UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 70

Docket Nos. DA-1221-09-0083-W-2
DA-0752-08-0352-I-4

Florentino L. Mata,

Appellant,

v.

Department of the Army,

Agency.

April 21, 2010

Lorenzo W. Tijerina, Esquire, San Antonio, Texas, for the appellant.

Vivian Michelle Redd, Fort Sam Houston, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision (ID) that sustained his removal in an adverse action appeal and denied his request for corrective action in an individual right of action (IRA) appeal. For the reasons explained below, we GRANT the petition under 5 C.F.R. § 1201.115(d), AFFIRM the ID in part, REVERSE the ID in part, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his position as a General Engineer, YD-0801-02, effective March 31, 2008, on charges of failure to follow instructions and disrespect. Removal Initial Appeal File (RIAF) I-1, Tab 1; *Id.*, Tab 10, Subtab 4d.[1] The appellant appealed the removal and requested a hearing. RIAF I-1, Tab 1. He alleged that his removal was the result of discrimination on the basis of his national origin (Hispanic/Mexican-American), sex, age (over 40) and retaliation for his protected equal employment opportunity (EEO) activity. RIAF I-3, Tabs 4, 10. The appellant also alleged that the removal was in retaliation for his protected whistleblowing activity, specifically, his having reported questionable travel expenditures and inadequate structural steel inspections. *Id.*, Tab 10. On October 2 and 17, 2008, the administrative judge held the hearing the appellant had requested on the removal. RIAF I-3, Vols. 5-6, Hearing Transcript (HT). The administrative judge found, however, that the appellant's claim of retaliation for protected EEO activity was untimely raised and precluded the appellant from presenting any evidence or argument on this issue. *Id.*, Vol. 5, HT at 9.

¶3 On October 10, 2008, the appellant filed an IRA appeal and requested a hearing on that matter as well. IRA IAF W-1, Tab 1. The administrative judge joined the two appeals for processing. *Id.*, Tab 4. The appellant objected to joinder. *Id.*, Tab 6. The administrative judge denied the appellant's request that he not join the two cases. In the IRA appeal, the appellant alleged retaliation for 33 protected disclosures in regard to 34 alleged personnel actions. *Id.*, Tab 11,

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[1] The administrative judge dismissed the removal appeal without prejudice three times, and dismissed the IRA appeal once without prejudice, prior to issuance of the initial decision on both refiled matters. The files for the appeals may be cited as follows: (1) DA-0752-08-0352-I-1: Removal Initial Appeal File (RIAF) I-1; (2) DA-0752-08-0352-I-2: RIAF I-2; (3) DA-0752-08-0352-I-3: RIAF I-3; (4) DA-0752-08-0352-I-4: RIAF I-4; (5) DA-1221-09-0083-W-1: IRA Initial Appeal File (IRA IAF) W-1; and (6) DA-1221-09-0083-W-2: IRA IAF W-2.

Tab 17, Tab 20 at 4, 9. The administrative judge found that the Board had jurisdiction over only one matter raised in the IRA appeal, a February 4, 2008 14-day suspension. IRA IAF W-1, Tab 20 at 4-11. The administrative judge found that this was the only matter that was a covered personnel action that was raised before the Office of Special Counsel and that the appellant had nonfrivolously alleged was causally related to a protected disclosure, i.e., his allegation that the agency had made use of defective steel trusses in some building projects. *Id.* The administrative judge held a hearing on May 12-13, 2009, on the IRA appeal. *Id.*, HT, Vols. 11-12. This hearing also encompassed the appellant's affirmative defenses in his removal appeal that his removal was the result of discrimination on the bases of his national origin, sex and age. *Id.*

¶4 In the ID, the administrative judge affirmed the agency's removal action and denied the appellant's request for corrective action in the IRA appeal. RIAF I-4, Tab 5; IRA IAF W-2, Tab 5. With regard to the removal action, the administrative judge found that the appellant engaged in the charged misconduct; that he failed to establish his affirmative defenses of discrimination based on national origin, sex, age, or retaliation for whistleblowing; that there was a nexus to the efficiency of the service; and that the penalty of removal was reasonable. *Id.* at 4-10. The administrative judge also found that the agency had proven by clear and convincing evidence that it would have suspended the appellant for 14 days on February 4, 2008, even in the absence of his protected disclosure. *Id.* at 14-15. He therefore denied the appellant's request for corrective action in the IRA appeal. *Id.* at 15.

¶5 The appellant has filed a petition for review (PFR) in which he renews his objection to the joinder of his removal and IRA appeals. PFR File, Tab 1. The appellant also asserts that the administrative judge erred in sustaining the misconduct charges in his removal appeal and in finding that he did not prove his allegations of age, sex and national origin discrimination. *Id.* The appellant argues that the administrative judge also erred in precluding him from presenting

evidence and argument on his claim of reprisal for protected EEO activity. *Id.* The agency has responded in opposition to the PFR. PFR File, Tab 4.

ANALYSIS

¶6 The Board may grant a PFR when the administrative judge makes an adjudicatory error affecting the outcome. 5 C.F.R. § 1201.115(d). We find that the appellant's argument that the joinder of his two appeals was improper does not show adjudicatory error by the administrative judge. Joinder of two or more appeals filed by the same appellant may be appropriate when joinder would expedite processing of the appeals and would not adversely affect the interests of the parties. *Boechler v. Department of the Interior*, 109 M.S.P.R. 542, ¶ 14 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009); 5 C.F.R. § 1201.36(a)(2), (b). The appellant has provided no evidence or argument to show that the administrative judge made an adjudicatory error by joining these two appeals.

¶7 We have considered the appellant's remaining arguments with regard to his removal appeal and, with one exception, find they lack merit. We therefore affirm the administrative judge's findings with regard to the charged misconduct and the appellant's affirmative defenses of discrimination based on national origin, sex, age, and retaliation for whistleblowing activity.[2] The appellant correctly asserts, however, that the administrative judge erred in precluding him from presenting evidence and argument regarding his affirmative defense of retaliation for protected EEO activity. Therefore, we grant the appellant's PFR for the sole purpose of addressing his argument regarding this claim.

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[2] We note that the administrative judge defined the appellant's whistleblowing disclosure in his removal appeal as being the same as in his IRA appeal. RIAF I-4, Tab 5 at 6. The administrative judge did not address whether the appellant's assertions that he reported questionable travel expenditures and inadequate structural steel inspections were protected disclosures. Because the appellant has not raised this issue on review, however, we find that he has abandoned it. *See Carson v. Department of Energy*, 109 M.S.P.R. 213, ¶ 14 n.1 (2008), *aff'd*, No. 2008-3285, 2009 WL 3241396 (Fed. Cir. Oct. 9, 2009).

¶8 The Board's regulations at 5 C.F.R. § 1201.24(b) provide as follows:

> An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. An appellant may not raise a new claim or defense after that time, except for good cause shown. However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.

¶9 The administrative judge found that the appellant's claim of retaliation for protected EEO activity was untimely raised for the first time in a supplemental prehearing submission after the prehearing conference. RIAF I-3, Vol. 5, HT at 9. However, a review of the appellant's prehearing submission regarding the issues and proposed witnesses, prior to the prehearing conference, shows that he raised retaliation for protected EEO activity. RIAF I-3, Tab 4 at 10-12.[3] The administrative judge did not list this affirmative defense in the summary of the prehearing conference. *Id.*, Tab 7. However, the appellant promptly filed his supplemental prehearing submission, stating that the administrative judge had requested further explanation of his affirmative defenses. *Id.*, Tab 10. This supplemental pleading also clearly alleges the affirmative defense of EEO retaliation. *Id.* at 1-6.

¶10 Thus, the appellant timely raised an affirmative defense of reprisal for protected EEO activity by citing it in his first prehearing submission. *Cf. Ramey v. U.S. Postal Service*, 70 M.S.P.R. 463, 467 (1996) (finding the appellant timely raised Family and Medical Leave Act claim in prehearing proceedings), *modified on other grounds, Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 75

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[3] We note that the submission cites only the discrimination provision of 5 U.S.C. § 2302(b)(1), not the retaliation provision of 5 U.S.C. § 2302(b)(9). However, the Board has held that a claim of retaliation for filing an EEO complaint is cognizable under both §§ 2302(b)(1) and 2302(b)(9). *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 20 n.8 (2007). Moreover, a fair reading of his prehearing submission, including his proffers for witness testimony, shows he raised EEO reprisal as an affirmative defense.

(1997). Furthermore, the appellant preserved his claim by raising it again in his supplemental submission when the administrative judge failed to include it in the prehearing summary. *See Yovan v. Department of the Treasury*, 86 M.S.P.R. 264, ¶ 7 (2000) (an appellant is deemed to have abandoned a discrimination claim if it is not included in the list of issues in a prehearing conference summary and the appellant had an opportunity to object). The record also shows that the agency was on notice of this claim through the appellant's discovery requests, RIAF I-3, Vol. 5, HT at 11, and the agency has not asserted that it would be prejudiced by adjudication of the claim. Therefore, we find that the administrative judge erred in precluding the appellant from presenting any evidence and argument on his claim that his removal constituted retaliation for protected EEO activity.

¶11 Congress has expressly mandated at 5 U.S.C. § 7702(a)(1) that the Board render a decision on allegations of discrimination raised in conjunction with otherwise appealable actions. *Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, ¶ 8 (2008). An agency's decision may not be sustained, even where the charged misconduct has been proven, if the employee shows that the decision was based on a prohibited personnel practice under 5 U.S.C. § 2302(b), such as discrimination. 5 U.S.C. § 7701(c)(2); *Lloyd v. Small Business Administration*, 96 M.S.P.R. 518, ¶ 6, *review dismissed*, 110 F. App'x 127 (Fed. Cir. 2004); 5 C.F.R. § 1201.56(b).

¶12 Because the appellant was precluded from presenting any evidence and argument on his affirmative defense of retaliation for EEO activity, we must remand this case to the administrative judge for adjudication of this issue. On remand, the administrative judge shall inform the appellant of the burdens and elements of proof on the claim of EEO retaliation and shall afford the parties an opportunity to present additional evidence and argument on this issue. Thereafter, the administrative judge shall issue a new initial decision on the appellant's removal.

ORDER

¶13 Accordingly, we affirm the ID's findings that the agency proved its misconduct charges in the removal appeal and that the appellant did not prove his affirmative defenses of discrimination based on national origin, sex and age or retaliation for whistleblowing as to his removal; we reverse the ID's finding that the appellant untimely raised an affirmative defense of retaliation for protected EEO activity in his removal appeal; and we remand the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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