension. *Id.*

¶3 On July 8, 2004, the appellant, by her union representative, electronically filed an appeal form with the Clerk of the Board. IAF, Tab 1 at 1. She asserted, inter alia, that an arbitrator sustained the agency's suspension action without ordering the agency to provide documents that the union requested pursuant to 5 U.S.C. § 7114(b)(4).¹ *Id.*, Tab 1, Appeal Form 185-2 at 1-2 and Appeal Form Continuation Sheet at 1. Specifically, she asserted that by letter dated November 14, 2002, the union requested a copy of government telephone records, including government cellular phone and phone card use, for bargaining unit and non-

¹ Pursuant to 5 U.S.C. § 7114(b)(4)(B), an agency must furnish information to the union, if the information is (1) reasonably available and (2) necessary for the union to represent its members. A party alleging that the agency has violated 5 U.S.C. § 7114(b) may file an unfair labor practices complaint with the Federal Labor Relations Authority. *See* 5 U.S.C. § 7116(b); 5 C.F.R. §§ 2423.3, 2423.6. The Board has no statutory authority over unfair labor practices, however. *See Barry v. Department of Justice*, 31 M.S.P.R. 676, 678 (1986) **Error! Bookmark not defined.**; *Clarry v. Department of Transportation*, 18 M.S.P.R. 147, 153 (1983), *aff'd*, 795 F.2d 1016 (Fed. Cir. 1986) (Table). Thus, to the extent that the appellant seeks to have the Board determine whether the agency committed an unfair labor practice by refusing to provide information that the union requested pursuant to 5 U.S.C. § 7114(b)(4), her claim is outside of the Board's jurisdiction.

bargaining unit employees in the OASAM National Office² for the last year, from “November 15, 2002 backward.” *Id.*, Tab 1, Appeal Form Continuation Sheet at 1. The appellant asserted that such documents could have established her claim of disparate treatment in connection with the agency’s penalty selection (i.e., “whether employees who had used their government phone in a like or similar manner to Ms. Fearon had not been subject to disciplinary action, or lesser disciplinary action”). *Id.* She asserted that, instead, the arbitrator ordered the agency to produce only records of the employees in her *immediate office* who were disciplined for excessive use of government phones for the period in question. *Id.* (emphasis added).³

¶4 The Clerk of the Board forwarded the appeal form to the Washington Regional Office as a petition for appeal. IAF, Tab 1. On July 12, 2004, an administrative judge (AJ) issued an Order to Show Cause, apprising the appellant that, because her appeal from the suspension appeared to be untimely filed she must show that it was timely filed or that good cause exists for the filing delay. *Id.*, Tab 3. He also apprised the appellant that, pursuant to 5 U.S.C. § 7121, her appeal may be outside of the Board’s jurisdiction since it appeared that she first elected to appeal the suspension through the negotiated grievance procedure rather than through the Board’s appeals process. *Id.* He ordered the appellant to meet her burden of proof on these matters within 15 days of the date of his order. *Id.*⁴

² The record does not contain the proper name for “OASAM” but, hereinafter, this entire office will be referred to as the “National Office.”

³ We have inserted the term “immediate office” for clarity. While the appellant omitted this term on her appeal form, it is apparent from the record that the arbitrator also limited the scope of the union’s request for information to employees in the appellant’s immediate office rather than employees in the National Office.

⁴ We assign no error to the AJ’s instructions at this stage regarding the timeliness and jurisdictional issues raised by the appeal. The AJ received the appellant’s e-appeal from the Clerk of the Board. With only her appeal form before him, the AJ could

¶5 The appellant timely responded to the AJ's order with attachments, including the arbitrator's decision. IAF, Tab 4. She asserted that she alleged disability discrimination "from the inception of this case" and was requesting a review of an arbitrator's decision under the Board's jurisdiction at 5 U.S.C. § 7121(d). IAF, Tab 5. Finding that the appellant had made clear that she was filing a request to review an arbitrator's decision pursuant to 5 U.S.C. § 1201.154(d), the AJ dismissed the appeal for lack of jurisdiction. *Id.*, Tab 6. He then forwarded the request for review to the Clerk of the Board for redocketing and adjudication. *Id.* By notice dated July 30, 2004, the Clerk of the Board notified the parties that: The case was recaptioned; the appellant must submit materials listed at 5 C.F.R. § 1201.154(d) on or before August 14, 2004; and the agency could file a response to the appellant's request for review within 35 days of the notice. Request for Review File (RRF), Tab 2. Neither party has responded to the Clerk of the Board's notice.

ANALYSIS

The appellant's request for review falls within the Board's jurisdiction.

¶6 Pursuant to 5 U.S.C. § 7121(d), the Board may review an arbitration decision if the grievant alleges that the agency action occurred due to discrimination prohibited by 5 U.S.C. § 2302(b)(1), the agency action is otherwise appealable to the Board under 5 U.S.C. § 7702, and a final grievance decision has been issued. *Cooper v. Department of Defense*, 98 M.S.P.R. 313, ¶ 11 n.3 (2005); *Confer v. Department of Veterans Affairs*, 57 M.S.P.R. 401, 403-04 (1993); *Ogden Air Logistics Center and American Federation of Government Employees, Local 1592*, 6 M.S.P.R. 630 (1981). In reviewing an arbitrator's decision, the Board has jurisdiction to consider an issue of prohibited

reasonably conclude that the appellant was seeking a direct Board appeal from the agency's suspension action after filing a grievance action, which 5 U.S.C. § 7121(d), (e)(1) prohibits.

discrimination even if the appellant did not raise the issue before the arbitrator, *see Jones v. Department of the Navy*, 898 F.2d 133, 135 (Fed. Cir 1990); *Butler v. Internal Revenue Service*, 86 M.S.P.R. 513, ¶ 9 (2000), and “irrespective of whether the appellant makes a nonfrivolous allegation of discrimination,” *see Bennett v. National Gallery of Art*, 79 M.S.P.R. 285, 294 (1998). Each of these criteria is satisfied in this case. The Board has jurisdiction over the appellant’s 20-day suspension under 5 U.S.C. §§ 7512(2), 7513(d), and 7701, and a final grievance decision has been issued. The appellant has raised a claim that the agency’s action was the result of disability discrimination, which is prohibited by 5 U.S.C. § 2302(b)(1)(D) and appealable to the Board in conjunction with an otherwise appealable action such as a 20-day suspension under 5 U.S.C. § 7702(a)(1)(B)(iii). We therefore find that this matter is within the Board’s jurisdiction. *See Williams v. Government Printing Office*, 86 M.S.P.R. 583, ¶ 5 (2000).

The appellant’s request for review is timely filed.

¶7 A request for review of an arbitrator’s decision must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than five days after the date of issuance, within 30 days after the appellant received the decision. 5 C.F.R. § 1201.154(d). In this case, the arbitrator issued a decision on June 3, 2004. Since the appellant does not claim that she received the decision more than five days after the date of issuance, July 8, 2004, was the last day of the 35-day filing period. IAF, Tab 1. Hence, her electronic filing of her request with the Clerk of the Board on July 8, 2004, was timely. 5 C.F.R. § 1201.4(1) (the date of filing by e-filing is the date of electronic submission).

The record does not establish that the arbitrator erred in interpreting civil service law, rule, or regulation in this case.

¶8 The scope of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Weaver v. Social Security Administration*, 94 M.S.P.R. 447, ¶ 8 (2003); *Higgs v. Social Security Administration*, 71 M.S.P.R. 48, 50 (1996). Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it would disagree with the arbitrator's decision. *Weaver*, 94 M.S.P.R. 447, ¶ 8. The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Id.*

¶9 Here, the appellant does not specifically challenge the arbitrator's decision to sustain the agency's charge that she excessively used a government-issued cellular phone for unofficial business. The arbitrator sustained this charge, finding that the appellant knew of the agency's regulations prohibiting the use of government-issued cellular phones for personal use and that she had previously received verbal warnings and a letter of reprimand for other instances in which she excessively used her government-issued cellular phone for personal business. IAF, Tab 4, Arbitrator's Decision at 9-12. The appellant asserts instead, in her request for review, that she alleged disability discrimination "from the inception of her case." IAF, Tab 5. The arbitrator's decision does not address such a claim, the appellant fails to point to any evidence that she raised this claim before the arbitrator, and we cannot determine whether she did so based on this record. Considering her disability discrimination claim for the first time in this request for review, as we must, the appellant fails to support it with facts, much less specify her disability, as required by 5 C.F.R. § 1201.154(d)(2), (d)(3). Such a

bare allegation is insufficient to establish disability discrimination. *See Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 666 (1997).⁵

¶10 The appellant's remaining claim concerns the reasonableness of the penalty. She asserts that, but for the arbitrator's failure to order the agency to comply with 5 U.S.C. § 7114(b)(4) by providing information listed in the union's November 14, 2002 request, she could have established her disparate penalty claim at the arbitration hearing. That is, had the union provided the appellant with a copy of government telephone records, including records related to government cellular phone and phone card use, for bargaining unit and non-bargaining unit employees in the National Office, the appellant could have shown whether these employees committed the same offense but received little or no discipline.

¶11 To prove disparate treatment with regard to the penalty for an act of misconduct, an appellant must show that a similarly situated employee received a different penalty. *Wentz v. U.S. Postal Service*, 91 M.S.P.R. 176, ¶ 22 (2002). The comparator employee must be in the same work unit, with the same supervisors, and the misconduct must be substantially similar. *Id.* To the extent that the union's request under 5 U.S.C. § 7114(b)(4) entitled the union to information that was relevant to the appellant's disparate penalty claim, the arbitrator may have erred by requiring the agency to provide the union with information regarding only those similarly situated employees who were actually disciplined for excessive use of government phones, because evidence regarding similarly-situated employees who received no discipline after committing similar misconduct would also support the appellant's disparate penalty claim. *See, e.g., Rackers v. Department of Justice*, 79 M.S.P.R. 262, 283-84 (1998) (the Board considered the appellant's claim that he was treated disparately on the basis of

⁵ Additionally, we note that nothing in the record indicates that disparate treatment is the basis for the appellant's disability discrimination claim.

other allegedly similarly situated employees who committed similar offenses but received no discipline), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). In any event, the Board has consistently found that allegations of disparate penalties provide no basis for reversal or mitigation where the punishment is appropriate to the seriousness of an employee's offense. *Quander v. Department of Justice*, 22 M.S.P.R. 419, 423 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table). There are two exceptions to this rule: (1) An agency may not knowingly and intentionally treat similarly situated employees differently; and (2) if an agency decides to begin levying a more severe penalty for a certain offense, it must give notice of the change in policy. *Social Security Administration v. Mills*, 73 M.S.P.R. 463, 473 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997) (Table).

¶12 As noted earlier, the arbitrator mitigated the agency's penalty from a 20-day suspension to a 5-day suspension. The arbitrator found that a 5-day suspension was appropriate because, while the agency's second charge was unproven, the appellant's misconduct underlying the sustained charge was serious. IAF, Tab 4, Arbitrator's Decision at 12. The arbitrator also considered that the appellant was reassigned to another office, had reimbursed the agency for the costs of her personal calls, and had her government-issued cellular phone privileges revoked. *Id.* Aside from her argument regarding disparate penalties, the appellant has not established that the arbitrator erred in finding that a 5-day suspension was appropriate for the seriousness of her offense. Nor has she established either of the exceptions to the general rule that proof of disparate penalties will not require reversal or mitigation of an otherwise appropriate penalty. Therefore, even if the arbitrator erred with respect to his ruling regarding the relevant information the agency had to provide to the union in support of the appellant's disparate penalties claim, the appellant's request for review does not establish that the arbitrator erred as a matter of law with respect to his ultimate conclusion that a 5-day suspension was an appropriate penalty for

the sustained misconduct. For all of the foregoing reasons, we SUSTAIN the arbitrator's decision.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this request for review. 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 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.