106 LRP 51968

Jorge Barreto, Appellant, v. DEPARTMENT OF JUSTICE, Agency

U.S. Merit Systems Protection Board, Atlanta Regional Office

AT-0752-06-0682-I-1

July 28, 2006

Judge / Administrative Officer

Ramon V. Gomez

Full Text

APPEARANCES:

Stuart A. Kirsch, Esquire, Riverdale, Georgia, for the appellant.

Docia M. Casillas, Washington, D.C., for the agency.

James A. Vogel, Jr., Washington, D.C., for the agency.

Initial Decision

Introduction and Jurisdiction

On May 16, 2006, the appellant timely appealed from his indefinite suspension, effective May 2, 2006,[1] from his competitive service position as a Correctional Officer, GS-0007-07/10, Bureau of Prisons, Federal Detention Center (FDC), Miami, Florida. See Appeal File (AF), Tab 1; Agency File, Tabs 4a and 4b. The Board has jurisdiction over this appeal. 5 U.S.C. §§ 7522(a)(1)(A), 7512, 7513(d), and 7701(a) (the Board has jurisdiction over appeals from suspensions of longer than 14 days that involve non-probationary employees in the competitive service). The in-person hearing was held in Miami, Florida, on July 17, 2006. For the reasons stated below, the indefinite suspension action is REVERSED.

Burdens of Proof

The burden of proof is on the agency. An indefinite suspension, such as this one, is not imposed based upon proven misconduct, but rather, to allow for the investigation and judicial assessment of conduct that could result in the imposition of imprisonment. *Dalton v. Department of Justice*, 66 M.S.P.R. 429, 435 (1995). Independent administrative investigation into the misconduct while criminal action is pending is discouraged due to due process considerations. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 110 (1990).

In order to support an indefinite suspension, the agency must show, by preponderant evidence,[2] (1) that it had reasonable cause to believe that the appellant committed a crime for which imprisonment may be imposed; (2) that the suspension has an ascertainable end; (3) that there is a nexus between the misconduct and the efficiency of the service; and (4) that the penalty is reasonable. *See, e.g., Dunnington v. Department of Justice*, 45 M.S.P.R. 305, 307 (1990), *aff'd*, 956 F.2d 1151, 1157 (Fed. Cir. 1992); *Dalton*, 66 M.S.P.R. at 435. The appellant has the burden of proof on his affirmative defense of prohibited discrimination based on his national origin (Hispanic/Puerto Rican). See AF, Tab 16 (summary of telephonic prehearing conference) at 3 and 4.[3]

Analysis and Findings

The agency did not prove reasonable cause.

In support of the indefinite suspension action, the agency stated that the reason for the agency action was its pending investigation into allegations of the appellant's improper relationships with inmates. Agency File, Tabs 4b and 4e. During the prehearing conference and the hearing, the agency stipulated that, when it suspended the appellant, neither an indictment, arraignment, nor information had been entered. AF, Tab 16 at 2; Hearing Tape 1B. The agency contends that all it needs to show to sustain this action is that the appellant is under agency investigation for inappropriate relationships with inmates. *Id.* Because it was unable to cite to any decision by the full Board or the federal courts to support its position in this respect, I ruled the agency must present evidence showing reasonable cause and

that the conduct of an investigation alone is insufficient to find the requisite reasonable cause.[4] *Id.*

While the agency presented evidence during the hearing of an ongoing investigation into possible criminal conduct on the part of the appellant, I find little, if any, evidence to support a finding of the requisite reasonable cause. The agency did not present evidence regarding the credibility of these allegations or even the underlying facts it relied on to initiate the agency investigation. Accordingly, I find that the suspension action cannot be sustained. *See Dunnington v. Department of Justice*, 956 F.2d 1151, 1156 (Fed. Cir. 1992);[5] *Ellis v. Department of Veterans Affairs*, 60 M.S.P.R. 681, 683 (1994) (touchstone must be whether the agency had sufficient facts to provide a sound basis for its action).

The appellant did not show that the agency committed prohibited discrimination based on his national origin (Hispanic/Puerto Rican).

Besides direct evidence6 of prohibited discriminatory motive, an employee may show discrimination based on disparate treatment, which is the most common claim of discrimination, or disparate impact. During the prehearing conference, the appellant claimed that he was treated less favorably than a non-Hispanic Black male comparative employee (a Mr. Cole) who was indefinitely suspended based on an indictment. AF, Tab 16 at 3.

The elements of a claim of discrimination on the ground of disparate treatment are: (a) that the appellant is a member of a protected group; (b) that he was similarly situated to an individual who was not a member of the protected group; and (c) that he was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate, nondiscriminatory reason for the agency's action.

Once the agency has articulated a legitimate, nondiscriminatory reason for its action, the burden shifts to the employee to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant must establish that the stated reason was false and that a prohibited discriminatory motive was the real reason. *Carter v. Small Business Administration*, 61 M.S.P.R. 656, 665 (1994). Where the record is complete, however, the administrative judge should weigh the evidence and make a finding on the ultimate issue, which is whether the action on appeal was discriminatory. *Schrodt v. U.S. Postal Service*, 79 M.S.P.R. at 616; *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 51 (1998); *Beam v. Office of Personnel Management*, 77 M.S.P.R. 49, 55 (1997) (Member Amador, dissenting).

The appellant presented little, if any, evidence that the agency action was based on a prohibited motive. The deciding official, Warden Loren A. Grayer, testified that Mr. Cox was alleged to have had inappropriate sexual relationships with female inmates. Hearing Tapes 1A, 1B and 2A. Warden Grayer further testified that the prior warden reassigned Mr. Cox to where he would have no contact with female inmates. Hearing Tape 2A. Warden Grayer testified that he had nothing to do with that decision since he became warden in Miami FDC after the decision had been made. *Id.*

Warden Grayer testified that, when he became aware that Mr. Cox had been formally indicted, he decided to indefinitely suspend Mr. Cox pending the outcome of the criminal proceedings. Hearing Tape 2A. Warden Grayer testified that Mr. Cox had subsequently resigned and was now in prison. *Id.* Warden Grayer further testified that the allegations against the appellant did not involve improper sexual relationship with inmates but, rather, inappropriate contact with high profile prisoners who were housed in a special unit. *Id.* The appellant's attorney conceded during the hearing that the appellant's alleged improper relationships did not involve sexual

relations with inmates. Id.

For comparison employees to be considered similarly situated, all relevant aspects of the appellant's employment situation must be `nearly identical to those of the comparison employees. *Wiley v. U.S. Postal Service*, MSPB Docket No. DA-0752-05-0539-I-1, Slip Op. at 10, ¶ 10 (July 11, 2006) *(citing Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003)). Moreover, the appellant and the comparison employee must have been supervised by the same individual. *Id.; Bell v. Department of the Treasury*, 54 M.S.P.R. 619, 628-29 (1992). While Warden Grayer was the deciding official in both cases, I find that the appellant was not similarly situated as Mr. Cox because their circumstances were not so similar as to warrant a finding of disparate treatment. Further finding that the appellant did not present direct evidence of discriminatory motivation on the part of agency officials, I conclude that he has not established his affirmative defense of national origin discrimination.

Decision

The agency's action is REVERSED.

Order

I ORDER the agency to cancel the suspension and retroactively restore appellant effective May 1, 2006. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I ORDER the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I ORDER the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I ORDER the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I ORDER the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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. I ORDER the agency 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. The checklists are also available on the Board's webpage.

Interim Relief

If a petition for review is filed by either party, I ORDER the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or

cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

Notice to parties concerning settlement

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

Notice to Appellant

This initial decision will become final on September 1, 2006, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

Board Review

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW.,

Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R. § 1201.4(j).

Judicial Review

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals

for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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. Additional information is available at the court's website. 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.

Attorney Fees

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

Enforcement

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

[1]The suspension action was effective immediately upon his receipt of the decision notice dated April 28, 2006. Agency File, Tab 4b. The SF-50 indicates that the action was effective May 2, 2006. *Id.* at Tab 4a.

[2]A preponderance of the evidence is that `degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

[3]During the hearing, the appellant withdrew his claim of race discrimination. Hearing Tape 1B. I also do not reach his affirmative defenses of harmful procedural error and denial of due process based on my finding the agency did not meet its burden of proof on the merits of the action.

[4]During the hearing, the agency handed me a motion for interlocutory appeal of my ruling which I denied during the hearing. Hearing Tape 1A.

[5]In an appropriate case, then, the agency must be able to act on the basis of the facts presented to it, without the necessity of an independent investigation of its own. However, those facts must be sufficient to meet the statutory test of reasonable cause, and the agency must take steps to assure that this is so.

[6]Direct evidence of prohibited discrimination may consist of documentary or testimonial evidence, and "[i]t may be any written or verbal policy or statement made by an employer that 'both reflect[s] directly the allegedly discriminatory attitude and bear[s] directly on the contested employment decision.'" *See George v. U.S. Postal Service*, 74 M.S.P.R. 71, 80 (1997). The appellant would prevail if direct evidence shows that her membership in a protected class was a motivating factor in the unfavorable employment action. See 42 U.S.C. § 2000e-2(m); *Beam v. Office of Personnel Management*, 66 M.S.P.R. 469, 475 & n. 1 (1995) (Member Amador, dissenting).

