

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

2012 MSPB 108

Docket No. CB-7121-11-0010-V-1

Lonnie Pace,

Appellant,

v.

Department of the Treasury,

Agency.

September 19, 2012

Dennis Schneider, Esquire, and Gretchen Paulig, Esquire, Austin, Texas,
for the appellant.

Diana R. Stallard, Esquire, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant seeks review of an arbitration decision that did not sustain his removal for misconduct and reinstated him with 4 months back pay. For the following reasons, we GRANT the appellant's request for review under [5 U.S.C. § 7121](#)(d), VACATE the arbitration decision with respect to the appellant's discrimination claims, the denial of compensatory damages, and the limitation of back pay to a 4-month period, and FORWARD the matter to the Dallas Regional Office for further adjudication regarding the appellant's affirmative defenses and remedy.

BACKGROUND

¶2 The agency removed the appellant from his GS-7 Tax Examining Technician position based on four charges of misconduct. Request for Review (RFR) File, Tab 1, Subtab C, Agency Exs. 2-4. The appellant's union filed a grievance that proceeded to arbitration. After a hearing, the arbitrator issued a decision finding that the agency failed to prove by a preponderance of the evidence that the removal "was only for such cause as will promote the efficiency of the Service." RFR File, Tab 1, Arbitration Decision at 29. The arbitrator determined that the agency must, among other things, reinstate the appellant with a one-time payment equivalent to 4 months of back pay based upon a 40-hour week. *Id.*

¶3 The appellant has requested that the Board review portions of the arbitrator's decision. In particular, the appellant claims that the arbitrator failed to analyze his claims of discrimination, retaliation, and harassment, failed to address his claim that the agency violated his due process rights, and misallocated the burden of proof on the issue of damages, which resulted in a premature and prejudicial ruling limiting the scope of his relief. The appellant requests that the Board find that the agency discriminated against him and order the agency to "resc[ind] the removal action *ab initio*," to restore the appellant with back pay, interest, and benefits covering the complete period from his removal through the date of reinstatement, and to pay other "significant damages for the harm caused to appellant." RFR File, Tab 1, Request for Review at 63. The agency has filed an opposition to the appellant's request for review.¹ RFR File, Tab 6.

¹ The agency's response alleges that the arbitration decision is contrary to civil service law in several respects. *E.g.*, RFR File, Tab 6, Agency's Response at 6, 9, 13, 16, 18, 21, 59, 89. The Board has held that, under [5 U.S.C. § 7121\(d\)](#), agencies lack an independent right to seek Board review of arbitration decisions. *In re Arbitration Between U.S. Army Corps of Engineers & National Federation of Federal Employees*, [51 M.S.P.R. 517](#), 518 (1991). Thus, although we have considered the agency's opposition to the issues raised by the appellant, we otherwise lack the authority to review the agency's allegations of error in the arbitrator's decision. *See id.* We deny

ANALYSIS

¶4 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., Hollingsworth v. Department of Commerce*, [115 M.S.P.R. 636](#), ¶ 6 (2011). Each of these conditions has been satisfied in this case. The Board has jurisdiction over the appellant's removal under [5 U.S.C. §§ 7512](#), 7513(d), 7701. RFR File, Tab 1, Subtab C, Agency Exs. 2-4; Tab 6, Agency's Response at 4. The appellant has alleged that his removal was the result of, among other things, race and disability discrimination, and an arbitrator issued a final decision on the appellant's grievance. Thus, we find that the Board has jurisdiction over this case. *See Hollingsworth*, [115 M.S.P.R. 636](#), ¶ 6.

¶5 The standard of the Board's review of an arbitrator's award is, however, deferential. *Hidalgo v. Department of Justice*, [93 M.S.P.R. 645](#), ¶ 7 (2003). The Board will modify or set aside such an award only when the arbitrator has erred as a matter of law in interpreting 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. *Hollingsworth*, [115 M.S.P.R. 636](#), ¶ 7. Nevertheless, the arbitrator's decision must include specific findings on the issues in question in order for the Board to defer to the arbitrator's findings and conclusions, *id.*, and the Board may make its own findings when the arbitrator failed to set forth any legal standard governing his evaluation of the evidence, *id.*,

the appellant's motion to strike portions of the agency's response and the appellant's motion to keep the record open to respond to the agency's "cross-request for review." RFR File, Tab 7.

¶ 8; *FitzGerald v. Department of Homeland Security*, [107 M.S.P.R. 666](#), ¶ 18 (2008).

¶ 6 The appellant claims that his union raised the following affirmative defenses to the removal action: “race, gender, and/or disability discrimination, and/or retaliation for having participated in the [equal employment opportunity] process and/or for having sought reasonable accommodation, and/or that the agency had created and maintained a hostile work environment.” RFR File, Tab 1, Request for Review at 8. In addition, the appellant asserts that his union repeatedly asserted that the agency had violated his due process rights. *Id.* at 10. The appellant argues that the agency’s violation of his due process rights is part of the pattern of the agency’s discriminatory and retaliatory conduct. *E.g., id.* at 12 n.9, 20, 39-42. The appellant requests that the Board make findings on his affirmative defenses and remedy because the arbitrator failed to adequately address these issues.²

¶ 7 The arbitrator acknowledged that the appellant’s union had “raised a number of issues” in addition to contesting whether the agency had removed the appellant for such cause as will promote the efficiency of the service, RFR File, Tab 1, Arbitration Decision at 2, 26, but he concluded:

As the final determination in this case specific will be to reinstate Pace, I do not see any reason to go to a lengthy discussion relative to discrimination on the part of the Agency in regard to disability and/or race. In passing, and based upon the evidence, a case could be made that Pace’s claims of discrimination could be viewed as arbitrable.

More to the question of a hostile work environment, it certainly seems that such environment was present at least in part. A good

² To the extent that the appellant is seeking enforcement of certain aspects the arbitrator’s award, *e.g.*, RFR File, Tab 1, Request for Review at 2, 63, the appellant has not established that the Board has the authority to enforce the arbitrator’s award in these circumstances, *see Hunter v. Department of the Air Force*, [83 M.S.P.R. 7](#), ¶¶ 10-11 (1999).

example would be that the Agency seemingly was more intent to discipline.

Id. at 26-27. The arbitrator further noted that “some accommodations were explored and tried” and that “an argument could also be made that Pace himself could have better attempted to address his disability with possibly more medical care,” but that there “simply was not enough evidence to firmly answer that question.” *Id.* at 28. The arbitrator suggested, “Possibly a change to another department and a different assignment for Pace might have helped[, but] I simply don’t know if that was a possibility.” *Id.*

¶8 The arbitrator concluded that “[g]iven such discussion, the termination was inappropriate” and “an accommodation must be made which is workable for both the Agency and Pace.” *Id.* The arbitrator proceeded to discuss the issue of back pay, finding that a “portion of backpay should be granted.” *Id.* at 29. The arbitrator awarded, without explanation as to how he determined the amount, 4 months of back pay based upon a 40-hour week, and he instructed the agency to reinstate the appellant and provide him with a “reasonable accommodation agreed upon by both the Agency and the grievant.” *Id.* at 29-30. Finally, the arbitrator stated that “no compensatory damages are appropriate.” *Id.* at 29.

¶9 We find that the arbitrator failed to analyze the appellant’s discrimination claims under any recognizable legal standard or framework. Thus, to the extent that he made any decision as to these claims, the Board will not defer to his findings and conclusions. *See Hollingsworth*, [115 M.S.P.R. 636](#), ¶ 8; *FitzGerald*, [107 M.S.P.R. 666](#), ¶ 18. Similarly, the arbitrator did not state the standard he applied in deciding to limit the appellant’s back pay to a 4-month period³ or in finding that no compensatory damages were appropriate. Accordingly, we vacate

³ The arbitrator issued his decision ordering reinstatement and 4 months back pay 26 months after the agency removed the appellant. The arbitrator thus mitigated the appellant’s removal to a 22-month suspension, with no explanation of why such a penalty was warranted.

these portions of the arbitration decision and forward the matter to the Board's Dallas Regional Office for assignment to an administrative judge to make recommended findings on these issues under the appropriate legal standards. *Cf. Hollingsworth*, [115 M.S.P.R. 636](#), ¶¶ 8-10.

¶10 In addition to the race and disability discrimination claims that were mentioned in the arbitration decision, the appellant's request for review references other matters that were not mentioned in the arbitrator's decision, such as gender discrimination, retaliation, and violation of his due process rights. RFR File, Tab 1, Request for Review at 8. The Board will address discrimination claims in a matter such as this regardless of whether the discrimination claims were raised during arbitration. *See Pleasant v. Department of Housing & Urban Development*, [98 M.S.P.R. 602](#), ¶ 6 (2005). However, the Board will not review arguments other than discrimination claims that were not raised before the arbitrator. *Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 45 (2007); *see Pleasant*, [98 M.S.P.R. 602](#), ¶ 16. To the extent that there is any dispute over whether any of the appellant's non-discrimination claims are reviewable by the Board, the administrative judge shall allow for the appropriate development of the record and make recommended findings on which issues are reviewable. The administrative judge shall then make recommended findings under the appropriate legal standards on the merits of any discrimination claims and other affirmative defenses that are properly reviewable.

¶11 The agency argues that the appellant should be deemed to have "waived" his race and gender discrimination arguments because the appellant makes only limited reference to them in his request for review. RFR File, Tab 6, Agency Response at 28. We disagree. The record does not establish that the appellant has knowingly withdrawn or abandoned any discrimination claims, and an appellant is typically entitled to notice of the applicable burdens and elements of proof and an opportunity to submit evidence and argument under the proper standard. *See Wynn v. U.S. Postal Service*, [115 M.S.P.R. 146](#), ¶¶ 10, 13-14

(2010). To the extent that, during the arbitration process, the appellant was not afforded proper notice of his burdens and elements of proof regarding any of his affirmative defenses that are properly before the Board under [5 U.S.C. § 7121](#)(d), the administrative judge shall provide such notice and afford the parties the opportunity to submit evidence and argument under the proper standards before making recommended findings on the merits of those claims.

ORDER

¶12 For the reasons discussed above, we FORWARD this matter to the Dallas Regional Office for further adjudication. The administrative judge shall conduct such further proceedings as necessary and make recommended findings to the Board regarding the appellant's affirmative defenses and remedy consistent with this Opinion and Order.

FOR THE BOARD:

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