

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

2010 MSPB 73

Docket No. CH-0752-09-0455-I-1

**Julia R. Anderson,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

April 23, 2010

Kurt Cummiskey, Esquire, St. Louis, Missouri, for the appellant.

G.M. Jeff Keys, Esquire, St. Louis, Missouri, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed the agency's removal action. For the following reasons, we GRANT the appellant's petition for review, AFFIRM the initial decision's findings that the agency proved its charge, nexus, and the penalty, VACATE the initial decision's findings regarding the appellant's claim of retaliation for protected activity under [5 U.S.C. § 7701\(c\)\(2\)](#), and REMAND the appeal for adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from the GS-5 position of Pharmacy Technician based on charges of patient endangerment and intentional falsification of documentation. Initial Appeal File (IAF), Tab 5, Subtabs 4b, 4c. The agency asserted with respect to the charge of patient endangerment that the appellant made three dispensing errors while working the pharmacy window. *Id.*, Tab 4c. Regarding the charge of falsification, it alleged that four times on December 1, 2008, and repeatedly between September 3, 2008, and December 5, 2008, the appellant filled cassettes in a medication dispensing machine and, in violation of the agency's requirements, entered a pharmacist's access code to complete the loading process. *Id.* In selecting the penalty, the agency relied upon a letter of reprimand for deliberate refusal to carry out a proper order from her immediate supervisor and a 1-day suspension for failure to follow medication processes and failure to follow established policy. *Id.*

¶3 The appellant appealed the agency's action, IAF, Tab 1, and alleged that she had filed an equal employment opportunity complaint of a hostile work environment in relation to her 1-day suspension, that the agency failed to investigate the complaint, and that the agency's removal action constituted retaliation for her protected activity, IAF, Tab 16.

¶4 Based on the record developed by the parties, including the testimony at the hearing, the administrative judge found that the agency failed to prove the patient endangerment charge. IAF, Tab 26, Initial Decision (ID) at 2-3. He found that the appellant's performance standard provided that an individual will be considered "successful" if he incurs not more than twelve incorrect medication errors that do not leave the pharmacy. *Id.* He found that an employee may not be disciplined for conduct that is defined as fully successful. *Id.* The administrative judge further found that the agency proved the charge of intentional falsification. ID at 4-6. He found that the agency uses a Scriptpro machine that contains many compartments, each containing a different medicine, to dispense medications. ID

at 4. The administrative judge found that Pharmacy Technicians fill the Scriptpro and Pharmacists must check the Technician's work each time the machine is refilled by entering a "PIN" number. *Id.* He found that the appellant used a Pharmacist's PIN when she refilled the Scriptpro to create the impression that he had checked her work when she was aware that he had not done so, thus misleading the agency into believing that her refilling of the Scriptpro machine had been checked by the Pharmacist. ID at 5. The administrative judge further found that the agency proved that it would have removed the appellant despite her protected activity, ID at 8 n.8, and that the penalty was within the bounds of reasonableness for the sustained charge, ID at 7-8.

¶5 The appellant petitions for review. Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition. PFR File, Tab 3.

ANALYSIS

¶6 We grant the appellant's petition for review for the sole purpose of addressing her argument that the agency's action was retaliation for protected equal employment opportunity activity. The remainder of the appellant's allegations in her petition for review are without merit and do not identify any new, previously unavailable evidence, nor do they show any error in law or regulation by the administrative judge that affects the outcome of this appeal. *See* [5 C.F.R. § 1201.115\(d\)](#). Thus, we AFFIRM the initial decision's findings regarding the proven charge, nexus, and the penalty.

¶7 The appellant alleges on review that the agency's proffered reason for the removal was a pretext for retaliation for her equal employment opportunity activity. She also contends that "[b]ecause the administrative judge did not pass on this issue, the matter should be remanded for consideration of Appellant's allegation of retaliation." PFR File, Tab 1 at 24. The initial decision's analysis of the retaliation claim merely finds that "the Agency has established by a preponderance of the evidence that it would have removed Appellant absent

knowledge of any protected activity,” and that “[t]herefore, I need not reach the issue of whether Appellant has proven a *prima facie* case of retaliation.” ID at 8 n.8.

¶8 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge’s conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980). The initial decision in this case does not meet that standard. *See Williams v. Department of Defense*, [47 M.S.P.R. 461](#), 464 (1991). Whether the agency retaliated against the appellant is a factual matter that may require the assessment of the credibility of witnesses. *See Garrison v. Department of the Navy*, [88 M.S.P.R. 389](#), ¶ 10 (2001). The administrative judge who heard the testimony firsthand and observed the demeanor of the witnesses is in the best position to assess the credibility of witnesses. *Jackson v. Veterans Administration*, [768 F.2d 1325](#), 1331 (Fed. Cir. 1985); *Posey v. Department of Defense*, [106 M.S.P.R. 472](#), ¶ 13 (2007). Thus, this appeal must be remanded for issuance of a new initial decision that meets the Board’s requirements set forth in *Spithaler*. *See Posey*, [106 M.S.P.R. 472](#), ¶ 13.

¶9 Where, as here, the case has gone to a hearing and the evidentiary record is complete, the administrative judge will not inquire into whether the action under review could have been retaliatory, whether the appellant has made out a *prima facie* case of retaliation, or whether some other threshold of proof has been met so as to shift the burden to the agency. *See Simien v. U.S. Postal Service*, [99 M.S.P.R. 237](#), ¶ 28 (2005). Rather, the inquiry proceeds to the ultimate question, which is whether, upon weighing the evidence presented by both parties, the appellant has met her overall burden of proving retaliation. *See Berry v. Department of Commerce*, [105 M.S.P.R. 596](#), ¶ 10 (2007) (the ultimate question is whether the appellant has demonstrated by preponderant evidence that the agency’s reason for its actions was a pretext for retaliation). Evidence to be

considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of retaliation that may be available to the employee, such as independent evidence of retaliatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer. *See Marshall v. Department of Veterans Affairs*, [111 M.S.P.R. 5](#), ¶ 17 (2008).

ORDER

¶10 Accordingly, we REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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