UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 59

Docket No. DC-0752-09-0694-I-1

Linda McCauley,

Appellant,

v.

Department of the Interior,

Agency.

June 10, 2011

Nicholas H. Sikon, Esquire, Silver Spring, Maryland, for the appellant.

Josh C. Hildreth, 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 seeks review of an initial decision affirming her removal from a position with the Department of the Interior. For the reasons discussed below, we GRANT IN PART the appellant's petition for review, REVERSE the administrative judge's finding regarding the charge of excessive absences, DENY IN PART the appellant's petition for review regarding the charge of absence without leave (AWOL), and SUSTAIN the appellant's removal.

BACKGROUND

¶2 Effective June 12, 2009, the agency removed the appellant from her GS-11 Administrative Services Specialist position based on two charges, excessive absences and AWOL. Initial Appeal File (IAF) Tab 7, Subtabs 4A, 4B, 4D. The first charge alleged that from January 2008 until the date of the proposal notice, April 7, 2009, the appellant was absent on approved leave for 136 workdays, not including periods of AWOL. *Id*., Subtabs 4D at 2, 4G. In support of the second charge, the agency alleged that the appellant was AWOL for 22 days. *Id*., Subtab 4D at 3.

¶3 The appellant filed a timely appeal. IAF, Tab 1. After holding a hearing at the appellant's request, the administrative judge concluded that the agency had proven both charges by a preponderance of the evidence and that the appellant failed to prove her affirmative defenses. IAF, Tab 26, Initial Decision (ID) at 5-15. The administrative judge found that removal was a reasonable penalty. *Id*. at 15-16.

¶4 In her petition for review, the appellant reasserted her argument raised below that the agency denied her due process because she did not receive the notice of proposed removal. IAF, Tab 1 at 2; Petition for Review (PFR) File, Tab 7 at 5-14. The appellant also argued that the administrative judge abused her discretion by precluding evidence related to the appellant's affirmative defense of retaliation for prior equal employment opportunity (EEO) activity. *Id*. at 14-16. Additionally, the appellant argued that the agency failed to prove that she was excessively absent because it allegedly failed to establish that she was absent for compelling reasons beyond her control, i.e., that she could not return to work. PFR File, Tab 7 at 16-18.

ANALYSIS

The appellant has not shown that the administrative judge erred in finding that she received the notice of proposed removal.

¶5 On review, the appellant argues, as she did below, that she did not receive the agency's notice of proposed removal, and therefore was denied due process. PFR File, Tab 7 at 5-14. In support of her claim, she submits for the first time on review a certified letter from the agency, bearing a postage meter imprint dated July 15, 2009, regarding her failure to contact an EEO Counselor. *Id.*, Exhibit 1. She also submits a U.S. Postal Service "Track & Confirm" search result showing that letter was delivered on December 9, 2009. *Id.*, Exhibit 2. She asserts that, "because the late delivery of this letter demonstrates that mail from the Agency failed to arrive properly, the preponderance of the evidence did not support a determination of proper delivery of mail from the Agency." PFR File, Tab 7 at 13-14. Thus, the appellant argues, there was insufficient evidence to support the administrative judge's determination that she received the proposal notice. *Id.* at 14. Because the appellant's evidence submitted on review postdates the initial decision and because it is relevant to the important issue of whether the appellant received the proposal notice, we will address it.

¶6 Even if we assume arguendo that the July letter took nearly five months to reach the appellant, that fact does not establish that any other letter the agency sent to her took a longer than normal time to arrive or did not arrive at all. Furthermore, the administrative judge deprived the agency of the presumption of delivery and receipt based on the proposing official's testimony that he did not personally observe the letter being stamped and mailed. ID at 9-10; *see* Hearing Transcript, Nov. 2, 2009 (HT) at 55. However, the administrative judge held that delivery and receipt was shown by hearing testimony. ID at 10. She cited the credible testimony of an agency official that, in his contacts with the appellant, the appellant made statements indicating she had received the notice of proposed action. *Id.*; *see* HT at 129-30. An agency human resources specialist also

testified that she called the appellant six times, and that she left voice-mail messages for the appellant regarding the proposal notice and the deadline for responding to it. HT at 148-50. The agency employee made contemporaneous documentation of these attempts, which were also included in the record. IAF, Tab 7, Subtab 4C; HT at 149.

¶7 In contrast, the administrative judge found the appellant's testimony was not credible on this subject and stated that her testimony was "confusing and evasive and her demeanor was disingenuous." ID at 10; *see* HT at 78-83, 100, 110-12, 114-18. The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The appellant fails to offer sufficiently sound reasons for overturning the administrative judge's credibility determinations. Thus, we conclude that the appellant has not shown error in the initial decision in this regard.[1]

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[1] The Board has held that an agency must make intelligent and diligent efforts – such as might reasonably be adopted by one desirous of actually informing the employee – to provide an employee notice of a proposed removal. *Givens v. U.S. Postal Service*, 49 M.S.P.R. 374, 378 (1991). In the instant case, the appellant challenges the administrative judge's finding that the agency's attempt to deliver the notice of proposed removal was "intelligent and diligent." PFR File, Tab 7 at 8-11. In finding that the agency's effort met that standard, the administrative judge noted that the agency mailed the proposal notice to the appellant's post office box and e-mailed it to both her office and home addresses. ID at 9. The proposing official testified that the post office box to which the agency mailed the proposal notice was the appellant's address of record. HT at 30. The administrative judge further found that "[b]ecause the proposal notice was sent in the same manner as other correspondence with the appellant and because the agency was not shown to have had any other method of corresponding with the appellant, the delivery was intelligent and diligent." ID at 9; *see Wright v. Department of the Navy*, 16 M.S.P.R. 408, 411 (1983) (service method consistent with the appellant's instructions to the agency and the agency's past practice with that appellant was "intelligent and diligent"). We agree with the administrative judge that the agency's mailing of the proposal notice to the appellant's address of record, in the

The appellant has not shown that any error by the administrative judge in precluding certain evidence prejudiced her substantive rights.

¶8 An administrative judge has wide discretion to control the proceedings, including authority to exclude testimony she believes would be irrelevant or immaterial. *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 20 (2007); *Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 8 (2000). The appellant asserts on review that the administrative judge abused her discretion by prohibiting the appellant from introducing evidence to undermine the proposing official's credibility. PFR File, Tab 7 at 14-16. The appellant attempted to introduce a purported transcript of a tape recording of an interaction she allegedly had with the proposing official immediately after she contacted an EEO counselor. *Id.* at 15. The appellant alleged that the proposing official came into her office, leaned over her right shoulder and said "Good Morning, you lying sack of shit[,]" and later denied it occurred. *Id.*; HT at 67. The administrative judge disallowed the admission of the transcript that allegedly contained the statement. HT at 67-68.

¶9 The appellant has provided no explanation regarding how admitting the transcript would have altered the outcome of this appeal. *See* PFR File, Tab 7. The proposing official's credibility was not a major issue in the administrative judge's decision, as he was not the deciding official and his testimony played no role in the administrative judge's determination that the notice of proposed action was received. *See* ID at 8 (holding that the testimony of the deciding official and the human resources specialist was the foundation for the conclusion that the notice of proposed action was received). Furthermore, the agency's proof of the appellant's absences did not rely solely on the proposing official's testimony. The agency submitted numerous documents to the same effect, and the appellant

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same manner it had successfully sent her other correspondence, was intelligent and diligent. The appellant's arguments to the contrary are without merit.

testified that she was absent. IAF, Tab 7, Subtab 4G; HT at 98-99. The proposing official did testify that the appellant's position needed to be filled, but he was not the only witness to provide that testimony. *See* HT at 13-14, 125. In sum, assuming arguendo that error occurred, the appellant has not shown how any error by the administrative judge regarding the admission of evidence attacking the official's credibility prejudiced her substantive rights; thus, she has not provided a basis for reversing the initial decision. *See Chang v. U.S. Postal Service*, 114 M.S.P.R. 258, ¶ 4 (2010); *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

An excessive absences charge may include sick leave, annual leave, Leave Without Pay (LWOP), and AWOL, but it may not include leave under the Family and Medical Leave Act (FMLA).

¶10 There appears to be some inconsistency in Board precedent regarding what leave can be used to support an adverse action based on excessive leave use. *See, e.g.*, *Curtis v. U.S. Postal Service*, 111 M.S.P.R. 626, ¶¶ 9-11 (2009) (holding that an agency cannot discipline an individual for his use of approved sick leave but can discipline an employee for his use of unscheduled LWOP); *Allen v. Department of the Army*, 76 M.S.P.R. 564, 570 (1997) (holding that an agency can bring an action against an employee for excessive absence even if the absence is excused on grounds of poor health); *Webb v. U.S. Postal Service*, 10 M.S.P.R. 536, 543 (1982) (holding that an adverse action taken by an agency against an employee based on periods of approved leave does not promote the efficiency of the service). Because the efficiency of the service may suffer in the absence of an employee's services, regardless of the type of leave used, we hold that whether the leave is sick leave, annual leave, LWOP, or AWOL will not be dispositive to a charge of excessive absences. To the extent that the Board has held or implied otherwise in cases such as *Curtis*, 111 M.S.P.R. 626, *Ryan v. Department of the Air Force*, 107 M.S.P.R. 71 (2007), *Scorcia v. U.S. Postal Service*, 78 M.S.P.R. 588 (1998), *Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401 (1997),

Clark v. Department of the Navy, 12 M.S.P.R. 428 (1982), and *Webb*, 10 M.S.P.R. 536, those cases are expressly overruled.

¶11 In the appellant's case, the agency included absences under the FMLA in its specification for the charge of excessive absences. IAF, Tab 7, Subtab 4D at 2. By statute, any employee who takes FMLA leave "for the intended purpose of the leave shall be entitled, upon return from such leave — (1) to be restored by the employing agency to the position held by the employee when the leave commenced; or (2) to be restored to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment." 5 U.S.C. § 6384(a). Because Congress's clear intent when enacting FMLA was to provide job security for individuals who needed to be temporarily absent due to a serious medical condition (whether their own or that of a family member addressed by the FMLA legislation) and the law unambiguously promises this job security, use of FMLA in any calculation to remove an employee is inappropriate.[2] Therefore, it is improper to consider FMLA absences as a part of the equation when evaluating if an employee has taken excessive leave. In contrast, the appellant's use of other LWOP, annual leave, or sick leave may be used to demonstrate that her absences were excessive. *See* IAF, Tab 7, Subtab 4D at 2.

The excessive absences charge cannot be sustained because the deciding official failed to consider all elements of that charge.

¶12 As the appellant notes in her petition for review, the Board has held that in order to prove a charge of excessive absences, the agency must show, inter alia, that "the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee

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[2] When enacting FMLA, Congress found that there was a "lack of employment policies to accommodate working parents [that could] force individuals to choose between job security and parenting" and there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." H.R. Rep. No. 103-8(I) at 1 (1993).

could not be on the job." *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984); *see* PFR File, Tab 7 at 17. In this case, the deciding official testified that because "there were big chunks of leave without pay that were granted to" the appellant while the supervisor "was waiting for medical documentation," the deciding official was unable to "know" whether the appellant was able to report for work. *See* HT at 136. Therefore, based on the record evidence, we must conclude that the agency failed to meet its burden of proof with regard to this element of the charge of excessive absences.

The penalty of removal is reasonable given the nature and extent of the sustained AWOL charge.

¶13 In addition to the excessive absences charge discussed above, the appellant was charged with having been AWOL for 22 consecutive workdays in March and April 2009, and was previously reprimanded for AWOL in November 2008. IAF, Tab 7, Subtab 4D at 3. The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Where, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Id.* at 308. In such a case, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

¶14 In this case, the deciding official considered the appellant's more than 20 years with the agency and her medical condition, but indicated that in light of the appellant's past discipline, he would have removed the appellant for the AWOL charge alone. *See* IAF, Tab 7, Subtab 4B at 2-3, HT at 126-27, 132-33, 138. AWOL is a serious offense and the Board has held that removal is a reasonable penalty for a sustained charge of AWOL for several weeks, particularly where the

appellant has prior discipline for the same offense. *See Thom v. Department of the Army*, 114 M.S.P.R. 169, ¶ 7 (2010); *Dias v. Department of Veterans Affairs*, 102 M.S.P.R. 53, ¶ 16 (2006); *Foreman v. U.S. Postal Service*, 89 M.S.P.R. 328, ¶ 17 (2001). Because the penalty of removal for more than 20 consecutive workdays of AWOL does not exceed the tolerable limits of reasonableness, the agency's removal of the appellant is affirmed.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. 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 Codes, 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.