IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2018-2100

DEVONA HOLLINGSWORTH,
Petitioner,

versus

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Petition for Review of
the Merit Systems Protection Board in Nos.
AT-4324-17-0315-I-2, AT-4324-18-0091-I-1

JUDGMENT

[Filed: May 17, 2019]

JOSEPH DAVID MAGRI, Merkle & Magri, PA, Tampa, FL. Argued for petitioner.

KELLY A. KRYSTYNIAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by JOSEPH H. HUNT, ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, JR.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, LINN, and WALLACH, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

May 17, 2019	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBERS

AT-4324-18-0091-I-1, AT-4324-17-0315-I-2

DEVONA HOLLINGSWORTH,
Appellant,

v.

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Agency.

INITIAL DECISION

DATE: May 10 2018

Joseph D. Magri, Esquire, Tampa, Florida, for the appellant.

Karen L. Mulcahy, Esquire, Bay Pines, Florida, for the agency.

Kristin Langwell, Esquire, St. Petersburg, Florida, for the agency.

BEFORE
Christopher G. Sprague Administrative Judge

INITIAL DECISION

On March 3, 2017, the appellant, the Assistant Chief of Health Information Management Services (HIMS), GS-0669-12, at the Department of Veterans' Affairs (VA or agency) Medical Center in Bay Pines, Florida, filed an appeal claiming that the agency violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301- 4335) (USERRA) when it: 1) failed to pay her at the GS-13 level for performing GS-13 work; 2) delayed in approving her military leave; and 3) created a hostile work environment. On September 31, 2017, the appellant filed a second appeal asserting that the VA violated USERRA when it terminated her during her probationary period. On December 14, 2017, these two appeals were joined. MSPB Docket # AT-4324-18-0091-I-1, Appeal File (AF3), Tab 12. The Board has jurisdiction over these appeals. 38 U.S.C. § 4324(b)–(c); Wilson v. Department of Army, 111 M.S.P.R. 54 (2009).[1] The hearing the appellant requested was conducted by video teleconference on April 5–6 & 24, 2018. For the reasons set forth below, the appellant's request for corrective action is DENIED.

Background

Except as noted herein, the following facts are not materially disputed. The appellant is a Master

[1] It is undisputed that the appellant, while preference eligible, was a probationary employee, and, as such, has no direct Board appeal rights over her termination. *See* 5 U.S.C. § 7511(a)(1)(B).

Sergeant in the U.S. Air Force (AF) Reserves with a duty station of Scott AF Base, Illinois, has a Doctorate in Education with a Specialization of Healthcare, and was a Health Services Management Supervisor with the AF from June of 2001 through February of 2016. AF3, Tab 25, p. 43. The appellant, a preference eligible, was appointed to the position of HIMS Assistant Chief, GS-12, on October 2, 2016. That position was subject to a one- year probationary period.

The appellant's initial first-line supervisor was the HIMS Chief, Ms. Patricia Bowman, and the appellant's second-line supervisor was the Chief of the Business Office, Ms. Dona Griffin-Hall. On November 18, 2016, Ms. Bowman went on extended absence, and she then resigned from her position on January 24, 2017.

By memorandum dated November 17, 2016, Ms. Griffin-Hall informed the appellant that she had concerns about the appellant's communication; that she expected the appellant to communicate in a respectful manner, to comply with guidance as given, to use legal names, and to seek to understand and apply VA processes and procedures as directed; and that, while debate is encouraged, once a decision is made, she expects the appellant's full support. AF3, Tab 11, p. 60– 61.

At the request of Ms. Griffin-Hall, the appellant was terminated during her probationary period on July 24, 2017 by the Human Resources (HR) Chief, Ms. Teryn Savage.

ANALYSIS AND FINDINGS

Under USERRA, the Board has appellate jurisdiction over appeals of "any person" alleging discrimination in federal employment because of military service.[2] *See* 38 U.S.C. §§ 4301–4333; *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1483 (Fed. Cir. 1998); *Machulas v. Department of Air Force*, 109 M.S.P.R. 165 (2008); *Petersen v. Department of Interior*, 71 M.S.P.R. 227, 231–40 (1996). Specifically, 38 U.S.C. § 4311(1)(a) provides in relevant part that a person who has performed service in a uniformed service shall not be denied any benefit of employment by an employer on the basis of that performance of military service. *Timberlake v. U.S. Postal Service*, 76 M.S.P.R. 172, 177 (1997). Additionally, an employer may not discriminate in employment against or take any adverse employment action against any person because that person has: (1) taken an action to enforce a protection afforded any person under 38 U.S.C. chapter 43, (2) testified or otherwise made a statement in or in connection with any proceeding under chapter 43, (3) assisted or otherwise participated in an investigation under

[2] It is undisputed that the appellant was terminated from the agency while serving military duty. The appellant argues that the agency violated 5 C.F.R. § 353.209 because it did not demonstrate it separated her "for cause." AF3, Tab 42. I disagree. The appellant's termination letter clearly identifies that the agency separated her for "conduct and unacceptable performance." AF3, Tab 11, p. 23. Additionally, as explained herein, the agency had ample cause to terminate the appellant during her probationary period. To the extent the appellant appears to argue that this regulation provides probationary employees procedural rights similar to 5 U.S.C. § 7503 such as notice and an opportunity to reply, I am not aware of any such authority nor has the appellant pointed to any.

chapter 43, or (4) exercised a right provided for in chapter 43. 38 U.S.C. § 4311(b).

Under USERRA, the appellant bears the initial burden of showing, by a preponderance of the evidence, that her military status was "a substantial or motivating factor" in the agency's action. *Burroughs v. Department of Army*, 120 M.S.P.R. 392, ¶ 5 (2013); *Erickson v. U.S. Postal Service*, 108 M.S.P.R. 494, ¶ 5 (2008). Preponderance of the evidence is defined by regulation as the 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. § 1201.4(q). If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the action anyway, for a valid reason. *Sheehan v. Department of Navy*, 240 F.3d 1009, 1013–14 (Fed. Cir. 2001); *Burroughs*, 120 M.S.P.R. 145, ¶ 5. This approach applies regardless of whether the appellant attempts to prove her case by direct or circumstantial evidence. *Burroughs*, 120 M.S.P.R. 145, ¶ 5.

Discriminatory motivation under USERRA may be established by direct evidence or reasonably inferred from a variety of factors. *See Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶ 9 (2006). These factors include proximity in time between the employee's military activity and the challenged employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by USERRA together with knowledge of the

employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id.*; *see also Sheehan*, 240 F.3d at 1013–14; *Erickson*, 108 M.S.P.R. at ¶ 5.

In a USERRA case brought under 38 U.S.C. § 4311, the Board's jurisdiction does not extend beyond the complained-of discrimination because of military status, does not allow for a decision on the merits of the underlying matter except to the extent necessary to address the appellant's military status discrimination claims, and thus does not include a review of other claims of prohibited discrimination. *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, ¶ 15 (2001).

The appellant failed to prove by preponderant evidence that either anti-military animus or reprisal for exercising a right protected by chapter 43 was a motivating factor for any of her claims.

Here, the appellant asserts the following are evidence of either military animus or retaliation for taking an action to enforce a protection afforded any person under 38 U.S.C., chapter 43: 1) that Ms. Griffin-Hall questioned the appellant's military experience and whether she should have been hired as the HIMS Assistant Chief in the first place; 2) that, when the appellant requested military leave, Ms. Griffin-Hall questioned the authenticity of the appellant's military orders and delayed in approving that leave request; 3) that the agency failed to temporarily promote the appellant to HIMS Chief, GS-13; 4) that the appellant's leave was incorrectly entered causing her to incur a letter of indebtedness;

5) that the agency's stated reasons for the appellant's termination are baseless and, therefore, a pretext for its discriminatory and retaliatory motives; and 6) that, on December 20, 2016, Ms. Griffin-Hall only intended to issue the appellant a written counseling, but, after Ms. Griffin-Hall discovered that the appellant had filed a USERRA complaint against her, she elevated the discipline to a termination. AF3, Tabs 10 & 42. This Initial Decision now addresses each in turn.

1) Appellant's Qualifications

The appellant was initially interviewed by a three member panel which recommended her to be selected as Assistant HIMS Chief, a GS-12 position. Ms. Bowman was lead on the panel, and she selected the appellant because she "nailed" her interview and because of her leadership experience in the AF. Hearing Transcript, vol. 3 (HT3), 56:17–21; 62:14–22. Ms. Griffin-Hall was not on the interview panel. Ms. Bowman testified that she discussed the appellant with Ms. Griffin-Hall, that Ms. Griffin-Hall expressed her concerns that she lacked VA HIMS experience and about whether the appellant's military experience qualified her to be the Assistant HIMS Chief, and that Ms. Griffin- Hall opined that the appellant's military experience appeared to qualify her for a different role – that of Health Services Management, but not the Assistant HIMS Chief. HT3, 58:15–59:7. Despite Ms. Griffin-Hall's concerns, she did not deny Ms. Bowman's selection of the appellant.

The interview panel's recommendation of the appellant was forwarded for approval to a professional standards board (PSB), but the PSB rejected the appellant's selection because the appellant lacked creditable specialized experience in health information management at the GS-7 through 11 levels to be considered for the GS-12 assignment. AF3, Tab 25, p 44. At HIMS's request, HR Director Tracy Skala appealed the PSB's decision to the Bay Pines VA Director, the Director reversed the PSB's decision, and the appellant was appointed as the Assistant HIMS Chief on October 2, 2016. AF3, Tab 25, pp. 45–46.

The appellant asserts that Ms. Griffin-Hall's concerns about whether the appellant's military experience qualified her to be selected as the Assistant HIMS Chief is evidence of military animus. AF3, Tab 42. For the reasons detailed below, I find that it is not.

First, I find that Ms. Griffin-Hall's questioning whether the appellant's military experience would adequately translate to her VA HIMS duties to be just that – a manger's legitimate concerns that a prospective employee who has never worked at the VA or HIMS is qualified to perform the duties of a supervisory position. Second, I infer from Ms. Bowman's testimony that the appellant's military experience in her resume was not a model of clarity regarding how that experience would adequately translate to the Assistant HIMS Chief's duties. Despite this issue, Ms. Bowman testified that the appellant "nailed" her interview. Given that Ms. Griffin-Hall did not participate in the appellant's interview and only reviewed the appellant's resume, I find that Ms. Griffin-Hall's concerns about the

appellant's qualifications were legitimate. Third, Ms. Griffin- Hall did not override Ms. Bowman's selection of the appellant. Finally, the PSB, who also did not interview the appellant, rejected the appellant as unqualified for the position. Thus, Ms. Griffin-Hall was not the only agency employee to question the appellant's qualifications for the Assistant HIMS Chief position.

Based on the foregoing, I find that the appellant failed to prove that military animus motivated Ms. Griffin-Hall's concerns as to whether the appellant's military experience qualified her to be the Assistant HIMS Chief.

2) Appellant's Military Orders

On November 28, 2016, the appellant sought half a day of military leave (ML) for a physical test she was ordered to take by the AF on December 15, 2016. MSPB Docket #AT-4324-17-0315-I-2 (AF2), Tab 6, p. 37.

By December 14, 2016, the appellant's ML request had not been approved. *Id*. On December 14, 2016, the appellant emailed Ms. Griffin-Hall inquiring about the status of her ML request. AF2, Tab 6, p. 40. One minute later, Ms. Griffin-Hall replies, "No problem. Are you working the other half of the day?" *Id*.

Ms. Griffin-Hall's timekeeper for seventeen employees, Ms. Randelle Niski, testified that Ms. Griffin-Hall was always "by the book" when it came to leave requests, that the appellant's was the first ML request that she had processed and she wasn't sure how to process it, that she sought and received

clarification on the ML leave requesting policy, that Ms. Griffin-Hall ultimately approved the appellant's ML request, and that Ms. Griffin-Hall had delayed over two weeks in processing leave requests other than those for military leave because of her busy schedule. HT1, 56:4–59:22.

Ms. Roxanne Bronner testified that, during a discussion between Ms. Griffin-Hall, Ms. Niski and herself, Ms. Griffin-Hall indicated that she was not inclined to approve the appellant's military leave because she questioned the authenticity of the appellant's orders as the orders were digitally signed and Ms. Griffin-Hall was used to seeing a "wet" signature on military orders. HT3, 97:16–99:19.

Based on the foregoing, I find that the appellant failed to prove that Ms. Griffin-Hall was motivated by anti-military animus when she delayed in approving the appellant's military for the following reasons. First, and most importantly, Ms. Griffin-Hall ultimately approved the appellant's ML request. Second, given that it is undisputed that Ms. Griffin-Hall was used to seeing military orders with a "wet" or handwritten signature, I find that Ms. Griffin-Hall's questioning the order's authenticity to be just that – a manager's legitimate concerns about the genuineness of the document. Finally, there is no evidence to even remotely suggest that Ms. Griffin-Hall harbored any anti-military animus. Indeed, Ms. Griffin-Hall testified that both her husband and her brothers are veterans, that she supervises other employees who take ML, and that her typical response

to requests for ML is, "No problem." HT1, 202:13–203:17; 206:10–16.[3]

3) Failure to Temporarily Promote Appellant to GS-13

The appellant asserts that, after Ms. Bowman left on extended leave on November 17, 2016, she was performing the duties of the HIMS Chief and should have been compensated at the GS-13 level for her efforts and that the agency's failure to do so violated USERRA. VA policy provides that an employee can be eligible for a temporary promotion to a vacant position if the applicant meets the qualifications for the level and can be boarded by the PSB. AF3, Tab 33, pp. 70–71. Here, the appellant requested to be compensated at the GS-13 level on January 25, 2017. AF3, Tabs 34, p. 212 & 31, pp. 133–238. However, I find that the appellant has failed to provide preponderant evidence that she was qualified to be the HIMS Chief, GS-13, since that position requires at least one year of experience at the GS-12 level, and the appellant had only been serving at the GS- 12 level at that time for about 4 months. AF3, Tab 34, p. 204. Therefore, I find

[3] Even if there had been such evidence of anti-military animus, I would have found that there is no evidence that the appellant was denied a "benefit of employment" as required by a USERRA claim because the ML was approved. *Timberlake*, 76 M.S.P.R. at 177. Additionally, to the extent the appellant complains about having to fulfill unnecessary requirements, the file contains an email from Ms. Niski in which she indicates this was the first time Ms. Niski ever processed military leave and acknowledges she used outdated VA guidance on this issue. AF2, Tab 6, pp. 35–37. Therefore, I find that this situation does not evidence anti-military animus.

that the appellant failed to prove the agency's failure to temporarily promote her violated USERRA.

4) Letter of Indebtedness

The appellant asserts that the agency intentionally inputted her as present for duty while she was performing military service which resulted in a letter of indebtedness. It is unclear from the record how the appellant's time was listed as being present for duty when it is undisputed she was on ML. It is also undisputed that the appellant was actually paid by the VA for this erroneously entered time. Therefore, I find that the appellant failed to prove that this error – however it was made and whoever made it – was motivated by an action that violates USERRA.[4]

5) Appellant's Termination

The appellant disputes the misconduct upon which Ms. Griffin-Hall based her termination recommendation to the HR Chief. AF3, Tab 32, pp. 87–179 (termination package). On July 18, 2017, the HR Chief terminated the appellant, effective July 24, 2017. AF3, Tab 32, p. 90. The termination package includes a memorandum issued by Ms. Griffin-Hall dated December 20, 2016 to the HR Chief requesting the appellant's termination during her probationary

[4] Even if there had been such evidence, I would have found that there is no evidence that the appellant was denied a "benefit of employment" as required by a USERRA claim because the appellant was paid for this time by both the military and the VA, and she cannot be paid simultaneously for both civilian and military service. *Timberlake*, 76 M.S.P.R. at 177.

period for failure to follow instructions, unauthorized release of medical information, and conduct unbecoming. AF3, Tab 32, p. 94.

i. Improper Release of Medical Information to the Union

One of the appellant's alleged unauthorized releases of medical information involves an email from the appellant to her subordinate's union informing the union of a change in the subordinate's tour of duty. *Id.* at p. 98. Initially, Ms. Griffin-Hall took issue with the fact that the appellant's email was in the incorrect format for a notification to the union (NTU), that she instructed the appellant to recall the email, and that the appellant had failed to do so. *Id.* at p. 98. The appellant admits that she did not recall the email as instructed. HT1, 85:4–86:9.

The NTU email includes the bargaining unit member's medical treatment plan, treatment location, and treatment schedule – all of which the agency asserts violate the VA's privacy policy because the union had no need to know such information. *Id.* at p. 97. For the reasons detailed below, I find that the appellant failed to demonstrate that either anti-military animus or USERRA reprisal motived this charged conduct.

First, it is undisputed that the appellant did not, in fact, recall the email. Therefore, I find that the appellant failed to follow her supervisor's instruction.[5]

[5] The appellant argues that the union did not reject the NTU, and the appellant, therefore, was not obligated to recall the NTU. This argument ignores the fact that Ms. Griffin-Hall is the appellant's supervisor, not the union.

Second, while it is undisputed that the union was entitled to notice of a change in a bargaining unit member's tour of duty, there is no reasoned basis that the union also needed to know the bargaining unit member's medical information causing that change to his tour. The VA's privacy policy instructs:

> All individuals who have access to sensitive information are responsible for protecting an individual's right to privacy and ensuring proper use and disclosure of information. All workforce members will be held accountable for compliance with these policies, procedures, and applicable laws.

AF3, Tab 11, p. 98. That policy also references consulting VHA Directive 1605.01. *Id*. That Directive requires written authorization for release of medical information where the recipient lacks a need to know that information. VHA Directive 1601.01, "Privacy & Release of Information," p. 39.

Here, the appellant does not argue that her subordinate's medical information should not have been protected. Rather, the appellant asserts that the union routinely receives this type of information, and, therefore, there was no breach of the VA's privacy policy. AF3, Tab 42. I am unpersuaded. Given that there is no evidence that this employee authorized the appellant to release the medical information to the union and that the union had no need to know this medical information, I find that the appellant violated the VA's privacy policy by releasing that information to the union.

Based on the foregoing, I find that the appellant failed to prove that this accusation was motivated by anti-military animus or by USERRA retaliation. This is especially true given that the appellant, as the Assistant HIMS Chief, was responsible for supervising the Bay Pines VA's release of information office and that this improper release of information directly relates to her supervisory duties.[6]

ii. Appellant's Compensatory (Comp) Time Request

The second instance in the termination package involves the appellant's February 15, 2017 comp time request for 0.5 hours. AF3, Tab 32, pp. 100–03. After making this request, the appellant received a message stating, "Supervisor approved but pending Director Approval." *Id.* In response, the appellant contacted her timekeeper, Ms. Niski, and copied the union, asking, "can you explain to me why I am waiting on [the Director] to approve my comp time? Is someone trying to disapprove my comp time?" *Id.* Ms. Niski responded, copying Ms. Griffin-Hall, "All OT/CT requires second-line approval. Any further questions can be directed to your supervisor and/or Payroll." *Id.* Three minutes later, the appellant replies:

> I was asking you as my timekeeper. My supervisor didn't make the notation in the system, which is why I directed the question

[6] For a tenured VA employee, the VA's penalty range for a first offense of failing to safeguard a confidential matter is admonishment to removal. AF3, Tab 11, p. 87. For a tenured VA employee, the VA's penalty range for a first offense of deliberate refusal to carry out any proper supervisory order is admonishment to removal. AF3, Tab 11, p. 88.

> to you. And since [Ms. Griffin-Hall] is not a "Director", and didn't make the note in the system, that is why the question went to you. My second-line approver is not the "Director". If you made a mistake, that is all you had to say. Either way, I am still waiting on my comp time to be approved and am noting this for my added records.

Id. Ms. Niski responded, inter alia, that she was offended and told the appellant she wanted her to stop vilifying her. *Id*. The appellant replied, inter alia, "At no time did I downplay or insult your actions, other than asked you to admit a mistake, which I believe was a reasonable request." *Id*. For the reasons detailed below, I find that the appellant failed to demonstrate that either anti-military animus or USERRA reprisal motived this charged conduct.

First, I find that the email exchange above is conduct unbecoming a supervisor. There was simply no need for the appellant to publically accuse anyone of attempting to disapprove her comp time request or to accuse Ms. Niski of making a mistake. Second, in her final email, the appellant herself admits that she publically disparaged, albeit "reasonably" so, Ms. Niski in front Ms. Griffin- Hall, who supervises both of them, and the union.[7] Finally, this dispute arose over a comp time request for a mere 0.5 hours, and I find that the appellant employed exceedingly poor

[7] It is also unclear why the appellant would copy the union as she is a supervisor and not a bargaining unit member. When asked at hearing as to why she would do this, she replied, "Could have been a slip of the key." HT1, 107:15–20.

judgment in escalating the issue in the manner in which she did over such a trivial matter.

iii. Training

The third instance in the termination package involves training events/courses on 12 subjects that the appellant, who was new to both her position and the VA, was supposed to take but did not. AF3, Tab 32, pp. 105–16. Ms. Griffin-Hall provided the appellant with a list of subject areas for training, including, at least for most of the trainings, a point of contact to schedule the training. *Id*. On February 17, 2017, Ms. Griffin-Hall asked the appellant about the status of one of the training events, and the appellant responded, "I attended [two of the trainings]. Everything else was cancelled due to conflicting schedules and were not rescheduled." *Id*. At hearing, the appellant was asked, "[W]hat was your responsibility to take training that your supervisor told you to take?" HT1, 77:3–5. The appellant responded, "I let her know that it was cancelled, and I was waiting for [Ms. Griffin-Hall] to reschedule them. I don't know who they talked to, to set up the scheduling." *Id*. at 6–9. The appellant also testified that Ms. Niski and others were responsible for scheduling the trainings. HT1, 76–78. For the reasons detailed below, I find that the appellant failed to demonstrate that either anti-military animus or USERRA reprisal motived this accusation.

First, it is undisputed that the appellant did not take all but 2 of the 12 trainings she was supposed to. Second, I find that, when a required training is postponed, it is entirely reasonable for a supervisor to expect a subordinate, who is also a supervisor, to

endeavor on her own accord to reschedule the required training. That the appellant failed to do so and blames others for her dereliction does not evidence anti-military animus, it evidences irresponsibility and apathy towards both the agency's training regimen and her new role as the Assistant HIMS Chief.

iv. CDI Interviews

The fourth instance in the termination package involves interviews for the HIMS positions of Clinical Documentation Improvement specialists (CDI). Ms. Griffin-Hall, who was the selecting official for the CDI positions, testified that she told the appellant to include Ms. Jacki Crews as a subject matter expert on the second round of interview panels for the CDI positions, and that she told the appellant to not include Ms. Roxanne Bronner on these CDI interview panels because she was not a subject matter expert, HT1, 239:17–243:14; see also AF3, Tab 11, pp. 37–38 (appellant's email responding to Ms. Crews, "I do not see the justification for you to know who is on the panel, since these positions would not report to you, they would report to me…."). Ms. Griffin-Hall stated that the appellant did not comply with this direction about Ms. Bronner. Id. Ms. Griffin- Hall further testified that she viewed the appellant's failure to include Ms. Crews on the first round of interviews as lacking good judgment since Ms. Crews was the subject matter expert and Ms. Bronner was not, and since Ms. Crews input should be valued as she would be working closely with the CDIs. Id. For the reasons detailed below, I find that the appellant failed to demonstrate that either anti-military animus or USERRA reprisal motived this accusation.

First, the appellant has not disputed that Ms. Bronner lacked subject matter expertise in this area or that Ms. Bronner was included on the first round of interviews. I find that this action both violates Ms. Griffin-Hall's direction regarding Ms. Bronner and evidences poor judgment by the appellant since Ms. Bronner lacked subject matter expertise. Second, I find the appellant's tone in her email denying Ms. Crews even the identity of the interview panel is not conducive to team building. As it is undisputed that Ms. Crews would be working closely with the CDIs, the appellant should have been more inclusive in her approach to this situation.

v. December 13, 2016 ROI Huddle

The fifth instance in the termination package involves a telephonic conference call between the appellant, Ms. Griffin-Hall, and members of the request for information (ROI) staff during which Ms. Griffin-Hall asserts the appellant had an unprofessional and disrespectful tone. Ms. Griffin-Hall attributes the following statements to the appellant:

- "I am the HIMS Manager!"

- "No! That is not true. All paper documents are not properly labeled for the MR staff to identify."

- "As long as I complete the task you have assigned me, why should it matter to you if I turn the charts?"

AF3, Tab 32, p. 127 (Report of Contact (ROC)). Ms. Griffin-Hall contacted the appellant after this

teleconference to discuss her concerns, and the appellant responded that these concerns were her "perception" and that she had two witnesses that may have a different perception. *Id*. Ms. Griffin-Hall testified that her decision to request the appellant's termination during her probationary period occurred immediately subsequent to this meeting. HT1, 290:24–291:8.

Ms. Shaw-Hillman testified that she was on the line for this teleconference, that the appellant's responses to Ms. Griffin-Hall's questions about the ROI issues were "pretty aggressive…abrasive," that the appellant had stated to Ms. Griffin-Hall, "what does it matter;" that the appellant's demeanor signaled to Ms. Griffin-Hall, "you do your job, and I'll do my job," that the appellant took a tone with Ms. Griffin-Hall that "I personally would not have taken;" and that the appellant's conduct during this teleconference in front of their subordinates was "completely uncalled for." HT2, 31:14–35:8.

The appellant testified that, during this meeting, Ms. Griffin-Hall instructed her not to get involved with helping her staff process these actions (turning the charts) and that she disagreed with Ms. Griffin-Hall's instruction. HT1, 97:21–101:9. The appellant testified that she told Ms. Griffin-Hall that the medical records scanners did not know how to turn charts, and that, to prove her point, she asked a medical records scanner to perform this task in front of the huddle but she could not. *Id*. at pp. 101:10–103:7. The appellant further testified that Ms. Griffin-Hall's ROC attributed statements to her that were actually said by others. Id. The appellant stated that the disagreements with Ms. Griffin-Hall were "started

by" Ms. Griffin-Hall. Id. at 106:3–8. The appellant specifically denied making the statement: "As long as I complete the task you have assigned me, why should it matter to you if I turn the charts?" *Id*. at pp. 101:6–9.

Based on the foregoing conflicting testimony, a credibility determination is necessary. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of Army*, 35 M.S.P.R. 453, 458 (1987).

Here, for the reasons detailed below, I find that the appellant did make the statement "As long as I complete the task you have assigned me, why should it matter to you if I turn the charts?" First, having observed the appellant's demeanor at hearing, I find much of her testimony to be evasive. Second, having observed Ms. Griffin-Hall's testimony at hearing, I find her testimony to be clear, straight-forward, and direct. I also credit Ms. Shaw-Hillman's testimony who heard the appellant say, "What does it matter," which forms a significant part of the disputed statement. Finally, given the nature of the dispute

occurring between the appellant and Ms. Griffin-Hall, I find that this statement is entirely consistent with that dispute since the appellant herself admits Ms. Griffin-Hall's instruction to her was to refrain from processing these actions. I also find that this statement's tone is consistent with the combative tone of the appellant's written correspondence. Therefore, I find that the appellant did say to Ms. Griffin-Hall, "As long as I complete the task you have assigned me, why should it matter to you if I turn the charts?"[8]

Additionally, the appellant did not specifically deny making the other statements attributed to her by Ms. Griffin-Hall's ROC. Based on that fact, as well as the credible testimony of Ms. Griffin and Ms. Shaw-Hillman, I find that the appellant made the statements in the ROC. I further find that these statements are disrespectful to one's second-level supervisor – especially in front of one's subordinates. Consequently, I find that the appellant failed to

[8] The appellant asserts that Ms. Rosa Sly testified that statements Ms. Griffin-Hall attributed to the appellant during this huddle were actually uttered by Ms. Marilyn Jackson. AF3, Tab 42, p. 9. What Ms. Sly actually testified was that the "only" thing the appellant stated to Ms. Griffin-Hall during this huddle was about how the ROI staff was not trained to turn charts. HT3, 42:3–16. Given that the appellant herself admits disputing Ms. Griffin-Hall's instruction to not be involved in processing these actions and using one of the ROI staff to prove her point, I do not credit Ms. Sly's testimony. *Hillen,* 35 M.S.P.R. at 458. Moreover, it was the appellant that was disputing Ms. Griffin-Hall's instruction not to be involved with the processing of these actions, so it would be illogical for Ms. Jackson, for whom there is no evidence that she was disputing this instruction, to have uttered this statement.

demonstrate that either anti-military animus or USERRA reprisal motived these accusations.

vi. Improper Release of Medical Information to Congressional Office

The sixth instance in the termination package involves the accusation that the appellant improperly approved the release of a veteran's medical records to a Congressional Office. AF3, Tab 32, p. 129–30. On or about November 16, 2016, Ms. Griffin-Hall took issue with the fact that the request for the information came from the veteran's Congressional Office's form, not on the VA's ROI request form, that, as such, this third-party request form should not have been fulfilled, and that its fulfillment violated the VA's privacy policy. Id. Ms. Griffin-Hall testified that the HIPPA form signed by the veteran authorized ROI to discuss the veteran's medical information with the Congressional Office, but not to release the medical records, that she had vetted her position with the VA's privacy office before discussing it with the appellant, that the VA's privacy office agreed that it was inappropriate for ROI to release the veteran's medical documentation to the Congressional Office, that she relayed her concerns to the appellant, but the appellant insisted that she was correct in approving their release and she told Ms. Griffin-Hall that she was wrong. HT1, 223:13–227:10. Ms. Griffin-Hall also stated that there was a policy in place for responding to Congressional Inquiries, that the Director's Office should have responded, that it was inappropriate for HIMS to directly respond to a Congressional Inquiry, and that, in response, the appellant asserted that she did not know about that policy. Id. at 227:11–229:4.

The appellant asserts that she did approve the release of information, but that her approval did not violate the VA's policy. AF3, Tab 42. After Ms. Griffin-Hall had instructed those involved not to accept third-party forms, the appellant told her subordinate who had released the information that she disagreed with Ms. Griffin-Hall on this policy. HT1, 88:13–96:11.

Based on the foregoing, I find that the appellant failed to carry her USERRA burden for the following reasons. First, I am convinced that Ms. Griffin-Hall's interpretation of the situation is correct – that the release of the medical documentation was improper. This is especially true given that Ms. Griffin-Hall unequivocally testified that she vetted her position with the VA's privacy office. Second, the appellant's failure to follow the VA's policy on responding to Congressional Inquires is not excused by the fact that she was unaware of the policy. This is true because the appellant is a supervisor, a higher-level employee, and she is instructing a rank and file employee to respond to a Member of Congress. Given the high level of the inquiry, this situation should have triggered in the appellant a need to seek guidance, as she had clearly not dealt with a Congressional Inquiry at the VA before. That she did not seek such guidance before acting further evidences her own poor judgement, not anti- military animus.

vii. Failure to Follow Instruction Regarding Delegation of Authority

The final instance in the termination package involves an instruction from Ms. Griffin-Hall to the appellant to not interface directly with her second-

level subordinates. AF3, Tab 32, pp. 132–39; HT1 210:24–216:19. Ms. Griffin-Hall testified that she told the appellant that she wanted the appellant's first-line subordinate, Ms. Sly, to directly interface with front-line employees, the appellant's second-level subordinates, during a huddle. Id. Ms. Griffin-Hall testified that the appellant disregarded her instruction and engaged with second- level subordinates during the huddle immediately following this instruction. Id. The appellant has not presented evidence that disputes Ms. Griffin-Hall's assertion in this regard.

Based on the foregoing, I find that the appellant failed to follow her supervisor's instruction and that there was nothing improper about the instruction. I correspondingly find that the appellant failed to carry her USERRA burden on this issue.

In sum, I find the appellant failed to prove that any instance in the termination package ran afoul of USERRA.

6) Timing of Decision to Terminate Appellant

The appellant asserts that Ms. Griffin-Hall initially sought to merely reprimand her, but, after finding out that the appellant had filed a USERRA complaint against her, she elevated the discipline to a termination. The threshold question in this inquiry is what triggers USERRA's antiretaliatory provisions.

USERRA prohibits retaliation for taking "an action to enforce a protection afforded any person under 38 U.S.C. chapter 43…." 38 U.S.C. § 4311(b)(1). Here, the appellant filed a hostile work

environment (HWE) complaint against Ms. Griffin-Hall asserting, inter alia, that her delay in approving the appellant's ML request discussed above created a hostile work environment. AF3, Tab 34, pp. 262–63. Because military leave is a protection under USERRA, since the appellant's HWE complaint was "an action" aimed at enforcing that protection, and as Congress elected not to limit "an action" by any modifier, I find that this action triggers USERRA's antiretaliatory protections. 38 U.S.C. §§ 4311(b)(1), 4316 (providing that members of the uniformed service shall be granted leave while performing such service). The next question is when Ms. Griffin-Hall became aware of the appellant's HWE complaint.

The complaint was assigned to Ms. Kris Brown, Associate Director for the Bay Pines VA, for investigation, and the file contains memorandum of an undated interview between the appellant and Ms. Brown in which the appellant references the ML issue. Id. at pp. 265–67. Ms. Brown testified that she met with Ms. Griffin-Hall on December 20, 2016 at 3:30 to discuss the HWE complaint with her. HT2, 163:13–19; AF3, Tab 33, p. 73. During that conversation, Ms. Brown made Ms. Griffin-Hall aware of the appellant's concerns about Ms. Griffin-Hall's delay in approving the appellant's ML.[9] HT2, 167;

[9] On December 14, 2016, the appellant also filed a complaint with the Department of Labor, Veterans' Employment & Training Service (DOL VETS) regarding the agency's delay in approving her military leave detailed above. AF2, Tab 6, pp. 50–54. On December 27, 2016, DOL VETS contacted Bay Pines Associate Director Ms. Kristine Brown to advise her of the USERRA complaint filed by the appellant. AF2, Tab 6, p.55. Because Ms. Brown was already aware of the appellant's allegations from the

AF3, Tab 39, p. 4. Therefore, I find that Ms. Griffin-Hall was aware that the appellant was enforcing a right under USERRA as of December 20, 2016 at approximately 3:30 PM.[10]

Ms. Griffin-Hall's email transmitting the memorandum entitled "Written Counseling for probationary employee," to Ms. Savage, the HR specialist assisting her, is date stamped December 20, 2016 at 10:42 a.m. AF3, Tab 40, p.7. Ms. Griffin-Hall's affidavit asserts that, after consulting with HR about the appellant's situation, she received a template for a written counseling from HR. *Id*. at p. 4. Ms. Griffin-Hall's affidavit further asserts that, while the December 20, 2016 exhibit sent to HR on December 20, 2016 at 10:43 AM is entitled "Written Counseling," she actually intended it to be a request for the appellant's termination. *Id*. The appellant argues that this is documentary evidence that, as of the morning of December 20, 2016, Ms. Griffin-Hall only intended to reprimand the appellant, and that, after learning of the appellant's HWE complaint, she retaliated against the appellant by increasing the reprimand to a termination. AF3, Tab 42. For the reasons detailed below, I find that Ms. Griffin-Hall had made up her mind to terminate the appellant prior to learning of the WHE complaint.

HWE complaint, it does not appear that Ms. Brown brought the USERRA complaint to Ms. Griffin-Hall's attention.

[10] To the extent the appellant asserts that Ms. Griffin-Hall "knew" of the appellant's HWE or USERRA complaint on December 14, 2016, there is simply no evidence to support this claim.

First, Ms. Griffin-Hall testified unequivocally that she decided to terminate the appellant during her probationary period after the December 13, 2016 meeting detailed above, that the appellant had been "abrasive" and "insistent" of her way during this meeting, that this meeting was "the last straw," and that she had been consulting with HR since that December 13, 2016 incident. HT1, 232:11–15; 290:24–291:8. I find that, based on the nature of the appellant's misconduct and disrespect towards her supervisor during this meeting, this is precisely the type of interchange that would motivate a supervisor to make a decision to terminate a probationer. Indeed, the appellant herself testified that, in the interchange between herself and Ms. Griffin-Hall following this huddle, Ms. Griffin-Hall went on a "rant". HT1, 104:18–105:19. Therefore, I credit Ms. Griffin-Hall's testimony that she made her decision to terminate the appellant after this December 13, 2016 incident. Since this interchange and corresponding decision predated Ms. Griffin-Hall's awareness of the HWE complaint, it could not have influenced her decision to terminate the appellant.

Second, there is no testimony from Ms. Taryn Savage that Ms. Griffin-Hall first sought to reprimand the appellant but, at some point after December 20, 2016, elevated the level of discipline to a termination.[11] Ms. Savage, HR Employee Labor

[11] While I acknowledge that the evidence of the email from Ms. Griffin-Hall to Ms. Savage at issue was not produced until after Ms. Savage testified, the appellant did not request to recall Ms. Savage on this issue. As the appellant has the initial burden in this USERRA appeal, I find that, if she had desired to explore this issue with Ms. Savage, it was incumbent upon her to do so. See 5 C.F.R. § 1201.59(c)(2).

Relations Specialist, testified that, approximately six weeks after the appellant's appointment, Ms. Griffin-Hall contacted her with concerns about the appellant's inappropriate communications; that she advised Ms. Griffin- Hall to terminate her during her probationary period; and that Ms. Griffin-Hall declined and opted to give the appellant a chance to improve through guidance and coaching. HT2, 77:22–79:19; AF3, Tab 11, p. 60–61 (November 17, 2016 memo "Concerns about Communication"). Ms. Savage testified that, after this initial conversation, she researched whether the appellant was, in fact, a probationary employee due to prior service with the Federal Bureau of Investigation, and that the reason she was performing this research was she believed the appellant would be terminated during her probationary period. HT2, 80:9–15. Ms. Savage explained that the reason for the delay between Ms. Griffin-Hall's December 20, 2016 request for termination and the HR Chief's July 18, 2017 termination letter was because her office had only two HR specialists for disciplinary and leave issues servicing 4300 employees, that it was very early in the appellant's probationary period, and that more urgent disciplinary matters involving weapons, threats, and drugs took priority. HT2, 85:19–86:15. Based on the foregoing, I find that none of Ms. Savage's testimony corroborates the appellant's assertions, but is consistent with Mr. Griffin-Hall's assertion.

Third, the record contains Ms. Griffin-Hall's request to the HR Chief that the appellant be terminated during her probationary period. AF3, Tab 32, p. 94. That request is dated December 20, 2016,

and there is no evidence that it was actually provided to HR after that date.

Finally, a December 16, 2016 email from Ms. Susanna Hernandez, Senior HR Specialist, to her supervisor indicates that Ms. Griffin-Hall was, on December 15, 2016, inquiring about whether the appellant was serving as a probationary employee. AF3, Tab 31, pp. 129–30. This evidence is highly relevant because, had Ms. Griffin-Hall actually been contemplating a reprimand, there simply would be no need to determine whether the appellant was probationary because the answer to that question has no meaningful legal implications – both probationary and tenured employees have no direct appeal rights to the Board over a reprimand. 5 U.S.C. § 7512.

Based on the foregoing, I credit Ms. Griffin-Hall's explanation that, despite the language in the December 20, 2016 email, she intended the action against the appellant to be a termination and not a reprimand.

Finally, there is also no evidence that others similarly situated to the appellant, but who did not file USERRA complaints, were not terminated during their probationary period. I also note that the termination package contains multiple infractions and the agency's table of penalties for one of these infractions for a tenured employee is as high as removal. Consequently, I find that the appellant failed to prove by preponderant evidence that Ms. Griffin-Hall's recommendation to terminate her during her probationary period violated USERRA.

Therefore, I conclude that the appellant has failed to establish that she is entitled to corrective action under USERRA.

DECISION

The appellant's request for corrective action under USERRA is DENIED.

FOR THE BOARD:

___/s/_____
Christopher G. Sprague
Administrative Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2018-2100

DEVONA HOLLINGSWORTH,
Petitioner,

versus

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

Petition for Review of
the Merit Systems Protection Board in Nos.
AT-4324-17-0315-I-2, AT-4324-18-0091-I-1

[Filed: August 5, 2019]

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before PROST, Chief Judge, NEWMAN, LOURIE, LINN*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, Circuit judges

PER CURIAM.

*Circuit Judge Linn participated only in the decision on the petition for panel rehearing.

ORDER

Petitioner Devona Hollingsworth filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on August 12, 2019.

FOR THE COURT

August 5, 2019
Date

/s;/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court