UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 89

Docket No. CH-0752-10-0351-I-1

John A. Somuk,

Appellant,

v.

Department of the Navy,

Agency.

September 30, 2011

Timothy L. Shonk, Esquire, Linton, Indiana, for the appellant.

L. Benjamin Pickens, Esquire, and Susan K. Luther, Esquire, Crane, Indiana, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that mitigated the appellant's removal to a 30-day suspension. For the following reasons, we GRANT the petition for review, VACATE the initial decision's findings regarding the charge of Failure to Follow Proper Leave Procedures and the reasonableness of the penalty, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his NT-0690-04 Industrial Hygienist position based on charges of Failure to Follow Proper Leave Procedures, 238.6 hours of Absence Without Leave (AWOL) between August 10, 2009, and October 15, 2009, and Inattention to Duty. Initial Appeal File (IAF), Tab 3, Subtabs 4b, 4c, 4k. Regarding the charge of Failure to Follow Proper Leave Procedures, the agency asserted that between July 30, 2009, and August 10, 2009, the appellant failed to call and request leave or report to duty, and subsequently failed to provide medical documentation to support his absences within 30 days after the date that the agency requested medical certification. *Id*., Subtab 4k at 1-3. The agency noted that although the appellant had submitted his medical documentation late, the agency approved his request for leave under the Family and Medical Leave Act of 1993 (FMLA) for the period from July 14, 2009, through August 10, 2009. *Id*. at 3. The proposal notice indicated that "[w]hile Ms. Stoll approved your FMLA request, it does not negate the fact that you repeatedly failed to follow proper leave procedures which resulted in an unnecessary burden on management and your coworkers." *Id*. at 4. The agency noted that the appellant's failure to provide timely notification and justification for his absences, as well as the dates he planned to return to duty, negatively impacted the mission and the agency's ability to meet customer demand, and that "[w]ork which would normally be assigned to you had to be completed by other employees who were already fully work loaded." *Id*.

¶3 After a hearing on appeal, the administrative judge found that the agency proved its AWOL and Inattention to Duty charges, but did not prove all of its AWOL specifications. IAF, Tab 34, Initial Decision (ID) at 5-12. The administrative judge also found that, although the appellant testified that he was aware of the leave policy and tried to follow that policy, the agency did not prove its charge of Failure to Follow Proper Leave Procedures because the agency approved the appellant's request for leave under the FMLA for the period in

question. ID at 2-4. In this regard, the administrative judge noted that the Board has held that if an agency bases an adverse action on its interference with an employee's rights under the FMLA, the adverse action is a violation of law and cannot stand. ID at 4. The administrative judge further found that the appellant did not prove his claims of disability discrimination or reprisal for whistleblowing activity. ID at 12-16. Finally, the administrative judge held that discipline based on the sustained charges promoted the efficiency of the service, but mitigated the removal to a 30-day suspension in light of, among other things, the agency's failure to prove its Failure to Follow Proper Leave Procedures charge and failure to prove all of the AWOL specifications, the appellant's lack of prior discipline and 28 years of service, and the agency's failure to address or deny the appellant's claim of disparate treatment for his absences. ID at 2, 16-21.

ANALYSIS

¶4 The agency asserts on review that under Board precedent it can discipline the appellant for failure to follow leave procedures even if it approves the leave. Petition for Review File, Tab 1 at 3. The agency further claims that neither party had notice that interference with the appellant's FMLA rights was an issue in the case, that the cases the administrative judge relied upon regarding the FMLA were distinguishable from this case because they involved a denial of FMLA leave, not a granting of FMLA leave, and that the appellant failed to meet the notice requirements under the FMLA of 30 calendar days' notice or notice within a reasonable period of time appropriate to the circumstances involved. *Id*. at 3-5.

¶5 The agency also contends that the administrative judge should not have mitigated the penalty because she improperly converted the appellant's allegation of disparate treatment in his affirmative defense of disability discrimination into a claim of disparate treatment with respect to the penalty, which the agency claims the appellant never raised. *Id*. at 6-7. The agency asserts that the two comparators addressed by the administrative judge were not similarly situated to

the appellant because the agency did not charge them with any misconduct, *id.* at 7-11, and that even if the charge of Failure to Follow Proper Leave Procedures is not sustained, removal for 4.5 weeks (188.6 hours) of AWOL and inattention to duty is within the tolerable limits of reasonableness, *id.* at 14-16.

¶6 In *Wilkinson v. Department of the Air Force*, 68 M.S.P.R. 4, 6 (1995), the agency removed the appellant for failure to request leave according to established procedures. The Board held that, although the agency eventually approved leave and/or leave without pay (LWOP) for the absences covering the period of the charge of failure to request leave according to established procedures, non-Postal Service agencies should be able to discipline employees for such behavior. *Id.* at 6-7. The Board noted that such action will encourage agencies to grant compelling leave requests even though proper leave-requesting procedures were not followed, while allowing agencies to hold employees accountable for their failure to follow such leave-requesting procedures. *Id.* at 7. Thus, the Board held that "a charge of failing to properly request sick leave, annual leave, or LWOP can be maintained by an agency that is bound by the laws and regulations that govern leave administration in the civil service, even though the agency eventually approves the leave request (or the Board on review determines that the agency's denial of the leave request was unreasonable), so long as the employee is on notice of the agency's requirements." *Id.*

¶7 The administrative judge in this case relied on *Gross v. Department of Justice*, 77 M.S.P.R. 83, 88 (1997), and *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 73 (1997), in finding that the agency's decision to discipline the appellant for failure to follow leave procedures for FMLA-protected dates interfered with the appellant's FMLA rights and could not be sustained. ID at 4-5. In *Gross*, 77 M.S.P.R. at 85, the agency suspended the appellant for 20 days based on a charge of failure to comply with the agency's leave-request policy. The agency suspended the appellant after placing him in an AWOL status for 5 unspecified days, and the appellant asserted that the agency violated the FMLA

by improperly denying him leave to care for an ill family member. *Id*. The Board found that the appellant's family medical emergency situation was covered by the FMLA, that the appellant satisfied the notice requirements of the FMLA and invoked entitlement to leave under it, and that the agency's denial of LWOP violated the provisions of the FMLA. *Id*. at 87-90. The Board noted that if an agency bases an adverse action on its interference with an employee's rights under the FMLA, the adverse action is a violation of law and cannot be sustained. *Id*. at 90. The Board concluded that "by failing to grant the appellant LWOP to care for his seriously ill mother, and then placing him in AWOL status and suspending him, the agency interfered with his rights under the FMLA," and the agency's action could not be sustained. *Id*. at 90-91 (footnote omitted).

¶8 In *Ellshoff*, 76 M.S.P.R. at 62, the agency removed the appellant based on charges of inability to perform her job duties and unauthorized absence from duty. The Board found that the agency did not prove its charges, and specifically found with respect to the AWOL charge that the charge could not be sustained because the appellant was entitled to LWOP for that period under the FMLA. *Id*. at 71. The Board noted that "there is no basis for treating the FMLA and its implementing regulations differently from any other leave-related statute and regulations which may apply to a leave-related charge." *Id*. at 73. The Board thus held that when the facts, either specifically raised by the appellant or otherwise shown by the record evidence, implicate the FMLA relative to a leave-related charge, the Board will consider and apply the FMLA without shifting the burden of proof to the appellant. *Id*.

¶9 Here, following the principle set forth in *Wilkinson*, we find that the mere fact that the agency approved leave under the FMLA for a period of time during which the agency also charged the appellant with Failure to Follow Proper Leave Procedures does not mean that the charge cannot be sustained. *See Bowen v. Department of the Navy*, 112 M.S.P.R. 607, ¶ 11 (2009) (the appellant identified nothing in the FMLA or the regulations implementing the FMLA that prohibited

the agency from requiring him to call in or request leave), *aff'd*, 402 F. App'x 521 (Fed. Cir. 2010). Rather, as set forth in *Gross* and *Ellshoff*, the question is whether the agency interfered with the appellant's rights under the FMLA in charging him with Failure to Follow Proper Leave Procedures.

¶10 Under 5 C.F.R. § 630.1206(a), if FMLA leave for a serious health condition is foreseeable based on planned medical treatment, the employee shall provide notice of the intention to take leave not less than 30 calendar days before the date the leave is to begin. If the need for leave is not foreseeable and the employee cannot provide 30 calendar days' notice of the need for leave, the employee shall provide notice within a reasonable period of time appropriate to the circumstances involved. 5 C.F.R. § 630.1206(c). An agency may waive the notice requirements under 5 C.F.R. § 630.1206(a) and instead impose the agency's usual and customary policies or procedures for providing notification of leave, but such notification policies or procedures must not be more stringent than the requirements set forth in section 630.1206. 5 C.F.R. § 630.1206(e). An employee must provide written medical certification requested by an agency under the FMLA no later than 15 calendar days after the date the agency requests such medical certification. 5 C.F.R. § 630.1207(h). However, if it is not practicable under the particular circumstances to provide the requested medical certification no later than 15 calendar days after the date requested by the agency despite the employee's diligent, good faith efforts, the employee must provide the medical certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date the agency requests such medical certification. *Id.*

¶11 The agency bears the burden of proving that it complied with the FMLA as part of its overall burden of proving a leave-based charge. *Bowen*, 112 M.S.P.R. 607, ¶ 8. Thus, in order to prove its charge of Failure to Follow Proper Leave Procedures the agency was required to show that it did not violate the appellant's

rights under the FMLA as set forth above relating to notice requirements and the timely provision of medical certification in response to an agency's request.

¶12 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). Moreover, the administrative judge has the responsibility to develop the record evidence regarding FMLA issues as necessary and appropriate, while considering administrative efficiency and fairness to the parties. *See Ellshoff*, 76 M.S.P.R. at 74. Here, the administrative judge found that the appellant was aware of the agency's leave policies, and the appellant has not challenged that finding on review. However, the parties were not placed on notice of the material issues of fact and law in this case with respect to whether the agency interfered with the appellant's FMLA rights in terms of notification of the need for leave under the FMLA and the timely provision of medical documentation supporting such leave. In addition, because the administrative judge found that the Failure to Follow Proper Leave Procedures charge could not be sustained because of the agency's approval of leave under the FMLA, she did not make explained findings as to whether the appellant, in fact, failed to follow proper leave procedures. Because such issues may involve resolving conflicting evidence and testimony based upon the demeanor of witnesses, the administrative judge is in the best position to resolve such questions. *See Doe v. Department of Justice*, 113 M.S.P.R. 128, ¶ 18 (2010). Thus, we find that there are material facts in dispute on several issues in this case that were not resolved in the initial decision.

ORDER

¶13 Accordingly, we remand this case to the Central Regional Office for further adjudication consistent with this Opinion and Order. On remand, the

administrative judge shall address the issues discussed above and allow the parties to submit further evidence and argument, including a hearing limited to those issues if requested by the appellant, so that a new decision may be issued based on a complete record. *See Doe v. Department of the Army*, 116 M.S.P.R. 160, ¶ 12 (2011); *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶¶ 13-14 (2010). The administrative judge shall then issue a new initial decision that incorporates her findings that have not been vacated by this Opinion and Order and redetermines whether the agency proved its charge of Failure to Follow Proper Leave Procedures and whether the penalty of removal is reasonable.

FOR THE BOARD:

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