UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 214

Docket No. AT-0752-09-0869-I-1

Gerald B. Wynn,

Appellant,

v.

United States Postal Service,

Agency.

November 2, 2010

Gerald B. Wynn, Fitzgerald, Georgia, pro se.

Janelle M. Sherlock, Esquire, Atlanta, Georgia, 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 the December 8, 2009 initial decision that affirmed his removal. For the reasons set forth below, we GRANT the petition for review, VACATE the findings in the initial decision, and REMAND the appeal for adjudication of the appellant's affirmative defenses of discrimination on the bases of marital status, political affiliation, and race.

BACKGROUND

¶2 The agency proposed removing the appellant, a preference-eligible city carrier, on a charge of Unsatisfactory Work Performance. Initial Appeal File

(IAF), Tab 11, Subtabs 4D at 1, 4F. In support of the charge, the agency set forth two specifications: (1) On May 11, 14, and 15, 2009, the appellant failed to follow agency regulations requiring him to secure his postal keys, which provide access to all collection boxes in the city; and (2) on May 14, 2009, the appellant failed to follow instructions by collecting mail from 11 collection boxes before the scheduled time, requiring another employee to return to each box and collect the mail at the appropriate time. IAF, Tab 11, Subtab 4D at 1-2. In its proposal notice, the agency also cited the appellant's July 18, 2008 14-day suspension for Unsatisfactory Work Performance, which resulted from the appellant losing an "Arrow Key."[*] *Id.* at 2; *see id.*, Subtabs 4H-4J. The appellant did not respond. *Id.*, Subtab 4C at 1. The agency found the charge was fully supported by the evidence and warranted the appellant's removal. *Id.* The appellant grieved his proposed removal and apparently his removal, and the agency's Dispute Resolution Team found that the agency had "just cause" for its actions. *Id.*, Subtab 4A.

¶3 The appellant filed an appeal in which he argued that he "did what [he] was told to do" and that he thought that the individual who was coming to the post office at 5:30 would also collect mail from the 11 collection boxes at that time. IAF, Tab 1 at 5. He also checked the boxes on his appeal form indicating that, in connection with his removal, the agency discriminated against him on the bases of his marital status or political affiliation, and his race. *Id.* at 6. He further claimed that his supervisor assigned work unfairly, gave confusing directions, and held him to an unrealistic time standard. *Id.* at 7.

¶4 After holding a hearing, the administrative judge sustained both specifications and the charge. IAF, Tab 16, Initial Decision (ID) at 3-7, 9. She

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[*] "An 'arrow key' is used by mail carriers to access a bank of mailboxes or a collection box that is locked by an 'arrow lock.'" *United States v. Ewain*, 88 F.3d 689, 691 (9th Cir. 1996). The Postal Service manufactures arrow keys, distributes them through controlled channels, and individual carriers must account for them daily. *Id.*

further found a nexus between the sustained charge and the efficiency of the service, that the agency considered the relevant *Douglas* factors, and that the penalty was reasonable. ID at 7-9.

¶5 In his petition for review, the appellant asserts that his representative did not adequately represent him. Petition for Review (PFR) File, Tab 1 at 2-3. The appellant further asserts that he found out that his representative had no training in Board matters. *Id.* at 2. He complains that his representative failed to adequately respond to the prior discipline cited in the proposal notice. *Id.* In addition, the appellant asserts that his representative neglected to raise the unfair treatment and different instructions he received from the head carrier supervisor, and did not stress his participation in the Employee Assistance Program. *Id.* at 2-3. The appellant acknowledges that he "made a mistake" on May 11 and offers the same excuses for his misconduct on May 13 and 14 that he offered below. *Id.* at 3. The agency responds in opposition. PFR File, Tab 5.

ANALYSIS

¶6 In his petition for review, the appellant has failed to present persuasive evidence or argument that would warrant disturbing the administrative judge's decision regarding the merits of the agency's charges. The appellant's allegations regarding his prior discipline are insufficient to demonstrate that the agency's reliance on it was improper. The Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). Because the administrative judge correctly found that the agency established the criteria for using prior discipline in this case, the appellant's argument to the contrary does not provide a basis for review.

¶7 Further, the appellant's claim of inadequate representation does not constitute a basis for reversal of the initial decision. *Sparks v. Department of the Interior*, 62 M.S.P.R. 369, 371 (1994). Even if true, the presence of inadequate counsel is not a basis for reversal, because the appellant is held responsible for the action or inaction of his counsel. *Id.*; *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981) (the appellant is responsible for the errors of his chosen representative).

¶8 In his petition for review, the appellant complains for the first time that his supervisor made a racial slur about him around Christmas 2008. PFR File, Tab 1 at 2. This allegation alone is insufficient to grant the appellant's petition because it does not meet the Board's criteria for review. *See* 5 C.F.R. § 1201.115(d). It is not based on new and material evidence that was unavailable, despite the appellant's due diligence, when the record closed, and it does not demonstrate that the administrative judge's decision was based on an erroneous interpretation of statute or regulation. *See id.*

¶9 Generally, the Board has held that 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 party was afforded an opportunity to object to the conference summary. *See Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 10 (2009); *Yovan v. Department of the Treasury*, 86 M.S.P.R. 264, ¶ 7 (2000); *cf. Mata v. Department of the Army*, 114 M.S.P.R. 6, ¶ 10 (2010) (the appellant preserved his claim by raising it in a supplemental submission when the administrative judge failed to include it in the prehearing summary). The present case, however, is similar to *Erkins v. U.S. Postal Service*, 108 M.S.P.R. 367, ¶ 7 (2008), in that the record below does not establish that the appellant withdrew or abandoned his affirmative defenses.

¶10 We now make clear that when an appellant raises an affirmative defense in an appeal either by checking the appropriate box in an appeal form, identifying an affirmative defense by name such as "race discrimination," "harmful procedural

error," etc., or by alleging facts that reasonably raise such an affirmative defense, the administrative judge must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. If an appellant expresses the intention to withdraw such an affirmative defense, in the close of record order or prehearing conference order the administrative judge must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give an appellant an opportunity to object to withdrawal of the affirmative defense. The record in this appeal simply does not establish that the appellant abandoned or withdrew the affirmative defenses he had raised in his appeal. As explained below, in the absence of evidence establishing the appellant had withdrawn or abandoned his affirmative defenses, it was incumbent on the administrative judge to advise the appellant of applicable burdens of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden.

The appellant's discrimination claims.

¶11 The appellant checked the boxes on his appeal form claiming discrimination on the bases of marital status or political affiliation, and race. IAF, Tab 1 at 6. In explaining his discrimination claims, he asserted that "I believe this is a case of discrimination because the supervisor that gave me all those crazy instructions that day has not liked me since the first time she saw me." IAF, Tab 1 at 7. However, the appellant did not indicate which kind of discrimination this assertion represented.

¶12 Although the appellant noted his affirmative defenses on his appeal form, as noted above, the administrative judge did not give him notice of the burdens and elements of proof for any affirmative defenses. In her prehearing conference summary, the administrative judge set forth the appellant's defenses to the merits of the agency's charges, which could include the factual basis for the appellant's affirmative defenses, if read broadly, but she omitted any specific mention of the affirmative defenses. IAF, Tab 14 at 2-3. Furthermore, even though the agency's

response below mentioned the appellant's racial discrimination claim, the agency did not explain what was required in order for the appellant to prove that affirmative defense, and it did not address the appellant's other allegations of discrimination. IAF, Tab 11, Subtab 1 at 1, 3. Thus, the agency's submissions did not place the appellant on notice of his burdens and the evidence necessary to prove his affirmative defenses. *Cf. Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 11 (2007) (remand was unnecessary, in part, because the agency's submissions put the appellant on notice of the correct burden and elements of proof necessary to establish his claims).

¶13 The Board has consistently required administrative judges to apprise an appellant of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden. *E.g., Erkins*, 108 M.S.P.R. 367, ¶ 8. Here, the appellant raised the issue of discrimination below. IAF, Tab 1 at 6. When an administrative judge fails to inform the parties of their burden and methods of proof, the Board typically remands the appeal so the administrative judge can afford such notice and an opportunity to submit evidence and argument under the proper standard. *Erkins*, 108 M.S.P.R. 367, ¶ 8. Because the record does not establish that the appellant withdrew or abandoned his affirmative defenses, and the administrative judge failed to give the appellant proper notice regarding his affirmative defenses, we must remand the appeal.

ORDER

¶14 Accordingly, we VACATE the initial decision and REMAND the appeal for adjudication of the appellant's affirmative defenses. On remand, the administrative judge shall apprise the appellant of the applicable burdens and elements of proof on his discrimination claims. Further, the administrative judge shall afford the appellant an opportunity for discovery on his affirmative defenses, and a supplemental hearing on these affirmative defenses if he requests

one. The administrative judge shall then issue a new initial decision making appropriate findings regarding the charge, nexus and penalty, and also specifically addressing the appellant's affirmative defenses.

FOR THE BOARD:

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