UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 81

Docket No. CB-7121-10-0004-V-1

Paul A. Keller,

Appellant,

v.

Department of the Army,

Agency.

April 29, 2010

Paul A. Keller, Colorado Springs, Colorado, pro se.

The agency has not designated a representative.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has requested review of an arbitrator's decision that denied his grievance concerning his removal. For the reasons set forth below, we GRANT the appellant's request for review and AFFIRM the arbitrator's decision.

BACKGROUND

¶2 Effective October 27, 2008, the agency removed the appellant from his position as a GS-7 Paramedic based on six charges: (1) losing an Emergency Medical Services bag; (2) failing to respond to an emergency call; (3) failing to observe Flight for Life procedures; (4) leaving the work site without permission;

(5) making an inaccurate patient assessment; and (6) attempting to conceal material facts. Request for Review (RR) File, Tab 1 at 4; Arbitration Award (AA) at 9, 11, 15, 18, 20, 23, RR File, Tab 1. The appellant challenged the action through the negotiated grievance procedure and the grievance was ultimately submitted to arbitration. Following a hearing, on October 8, 2009, the arbitrator denied the grievance, finding that the agency had proven all six charges, AA at 1, 9-29, that there was a nexus between the sustained charges and the efficiency of the service, *id.* at 29, that removal was a reasonable penalty for the sustained charges, *id.* at 29-32, and that the appellant had failed to establish either of his claims of harmful procedural error, *id.* at 33-35.

¶3 On November 6, 2009, the appellant electronically filed an "appeal" with the Board's Denver Field Office challenging the arbitrator's decision. RR File, Tab 1 at 1. Recognizing that the "appeal" was properly a request for review of the arbitrator's decision which should have been filed with the Clerk of the Board, *see Brent v. Department of Justice*, 100 M.S.P.R. 586, ¶ 6 (2005), *aff'd*, 213 F. App'x 993 (Fed. Cir. 2007), the Denver Field Office forwarded the request for review to the Clerk of the Board, RR File, Tab 1 at 1. The Clerk notified the parties that the request had been filed. *Id.*, Tab 2. Although afforded an opportunity to do so, *id.*, the agency did not file a response.

ANALYSIS

The appellant is deemed to have timely filed a request for review of the arbitrator's decision.

¶4 The appellant filed his appeal form containing his request for review of the arbitrator's decision with the field office within 35 days after the date of issuance of the arbitrator's decision. Therefore we deem that he timely filed his request for review. *See* 5 C.F.R. § 1201.154(d); *Brent*, 100 M.S.P.R. 586, ¶¶ 6-7; *cf. Coles v. U.S. Postal Service*, 105 M.S.P.R. 516, ¶ 12 (2007) (a petition for review

mistakenly filed with the regional office within the deadline for filing a petition for review is deemed a timely filing with the Board).

The Board has jurisdiction over the appellant's request for review of the arbitrator's decision.

¶5 The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) where the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination as stated in 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *De Bow v. Department of the Air Force*, 97 M.S.P.R. 5, ¶ 4 (2004). These criteria are satisfied in this case. First, the appellant's grievance concerns his removal, a subject matter over which the Board has jurisdiction. 5 U.S.C. §§ 7512(1); 7513(d). Next, the appellant alleged that the agency took the action in retaliation for his having engaged in prior equal employment opportunity (EEO) activity. RR File, Tab 1 at 13; *see Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 12 (2005). Although it does not appear that the appellant raised this issue before the arbitrator, the Board has jurisdiction to review an issue of prohibited 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). Finally, the arbitrator has issued a final decision. AA at 1-35.

The appellant has not shown that the arbitrator erred in interpreting civil service law, rule, or regulation.

¶6 The standard of the Board's review of an arbitration decision is narrow; such decisions are entitled to a greater degree of deference than initial decisions of the Board's administrative judges. *Weaver v. Social Security Administration*, 94 M.S.P.R. 447, ¶ 8 (2003). Even if the Board disagrees with the arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Chandler v. Social Security Administration*, 80 M.S.P.R. 542, ¶ 5 (1999). The Board will modify or set aside an arbitrator's decision only

where the arbitrator has erred as a matter of law in interpreting civil service law, rule or regulation. *Weaver*, 94 M.S.P.R. 447, ¶ 8.

¶7 The appellant presents various challenges to the arbitrator's decision. RR File, Tab 1 at 6-11, 13. The appellant vaguely alleges that the arbitrator did not base his decision on any "law," but rather on his "feelings and/or character," taking everything certain agency witnesses said "at face value," even though they testified differently at the appellant's hearing before the Equal Employment Opportunity Commission. RR File, Tab 1 at 9. We construe these general claims as challenges by the appellant to the arbitrator's credibility determinations, factual findings, and legal conclusions. His mere disagreement, however, does not show legal error. *See Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶¶ 15-16, *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008).

¶8 Apart from these general challenges, the appellant contends that the arbitrator improperly found that the agency proved charges (5) and (6). In charge (5), the agency alleged that the appellant administered an incorrect medication to a patient complaining of chest pains, that the error was caused by the appellant's misinterpreting the electrocardiogram results, and that he failed to follow proper procedures when he consulted with the physician at the agency medical facility regarding a course of treatment rather than the physician at the receiving hospital. AA at 20. After reviewing the documentary and testimonial evidence, the arbitrator found that it overwhelmingly supported the conclusion that the appellant improperly assessed the patient's condition and administered an incorrect medication, i.e., he administered Amiodarone when he should have administered Adenosine. *Id.* at 20-23. In charge (6), the agency alleged that the appellant attempted to conceal the fact that he had administered the wrong medication by writing on the Patient Care Report that he had administered "Adenocard, 6 mg." [1] *Id.* at 23. After weighing the evidence, including

[1] Adenosine is also apparently known as Adenocard. *See* AA at 4 n.3.

circumstantial evidence, and considering the witnesses' credibility, the arbitrator found that the appellant attempted by his actions to obfuscate the permanent paper trail regarding his administration of the medication, and, in so doing, attempted to conceal a material fact with the intent of deceiving his employer. *Id.* at 23-28. The appellant argues that the arbitrator failed to note minor discrepancies in the testimony of certain agency witnesses as to these matters. RR at 10-11. The appellant has not, however, shown that, in reviewing and analyzing the evidence, the arbitrator erred as a matter of law in interpreting a civil service law, rule or regulation.

¶9 The appellant challenges the arbitrator's findings that he did not establish either of his claims of harmful procedural error. As to the first claim, the appellant argues that the arbitrator did not appropriately frame his argument that "the [a]gency saved all the evidence of any possible misconduct and put it all together and said it's time for termination," that he was never put on notice until the agency proposed to remove him, and that "[t]his was not progressive discipline." RR File, Tab 1 at 9. The arbitrator found that no provision of the negotiated agreement either requires progressive discipline or requires the employer to bring action immediately upon the occurrence of the misconduct. AA at 33. He found that, to the extent that the agreement requires the agency to proceed against an employee within a reasonable period of time after the occurrence of the alleged misconduct, the agency did so.[2] *Id.* at 33-34. The arbitrator concluded that there was no error in the agency's timing of the action and that, even assuming that error occurred, the appellant had not alleged any prejudice, "other than speculation that he might have suffered multiple prior actions leading up to removal *vice* the removal that occurred in one fell swoop."

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[2] The incident described in the first charge occurred on April 15, 2008; the incident described in the fifth and sixth charges occurred on July 21, 2008; and the agency proposed the appellant's removal on August 20, 2008. AA at 3-6.

Id. at 34. The arbitrator's decision shows that he applied the correct standard in determining whether the appellant showed harmful error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). Thus, the arbitrator's findings are entitled to deference. *See, e.g., Oates v. Department of Labor*, 105 M.S.P.R. 10, ¶ 8 (2007).

¶10 As to his second claim, the appellant argues that the agency did not ask a key player in the incidents that formed the basis for charges (5) and (6) to provide a written statement. RR File, Tab 1 at 10. The arbitrator found that nothing in the negotiated agreement speaks directly to requirements for the agency's investigation prior to initiating disciplinary action, other than that, as part of the decision-making process, the agency will discuss with the employee the basis for the action, and carefully consider his views before issuing any written notice to the employee. The arbitrator found that the agency did so, such that there was no error and that, even assuming that an error occurred, the appellant had not alleged any prejudice as a result. AA at 34. The arbitrator further found that the Board imposes no strictures on an agency's investigation in the absence of a statutory or regulatory requirement, except for the duty to make reasonable inquiries into exonerating facts the employee has brought to the agency's attention. *Id.* at 35. Again, the arbitrator's decision shows that he applied the correct standard in determining whether the appellant showed harmful error, *see Stephen*, 47 M.S.P.R. at 681, 685, and therefore the arbitrator's findings are entitled to deference, *Oates*, 105 M.S.P.R. 10, ¶ 8.

The appellant has not shown that the agency's action was taken in retaliation for his prior EEO activity.

¶11 To prove retaliation for filing an EEO complaint, an appellant must show that: (1) He engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged

retaliation and the adverse action.[3] *Dobruck v. Department of Veterans Affairs*, 102 M.S.P.R. 578, ¶ 19 (2006), *aff'd*, 212 F. App'x 997 (Fed. Cir. 2007).

¶12 The appellant alleges that he was hired as a disabled veteran; the proposing official knew of his disability; when he asked for accommodation, he was told "no"; a few weeks later, "this story was fabricated" to terminate his employment; and an EEO complaint is still pending on this issue. RR File, Tab 1 at 13. The appellant has submitted no evidence in support of his claim. However, even assuming that he engaged in protected EEO activity of which the proposing official was aware, and that retaliation could have been the motive for the removal action, the appellant has failed to establish the last prong of the test. To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the action was taken because of the protected activity. *Murry v. General Services Administration*, 93 M.S.P.R. 560, ¶ 6 (2003). This requires the Board to weigh the gravity of the misconduct charges against the intensity of the motive to retaliate. *Warren v. Department of the Army*, 804 F.2d 654, 658 (Fed. Cir. 1986). Here, the arbitrator found that the agency proved all six charges which were most serious in nature, ranging from lack of accountability to poor judgment to knowing and/or intentional wrongdoing. They all diminished the appellant's ability to exercise judgment and make decisions affecting the health and safety of those he served. Beyond his bare assertion, the appellant has not established that either the proposing official or the deciding official had any motive to retaliate against him due to his prior EEO complaint. Under these circumstances, we find that the appellant has not established a genuine nexus between the alleged retaliation and his removal.

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[3] Even though the arbitrator convened a hearing in this case, this analysis of the appellant's retaliation claim is appropriate because he did not raise the issue of retaliation before the arbitrator. *Dobruck*, 102 M.S.P.R. 578, ¶ 19 n.3.

The appellant has not shown that the arbitrator erred as a matter of law in determining the penalty.

¶13 The appellant argues that, in reviewing the penalty, the arbitrator failed to apply the *Douglas* factors[4] because he did not take into account that certain agency witnesses did not testify credibly. The appellant contends that he "should have won all 6 of the *Douglas* factors," and that, even if not all the factors favored mitigation, he should have prevailed. RR File, Tab 1 at 9. In assessing the penalty, the arbitrator acknowledged that his review was only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. AA at 29. The arbitrator found, based on a Memorandum for Record that the deciding official had prepared, that that official was aware of the *Douglas* factors and addressed them in a meaningful way prior to issuing his decision letter. The arbitrator noted, however, that there was limited hearing testimony on the issue, and so he reviewed the deciding official's findings as set forth in the Memorandum of Record. *Id.* at 30. The arbitrator found that the deciding official considered that the charges were serious; that, while the appellant had no prior disciplinary record, he had received counseling twice; that he had only been with the agency for little more than a year; that, although he had received a high rating on his last appraisal, his offenses had caused the deciding official and the appellant's supervisor to lose trust in him; that there were no comparable cases involving

[4] These are the factors that the Board has deemed relevant for consideration in assessing the reasonableness of an agency-imposed penalty. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). They include the nature and seriousness of the offense and its relation to the employee's duties, his job level and type, his past disciplinary and work record, the effect of his offense on his ability to perform, the consistency of the penalty with those imposed on others for the same or similar offenses, and with any applicable agency table of penalties, the notoriety of the offense, the clarity with which the employee was on notice of any rules that were violated in committing the offense, his potential for rehabilitation, any mitigating circumstances, and the adequacy of any alternative sanctions. *Id.*

similar offenses; that the penalty was consistent with the agency's table of penalties; that the appellant was, or should have been, on notice regarding the impropriety of his misconduct; that he had little potential for rehabilitation; that there were no unusual mitigating factors; and that there was no alternative sanction short of removal that would be adequate, given the nature of the offenses. *Id.* at 30-32. The arbitrator concluded from his review that there was no basis to suggest that the deciding official failed to consider all the relevant factors, and further that that there was no real basis to find that removal was beyond the tolerable limits of reasonableness, particularly given the nature and range of the proven charges in relation to the life-or-death nature of the appellant's duties. *Id.* at 32. Because the arbitrator applied the same rules that the Board applies in reviewing agency-imposed penalty, his findings are entitled to deference. *See Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 50 (2007).

¶14 Accordingly, we AFFIRM the arbitrator's decision.

ORDER

¶15 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 Code, 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 77960
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 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, 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.