UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 84

Docket No. AT-0752-07-0563-B-1

Jerome Deas,
Appellant,
v.
Department of Transportation,
Agency.

May 19, 2009

Sean Lafferty, Esquire, Burlington, Massachusetts, for the appellant.

Gerald A. Ellis, Esquire, College Park, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Both Chairman McPhie and Vice Chairman Rose issue separate opinions.

ORDER

This case is before the Board by petition for review of the initial decision which dismissed the appeal without a hearing. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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, www.cafc.uscourts.gov. 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:

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William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

Jerome Deas v. Department of Transportation

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¶1 I would grant the appellant's petition for review because I believe that the Administrative Judge denied the appellant discovery based on her too narrow reading of the requirement that a comparator employee in a disparate treatment case have engaged in "similar misconduct."

¶2 The appellant supervisor alleges that the agency discriminated against him when it suspended him pending its completion of an investigation into allegations that he made intimidating remarks by stating that he was "going in [his] car to get [his] guns." The remarks were allegedly made during the course of an ongoing investigation into other misconduct by the appellant. In an effort to satisfy his burden of making a non-frivolous allegation of disparate treatment, the appellant sought discovery concerning certain other employees that he alleges were accused of conduct similar to his but were not suspended pending an investigation. These included (1) a supervisor who was accused by a female subordinate of rape on agency property; (2) a supervisor who was alleged to have threatened to "pop a cap in the ass" of an employee; and (3) a supervisor who had allegedly been "on the verge of violence" toward management officials. The AJ denied these discovery requests on the grounds that the individuals were not proper comparison employees. IAF Tab 25. The AJ found that only supervisory employees who threatened violence while already under investigation for other misconduct were relevant comparators for purposes of showing disparate treatment, and that information regarding any other employees was not discoverable. The AJ then dismissed the appellant's appeal without a hearing, on the grounds that the appellant had not identified any other "employees who allegedly made intimidating remarks during the course of an ongoing

investigation who were treated less harshly than he was." Initial Decision (ID), IAF Tab 39 at 9-10.

¶3 I believe the AJ viewed the evidence relevant to meeting the appellant's burden too narrowly, and that she consequently denied the appellant discovery to which he was entitled. That error, in turn, may have denied the appellant the opportunity to make a non-frivolous allegation of disparate treatment.

¶4 In the Board's prior Opinion & Order in this case, it explained that "in order to be considered similarly situated, comparison 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." *Deas v. Department of Transportation,* 108 M.S.P.R. 637, 648 (2008). However, contrary to the AJ's interpretation, the Board did not hold in *Deas* that the appellant could only meet his burden by making a non-frivolous allegation that another supervisor made intimidating remarks during the course of an ongoing investigation. Rather, the Board merely explained that another supervisor who had initially been accused and subject to investigation for the same conduct as appellant, was not similarly situated with respect to the basis for the appellant's suspension because "the agency did not suspect [the other supervisor] of making similar [threatening] remarks." *Id.* Thus, the thrust of the Board's position was that the other supervisor was not comparable because he *did not make threatening remarks*, not because threatening remarks he had made were not made in the context of an ongoing investigation.

¶5 The Board must obviously decide on a case-by-case basis whether conduct offered for comparison in order to show disparate treatment is sufficiently similar and without differentiating or mitigating circumstances so as to raise an inference of discrimination. In doing so, the Board should consider the nature of the misconduct as well as its seriousness and any other relevant factors, such as its context and surrounding circumstances. Here, the crux of the appellant's conduct was that he threatened violence against co-workers. The fact that such a

statement is made during an ongoing investigation of other unrelated conduct could, under some circumstances, be relevant, such as where the intent is to engage in witness intimidation. However, there is no evidence in this case regarding the appellant's motivation for making the alleged threatening statements or their context.

¶6 Given that fact, I believe the AJ erred by not permitting the appellant to discover evidence concerning the agency's treatment of (1) another supervisor who allegedly stated that he would "pop a cap in the ass" of another employee; (2) another supervisor who allegedly raped an employee outside an agency facility; and (3) another supervisor who was allegedly "on the verge of violence" toward management. Incident (1), on its face, involved virtually identical conduct. The fact that it did not occur during the pendency of an investigation is not a materially distinguishing factor. Incident (2) involved the actual carrying out of violence, and is therefore at least as serious as appellant's remarks, including, specifically, as a predictor of the actor's potential for future violence in the workplace. Incident (3) is a closer call, but under the Board's liberal discovery rules, the appellant should also be able to obtain information concerning this incident.

¶7 Although I believe these three alleged incidents of misconduct are sufficiently similar to that of appellant to entitle him to discovery of the incidents, I take no position on the question of whether, after such discovery, the appellant would have been able to make a non-frivolous allegation that any of the alleged misconduct is "similar to the appellant's without differentiating or mitigating circumstances that would distinguish the[] misconduct or the appropriate discipline for it."

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Neil A. G. McPhie
Chairman

SEPARATE OPINION OF MARY M. ROSE

in

Jerome Deas v. Department of Transportation

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¶1 I believe that the administrative judge correctly interpreted and applied the Board's remand instructions regarding the required similarity of comparison employees in regulating discovery concerning the appellant's discrimination claim. I would, therefore, deny the appellant's petition for review.

¶2 In *Deas v. Department of Transportation*, 108 M.S.P.R. 637, ¶¶ 15-21 (2008), the Board found that the appellant was entitled to further discovery regarding his discrimination claim before determining whether the claim might support his request for compensatory damages. The Board, however, first agreed with the administrative judge's conclusion that the existing record did not show a nonfrivolous allegation that the appellant's constructive suspension was motivated by race discrimination. *Id.* ¶ 17.

¶3 The Board based this finding on the appellant's failure to allege facts that would establish that the agency did not suspend similarly situated employees outside of the appellant's protected class during its investigations into their alleged misconduct when it suspected the employees of indicating an intention to retrieve a firearm or otherwise inflict bodily harm against agency employees, as the appellant had allegedly done. *Id.* The Board also found that the appellant did not allege that he was similarly situated to alleged comparison supervisor Jerry Bordeaux because the appellant's allegation did not indicate that Bordeaux made intimidating remarks while a respondent in an official inquiry. *Id.* ¶ 18. The Board concluded, however, that the appellant was entitled to engage in discovery to attempt to obtain other relevant information supporting his discrimination claim, and that the administrative judge abused her discretion in denying the

appellant the opportunity to engage in such discovery regarding the agency's proposal to suspend him. *Id.* ¶¶ 19-20.

¶4 The administrative judge regulated discovery in accordance with these findings on remand. Remand Appeal File, Tabs 25, 36 at 2-4. The appellant now argues on review that the administrative judge applied an overly restrictive standard regarding the degree of similarity required for comparing employees. Remand Petition for Review File, Tab 2 at 6-16. Chairman McPhie agrees, stating that the Board did not previously hold that the appellant could only meet his burden by making a nonfrivolous allegation that another supervisor made intimidating remarks during the course of an ongoing investigation. The Chairman would, therefore, find that the appellant was entitled to further discovery regarding three other supervisors who engaged in misconduct that the Chairman deems similar, but which was not committed during an ongoing investigation.

¶5 I disagree. In *Deas*, the Board first stated the traditional rule that, to be considered similarly situated, all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparison employee. 108 M.S.P.R. 637, ¶ 16. It then found that the appellant had alleged that he is a member of a protected class and that the agency treated him disparately by suspending him during its investigation into his alleged misconduct while not suspending employees outside of his protected class during its investigations into their alleged misconduct. *Id.* ¶ 17. The Board then found, however, that the appellant failed to allege facts that would establish that the agency suspected those employees it investigated but did not suspend of committing misconduct that was substantially similar to his suspected misconduct. *Id.*

¶6 The Board further expounded on the requirement that a comparison employee must have made threatening remarks during the course of an investigation. It found that the appellant alleged that he was similarly situated to comparison supervisor Bordeaux, insofar as the appellant alleged that he and

Bordeaux were managers at the same work unit and that the agency initially charged the appellant and Bordeaux with the same or similar misconduct related to the creation of a hostile work environment. *Id.* ¶ 18. The Board found this claim insufficient for comparison employee purposes, however, because the appellant failed to allege that he and Bordeaux were similarly situated with respect to the basis for the appellant's suspension -- allegations that the appellant made "intimidating remarks while a respondent in an official inquiry." *Id.* The Board explained that, while the agency may have investigated both Bordeaux and the appellant with regard to charges relating to the environment at their work site, the agency did not propose to suspend the appellant pending the completion of its investigation until after he allegedly made intimidating remarks during the course of the investigation, and the appellant did not allege that the agency suspected Bordeaux of making similar remarks. *Id.*

¶7 Thus, I believe that the Board's prior decision clearly found that a relevant comparison employee in this case must have made intimidating remarks while being the subject of an official inquiry. None of the alleged comparison employees identified in the appellant's petition for review or Chairman's McPhie's Separate Opinion satisfy this requirement. Indeed, to find these other comparison employees to be similarly situated to the appellant at this stage of the appeal, and to remand for further discovery on this broader class of alleged similarly situated comparison employees, would contravene the law of the case doctrine, that precludes relitigating matters that were explicitly decided in a prior decision. *See Timmers v. Office of Personnel Management*, 105 M.S.P.R. 4, ¶ 10 (2007). I would, therefore, deny the appellant's petition for review.

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Mary M. Rose
Vice Chairman