UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 110

Docket No. DC-0752-09-0770-I-4

Leroy Alford,

Appellant,

v.

Department of Defense,

Agency.

September 21, 2012

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that affirmed his removal. As set forth below, we GRANT the appellant's petition, REVERSE the initial decision on the merits, and REVERSE the agency's removal action. We VACATE the administrative judge's findings as to the appellant's claim of disability discrimination and REMAND the appeal for further findings on that issue, consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his GG-15 position as a Management Analysis Officer for the second time,[1] effective July 15, 2009, based on unacceptable performance. MSPB Docket No. DC-0752-09-0770-I-4 Initial Appeal File (IAF I-4), Tab 3, Subtabs 4b, 4c. On appeal, the appellant challenged the agency's determination regarding his performance, claimed a denial of due process and noted various procedural errors, alleged discrimination on the bases of race and disability, and alleged reprisal for protected activity. MSPB Docket No. DC-0752-09-0770-I-1 Initial Appeal File, Tab 1. In setting out the matters to be considered, the administrative judge noted two additional issues that were reserved for his consideration in the Board's previous compliance decision, *Alford v. Department of Defense*, 113 M.S.P.R. 629, ¶¶ 24-27 (2010); IAF I-4, Tab 6. Those issues were: (1) whether any failure by the agency to restore the appellant to his position and duties following the reversal of his first removal had an impact on any issue relevant to the instant appeal; and (2) whether this removal action, and the agency's actions leading up to it, were taken in reprisal for the appellant's first Board appeal. IAF I-4, Tab 6. Because there was a question as to whether the agency had taken this action under 5 U.S.C. chapter 75 or 43, the administrative judge reviewed the relevant law pertaining to the statutory basis for the agency's action and concluded that the agency was required, as it did, to take the action under chapter 75, and that, as a preference eligible, the appellant has chapter 75 appeal rights. *Id.*

¶3 Following a hearing, the administrative judge issued an initial decision affirming the agency's action. *Id.*, Tab 17; Initial Decision (ID) at 1, 22. He first

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[1] The agency canceled the appellant's first removal after he filed an appeal with the Board. Finding that the agency had not restored the appellant to the status quo ante, the administrative judge denied the agency's motion to dismiss the appeal as moot and reversed the action in an initial decision that became the Board's final decision on October 2, 2008, when neither party filed a petition for review. *Alford v. Department of Defense*, MSPB Docket No. DC-0752-08-0070-I-2 (Initial Decision, Aug. 28, 2008).

considered whether the agency had properly restored the appellant to his position and duties following the reversal of its earlier action, noting that, upon his return to duty, the appellant no longer had supervisory responsibilities. ID at 4-5. The administrative judge found, based upon the persuasive and mutually corroborative testimonies of the agency officials involved, that the agency had legitimate reasons for changing the appellant's duties upon his reinstatement and that this restoration was therefore proper. ID at 4-6. The administrative judge next found that the agency had proven its charges by preponderant evidence. ID at 6-12. He then found that the appellant did not establish his claims of denial of due process or harmful error with regard to the deciding official's consideration of additional documents prior to the removal or as to the appellant's opportunity to reply to the charges. ID at 12-14. The administrative judge further found that, while the involved agency officials were aware of the appellant's protected activities (his Board appeals, equal employment opportunity-related filings, and filings with the Office of Special Counsel and the agency's Inspector General), there was no evidence to show that their decisions finding his performance unacceptable, and their proposing and effecting his removal a second time, were in any way motivated by or connected to his involvement in prior protected activity. ID at 14-15. The administrative judge next considered the appellant's affirmative defenses of race discrimination and discrimination based on disability, but found that the record contained no support for either claim. ID at 15-19. Lastly, the administrative judge found that removal was a reasonable penalty for the sustained charges. ID at 19-22.

ANALYSIS

¶4 The appellant filed a petition for review, Petition for Review (PFR) File, Tab 3, to which the agency has responded in opposition. *Id.*, Tab 7. In his petition for review, the appellant argues, among other things, that the administrative judge erred in considering the agency's action under chapter 75,

and incorrectly found that he was properly restored upon his reinstatement. *Id.*, Tab 3 at 3-6, 13-17. We have reviewed the administrative judge's findings as to these issues and discern no reason to disturb them. *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (finding no reason to disturb the administrative judge's findings where he considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions). The appellant also argues that, contrary to the administrative judge's findings, he established that the agency violated his due process rights and that the administrative judge erred in not allowing him to present two of his treating physicians as witnesses.[2] PFR File, Tab 3 at 7-10, 12-13. We address these two issues below.

The agency's failure to provide the appellant with a meaningful opportunity to respond to the proposed removal before issuing a decision constitutes a violation of minimum due process of law warranting reversal of the agency's action.

¶5 The February 20, 2009 proposal notice afforded the appellant 15 calendar days in which to respond, in writing, in person, or both. IAF I-4, Tab 3, Subtab 4r at 5. The appellant requested an extension of the time period in which to respond, *id.*, Subtab 4n, which the agency granted, *id.*, Subtab 4l. The appellant submitted both a written and an oral response. *Id.*, Subtabs 4j, 4h. On June 26, 2009, the agency issued an "Update: Notice of Proposed Removal." *Id.*, Subtab 4f. The agency indicated that the deciding official was reviewing additional materials relating to the proposed removal before rendering a final decision, specifically, a complete set of documents identified as Agency Hearing Exhibits Volumes I-III in another of the appellant's appeals, and a memorandum for the record drafted by the individual who rated the appellant's performance "Unacceptable," which was attached for the appellant's review. *Id.* In the June

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[2] The appellant has not challenged the administrative judge's findings that he failed to establish his claims of racial discrimination and reprisal for protected activity, and we discern no basis to disturb those findings. *See* PFR File, Tab 3; ID at 14-16, 19.

26, 2009 proposal, the agency afforded the appellant 2 weeks from the date he received it in which to provide a written reply and to request an oral reply relative to the additional materials, and it advised him to direct any questions, an amended written reply, or a request for an oral reply to Anita Willis, Human Resources Specialist. *Id*. The appellant, who was on administrative leave, received the updated proposal notice by Federal Express on Monday, June 29, 2009. MSPB Docket No. DC-0752-09-0770-I-3 Initial Appeal File, Tab 15, Appellant's Exhibit P. Exactly 2 weeks later, on Monday, July 13, 2009, he sent a letter requesting an oral reply by certified mail correctly addressed to Ms. Willis at the address provided by the agency in the June 26, 2009 updated proposal notice. IAF I-4, Tab 3, Subtabs 4a, 4d. According to documentation from the U.S. Postal Service provided by the appellant, the letter was delivered on Friday, July 17, 2009, but Ms. Willis did not sign for it until the following Monday, July 20, 2009. *Id.*, Subtabs 4a, 4d. By this time, the agency had already issued its July 15, 2009 decision letter removing the appellant from his position effective that day. *Id.*, Subtabs 4c, 4b.

¶6 Due process under the Constitution requires that a tenured federal employee be provided "written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 542 (emphasis in original). This requires a "meaningful opportunity to invoke the discretion of the decisionmaker" before the personnel action is effected. *Id.* at 543. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Id.* at 546. An employee cannot be said to have had a meaningful opportunity to present his side of the story and invoke the discretion of the deciding official if the deciding official did not hear the

appellant's oral reply to the proposal notice before issuing his decision. *See id.* at 543.

¶7 In rejecting the appellant's due process claim, the administrative judge found that it was "through no fault of the agency" that the appellant's request for a supplemental oral reply was received after the decision letter was issued. ID at 14. The record, however, shows otherwise. As noted above, the June 26, 2009 updated proposal notice afforded the appellant 2 weeks from his receipt of the letter in which to file a written response and/or request an oral reply. IAF I-4, Tab 3, Subtab 4f. By providing the address to which the response and/or request should be sent, the agency indicated that the appellant could do either by mail and that, if he chose to do so, the timeliness of his response would be measured from the date he deposited his response in the mails. *See Doe v. U.S. Postal Service*, No. 2011-3162, 2012 WL 2337347, at *2-3 (Fed. Cir. June 20, 2012).[3] Based on the date the appellant received the letter, June 29, 2009, and the date he mailed his request for an oral reply, July 13, 2009, the request he submitted was timely under the agency's own terms, and the agency was obligated to wait a reasonable time for its delivery. By failing to do so, the deciding official issued a decision without allowing the appellant to make an oral reply to the agency's updated proposal notice, thereby violating his right to minimum due process. Accordingly, the agency's action must be reversed.[4] *Blank v. Department of the*

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[3] The Board may follow nonprecedential decisions of the Court of Appeals for the Federal Circuit to the extent that it finds them to be persuasive. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 11 (2010). We find *Doe* persuasive for the proposition cited above.

[4] Based on this disposition, we need not determine: (1) whether the agency also committed harmful procedural error, *see Ward v. U.S. Postal Service*, 634 F.3d 1274, 1282 (Fed. Cir. 2011); (2) whether the agency violated the appellant's due process rights or committed harmful procedural error with regard to the deciding official's consideration of the "additional materials," as the agency acknowledged in the Update: Notice of Proposed Removal, IAF I-4, Tab 3, Subtab 4f, *see Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999); or (3) whether the administrative judge erred in his analysis of the agency-imposed penalty.

Army, 247 F.3d 1225, 1228 (Fed. Cir. 2001) (stating that an action must be reversed if it is not in accordance with the requirements of the Due Process Clause of the Fifth Amendment).

The appeal must be remanded for further proceedings and a new adjudication of the appellant's disability discrimination claim.

¶8 During the proceedings below, the appellant sought to present testimony from two of his treating doctors. On January 13, 2011, the administrative judge approved Drs. Erica Jarrett and John Massey to testify as witnesses for the appellant at the hearing which began on January 24, 2011. IAF I-4, Tab 6 at 10. In his October 29, 2010 prehearing submission, the appellant had identified each as a "federal employee, Walter Reed Army Medical Center," who was to testify regarding the appellant's stress-related mental health issues during the performance improvement period. IAF I-3, Appellant's List of Witnesses, Tab 15 at 3. Following the prehearing conference, the appellant, through his counsel, made efforts to secure the presence of Jarrett and Massey. IAF I-4, Tab 9, Exhibit A. An attorney for Walter Reed Army Medical Center advised the appellant's representative that the Army had to authorize the appearance of its personnel at the Board hearing, and that the appellant had to make the request in writing. *Id.* The appellant's attorney expressed to the agency representative on January 14, 2011, that he was not sure if it would be possible to work out all the details to get the Army doctors to the hearing and that, if not, he would consider asking the administrative judge to allow their testimony at a later time. *Id.* By letter on January 21, 2011, the Walter Reed Army Medical Center attorney granted the appellant's request for the appearance of Jarrett and Massey. *Id.*, Exhibit B. He further stated that the doctors' supervisors had to approve their absence from duty and he suggested to the appellant's attorney that "you conduct any necessary interviews at Walter Reed Army Medical Center." *Id.* The doctors did not appear at the hearing, and the appellant objected to their absence. January

26, 2011 Hearing Transcript at 44. On January 31, 2011, the appellant filed a motion to reopen the hearing so that he could call the two witnesses. IAF I-4, Tab 9. The agency opposed the motion, *id.*, Tab 10, and the administrative judge denied it, reasoning that the appellant had failed to secure the attendance of the witnesses. *Id.*, Tab 11.

¶9 The Board's regulations provide that every federal agency must make its employees available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the administrative judge to do so. 5 C.F.R. § 1201.33(a). Inasmuch as the administrative judge approved Jarrett and Massey to testify, and in light of the restrictions and delays imposed by Walter Reed Army Medical Center, the administrative judge should have ordered the appearance of these witnesses at the hearing. It was not the appellant's responsibility alone to ensure their appearance.

¶10 Because the approved witnesses were to provide medical testimony in support of the appellant's failure to accommodate claim of disability discrimination, and because our reviewing court has cautioned against disallowing witnesses whose testimony may bear on an appellant's affirmative defense, *see Whitmore v. Department of Labor*, 680 F.3d 1353, 1368-70 (Fed. Cir. 2012), we direct the administrative judge to conduct a supplemental hearing in order to obtain testimony from Jarrett and Massey[5] and to make new findings on the appellant's failure to accommodate disability discrimination claim,[6] and we therefore remand the appeal for that purpose.[7]

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[5] We note the statement of the Walter Reed attorney to the appellant's counsel that "you must pay all travel expenses" for the doctors. IAF I-4, Tab 9, Exhibit B. We refer the parties and the administrative judge to 5 C.F.R. § 1201.33(a), with regard to the status of federal employees who appear as witnesses at Board hearings.

[6] We take this opportunity, however, to correct the administrative judge's analysis of the appellant's disparate treatment claim with regard to an allegedly similarly-situated employee who was not removed. The administrative judge found that the appellant failed to show that he had an impairment which substantially limited him in a major life activity, ID at 18, but failed to address whether the appellant may have been "regarded

ORDER

¶11 The appeal is remanded to the Washington Regional Office for further adjudication of the appellant's failure to accommodate claim of disability discrimination.

¶12 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective July 15, 2009. *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.

¶13 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.

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as" having such an impairment. *See* 42 U.S.C. § 12102(1)(C); 29 C.F.R. § 1630.2(g)(1)(iii). While an employee who is disabled solely under the "regarded as" prong is not entitled to reasonable accommodation, he may pursue a claim of disability discrimination on a disparate treatment theory, as the appellant did here. *See* 29 C.F.R. §§ 1630.2(g)(3), 1630.9(e). The administrative judge found that the appellant failed to show that his alleged comparator employee was similarly situated because he had no performance problems. ID at 18. The appellant provided no other evidence of discriminatory animus. Because we agree that the appellant did not establish his claim of disparate treatment, we need not determine whether the appellant was disabled under the "regarded as" prong.

[7] Because we have vacated the administrative judge's findings on the appellant's allegation of disability discrimination and are remanding the appeal for further proceedings and new findings on that issue, we need not address the appellant's claim that the administrative judge erred in finding, based on the current record, that the appellant is not disabled.

¶14 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 to describe 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).

¶15 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 in 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).

¶16 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.

FOR THE BOARD:

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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

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.