

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

2011 MSPB 26

Docket No. CB-7121-10-0016-V-1

**Kimberly Hollingsworth,
Appellant,**

v.

**Department of Commerce,
Agency.**

February 18, 2011

Gary M. Gilbert, Esquire, Stephanie M. Herrera, Esquire, Silver Spring, Maryland, for the appellant.

Kardesha N. Bradley, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a request for review (RFR) of an arbitration decision in which the arbitrator reversed the agency's decision to remove the appellant but denied her request for attorneys' fees and compensatory damages. For the reasons set forth below, we GRANT the request for review under [5 U.S.C. § 7121\(d\)](#) and [5 C.F.R. § 1201.154\(d\)](#), AFFIRM the arbitrator's findings that the appellant was a qualified person with a disability and that the agency failed to accommodate her, VACATE the arbitrator's denial of the appellant's request for

attorneys' fees and compensatory damages, and FORWARD the matter to the regional office for a hearing on the issue of compensatory damages.

BACKGROUND

¶2 The agency proposed removing the appellant, a GS-12 Survey Statistician for the agency's Census Bureau, on two charges, Unavailability and Failure to Follow a Supervisory Directive. *See* RFR File, Tab 3, Exhibit (Ex.) 1, Employee Ex. C at 86-93.¹ The appellant claimed that she experienced coughing, sneezing, and difficulty breathing, even after using her inhaler, after she moved into her new office space. She contended that medical professionals told her she had an allergic reaction that had triggered an asthma attack and that she also had bronchitis and a sinus infection. *See, e.g.*, RFR File, Tab 3, Ex. 1, Employee Exhibits B-1, B-5 at 1-2. She also asserted that the agency failed to provide her with a reasonable accommodation. *Id.*, Employee Ex. B-5 at 1. In an April 8, 2009 decision letter, the deciding official sustained the charges against the appellant on his findings that she had not returned to work since April 17, 2007, and that she had not followed her supervisors' numerous directives to either return to duty or submit sufficient medical documentation of her condition. *See* RFR File, Tab 3, Employee Ex. C at 115-117.

¶3 The appellant grieved her removal. RFR File, Tab 6 at 132-134. The agency denied the grievance on June 12, 2009, and the union subsequently invoked arbitration. *See* RFR File, Tab 3, Ex. 4 at 25. Following two days of hearing, the arbitrator found that the appellant established that she was a qualified individual with a disability and that the agency failed to provide her with a reasonable accommodation. *Id.* at 2, 34-35, 38-40. Accordingly, the arbitrator ordered the agency to reinstate the appellant with back pay from April

¹ Due to the large size of the arbitration proceeding record, the appellant included an electronic version, which included both parties' exhibits. *See* RFR File, Tab 3 at 2 n.1, *see also id.*, Exhibits 1-3.

10, 2009, and to provide her with a reasonable accommodation. *Id.* at 44. The appellant requested compensatory damages and attorneys' fees in the arbitration proceeding. *See id.* at 27. However, despite ordering the agency to make the appellant whole "for any losses she may have suffered by virtue of her termination," the arbitrator denied the appellant's "other remedial requests" without either describing or analyzing them. *Id.* at 45.

¶4 The appellant's counsel subsequently filed a pleading with the arbitrator titled Request for Status Conference for Clarification of Remedies Awarded and Deadline for Submission of Petition for Attorneys' Fees and/or Compensatory Damages. RFR File, Tab 3, Ex. 5 at 1. In ruling on the appellant's request, the arbitrator noted that in litigating the case, the appellant's counsel had "stated the issues in this case include 'compensatory damages (both pecuniary and nonpecuniary), reasonable attorneys' fees and/or any other relief provided for by law.'" *Id.*, Ex. 6 at 2. The arbitrator further noted that, after he ordered a remedy that included reinstatement and back pay, he had stated: "Other remedial requests are denied." *Id.* The arbitrator ruled that, under those circumstances, no clarification of his decision was required, and he denied the appellant's request. *Id.*

¶5 The appellant filed a request for review of the arbitrator's decision in which she does not challenge the arbitrator's factual findings, his determination that the agency failed to accommodate her, or his order reinstating her and awarding her back pay.² RFR File, Tab 3 at 1. Instead, the appellant challenges the arbitrator's failure to award her attorneys' fees and compensatory damages. *Id.* at 1-2. In response, the agency asserts that because the appellant failed to meet her obligation to submit evidence of her compensatory damages during the hearing before the arbitrator, she cannot demonstrate that the arbitrator's failure to award damages constituted an error in the interpretation of civil service law,

² Accordingly, we AFFIRM the arbitrator's findings on these issues.

rule, or regulation. RFR File, Tab 5 at 4. The agency also asserts that even though the appellant was the prevailing party in this matter, she cannot show that an award of attorneys' fees is warranted in the interest of justice or that the fees she requests are reasonable. *Id.*

ANALYSIS

¶6 The Board has jurisdiction to review an arbitrator's decision under [5 U.S.C. § 7121](#)(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under [5 U.S.C. § 2302](#)(b)(1) in connection with the underlying action, and a final decision has been issued. *E.g., Godesky v. Department of Health & Human Services*, [101 M.S.P.R. 280](#), ¶ 5 (2006). Each of these conditions has been satisfied in this case. The appellant's removal is within the Board's jurisdiction. [5 U.S.C. §§ 7512](#)(1), 7513(d). The appellant alleged that her removal was the result of discrimination in violation of [5 U.S.C. § 2302](#)(b)(1). *See, e.g.*, RFR File, Tab 3 at 1, 6. The arbitrator issued a May 14, 2010 final decision on the appellant's grievance. RFR File, Tab 3, Ex. 4. Thus, we find that the Board has jurisdiction over this case. *See Godesky*, [101 M.S.P.R. 280](#), ¶ 5.

¶7 The Board's scope of review of an arbitrator's award is limited. *See, e.g., FitzGerald v. Department of Homeland Security*, [107 M.S.P.R. 666](#), ¶ 9 (2008). The Board will modify or set aside such an award only when the arbitrator has erred in interpreting a civil service law, rule, or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, the arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for example, by misallocating the burdens of proof or employing the wrong analytical framework. *Berry v. Department of Commerce*, [105 M.S.P.R. 596](#), ¶ 5 (2007). However, the Board has long held that "[i]n order for the Board to provide deference to an arbitrator's findings and conclusions, the

award must include specific findings on the issues in question.” *Marshall v. Department of Veterans Affairs*, [111 M.S.P.R. 5](#), ¶ 12 (2008) (citing *Appling v. Social Security Administration*, [30 M.S.P.R. 375](#), 379 (1986)).

¶8 As noted above, the appellant asserts that the arbitrator erred in failing to award her attorneys’ fees, compensatory damages, and costs. RFR File, Tab 3 at 1-2. Examination of the arbitrator’s 45-page decision reveals no mention of attorneys’ fees or compensatory damages, only the phrase cited by the arbitrator in denying the appellant’s request for clarification of the arbitration award, i.e., “[o]ther remedial requests are denied.” See RFR File, Tab 3, Ex. 4 at 45, Ex. 6 at 2. Because the arbitrator made no specific findings on the issues of attorneys’ fees or compensatory damages, his decision to deny those requests is not entitled to deference. See, e.g., *Appling*, 30 M.S.P.R. at 379. Further, because the arbitrator did not cite any legal standard or employ any analytical framework in denying the appellant’s requests for attorneys’ fees and compensatory damages, we find that the arbitrator made a legal error that permits the Board to make its own findings. See *FitzGerald*, [107 M.S.P.R. 666](#), ¶ 18 (the arbitrator’s failure to cite any legal standard or follow the proper analytical framework in adjudicating a retaliation claim permitted the Board to make its own findings on the issue). Because the arbitrator erred as a matter of law, we grant the appellant’s request for review of the arbitrator’s decision and vacate the portion of that decision denying the appellant’s request for attorneys’ fees and compensatory damages. We affirm the remainder of the arbitrator’s decision.

¶9 Where there has been no prior proceeding before a judge and the first Board proceeding, like the request to review the arbitration decision here, is before the full 3-member Board, the Board may forward a request for compensatory damages to a judge for hearing and a recommendation to the Board. See [5 C.F.R. § 1201.204\(h\)\(3\)](#). Therefore, we forward the appellant’s request for compensatory damages to the Washington Regional Office for a hearing and recommendation. After receiving the administrative judge’s

recommendation on compensatory damages, we will issue a final decision on the merits of the appellant's request for review of the arbitrator's decision. *Id.* If the appellant is the prevailing party in her request for arbitration review pursuant to [5 C.F.R. § 1201.202\(a\)\(2\)](#), she may then initiate an addendum proceeding for attorneys' fees after the conclusion of the compensatory damages matter. *See* 5 C.F.R. § 1201.203.

ORDER

¶10 Accordingly, we FORWARD the case to the Washington Regional Office for a hearing on the issue of compensatory damages. The administrative judge shall hold a hearing on the appellant's request for compensatory damages and provide a recommendation to the Board on that issue. The Board will subsequently issue a final decision on both the merits of the appellant's request for review and her request for compensatory damages.

FOR THE BOARD:

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