UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 7

Docket No. CB-7121-07-0023-V-1

William Luther,

Appellant,

v.

Department of Commerce,

Agency.

January 17, 2008

William Luther, Alexandria, Virginia, pro se.

Susan Kane, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a request for review of an arbitration decision that affirmed his removal for misconduct. The agency has responded in opposition to the request for review. For the reasons set forth below, we GRANT the appellant's request for review under 5 U.S.C. § 7121(d) and SUSTAIN the arbitrator's decision.

BACKGROUND

¶2 Effective May 26, 2006, the agency removed the appellant from his GS-14 Patent Examiner position based on the following charges: (1) Conduct Unbecoming a Federal Employee (1 specification); (2) Failure to Follow

Supervisory Instructions (10 specifications); (3) Failure to Follow Leave Requesting Procedures (14 specifications); (4) Absence Without Leave (AWOL) (28 specifications); and (5) Receipt of Pay for Time Not Worked (8 specifications). Request for Review (RFR) File, Tab 12, Joint Exhibits 1, 7.

¶3 With regard to the specification of the "Conduct Unbecoming" charge, the agency asserted that the appellant, acting as the union representative for another agency employee in a proposed adverse action, surreptitiously recorded an oral reply presented to the deciding official on January 31, 2003. RFR File, Tab 12, Joint Exhibit 1 at 2. The appellant subsequently attempted to introduce a transcript of the secretly recorded oral reply during an arbitration hearing in January 2005. *Id.*

¶4 As to Charge 2, Specifications 1-7, the agency alleged that the appellant's supervisor, Chi Pham, instructed him to attend a mandatory investigatory meeting on several occasions between August 5, 2005, and January 10, 2006. RFR File, Tab 12, Joint Exhibit 1 at 2-5. In each instance, the appellant failed to report to the meeting, as instructed. As to specifications 8-10 of this charge, the agency averred that, on December 28, 2005, Pham notified the appellant that his performance was unacceptable in the critical element of Workflow Management and that he was being given an opportunity to improve his performance. *Id.*, Joint Exhibit 1, Subtab 20. Pham instructed the appellant that he must devote at least 5 hours per work day to performing examining duties, and he must request, and gain approval in advance, for all paid time not related to patent examining duties. *Id.* However, over the next 3 pay periods, although the appellant was in a paid status for 123 hours, he performed no patent examining duties at all. Instead, without obtaining approval, he worked exclusively on union-related activities while on duty. *Id.*

¶5 With regard to Charge 3, "Failure to Follow Leave Requesting Procedures," the agency alleged that the appellant failed to report to work and failed to properly request approval for his absences on 14 work days between July

6 and October 27, 2005. RFR File, Tab 12, Joint Exhibit 1 at 6-8. With regard to Charge 4, the agency asserted that the appellant was AWOL on 28 days between July 6 and December 28, 2005. *Id.* at 9-12. The record shows that the 14 specifications underlying Charge 3 directly correspond to 14 of the 28 specifications underlying Charge 4.

¶6 Finally, as to Charge 5 and its specifications, the agency noted that in March of 2005 the appellant was placed on a performance improvement plan because of unacceptable performance in the critical element of Production Goal Achievement, and he was ordered by Pham to spend at least 4 hours per day, 5 days per week, performing patent examining work. RFR File, Tab 12, Joint Exhibit 1 at 13. In addition, Pham ordered the appellant to request advance approval of his use of leave and any other time not related to patent examining duties. *Id.*, Joint Exhibit 1, Subtab 19. Subsequently, between June 16 and November 8, 2005, the appellant claimed on 8 specific days that he worked a full work day performing patent examining duties. However, the agency's security turnstile records showed that the appellant could not have performed these duties because he was not present in his office for the entire 8-hour period claimed for each day. *Id.* Joint Exhibit 1 at 14-16. The total discrepancy between the appellant's time and attendance sheets and the security turnstile records indicate that, during the 64 hours encompassed by the specifications of the charge, the appellant claimed 27 hours and 38 minutes of paid work time when he was not performing patent examining duties. *Id.* at 16.

¶7 On March 20, 2006, the appellant's second-level supervisor, Group Director Jin Ng, proposed his removal from federal employment. RFR File, Tab 12, Joint Exhibit 1. After considering the appellant's oral and written replies to the proposed adverse action, Margaret Focarino, the Deputy Commissioner for Patent Operations, sustained all of the charges and specifications, except for Specification 5 of Charge 5, and ordered the appellant's removal. *Id.*, Joint Exhibit 7.

¶8 Through his union, the appellant challenged his removal by directly invoking arbitration as authorized under the negotiated grievance procedures set forth in the collective bargaining agreement between the union and the agency. RFR File, Joint Exhibit 10. The arbitrator conducted a 3-day hearing in January-February 2007, and issued an opinion and award on June 1, 2007. Arbitration Pleading and Award (APA) File, Tab 8. The arbitrator did not sustain Charge 1 and its specification, finding that the charge was too trivial to warrant consideration in support of the removal action. *Id.* at 4-6. The arbitrator sustained the remaining four charges. However, he merged 14 specifications in Charge 4 with their corresponding specifications in Charge 3. *Id.* at 9-10. In addition, the arbitrator deemed as withdrawn or unproven several specifications in Charges 2, 3, and 4 because the agency did not address them in its post-hearing brief. *Id.* at 14-16, 24, 30, 34. The arbitrator also found that the appellant failed to prove that the agency engaged in disability discrimination or retaliated against him for his prior equal employment opportunity (EEO) activity. *Id.* at 45-52. The arbitrator further concluded that the penalty of removal did not exceed the limits of reasonableness. *Id.* at 53-60.

¶9 The appellant requests review of the arbitrator's decision, asserting that the arbitrator committed legal error because he exceeded his legal authority and sustained the removal based on non-facts. RFR File, Tabs 2, 8, 9. The appellant also contends that the penalty of removal exceeded the bounds of reasonableness. *Id.* The agency opposes the request for review. *Id.*, Tab 13.

¶10 After the record closed, the appellant filed several additional submissions to the Board. RFR File, Tabs 14, 16, 19, 20. The agency has filed a motion to strike the first of these additional submissions as untimely filed under 5 C.F.R. § 1201.154(e) because the appellant has not made a showing that the additional

evidence and argument was not readily available before the record closed.[*] *Id.,* Tab 15.

ANALYSIS

Board Jurisdiction

¶11 Under 5 U.S.C. § 7121(d), the Board has jurisdiction to review a final decision of an arbitrator on a grievance if the subject matter of the grievance is one over which the Board has jurisdiction and the appellant has alleged that the action at issue constitutes discrimination on a basis covered by 5 U.S.C. § 2302(b)(1). *Berry v. Department of Commerce* 105 M.S.P.R. 596, ¶ 4 (2007); *Fulks v. Department of Defense*, 100 M.S.P.R. 228, ¶ 6 (2005). Each of these conditions is satisfied in the present case: The Board has jurisdiction over a removal under 5 U.S.C. § 7512(1); the appellant alleges disability discrimination and retaliation for protected EEO activity in violation of 5 U.S.C. § 2302(b)(1); and the arbitration decision that was issued in this case is the final decision on the appellant's grievance. We therefore have jurisdiction over this request for review. *See Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 5 (2006); *De Bow v. Department of the Air Force*, 97 M.S.P.R. 5, ¶ 4 (2004).

Merits of the Charges

¶12 The scope of the Board's review of arbitrators' decisions is limited; those decisions are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Fulks*, 100 M.S.P.R. 228, ¶ 7; *De Bow*,

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[*] We decline to consider the submissions filed by the appellant in this case after August 15, 2007. On August 14, 2007, the Clerk of the Board denied the appellant's request for a 14-day extension of time beyond September 17, 2007, to file a reply to the agency's response, and informed the appellant that any additional filing from him in this case must meet the requirements of 5 C.F.R. § 1201.154(e). RFR, Tab 10. Since that order, the appellant has filed six additional pleadings without providing any showing that the evidence was not readily available before the record closed. RFR File, Tabs 14, 16-20. We therefore will not consider these additional submissions on review.

97 M.S.P.R. 5, ¶ 5. The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Fulks*, 100 M.S.P.R. 228, ¶ 7; *De Bow*, 97 M.S.P.R. 5, ¶ 5. Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it disagrees with the arbitrator's decision. *Fulks*, 100 M.S.P.R. 228, ¶ 7; *De Bow*, 97 M.S.P.R. 5, ¶ 5. 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. *Jones v. Department of the Treasury*, 93 M.S.P.R. 494, ¶ 8 (2003).

¶13 The appellant contends on review that the arbitrator erred as a matter of fact and law in sustaining the charges. With regard to Charge 2, Specifications 1-6, the appellant argues that he was not obligated to obey Pham's instructions to appear for the investigatory meetings because the record shows that he was either on approved leave or approved non-examining time for union-related activities at the times that Pham ordered him to report. RFR File, Tab 2 at 5-12; Tab 8 at 11. The arbitrator carefully examined the appellant's explanations for failing to appear at each of the meetings and determined that they did not excuse the appellant's failure to obey Pham's instructions. APA File, Tab 8 at 16-18, 20-22, 27-34. The appellant has failed to show that the arbitrator erred as a matter of law. Indeed, the case law cited by the appellant to show legal error is inapplicable to this charge because those cases only establish that an agency may not discipline an employee for absenteeism if the absence from duty was approved. RFR File, Tab 8 at 7-8. In this charge, the agency did not allege that the appellant was absent from duty. Rather, the appellant repeatedly chose to ignore Pham's orders to attend the mandatory meetings. Thus, the arbitrator did not err in sustaining these specifications.

¶14 The appellant argues that Specifications 8 and 9 of Charge 2 were improperly sustained by the arbitrator because Pham approved the time that he

spent performing non-examining duties during the pay periods between December 25, 2005, and January 21, 2006. RFR File, Tab 8 at 4-6. The appellant's argument is unpersuasive. The record shows that, when informing the appellant on December 28, 2005, that he was being provided an opportunity to improve his performance, Pham instructed the appellant that he must work at least 5 hours per work day performing patent examination duties and that he must receive prior approval before performing any non-examining duties, i.e., union-related activities. RFR File, Tab 12, Joint Exhibit 1, Subtab 20. The appellant does not dispute that he performed no examining duties during these pay periods and that he did not receive prior approval to work exclusively on union-related matters. Instead, he contends that Pham retroactively approved of his performance of non-examining duties because Pham certified his time and attendance records for each pay period. RFR, Tab 8 at 5-6. He also argues that Pham never specifically told him that he could not spend time on union activities. RFR, Tab 2, Appellant's Memorandum of Law at 11. These arguments, however, do not excuse the appellant's failure to follow Pham's clear supervisory instructions to limit his union-related activities and to return to performing the duties of his official position. The fact that Pham subsequently certified the appellant's time and attendance records does not prove that he excused or approved of the appellant's violation of his order to perform his examining duties at least 5 hours per work day and to request advance approval for the performance of any non-examining duties.

¶15 With regard to Charges 3 and 4, Failure to Follow Leave Requesting Procedures and AWOL, the appellant contends that the arbitrator erred because the record shows that he followed Pham's instructions for requesting unscheduled leave at all times. RFR, Tab 2, Appellant's Memorandum of Law at 4. In particular, the appellant testified that Pham informed him in October 2004 that he had a lenient policy with regard to requesting unscheduled sick leave. According to the appellant, Pham told him that, if he needed to request sick leave for several

days, he should call in every day, but if he forgot to call in, it did not matter. RFR File, Hearing Transcript at 364, Appellant's Testimony. The appellant thus asserts that, since he generally informed Pham that he would need to be on sick leave during the periods he was absent, he was not required to contact Pham for approval of sick leave on each day that he was absent. RFR, Tab 2, Appellant's Memorandum of Law at 4. The arbitrator found, however, that the record established that the appellant knew that Pham's lax leave policy no longer applied to him at the time of the charged offenses, and that he was obligated to follow the agency's formal leave requesting procedures, which included the requirement to make telephonic contact to request sick leave on each day of an unscheduled absence. APA File, Tab 8 at 14-15, 24. The appellant also argues that the charged absences between August and November 2005 should not have been sustained because he had received approval of intermittent sick leave to care for a family member during this period. RFR, Tab 9. The arbitrator rejected this contention as well, finding that the earlier approval of this leave did not relieve the appellant of the obligation to keep Pham properly informed of his duty and leave status. APA File, Tab 8 at 19-20.

¶16 The appellant asserts that the arbitrator erred in sustaining Charge 5, Receipt of Pay for Time Not Worked, because Pham instructed him to charge his union-related activities as examining time. RFR File, Tab 8 at 9. As noted above, this charge alleges that the appellant claimed on his time sheet that he had performed patent examining duties for 8 hours on several days when he was not present in his office, and did not work at patent examining duties, for the entire 8-hour work day. RFR File, Joint Exhibit 1. In sustaining the charge and its specifications, the arbitrator credited the appellant's testimony and evidence that he was performing union-related activities outside of his office at the times charged, but he did not credit the appellant's testimony that Pham authorized him to claim this time as patent examining time while he was being evaluated under a performance improvement period. APA File, Tab 8 at 38-45. The arbitrator also

found that the appellant's union-related activities were not properly compensable because the appellant did not request, or obtain approval, to perform these duties from Pham. *Id.* The appellant has failed to show that the arbitrator erred as a matter of law in making these determinations.

Affirmative Defenses

¶17 The appellant has the burden of presenting evidence to establish discrimination. *Slavich v. Social Security Administration*, 102 M.S.P.R. 171, ¶ 9 (2006). In his request for review, the appellant has not argued that the arbitrator erred in his analysis of his discrimination and retaliation claims. Further, he has presented no new argument or referred on review to any new evidence to support these claims. He therefore has failed to show legal error with regard to the affirmative defenses alleged in this case.

Penalty

¶18 The deference that is due to arbitrators' findings extends to findings related to penalty determinations. *Fulks*, 100 M.S.P.R. 228, ¶ 20. In making these findings, arbitrators are required to apply the same rules the Board applies. *Id.; Belldina v. Department of Justice*, 50 M.S.P.R. 497, 501-02 (1991). When the arbitrator does not apply those rules, his penalty determination is not entitled to deference, and the Board will conduct its own analysis. *Fulks*, 100 M.S.P.R. 228, ¶ 20.

¶19 The appellant argues on review that the arbitrator erred by misapplying the *Douglas* factors, and that a proper weighing of the *Douglas* factors leads to the conclusion that the penalty is unreasonable under the circumstances of this case. RFR File, Tab 8 at 6, 10-13. It is well established that, when the Board sustains fewer than all of the agency's charges, it will consider carefully whether the sustained charges merited the penalty imposed by the agency, and it 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); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). The Board may also impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing the mitigating factors. *Gray v. U.S. Postal Service*, 97 M.S.P.R. 617, ¶ 11 (2004), *aff'd*, 05-3074 (Fed. Cir. June 9, 2005) (NP). The Board's function with regard to its review of an agency's penalty selection is not to displace management's responsibility, but to determine whether management exercised its judgment within the tolerable limits of reasonableness. *Id.*

¶20 Here, the appellant essentially argues on review his own views concerning how the *Douglas* factors should have been weighed in this case, and he asserts that, because the arbitrator weighed the *Douglas* factors differently than he would, the arbitrator's decision must be set aside. RFR File, Tab 8 at 10-13. The issue presented here, however, is whether the arbitrator erred as a matter of law in determining the maximum reasonable penalty. The appellant has failed to show that the arbitrator misallocated the burdens of proof, employed the wrong analytical framework, or committed any other legal error in his analysis of the penalty. Accordingly, the appellant has shown no reason to disturb his penalty determination.

ORDER

¶21 This is the final decision of the Merit Systems Protection Board in this request for review. 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 19848
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 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, http://fedcir.gov/contents.html. 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.