UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

68 M.S.P.R. 82

Docket Number SL-0752-94-0218-I-1

BRUCE SUBLETTE, Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

Date: June 21, 1995

Charles R. Oldham, Esquire, St. Louis, Missouri, for the appellant.

Stephanie H. Winter and William D. Kimball, Esquires, St. Louis, Missouri, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The agency petitions for review of the June 10, 1994 initial decision that mitigated its removal action to a demotion. The appellant cross petitions for review. For the reasons discussed below, we find that the petition and cross petition do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY them. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still MITIGATING the removal to a demotion.

BACKGROUND

The agency removed the appellant from his position as a GS-12 Supervisory General Supply Specialist, after finding that he had engaged in a pattern of conduct unbecoming to a federal employee supervisor. *See* Appeal File, Vol. I, Tab 4 (Agency File), Subtab 4c. Specifically, the agency found nine instances of improper conduct, including violations of the command's policies on sexual harassment, obscene language, discrimination, and offensive comments. *See id*.

The appellant raised disability discrimination as an affirmative defense. Following a hearing, the administrative judge issued an initial decision finding that the agency proved its charge against the appellant, including all nine of its specifications. He further found, however, that the appellant established that he was discriminated against, based on his disability, consisting of a combination of major depression and post traumatic stress disorder (PTSD). Despite his finding of discrimination, he went on to analyze the penalty. He found that although it would be speculative to find that the appellant's disability was the sole cause of his misconduct, it was a significant contributing factor. The administrative judge concluded that the maximum reasonable penalty would be a reduction in grade to a nonsupervisory position, outside of the appellant's former work unit (the Logistics Directorate), leaving the exact choice of a position in the agency's sole discretion. He also ordered the agency to provide the appellant with interim relief if a petition for review were filed.

In its petition for review, the agency contends that the administrative judge erred in denying its motion to have the appellant examined by its own psychiatrist, that it did not know of the appellant's alleged condition until after the removal action, and that its penalty was appropriate. It has accompanied its petition with evidence that it provided the appellant with interim relief. In his response to the petition for review, the appellant contends that the agency did not provide him with proper interim relief, because it placed him in a GS-4 position. He responds to the agency's arguments, and, in his cross petition for review, asks that the administrative judge's order be modified to provide that he be placed in a position at the GS-11 level or higher. *See* Petition for Review File, Tab 4.

ANALYSIS

The agency has shown that it provided interim relief in accordance with the administrative judge's order.

In addition to stating that the appellant was to be demoted to a nonsupervisory position, the administrative judge's order said that the "choice of an exact position will be in the sole discretion of the agency."[1] Initial Decision at 28. Accordingly, the agency was acting within the terms of the order when it placed the appellant in a GS-4 position. The agency has provided evidence that it placed the appellant in this position effective June 10, 1994, the date of the initial decision. *See* Petition for Review File, Tab 1, Encl. 1. Accordingly, it has provided the requisite interim relief, and its petition for review is properly before us.

The administrative judge correctly found that the agency proved its charge.

In his cross petition for review, the appellant does not dispute that the agency proved its charge, including all nine specifications, against him. We find no error in the administrative judge's analysis. Accordingly, we concur with his finding that the agency proved its charge.

The administrative judge erred in mitigating the penalty after finding discrimination.

After finding that the agency discriminated against the appellant, the administrative judge then mitigated the penalty. This was in error, as the remedy for discrimination is to make the victim "whole." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). In this case, having found discrimination, the administrative judge should have reversed the adverse action completely. Because we find, however, that the administrative judge erred in finding discrimination, we shall not require that the agency now provide the appellant with make-whole relief.

The appellant has not established that he has a disability.

To establish that he is a disabled person, entitled to reasonable accommodation, the appellant must first show that he has a physical or mental impairment that substantially limits one or more of his major life activities, including foreclosure generally of the type of employment involved; has a record of such an impairment; or is regarded as having such an impairment. *See* 29 C.F.R. § 1614.203(a); *Sigler v. Department of the Army*, 63 M.S.P.R. 103, 110 (1994); *Carr v. Department of Defense*, 61 M.S.P.R. 172, 178 (1994).

In finding that the appellant established that he was disabled, the administrative judge relied heavily on the testimony of the appellant's psychiatrist, Dr. Wolff. Dr. Wolff, however, first saw the appellant on November 2, 1993, after the agency had proposed the appellant's removal. *See* Hearing Transcript (HT), Vol. II at 236. The appellant was terminated because of misconduct he committed between February and October 1993. *See* Agency File, Tab 4o. Although the appellant and Dr. Wolff testified that the appellant suffered from nightmares and occasional angry outbursts before he started seeing Dr. Wolff, there is no evidence that he sought psychiatric or other assistance, or that he felt that he could not perform his job, prior to his first meeting with Dr. Wolff.

Further, the inquiry as to whether a person is disabled is an individualized one, which focuses on whether the particular impairment constitutes a significant barrier to the person's employment and/or other major life activity.[2] *See Rodriguez v. Department of the Air Force*, 60 M.S.P.R. 279, 282 (1994). Dr. Wolff's testimony and the other medical evidence do not establish that the appellant's mental condition significantly restricted him as to the condition, manner or duration under which he could

perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *See* 29 C.F.R. § 1630.2(j)(3)(i).

Dr. Wolff testified that a stressful and chaotic work environment would exacerbate the intensity of whatever inclination the appellant might have for PTSD symptoms. *See* HT, Vol. II at 253. He further stated that the appellant's work environment was disorganized and stressful, and somewhat reminiscent on a deep psychological level of the Vietnam experience. *See* HT, Vol. II at 255.

Dr. Wolff further testified that the appellant should not be in a position where he makes policy decisions, although he would be very good at carrying out assigned tasks. *See* HT, Vol. II at 251. Dr. Wolff provides no basis for his opinion, beyond saying that he bases it on his evaluation of the appellant. We find that although there is evidence that the work environment was stressful, there is no evidence, aside from Dr. Wolff's opinion, that the appellant had difficulty making decisions, and was substantially impaired from performing in a decision-making position. In fact, there was very little, if any, evidence presented as to the exact nature of the work the appellant performed, and how his mental condition affected his ability to perform his duties.

Moreover, while the agency attempted to establish that the appellant's inappropriate behavior had occurred in the supervisory position he held before his most recent one, the appellant denied these incidents. *See, e.g.,* HT, Vol. II at 294-95. The appellant had always received good performance appraisals in this previous position, and did not testify or offer other evidence that the supervisory nature of the position was difficult for him. *See* Appeal File, Vol. II, Tab 21, Appellant's Ex. B (Performance Appraisals). Accordingly, we find that the appellant has failed to establish that he was significantly restricted with regard to performing in government supervisory positions in general.

In short, based on the appellant's evidence, even if we were to find that the appellant established that he had depression and PTSD while he held his last position, he has not shown that these conditions substantially impaired his ability to perform his work. To the extent that he did show such impairment, it was the stresses of his particular work environment, rather than the supervisory nature of the position, that contributed to his purported condition. Therefore, he has established at most that his impairment precluded him from meeting the demands of a particular job, and not that he was foreclosed generally from a type of employment, which he must prove to establish that he is disabled. *See Manuel v. Department of*

Veterans Affairs, 58 M.S.P.R. 424, 428 (1993). The appellant has not established that the action appealed to the Board was based on his disability.

Even if we were to assume that the appellant showed that he has a disability, he has nevertheless failed to establish a prima facie case of disability discrimination. As part of his prima facie case, the appellant must show that the agency knew about his disability at the time of the adverse action, and that the action appealed to the Board was based on his disability. Since the agency learned of the appellant's purported impairment/disability after it proposed his removal, but before a final agency decision was rendered, it did have knowledge of the alleged disability. However, the appellant has not shown that the removal was based on his alleged disability. *See, e.g., Battle v. Department of Transportation*, 63 M.S.P.R. 403, 408 (1994).

As noted above, the agency did not become aware that the appellant might have some kind of mental impairment until after it proposed his removal. In response to requests from the appellant's attorney, the deciding official postponed his decision several times to allow the appellant to gather evidence as to whether he had a mental disability. Dr. Wolff eventually provided the deciding official with an oral report over the telephone, which stated that the appellant did not meet all the crieteria for PTSD, and that although the appellant had a depressive condition, his behavior was inexplicable based on a depression diagnosis. *See* Agency File, Tab 4e. We find no evidence that the agency's decision to implement its proposed removal was based on the appellant's purported disability.

Further, the appellant has not established that the misconduct for which he was removed occurred when he was experiencing an episode of his PTSD or depression, or was otherwise due to his purported disability. Although he testified that he gets "hyper and upset" at times, he did not claim that he was in that condition at the time of his misconduct. Nor did Dr. Wolff's testimony establish that the incidents at issue resulted from the appellant's alleged disability. He agreed with the appellant's attorney's comment that during an outbreak of anger or irritability, the appellant might make inappropriate remarks that he would not normally make, and that on-the-job manifestations of PTSD and depression could include profanity and abusive statements. *See* HT, Vol. II at 255, 266. The misconduct at issue here, however, was not necessarily the kind of aggressive or irritable outburst spoken of by the appellant and his psychiatrist. Indeed, there is no evidence that the appellant was even particularly "hyper" when some of the incidents occurred.

For example, the appellant admitted to entering a female employee's work area, and saying "Boy, we must have some hot mamas in here today,"

followed by "I know that was a really sexist statement," as he ran his hand along the employee's back atop her bra strap. *See* Agency File, Tab 4o; HT Vol. I at 48-49. There is no evidence that he was angry, under stress, or otherwise affected by his PTSD or depression, as he engaged in this behavior. Similarly, when he referred to a colonel as a "smart nigger," and spoke of another employee as a "little nigger," there is no evidence that he was feeling the effects of his mental disability, or acting in response to workplace stresses. Thus, the appellant has failed to show that the misconduct on which his removal was based was the result of a disability.[3]

Because the appellant has failed to establish a prima facie case of disability discrimination, he is not entitled to a reasonable accommodation of his purported disability. Accordingly, to the extent that the administrative judge ordered that he be demoted to a position of the agency's choice as an accommodation for his disability, we need not determine whether this is a proper accommodation.

The penalty of removal should be mitigated to a demotion.

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Mitigating factors include circumstances such as unusual job tensions, personality problems, and mental impairment. *See id*. at 305. The Board has held that the appellant's mental condition is a factor to be considered in determining the appropriateness of the penalty. *See Faint v. U.S. Postal Service*, 22 M.S.P.R. 495, 498 (1984), *aff'd*, 770 F.2d 179 (Fed. Cir. 1985) (Table). Here, while the appellant may not have shown that he was mentally disabled, he has shown that before removing him the agency was aware that he had some degree of mental impairment. In addition, we note that the appellant has over 26 years of military and civilian federal service with above-satisfactory ratings and no prior disciplinary record. Further, he has shown potential for rehabilitation, in that he indicated to agency officials that he was willing to work to improve and to do whatever was necessary to improve. In addition, he has since embarked on a treatment program of antidepressants and psychotherapy. We find that the agency failed to accord sufficient weight to these mitigating factors. The agency also failed to apply any progressive discipline to the situation. The agency's Table of Penalties for a first offense of conduct unbecoming a federal employee ranges from a one-day suspension to a removal, and the agency chose the most severe penalty. *See* Agency File, Tab 4aa.

Balanced against these strong mitigating factors, however, is the seriousness of the proven misconduct. The appellant was a supervisor, and

the agency has a right to expect a higher standard of performance from a supervisor than from a nonsupervisory employee. Moreover, as a supervisor, the appellant had the responsibility to command policy and to set an example for subordinate employees to follow, and not to continually violate agency policy. The appellant's misconduct was disrespectful of and offensive to the affected employees, and disruptive to the work environment. The seriousness of the offense, the appellant's status as a supervisor, the fact that he was warned informally about his conduct, the repeated nature of the misconduct over an extended period of time, and its effect on the morale of the workplace taken together mandate a significant penalty that impresses upon him the seriousness of his actions to promote the efficiency of the service. Accordingly, we find that the penalty should be mitigated to a demotion (i.e., a reduction in grade) to the highest available nonsupervisory position for which the appellant is qualified, at a grade no higher than GS-11. *See Davis*, slip op. at 8-9.

ORDER

We ORDER the agency to cancel the appellant's removal and to demote the appellant, effective January 21, 1994, to the highest available nonsupervisory position for which he is qualified, at a grade no higher than GS-11. *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.

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 St. Louis field 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).

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

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

You should submit your request to the EEOC 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.§ 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, 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 should file your civil action with the district court 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)(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 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 choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(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.

1 Under a recent Board decision, issued after the initial decision, the administrative judge's grant of broad discretion to the agency might be improper. *See Davis v. U.S. Postal Service*, MSPB Docket No. AT-0752-94-0300-C-1, (Apr. 10, 1995). Nevertheless, because the agency was given "sole discretion" as to where to place the appellant, it was arguably in compliance with the administrative judge's order as written. In any event, because we reopen the appeal on our own motion, any error by the administrative judge in this regard is harmless. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

2 The appellant has not alleged that his impairment substantially limited any major life activity other than that of working.

3 In light of this finding, we need not address the agency's argument that it was entitled to a continuance for its medical expert to examine the appellant to enable the agency to better respond to the appellant's claim of discrimination.