

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE**

BERNADINE DAVIS,
Appellant,

DOCKET NUMBER
CH-0752-04-0624-I-1

v.

DEPARTMENT OF LABOR,
Agency.

DATE: September 29, 2004

Martin L. Ehlen, Chicago, Illinois, for the appellant.

Barbara A. Goldberg, Esquire, Chicago, Illinois, for the agency.

BEFORE

Stephen E. Manrose
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed a timely appeal from an action suspending her for thirty days, effective June 7, 2004, from the position of Equal Opportunity Specialist with the Department of Labor, Office of Federal Contract Compliance Programs, Chicago, Illinois. I held a hearing on September 21, 2004.

The appeal falls within the Board's appellate jurisdiction. *See* 5 U.S.C.A. §§ 7511-7513 (West 1996). For the reasons stated below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

The appellant's suspension is based on a charge that she failed to follow instructions. The supporting specification states the appellant was instructed she "was not to send any form of work-related correspondence, including faxes or email messages, to contractors or others without supervisory approval." The appellant allegedly violated this instruction on November 25, 2003 when she allegedly attempted to fax employment data from a contractor to a representative from a law firm without supervisory approval. In addition, the appellant discussed the employment data on the telephone with the contractor before she attempted to send it.

Duane Grapperhaus, District Director, and Sandral Sims, Assistant District Director, testified the instructions referenced in the charge are contained in the agency response file at Tab 4k. This evidence reflects they repeatedly instructed the appellant "not to send any correspondence, faxes or e-mails to contractors or for other official business without a supervisor's approval." Ms. Grapperhaus testified the information the appellant allegedly attempted to fax is contained in the agency's response file at Tab 4n. The information consists of the "hire ratio" at the New Breed Leasing firm, as expressed in racial and gender numbers for hires and "placements." Mr. Grapperhaus stated this document was strictly an internal document for investigative purposes and the data was not finalized. He stated the appellant told him she had talked to the contractor about the information and that she intended to fax the document. He stated the appellant did not ask for permission to fax the document and that no supervisor authorized her to fax the material. He stated he intercepted the document before the appellant even reached the room in which the fax machine was located and he thus prevented the appellant from transmitting the information.

Shirley J. Thomas, Deputy Regional Director and the deciding official in this case, stated she upheld the charge because the appellant told the contractor

she would fax the document and the evidence did not reflect she intended to ask supervisory permission to do so.

The appellant admitted she did not get supervisory authorization to fax the document and that she informed the contractor she intended to fax the material. She stated she stood outside Mr. Grapperhaus's office so he could make a decision about whether the fax should be sent. She stated she "indirectly" asked for permission by telling him about her conversation with the contractor but that Mr. Grapperhaus effectively ended the matter by telling her she could not fax the material. Accordingly, the material never reached the fax machine.

In her oral response, the appellant stated she was standing at the fax machine, fully intending to use the fax machine, when Mr. Grapperhaus interrupted her and told her she could not fax the material. In addition, the appellant conceded in her response she was unaware she needed supervisor approval to fax the material (Tab 4e). In her testimony, the appellant stated she was confused at the time she made her response because she had just lost her mother.

There is undisputed evidence the appellant did not violate the instruction issued by Mr. Grapperhaus and Ms. Sims. The material, in fact, was never placed in the fax machine and it was never sent. The appellant and Mr. Grapperhaus apparently now agree the fax machine was in a different room from where they conversed. Mr. Grapperhaus in fact stated the appellant had to walk past the fax machine to enter the reception area where they encountered each other. This testimony corroborates the appellant's testimony that she intended to seek Mr. Grapperhaus's approval before sending the fax. For this reason and because the fax was never sent, the appellant did not in fact violate the instruction against faxing the material.

The agency understandably had an interest in preventing transmission of the document before it was sent. Nevertheless, it must prove the charge it made.

Because the appellant did not violate the instruction that is at issue, I find the charge is not supported by preponderant evidence. It is therefore not sustained.

Because the sole charge against the appellant is not sustained, the agency's action must be reversed. 5 U.S.C.A. § 7701(c)(1)(B) (West 1996).

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the suspension and retroactively restore appellant effective June 7, 2004. 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 necessary information requested by the agency.

I **ORDER** the agency to pay appellant by check or electronic funds transfer the undisputed back pay amount no later than 60 days after this decision is final. Appellant may file a petition for enforcement to resolve any 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.

INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A) because the appellant has been working in her position following the end of the suspension.

FOR THE BOARD:

Stephen E. Manrose
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **November 3, 2004**, 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 this initial decision is received by you 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. 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), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

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. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail 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. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

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.

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.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.