

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2012 MSPB 98**

Docket No. AT-0752-11-0584-I-1

**Friedrich C. Paetow,
Appellant,
v.
Department of Veterans Affairs,
Agency.**

August 17, 2012

Tiffany L. Malin, Esquire, Denver, Colorado, for the appellant.

Johnston Walker, Jackson, Mississippi, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the Initial Decision that reversed its demotion of the appellant. We AFFIRM the Initial Decision AS MODIFIED by this Opinion and Order, still reversing the agency's demotion action.

BACKGROUND

¶2 The agency employed the appellant as a police officer at its Gulf Coast Veterans Health Care System in Biloxi, Mississippi. Initial Appeal File (IAF), Tab 4, Subtab 4e. As a police officer, the appellant was required to achieve and

maintain qualification in the use of approved firearms, IAF, Tab 4, Subtab 4k at 5, and complete an annual psychological assessment to establish his suitability to carry a firearm as a condition of continued employment pursuant to [5 C.F.R. § 339.301](#) *et seq.*, *id.* at 6.

¶3 In March 2009, the appellant admitted that he lost his temper and raised his voice in frustration while meeting with Ronald Hines, the Chief of the Police Service. IAF, Tab 4, Subtab 4d at 2. As a result, he was referred for a fitness for duty examination with Dr. Julie Teater, a clinical psychologist, on March 31, 2009. IAF, Tab 8 at 14. Dr. Teater conducted the examination, consisting of two hours of psychological testing and a structured clinical interview, and found the appellant fit for duty in a weapons-carrying position. *Id.* at 14-16. Three months later, on June 30, 2009, the appellant underwent his annual fitness for duty evaluation with Dr. Teater. IAF, Tab 7 at 18. This time, Dr. Teater noted “significant changes” since the appellant’s psychological assessment of the year before, which had been conducted on July 22, 2008, and found the appellant did not have “the emotional stability to continue to carry a weapon as a function of his duties.” *Id.* at 18-19. She based her conclusion on the appellant’s reporting that he had told his supervisor that he was going to “kick another officer’s ass” and did not appear “to appreciate the inappropriateness of his behavior.” *Id.* at 18. She noted that the appellant had been examined on March 31, 2009, “due to being disrespectful to a supervisor and having general anger management issues,” and had continued to demonstrate poor judgment as well as an increase in anger management issues. *Id.* at 18-19. On August 10, 2009, based on Dr. Teater’s evaluation, Dr. Gregory Rands, the agency’s occupational health physician, recommended that action be taken to separate the appellant, and the agency placed the appellant in a vacant dispatcher position that did not require him to carry a weapon. IAF, Tab 4, Subtab 4h.

¶4 On February 11, 2010, the agency proposed the appellant’s removal based on the single charge of “failure to maintain firearm qualification standards” as a

result of failing the psychological assessment portion of the annual fitness evaluation. IAF, Tab 4, Subtab 4e, Tab 7 at 18-19. On March 5, 2010, the appellant submitted a written reply containing medical documentation from two mental health practitioners who had also conducted psychological evaluations of the appellant but found that the appellant did meet the medical standards of his position. IAF, Tab 4, Subtab 4d. The appellant additionally stated that he had passed a psychological evaluation conducted for the Jackson County Sheriff's Office, but he did not submit verifying documentation. *Id.* at 3. On February 24, 2011, Thomas Wisnieski, the deciding official, sustained the charges in the proposal notice but made the decision to demote the appellant "to the next lower grade" rather than remove him. IAF, Tab 4, Subtab 4b. The agency then demoted the appellant two grade levels from a Lead Police Officer, GS-0083-07, to a Security Assistant, GS-0086-05, effective March 13, 2011. IAF, Tab 4, Subtab 4a.

¶5 The appellant filed a Board appeal challenging the demotion action. IAF, Tab 1. Specifically, the appellant claimed that he was fit to perform the full range of duties as a police officer, including carrying a firearm, based on the psychological evaluation he underwent on January 14, 2010, in connection with his application for employment with the Jackson County Sheriff's Office, and four additional psychological evaluations that he underwent at his own expense in August and September 2009, and March and May 2011. *See* IAF, Tabs 8, 15; *see also* IAF, Tab 4, Subtabs 4g (examination by Dr. Michael Zakaras, Ph.D. from August 18 to 28, 2009), 4f (examination by Dr. William Gasparrini, Ph.D. on September 2, 2009); Tab 8 at 8 (examination by Dr. Gasparrini on May 13, 2011), 12 (examination by Dr. Ruth Shoemaker, Ph.D. on March 14 and 16, 2011); Tab 12 (psychological assessment conducted by Psychological Resources, Inc., of Atlanta, GA, on January 14, 2010, for Jackson County, Mississippi, Sheriff's Office). All of these evaluations found the appellant fit for duty as a weapons-carrying police officer. The appellant also claimed that the agency demoted him

because it perceived that he had a mental or emotional disability, IAF, Tab 1 at 4, and that he had been subject to a disparate penalty because Chief of Police Hines, a supervisory law enforcement officer, had exhibited angry, potentially violent behavior in the workplace in 2010 but had not been charged or disciplined in any way. IAF, Tabs 8 at 5, 15 at 11-12.

¶6 After conducting the requested hearing, the administrative judge issued an initial decision finding that the agency failed to prove its charge and reversing the agency action. IAF, Tab 16, Initial Decision (ID). In reaching that finding, the administrative judge determined that the medical evaluations provided by the appellant were more persuasive than the two conflicting evaluations prepared by Dr. Teater. *Id.* at 7-8. The administrative judge also found that the appellant failed to prove his affirmative defense of disability discrimination. *Id.*

¶7 The agency has filed a petition for review. Petition for Review (PFR) File, Tab 3. The appellant has filed a response in opposition. PFR File, Tab 5. In his response, the appellant does not challenge the administrative judge's finding that he failed to prove disability discrimination. *Id.*

ANALYSIS

¶8 In its petition for review, the agency makes three arguments challenging the administrative judge's finding that the agency failed to prove its charge: (1) the administrative judge applied the wrong legal standard when analyzing the charge; (2) the administrative judge improperly discredited the testimony of the agency witnesses, and also incorrectly interpreted and/or ignored evidence; and (3) the administrative judge failed to follow *Martin v. Department of Veterans Affairs*, [412 F.3d 1258](#) (Fed. Cir. 2005), when he reviewed and considered medical evidence that was not supplied to Mr. Wisnieski prior to making his decision to demote the appellant. PFR File, Tab 3. We address these contentions below.

¶9 The agency first argues that the administrative judge incorrectly analyzed the agency's charge under the standard set forth at [5 C.F.R. § 339.206](#), which pertains to disqualification of an employee on the basis of his medical history, rather than those set forth at [5 C.F.R. § 339.301](#), which pertain to an employee's failure to pass a medical examination. PFR File, Tab 3 at 11. Nowhere in its notice of proposed removal or decision letter, however, did the agency cite any portion of 5 C.F.R. part 339. Instead, the agency referred to various portions of the VA Handbook and a Medical Center Memorandum explaining the VA firearms program. IAF, Tab 4, Subtabs 4b, 4e. The administrative judge analyzed the agency's charge precisely as it was written, namely, as the appellant's alleged "inability to maintain the physical fitness standards required to maintain [his] position as a VA Police Officer . . . in direct violation of VA Handbook 0730, Appendix A, Specific Medical Standards for VA Police Officer Applicants and Incumbents," as evidenced by his failure to pass his annual physical fitness evaluation on August 10, 2009. *See* IAF, Tab 4, Subtabs 4e, 4j, 4k. The administrative judge provided a thorough assessment and analysis of the evidence and testimony that support a finding that the agency failed to prove its charge by preponderant evidence. Accordingly, even assuming that the citation in the initial decision to [5 C.F.R. § 339.206](#) was adjudicatory error, it did not alter the outcome of the appeal and did not prejudice the rights of either party. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (finding that adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

¶10 The agency also contends on review that the administrative judge improperly credited the testimony of Dr. Gasparrini over the testimony of Mr. Wisnieski and Dr. Teater, and also argues that the administrative judge incorrectly interpreted or ignored evidence contained in the psychological examinations submitted by the appellant when he determined that the appellant was fit for duty in a weapons-carrying position. PFR File, Tab 3 at 7, 9, 10,

12-16, 22-24. The agency's assertions, however, fail to provide a basis for granting review because they constitute mere disagreement with the administrative judge's explained credibility determinations and findings of fact.

¶11 In making his finding that the agency failed to prove by preponderant evidence that the appellant was medically unfit to occupy his position, the administrative judge noted that the record contained seven medical evaluations of the appellant concerning whether he was fit for duty in a weapons-carrying position. ID at 5, 7. He found that four of the medical evaluations were available to the deciding official when he made his decision to demote the appellant on February 24, 2011 (two from Dr. Teater, one from Dr. Gasparrini, and one from Dr. Zakaras), and, of those four evaluations, three of them found the appellant medically fit to carry a firearm and to occupy a police officer position. *Id.* He also found that the only evidence presented by the agency that the appellant was not medically fit to hold the position of a police officer was the June 30, 2009 evaluation prepared by Dr. Teater, and that that evaluation conflicted with the prior evaluation prepared by Dr. Teater just 3 months before on March 31, 2009. *Id.* at 7. The administrative judge noted that the only change in the appellant's behavior between those two evaluations was a statement made by the appellant that he would "kick another officer's ass," and he found that statement should not have disqualified the appellant from holding the police officer position. *Id.*

¶12 Applying the criteria for resolving credibility issues as set forth in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), the administrative judge found that the testimony of Mr. Wisnieski was somewhat vague and inconsistent with the evidence pending before him, considering that three of the four medical evaluations he reviewed in making his determination found that the appellant was fit for duty in a weapons-carrying position. ID at 6-7. The administrative judge further found that the testimony of Dr. Gasparrini was straightforward and that his evaluations were supported by a detailed analysis that warranted the conclusions reached. *Id.* In addition, the administrative judge found that the

medical evaluations prepared by Dr. Gasparrini, Dr. Shoemaker, and the Jackson County Sheriff's Department, concluding that the appellant was fit for duty, were more persuasive than the two conflicting evaluations prepared by Dr. Teater. *Id.* at 7-8. Therefore, the administrative judge reviewed all of the medical evidence submitted by the appellant to Mr. Wisnieski and determined that the appellant's evidence established that, contrary to Dr. Teater's second evaluation upon which Mr. Wisnieski based his decision, the appellant was fit for duty in a weapons-carrying position. *Id.* at 6-7, 8 n.2.

¶13 The initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions, and we therefore discern no reason to re-weigh the evidence or substitute the Board's own judgment on credibility issues. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-106 (1997) (finding that the Board will give due deference to the credibility findings of the administrative judge, and will not grant a petition for review based on a party's mere disagreement with those findings). Accordingly, we defer to these reasoned and explained credibility determinations and findings of fact. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002); *Diggs v. Department of Housing & Urban Development*, [114 M.S.P.R. 464](#), ¶ 8 (2010).

¶14 Finally, the agency claims that *Martin v. Department of Veterans Affairs*, [412 F.3d 1258](#) (Fed. Cir. 2005) is controlling and necessitates reversal of the initial decision because the administrative judge should not have reviewed any medical evidence that was not presented to Mr. Wisnieski in determining whether the appellant was fit for duty in a weapons-carrying position. PFR File, Tab 3 at 6-7, 17-19. The agency argues that *Martin* "limits the information to be considered [by the Board and/or arbitrator] to the set of information provided to the Agency or to the deciding official *prior* to any decision" on the proposed disciplinary action. PFR File, Tab 3 at 19. The agency argues, therefore, that the administrative judge should have analyzed the appeal under [5 C.F.R. § 339.303](#)

and limited his review to the psychological assessments provided to Mr. Wisnieski.

¶15 The agency's reliance on *Martin* is misplaced. In *Martin*, the court analyzed the appellant's claim in the context of an affirmative defense of harmful procedural error and determined that the agency did not violate the regulation because the regulation only required the agency to consider medical evidence it received prior to reaching its decision, and the appellant had not supplied his additional medical evidence to the agency despite being given adequate notice to do so. *Martin*, 412 F.3d at 1265. We note that the arbitrator did review the additional evidence submitted by the appellant during the arbitration proceedings that was not submitted to the deciding official, but the arbitrator nevertheless sustained the agency's action, and the court did not find that it was inappropriate for the arbitrator to review the additional medical evidence. *Id.* at 1263.

¶16 In any event, the result would be the same even if we were to accept the agency's argument that the administrative judge should have limited his review to the psychological assessments provided to Mr. Wisnieski. The administrative judge noted – in response to the agency's argument below regarding *Martin* – that he still would have found that the agency failed to meet its burden of proving the charge even if he only considered the evidence that was before Mr. Wisnieski at the time he made his decision. ID at 8 n.5. This finding is consistent with the administrative judge's explained credibility determinations and fact findings regarding the four psychological assessments before Mr. Wisnieski at the time, which are supported by the record and entitled to deference. *See Diggs*, [114 M.S.P.R. 464](#), ¶ 8.

¶17 We therefore find no error in the administrative judge's determination that the agency failed to prove its charge by preponderant evidence. Except as modified by this Opinion and Order, the Initial Decision of the administrative judge is the Board's final decision.

ORDER

¶18 We ORDER the agency to cancel the demotion and to restore the appellant effective March 13, 2011. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶19 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶20 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶21 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶22 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision

are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

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. § 2000e-5\(f\)](#); [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:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.