

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

100 M.S.P.R. 586

DENISE BRENT,
Appellant,

DOCKET NUMBER
AT-0752-05-0514-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: December 8, 2005

Louise Harrell, Esquire, Jackson, Mississippi, for the appellant.

Elizabeth K. Blackmon, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's timely request for a review of the October 24, 2004 arbitration decision that denied the appellant's grievance concerning her removal. For the reasons set forth below, we VACATE the administrative judge's initial decision, GRANT the appellant's request for review, and SUSTAIN the arbitration decision.

BACKGROUND

¶2 The following facts are not in dispute. The appellant was employed in the GS-11 position of Education Specialist at the Federal Correctional Institution in Yazoo City, Mississippi. Initial Appeal File (IAF), Tab 6, Subtab 4d. The

agency removed the appellant effective December 9, 2003 based on charges of: (1) The appearance of improper contact with an inmate's family member; (2) accepting an item from an inmate's family member; and (3) failure to report the receipt of an item from an inmate's family member. IAF, Tab 6, Subtabs 4d, 4e, 4k.

¶3 The appellant elected to grieve her removal through the agency's negotiated grievance procedure and the grievance was ultimately submitted to arbitration. *See* Arbitrator's Award, IAF, Tab 6, Subtab 4b. Following a hearing, the arbitrator denied the appellant's grievance, sustained the appellant's removal, and concluded that the appellant failed to prove her affirmative defense of disparate treatment. *Id.* The appellant requested review of the arbitrator's award by submitting a completed petition for appeal form to the Board's Atlanta Regional Office. IAF, Tab 1.

¶4 Upon receipt of the appellant's request, the regional office docketed this matter as a petition for appeal. *See* IAF, Tabs 1, 2. Subsequently, an administrative judge issued a show-cause order informing the appellant that, pursuant to 5 U.S.C. § 7121, her appeal may be outside the Board's jurisdiction since it appeared that she alleged disparate treatment rather than discrimination in connection with her grievance. IAF, Tab 3. In response, the appellant asserted that she had alleged race discrimination and disparate treatment before the arbitrator and was requesting review of the arbitrator's decision under 5 U.S.C. § 7121(d). IAF, Tabs 4, 5.

¶5 Finding that the appellant had made it clear that she was filing a request to review an arbitrator's decision rather than a petition for appeal, the administrative judge dismissed the matter for lack of jurisdiction because it should have been addressed to the Clerk of the Board rather than the Atlanta Regional Office. IAF, Tab 7, Initial Decision (ID). The appellant then filed a "petition for review" in which she asserted that she was seeking review of the arbitrator's decision and that the underlying removal action constituted race discrimination. PFRF, Tab 1.

The agency filed a response in opposition to the appellant's petition in which it argued that the appellant's original request for review filed with the Atlanta Regional Office was untimely and, in the alternative, that the request for review should be denied on its merits. PFRF, Tab 3.

ANALYSIS

The administrative judge's initial decision is hereby vacated.

¶6 In non-postal cases, requests for review of arbitration decisions properly are reviewed by the full Board and not by the Board's administrative judges. *See* 5 U.S.C. § 7121(d); *Ariza v. Department of Education*, 36 M.S.P.R. 54, 55 n.1 (1988). Thus, the administrative judge correctly declined to accept jurisdiction over this matter once he realized that the appellant was seeking review of an arbitration award rather than filing a direct appeal of her removal. However, rather than requiring the appellant to file a petition for review, he should simply have forwarded the matter to the Clerk of the Board for further action. In any event, we VACATE the initial decision and address the appellant's request for review and all pleadings submitted to the administrative judge below as if it had been filed with the Clerk in the first instance.

The appellant's request for review was timely filed.

¶7 The agency argues that the appellant's request for review was untimely filed by five months. *See* IAF, Tab 8; PFRF, Tab 3. A request for review of an arbitrator's decision must be filed within 35 days after the date of issuance of the decision, or, if the appellant shows that the decision was received more than five days after the date of issuance, within 30 days after the appellant received the decision. 5 C.F.R. § 1201.154(d). In this case, the arbitrator issued a decision on October 24, 2004. IAF, Tab 6, Subtab 4b. Within 30 days of the arbitrator's decision, on November 22, 2004, the appellant filed a request for review with the Federal Labor Relations Authority rather than with the Board. IAF, Tab 6, Subtabs 1, 4a. However, in accordance with 5 U.S.C. § 7702(f), the Board has

held that it must consider timely a petition in a mixed case that was filed on time but with an agency other than the Board. *See Wood v. Department of Defense*, 71 M.S.P.R. 104, 106 (1996). Thus, we find that the appellant's petition for appeal must be considered to have been timely filed with the Board.

Jurisdiction and the legal standard for review of arbitrators' awards.

¶8 The Board has jurisdiction to review an arbitrator's award under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleges discrimination under 5 U.S.C. § 2302(b)(1), and a final decision has been issued. *See Hutchinson v. Department of Labor*, 91 M.S.P.R. 31, ¶ 3 (2001). Each of these criteria is satisfied in the present case. The Board has jurisdiction over a removal action under 5 U.S.C. § 7512, the appellant alleged race discrimination in violation of 5 U.S.C. § 2302(b)(1)(A), and a final decision was issued denying the appellant's grievance. Thus, we find that the Board has jurisdiction over this case. *See Williams v. Government Printing Office*, 86 M.S.P.R. 583, ¶ 5 (2000).

¶9 The scope of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Weaver v. Social Security Administration*, 94 M.S.P.R. 447, ¶ 8 (2003); *Higgs v. Social Security Administration*, 71 M.S.P.R. 48, 50 (1996). 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. *Weaver*, 94 M.S.P.R. 447, ¶ 8. Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it would disagree with the arbitrator's decision. *Id.* For the reasons discussed below, we find that the appellant has failed to establish that the arbitrator committed legal error.

The appellant has not shown that the agency's action was the result of discrimination.

¶10 Below, and in her petition, the appellant alleges that the arbitrator erred by upholding her removal because the agency's action was the result of prohibited discrimination and disparate treatment. IAF, Tabs 4, 5; PFRF, Tab 1. She does not challenge the merits of the charges against her. *Id.* An employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that she is a member of a protected group, she was similarly situated to an individual who was not a member of the protected group, and she was treated more harshly than the individual who was not a member of her protected group. *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 9 (2003).

¶11 Here, the appellant asserts that she is African-American and that she was treated more severely than a white employee who engaged in more egregious conduct. IAF, Tabs 4, 5; PFRF, Tab 1. In support of her allegation, the appellant submitted a discipline log in which the names of the disciplined employees are redacted, and she has highlighted a specific entry, numbered 02-10. IAF, Tab 4, Exhibit 1 at 2. According to the highlighted entry, the agency charged this employee with having an inappropriate relationship with an inmate, conduct which creates the appearance of an inappropriate relationship, and unauthorized dissemination of official information. *Id.* The agency proposed that this employee receive a 30-day suspension but ultimately mitigated the penalty to a 21-day suspension. *Id.*

¶12 The appellant's proffered evidence, however, fails to support her allegation of disparate treatment. For comparison employees to be considered similarly situated to the appellant, all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparison employee. *Hidalgo*, 93 M.S.P.R. 645, ¶ 10. Among other things, comparative employees must have engaged in conduct similar to the appellant's without differentiating or mitigating

circumstances that would distinguish their misconduct or the appropriate discipline for it. *Id.* 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, 629 (1992).

¶13 The arbitrator did not address the appellant's discrimination claim in detail. IAF, Tab 4, Subtab 4b. However, the arbitrator found that the appellant failed to prove her claim because the cases she offered as comparators were not similar to her case. *Id.* at 10. Based on the information provided by the appellant, we are unable to conclude that the unidentified employee and the appellant were similarly situated and, therefore, she has not shown that the arbitrator erred as a matter of law in interpreting civil service law, rule, or regulation.

¶14 As an initial matter, because the appellant has only provided us with the agency's charges, proposed discipline, and imposed discipline against the comparator, but has not identified his or her position, grade, supervisor, work unit, or other relevant circumstances, we are unable to determine whether the unidentified employee and the appellant were in a nearly identical employment situation. We are also unable to determine whether the unidentified employee engaged in conduct similar to the appellant without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it. Consequently, we find that the appellant has failed to establish a sufficient basis upon which the arbitrator's decision should be reversed. *See De Bow v. Department of the Air Force*, 97 M.S.P.R. 5, ¶ 7 (2004); *Weaver*, 94 M.S.P.R. 447, ¶ 19; *Hidalgo*, 93 M.S.P.R. 645, ¶¶ 9-10.

ORDER

¶15 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:

Washington, D.C.

Bentley M. Roberts, Jr.
Clerk of the Board