



Bustamante v. Department of Air Force

2000 | Cited 0 times | Federal Circuit | July 10, 2000

DECISION

Juan Bustamante appeals from the final decision of the Merit Systems Protection Board affirming the action of the Department of the Air Force (the "agency") removing him from his position as a GS-4 Transportation Clerk. See *Bustamante v. Department of Air Force*, No. DA-0432-98-0382-I-1 (MSPB July 20, 1999) ("Bustamante II") (final order). Because Bustamante has not shown that the Board erred in its decision, we affirm.

DISCUSSION

Mr. Bustamante was employed as a Transportation Clerk at the Air Force's 37th Civil Engineer Squadron, Operations Flight Division, Lackland Air Force Base, Texas. See *Bustamante v. Department of Air Force*, No. DA-0432-98-0382-I-1, slip op. at 1 (MSPB Feb. 26, 1999) ("Bustamante I") (initial decision). On June 2, 1997, his supervisor, Deputy Chief of Operations Flight, Leo E. Marshall, issued a memorandum warning Bustamante that he had failed to comply with critical element 1E of his performance standards. See *id.* at 1-2. That element reads as follows:

1E/Critical Element: Maintenance and safety inspections

1S/Standard: Conducts weekly vehicle inspections, schedules and inspects fifteen percent of cost center vehicles and provides status on inspections and maintains Operation Chief's vehicle inspection ready. Two failures to schedule/inspect/maintain vehicle allowed per rating. J.A. at 41.

The memorandum established a 120-day performance improvement period ("PIP") during which Bustamante could achieve compliance with the critical element, see *Bustamante I*, slip op. at 2, and Marshall extended this period by 30 days to afford Bustamante an additional opportunity to improve his performance, see *id.* at 10. When Bustamante failed to elevate his performance to an acceptable level, Marshall proposed Bustamante's removal, and on May 1, 1998, Chief of Operations Flight, Major Douglas Wroten, issued a decision removing Bustamante. See *id.* at 2.

Bustamante appealed the agency's removal action to the Board. The Administrative Judge ("AJ") affirmed, holding, inter alia, that the agency had satisfied its burden of proving that Bustamante's performance was deficient as to critical element 1E, and that the agency had given Bustamante a reasonable opportunity to improve his performance. See *id.* at 4-10. The Board denied Bustamante's petition for review, rendering the AJ's initial decision final. See *Bustamante II*, slip op. at 1-2; see



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also 5 C.F.R. § 1201.113(b) (2000). Bustamante then appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (1994).

We must affirm a Board decision unless it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. See 5 U.S.C. § 7703(c) (1994); *Chase-Baker v. DOJ*, 198 F.3d 843, 845 (Fed. Cir. 1999).

Bustamante advances several arguments in support of his contention that the Board erred in affirming the agency's action removing him. Bustamante argues that the performance standard was unreasonably high, requiring an accuracy rate of 99.98%. Bustamante further asserts that there was no reasonable opportunity for him to improve, and that the PIP memorandum of June 2, 1997 imposed more stringent requirements than the performance standard itself. Bustamante lastly contends that his supervisor had a duty to inform him in writing, during the appraisal cycle, that he was failing to meet the performance plan.

We agree with the agency that the Board did not err in affirming the removal action. As an initial matter, Bustamante fails to explain or to provide any support for his contention that a 99.98% accuracy rate was required of him, or that the performance standard was otherwise unreasonably high. While Bustamante contends that he was not provided a reasonable opportunity to improve his performance, this assertion is belied by the Board's finding, which is supported by the PIP memorandum and Marshall's testimony, that Bustamante was given 120 days to improve his performance, and an additional 30-day opportunity to achieve compliance with critical element 1E.

Bustamante's contention that the PIP memorandum imposed more stringent requirements than critical element 1E is also without merit. The memorandum tracks the language of the critical element, and carefully instructs Bustamante how to achieve compliance with the requirements of that element. See J.A. at 41. To the extent that Bustamante complains that keeping his supervisor informed of his vehicle inspections and maintenance on a daily basis was an additional, onerous requirement, we agree with the agency that this was merely a clarification of critical element 1E's requirement that such status reports be given. See *id.* Lastly, while Bustamante argues that the agency failed to notify him in writing of his deficiencies during the rating period before he received his PIP, this ignores the fact that the PIP is the key written notice of deficient performance. We have considered Bustamante's remaining arguments, but find them unpersuasive. We therefore affirm.

