OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

Gerald Evans,	)	
	)	
Appellant	)	
	)	Case No: 16-AC-18 (CV, RP)
v.	)	
	)	
Office of the Architect of the Capitol,	)	
	)	
Appellee.	)	
	)	

Before the Board of Directors: Barbara Childs Wallace, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel, Members.

DECISION OF THE BOARD OF DIRECTORS

This appeal is before the Board of Directors ("Board") pursuant to the appellant Gerald Evans's petition for review ("PFR") of the Hearing Officer's August 10, 2017 Decision and Order, which found unproven Evans's claims that the Office of the Architect of the Capitol ("AOC") issued him a memorandum of counseling in reprisal for filing his complaint in *Evans v. Office of the Architect of the Capitol*, No. 13-AC-56 (CV, AG, RP), 2017 WL 1057256 (Mar.13, 2017) ("*Evans I*"), which alleged discrimination based on race, age and reprisal.

Upon due consideration of the Hearing Officer's Order and Decision, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's decision on all claims.

I. Background

Evans was an employee in the AOC's Capitol Power Plant ("CPP"), Utility Distribution System ("UDS"). On October 26, 2016, following counseling and mediation, Evans filed a Complaint with the Office of Compliance ("OOC") alleging discrimination based on race under section 201(a)(1) of the Congressional Accountability Act ("CAA") and reprisal under section 207(a).[1] Evans alleged that the AOC's issuance of a memorandum of counseling was both an act of discrimination and an act of reprisal taken for his previous complaint in *Evans I*.

In a prehearing ruling on January 17, 2017, the Hearing Officer granted the AOC's motion to dismiss Evans's claim of racial discrimination, and denied the AOC's motion to

[1] Although Evans refers to his claim as alleging "retaliation," we will refer to it herein using the statutory term "reprisal." *See* 2 U.S.C. § 1317.

dismiss his reprisal claim.[2] *See* Decision & Order on Respondent's Motion for Summary Judgment (Jan. 17, 2017). With respect to Evans's discrimination claim, the Hearing Officer determined that he had failed to allege that the memorandum of counseling constituted an employment action accompanied by an objectively tangible consequence, such as a decrease in pay or benefits, and therefore failed to state a claim under Title VII. Evans does not contest the Hearing Officer's determination in this regard.

With respect to Evans's reprisal claim, however, the Hearing Officer noted that the memorandum of counseling unequivocally stated that any similar or other subsequent misconduct could result in his progressive discipline, up to and including removal. Because, for purposes of a motion to dismiss, such a statement might reasonably be deemed likely to deter one from engaging in further protected activity, the Hearing Officer denied AOC's motion, concluding that Evans had stated a claim upon which relief can be granted.

The matter thus proceeded to hearing on Evans's reprisal claim on March 22-24 and March 28, 2017. In an August 10, 2017 Decision and Order, the Hearing Officer determined that Evans had failed to establish his reprisal claim based on the following findings of fact, which, unless otherwise noted, are undisputed.

Evans was assigned to CPP, UDS for 9 years until November 2016. William Phelps, a Supervisory General Engineer, was Evans's first-line supervisor during the *Evans I* proceeding, but was not implicated as an alleged responsible official in that case and did not testify therein. During the relevant time period, Parsons, an independent contracting company, was performing operations and maintenance work for the CPP. Phelps and another AOC employee, Kevin Paige, were Contracting Officer's Technical Representatives ("COTR") for the Parsons contract and had the authority to direct Parsons personnel.

Evans believed that three large rolling cabinets on the first floor of the Blue Building, where Parsons was conducting its work, constituted a trip hazard and blocked two exits. At 7:30 a.m. on September 24, 2015, the UDS and Parsons teams met, and Phelps announced that Parsons would move the cabinets to the second floor of the Blue Building. On the morning of September 24th, Evans noticed Parsons personnel preparing for the move to the second floor. He did not recall Phelps stating at the 7:30 a.m. meeting that Parsons was to move the boxes to the second floor. Parsons Project Manager ("PM") Ronald Yozwiak and Parsons employee Ronald Pfeiffer testified without contradiction that Evans halted the move and suggested there may be a better place to put the cabinets. Evans expressed concern to Phelps that the cabinet weight was

[2] Although the AOC captioned its motion as one for summary judgment, it stated in its motion that "[t]he facts laid out in this motion for summary judgment are uncontested by Respondent for the purpose of this Motion only, and should not be considered admissions to be used or relied upon in further proceedings. Respondents[sic] reserve the right to contest these facts should this motion be denied in whole or in part." *See* AOC Motion for Summary Judgment at 3. The Hearing Officer, determining that this was "an *arguendo* submission rather than the required submission of material facts," instead construed the AOC's submission as a motion to dismiss for failure to state a claim upon which relief can be granted, and adjudicated the motion as such. *See* 2 U.S.C. § 1405(b); H.O.'s Decision & Order on AOC's Motion for Summary Judgment at 4. On review, Evans does not appear to challenge the Hearing Officer's partial motion to dismiss for failure to state a claim, and neither party contests the Hearing Officer's determination to construe the AOC's motion for summary judgment as a motion to dismiss. In any event, we find no basis for disturbing the Hearing Officer's order construing the AOC's motion as a motion to dismiss for failure to state a claim.

unsafe on the second floor of the Blue Building. Phelps responded that the floor would be safe. Evans testified that he then instructed the Parsons crew to go ahead with the second floor move.[3] Thereafter, Evans told COTR Paige of his safety concerns for the second floor weight capacity and recommended placing the cabinets in the Coal Yard instead. Paige was unaware of Phelps's instruction to move the cabinets to the second floor and told Evans it would be okay to move the cabinets to the Coal Yard instead. After lunch on September 24, Evans informed Yozwiak that the cabinets would be moved to the Coal Yard the next day.

On the morning of September 25, Evans began moving the cabinets to the Coal Yard. Evans and UDS Master Electrician Liller drove to the Coal Yard while Parsons personnel moved the cabinets in a Parsons truck. Liller did not direct Parsons regarding this move.

Shortly thereafter, Phelps became aware that the cabinets were being moved to the Coal Yard and phoned Parsons PM Yozwiak, who stated that his crew was in the Coal Yard pursuant to Evans's instructions. Phelps then phoned Evans, who responded that "it had been decided" to move the boxes to the Coal Yard. Phelps then phoned Yozwiak and told him to put the cabinets in the Coal Yard Sea Container. Phelps testified that he did so because he was concerned about exposure to legal liability resulting from a non-COTR directing Parsons. Phelps then called Evans and instructed him to leave the cabinets in the Coal Yard subject to further discussion on Monday, September 28.

On September 28, Evans and Phelps met to discuss the cabinets. Phelps declined Evans's offer to return the cabinets to the Blue Building. Phelps initially considered Evans to have committed two infractions: Improper redirection of a contractor and insubordination. After Evans explained that he moved the cabinets in order to show that UDS could make and carry out a decision as a team, Phelps no longer considered Evans insubordinate because he was "trying to do something good."

Employee Relations Specialist Brandi Mehok subsequently suggested that Phelps investigate the circumstances surrounding the move by making notes and obtaining statements from all involved. Phelps obtained a written statement from PM Yozwiak stating that Evans had stopped Parsons from completing the move to the second floor on September 24. Evans and Liller declined to provide written statements. Evans did not inform Phelps that Paige had agreed with the move to the Coal Yard.

Upon completing the investigation, Mehok and Phelps agreed that Evans's actions warranted a formal reprimand for improper redirection of a contractor. After identifying comparative past treatment of other employees, Mehok and Phelps prepared a draft letter of reprimand. Phelps then met with Evans's other supervisors, Jim O'Keefe and Chris Potter, to discuss the matter. They concluded that Evans meant no harm and that a memorandum of counseling would be a better choice than a formal reprimand.[4]

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[3] PM Yozwiak's contemporaneous written statement does not corroborate Evan's contention that he instructed the Parsons crew to continue with the move to the second floor. The Hearing Officer acknowledged Yozwiak's statement but did not render a finding on this issue.

[4] Potter testified in *Evans I*.

On October 29, Phelps issued the memorandum of counseling. The language was identical to the draft formal reprimand except that it was titled "Memorandum of Counseling" and had no provision for inclusion in Evans's official personnel folder. AOC's policy characterizes counseling as an "Informal Action." Counseling memoranda may be used for imposing progressive discipline for up to one year following issuance. It never became necessary to apply progressive discipline to Evans and the memorandum of counseling was not reflected in his next performance evaluation.

Based on the foregoing, the Hearing Officer determined that Evans failed to establish that the AOC issued the memorandum of counseling in reprisal for his protected activity in *Evans I*. Specifically, the Hearing Officer stated that, although it was clear that Evans engaged in protected activity and that the issuance of the memorandum of counseling constituted action that is reasonably likely to deter future protected activity, he presented no evidence impugning the AOC's defense that his unauthorized redirection of the Parsons contractor exposed the AOC and Evans to legal liability, and that exposure to liability was the actual reason for issuing the memorandum of counseling.

Evans has timely filed a PFR of the Hearing Officer's Decision and Order; the AOC has filed a response in opposition to Evans's PFR; and Evans has timely filed a reply to the AOC's response.

II. Standard of Review

The Board's standard of review requires it to set aside a Hearing Officer's decision if it determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Rouiller v. U.S. Capitol Police*, Case No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *6 (Jan. 9, 2017). In making determinations under subsection (c), the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 2 U.S.C. § 1406(d).

III. Analysis

A. The Board's Analytical Framework for Analyzing Reprisal Claims

On review, Evans reiterates his claim that the AOC retaliated against him for his participation in *Evans I*, which he filed with the Office of Compliance on January 5, 2015. Section 207(a) of the Act provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1317. As discussed in today's Decision in *Paige v. Office of the Architect of the Capitol*, No. 16-AC-17 (CV, RP), to establish a claim for reprisal under the CAA, the employee is required to demonstrate that: (1) he engaged in activity protected by section 207(a) of the CAA; (2) the employing office took a materially adverse action against him; and (3) a causal

connection existed between the two. If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate, non-retaliatory reason for its actions. The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden of proof to the complainant to show that the employer's reason is merely a pretext for unlawful retaliation. *See also Rouiller,* 2017 WL 106137, at *9-10; *Evans v. U.S. Capitol Police Bd.*, Case No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *6 (Dec. 9, 2015); *Id.*; *see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981). However, where a hearing has been held and the record is complete, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the question of whether the employee has established a prima facie case drops from the case and the inquiry shifts to whether the employee has demonstrated by a preponderance of the evidence that the employing office's proffered reason for its actions was a pretext for retaliation or discrimination. *Evans*, 2017 WL 1057256, at *5 (Mar. 13, 2017).

In this case, the Hearing Officer denied the AOC's motion for summary judgment as to Evans's reprisal claim, a 3-day hearing followed and neither party has argued that the record was not fully developed on this claim. Rather than engaging in a burden-shifting analysis, therefore, we instead review the evidence as a whole to determine whether the Hearing Officer's determination is supported by substantial evidence that Evans failed to prove that the memorandum of counseling was issued by the AOC in reprisal for his participation in a protected activity. For the reasons below, we affirm the Hearing Officer's determination.

B. The Hearing Officer Correctly Determined that the Appellant Failed to Establish His Reprisal Claim

As stated above, the Hearing Officer concluded that Evans failed to establish that the memorandum of counseling was issued in reprisal for his protected activity in *Evans I* because he failed to establish that the AOC's proffered reasons for issuing the memorandum were a mere pretext. We agree.

As an initial matter, we note that the AOC does not challenge the Hearing Officer's conclusion that Evans engaged in a protected activity, or that the AOC took action against him that is reasonably likely to deter protected activity. As to the first element of Evans's reprisal claim, the parties stipulated that participation in *Evans I* comprises a protected activity, and we agree with the Hearing Officer's finding that the AOC's actors were aware of Evans's participation in this activity. Moreover, the potential to use the memorandum of counseling in progressive discipline makes it likely to deter protected activity. *See Carrol v. Abraham*, No. C 02-1063 JSW, 2004 WL 3244349, *5 (N.D. Cal., Mar. 30, 2004) ("A letter of admonishment is reasonably likely to deter a person from making such a complaint and thus constitutes an adverse employment action.").[5]

Moreover, the temporal proximity between *Evans I,* which was pending at the time of the relevant events, and the issuance of the memorandum of counseling, is certainly circumstantial

[5] To the extent that Evans contends that the Board has misconstrued CAA section 207(a) by requiring an employee to establish that he was subject to a "materially adverse action" in reprisal for his protected activity, for the reasons set forth in today's Decision in *Paige*, we disagree.

evidence that it was issued because of Evans's protected activity.[6] *Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579, *10 (Sept. 19, 2006). But we agree with the Hearing Officer that temporal proximity alone does not establish pretext in this case because the AOC has articulated legitimate, non-retaliatory reasons for issuing the memorandum of counseling, i.e., his redirection of Parsons exposed Evans and the AOC to legal liability. Indeed, Phelps testified without contradiction that a non-COTR directing a contractor could make the non-COTR or the AOC financially liable for the costs incurred by the change in direction. We find no error in the Hearing Officer's conclusion that Evans failed to demonstrate that the AOC's proffered reasons for issuing the memorandum of counseling were pretext for reprisal. *See Woodruff v. Peters,* 482 F.3d 521, 530 (D.C. Cir. 2007) (temporal proximity of less than 1 month supported causation and established a prima facie claim, but the employee's claim nonetheless failed because she failed to present "positive evidence beyond mere proximity" to defeat employer's proffered explanations).

On review, Evans contends that the AOC's reasons were pretextual because he was in fact authorized to direct Parsons. However, once the employer has articulated a non-retaliatory explanation for its action, as the AOC did here, the issue is not "the correctness or desirability of [the] reasons offered . . . but whether the employer honestly believes in the reasons it offers." *See Gage v. Office of the Architect of the Capitol*, No. 00-AC-21 (CV), 2001 WL 36175210, 5* (Nov. 14, 2001) (quoting *McCoy v. WGN Cont. Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)); *George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005) ("an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false."). Further, the Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory [or retaliatory] motive." *Id.* (quoting *Milton v. Weinberger*, 696 F.2d 94, 100 (D.C. Cir. 1982)). Here, substantial evidence supports the Hearing Officer's finding that Phelps honestly believed that Evans was not authorized to direct Parsons. *See Gage*, 2011 WL 36175210, at *5 (quoting *McCoy*, 957 F.2d at 373). It is therefore irrelevant to the reprisal claim whether Evans was in fact authorized to do so.

We also reject Evans's contention on review that OSHA's "general duty" clause justified redirecting Parsons due to safety concerns. First, the Hearing Officer's determination is supported by substantial evidence that Evans was informed of the second floor's safe weight capacity prior to Evans informing Parsons that the cabinets would be moved to the Coal Yard. Second, whether Evans was justified in redirecting Parsons is irrelevant to the question of whether the AOC's reasons for the action were pretext for reprisal. Because we find no basis to disturb the Hearing Officer's conclusion that Phelps honestly believed that Evans's actions were not authorized, Evans's arguments to the contrary on review do not support a finding of pretext.

Evans also asserts on review that Phelps's testimony concerning potential exposure to legal liability was not credible. We find no basis to disturb this credibility determination, which finds support in the record and is consistent with the law. *See Patterson v. Office of the Architect of the Capitol*, No. 08-AC-58 (CV, RP), 2011 WL 332312, at *6 (Jan. 21, 2011) (observing that

[6] Phelps's instructions and the move to the Coal Yard occurred on September 24-25, 2015 and the Memorandum of Counseling was issued on October 29, 2015, while *Evans I* was pending. The *Evans I* hearing took place on October 15-16 and December 1, 2, and 4, 2015. *Evans*, 2017 WL 1057256 at *2.

credibility determinations are entitled to substantial deference, because it is the Hearing Officer who sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records); *Purifoy v. Dep't of Veterans Affairs*, 838 F.3d 1367, 1373 (Fed. Cir. 2016) (credibility determinations are entitled to deference not only when they explicitly rely on demeanor but also when they do so "by necessary implication"); *Palace Sports & Entm't v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court will not disturb the Board's adoption of an ALJ's credibility determinations unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable). In any event, it is well-established that a "mere allegation of pretext, with little or no factual support, cannot easily overcome a valid reason proffered" for an adverse employment action. *See Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 760 (1st Cir. 1988).

In support of his contention that Phelps was not in fact motivated by his concern about legal liability, Evans also points to the uncontested fact that no legal liability in fact accrued. Evans, however, misconstrues the Hearing Officer's finding: It was the *exposure* to legal liability, not actual liability, which Phelps asserts was the reason for issuing the memorandum. Evans has offered no factual support, and we find none, to overcome the AOC's assertion that exposure to legal liability was a legitimate, non-retaliatory factor in issuing the Memorandum of Counseling.[7]

Evans also contends on review that Phelps's request for a written statement during the investigation deviated from the AOC's standard procedures and that the AOC's proffered reasons for issuing the memorandum were therefore pretext. We disagree. Evidence indicating that an employer deviated from its procedures may support an assertion of pretext. *See United States Capitol Police v. Fraternal Order of Police*, No. 15-LMR-01 (CA), 2016 WL 3753511, *8 (July 5, 2016) (citing *NLRB v. Gen. Fabrications Corp*., 222 F.3d 218, 226 (6th Cir. 2000)). However, we agree with the Hearing Officer's determination that there was no conflict between the AOC's standard procedures and the action taken in the instant case. Contrary to Evans's contentions, there is no evidence in the record indicating that it is improper under the AOC's disciplinary procedures for a supervisor performing an investigation to request that an employee provide a statement. Therefore, Phelps's request for information does not show pretext.

We similarly find no support in Evans's contention that Phelps's reasons were a pretext for reprisal because other employees involved in moving the cabinets did not receive a Memorandum of Counseling. Testimony from Parsons employees supports the Hearing Officer's finding that, contrary to Evans's assertions, no other UDS employee redirected Parsons.[8] Because only Evans redirected the Parsons crew, he was not similarly situated to other UDS employees. Therefore, Evans has not demonstrated that the AOC's proffered reasons for issuing the Memorandum were mere pretext. Accordingly, we find that the Hearing Officer's

[7] We similarly reject Evans's contention that Phelps's ratification of the move to the Coal Yard was tantamount to condoning the move. We again find no basis to disturb the Hearing Officer's determination that Phelps ratified the move in order to avoid exposure to legal liability due to a non-COTR directing a contractor.

[8] Evans contends that UDS employee Liller participated in the redirection, while UDS employee Baker was insubordinate in failing to move the boxes to the second floor pursuant to Phelps's orders. PFR at 22-23. We agree with the Hearing Officer that the record does not support these contentions.

determination that Evans failed to establish his reprisal claim is supported by substantial evidence.

Finally, we disagree with Evans's contention on review that the Hearing Officer's decision was inconsistent with the requirements of 2 U.S.C. § 1405(g) and therefore must be reversed. Section 1405(g) provides, in relevant part, that "[t]he hearing officer shall issue a written decision as expeditiously as possible" and that "[t]he decision shall state the issues raised in the complaint, describe the evidence in the record, contain findings of fact and conclusions of law, contain a determination of whether a violation has occurred, and order such remedies as are appropriate pursuant to subchapter II of this chapter." The Hearing Officer's decision clearly met and exceeded this standard. Contrary to Evans's assertion, section 1405 does not require additional "specificity and exactitude" in the Hearing Officer's conclusions which, as detailed above, are supported by substantial evidence and consistent with the law.

ORDER

For the foregoing reasons, we DENY the appellant's PFR and AFFIRM the Hearing Officer's decision on all claims.

It is so ORDERED.

Issued, Washington, DC, September 12, 2018.