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EMPLOYEE APPEALS BOARD

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

ANDRE FUNCHES

APPELLANT

VS.

DOCKET NO. 13-010

MISSISSIPPI DEVELOPMENT AUTHORITY

RESPONDENT

ORDER OF EAB BOARD, *EN BANC*

Before the Mississippi Employee Appeals Board (MEAB) *en banc*, is the appeal of Andre Funches from an October 17, 2013, Order of Hearing Officer Ingrid Dave Williams. Funches initially appealed six grievances to the MEAB. Each of Funches' complaints/grievances are listed below:

- (1) Funches alleged that he was not hired for an Associate Manager Finance Senior because he had been unresponsive to sexual advances of his supervisor, Katrina Wells;
- (2) A second grievance by Funches was that the person chosen for the Associate Manager Finance Senior position, Tameika Shelwood, was not qualified for the position of Associate Manager Finance Senior;
- (3) A third grievance by Funches was that he was denied a promotion and training in February, 2012;
- (4) A fourth grievance by Funches was that Tracy Davis, a MDA Human Resource employee, retaliated against Funches by stating to a fellow employee that "a lot of things are going on with Andre," and that the employee should not associate with Funches;
- (5) A fifth grievance of Funches concerned a 2008 transfer;
- (6) A sixth grievance of Funches was that he had not been chosen for the

job of MDA Associate Manager Finance Senior in retaliation for not responding to his supervisor's sexual advances.

Prior to the hearing on the merits on May 14, 2013, and July 11, 2013, Hearing Officer Williams, ruled on Mississippi Development Authority's Motion to Dismiss all of Funches' claims. Hearing Officer Williams ruled that Funches' grievances set forth in numbers two, three, and five would be dismissed in their entirety; that Funches' grievance in paragraph number 4 would be dismissed, in part – to wit, the allegation that Davis retaliated against Funches. Hearing Officer Williams' April 10, 2013, Order provided that the remaining grievances of Funches would not be dismissed, but would proceed for a hearing on the merits.

Subsequent to April 10, 2013, Funches was provided an appeal hearing on his first and sixth grievances that he was not hired for a position as Associate Manager Finance Senior because he was being retaliated against for being unresponsive to his supervisor's sexual advances; and the portion of his grievance that the Mississippi Development Authority had breached Funches' right of confidentiality.

By Order dated October 17, 2013, Hearing Officer Williams, after two days of receiving evidence, entered an Order holding that Funches failed to meet his burden of proof that he was, in fact, retaliated against and that he was denied the position of Mississippi Development Authority - Associate Manager Finance Senior for not responding to his supervisor's alleged sexual advances. Officer Williams further found as a fact that Funches failed to meet his burden of proof that Tracy Davis violated Funches' confidentiality.

Aggrieved by the October 17, 2013, adverse ruling, Funches timely appealed the October 17, 2013, Order to the Full Employee Appeals Board. Having considered the record in this matter, both the brief of the Mississippi Development Authority and Funches' brief, the MEAB, *en banc*, affirms the October 17, 2013, Order of Hearing Officer Williams in all respects. The reasons for affirmance follow.

I.

Was the Order of April 10, 2013, dismissing Funches' grievance numbers, 2, 3, and 5 in their entirety and partial dismissal of Funches' number 4 grievance error? The answer is no.

Funches' second grievance alleged that the person who did receive the position of Associate Manager Finance Senior was not qualified for the position. Mississippi State Personnel Board Rule 10.3.E states "the selection of an individual by the appointing authority . . . is not grievable, unless it is alleged that the selection is in violation of a written agency policy or a MSPB rule on filling vacancies." As noted, in Hearing Officer Williams' April 10, 2013, Order, Funches did not allege that either the Mississippi Development Authority, or the Mississippi State Personnel Board, violated their rules in determining that Shelwood was qualified to be placed on the list of eligible candidates for the Associate Manager Finance Senior position. While Funches' retaliation allegation is that he was denied the position sought because he was a male and rejected his supervisor's sexual advances that does not mean that Shelwood was improperly placed on the list of eligible candidates for the position of Associate Manager Finance Senior position.

Funches' third grievance was that he was denied a promotion in February, 2012. Funches did not submit an appeal on his alleged February, 2012, promotion denial until

February 7, 2013. Funches was obligated to appeal his alleged February, 2012, promotion denial within fifteen (15) days of the final denial at his agency level. *See*, MSPB Rule 9.4(B). Because Funches did not appeal the alleged denial of the February, 2012, promotion until February 7, 2013, Funches, as a matter of law, failed to timely appeal that grievance. Accordingly, Hearing Officer Williams' dismissal of that grievance in her April 10, 2013, Order was correct.

Funches' fifth grievance pertains to a complaint of being transferred in 2008. Again, MSPB Rule 9.4(B) required Funches to file his appeal to the Mississippi Employee Appeals Board within fifteen (15) days of his final grievance at the agency level. Funches did not file an appeal on the alleged improper transfer until February, 2013, over three years after the alleged improper transfer. The February, 2013, appeal was untimely and Hearing Officer Williams was correct to dismiss that appeal in her April 10, 2013, Order.

With regard to Funches' grievance number 4 "confidentiality claim," Hearing Officer Williams' October 17, 2013, Order found that Tracy Davis discussed various alleged employment difficulties of Funches with another employee, Angela Reed. Hearing Officer Williams further found as a fact that while Davis discussed Funches' alleged employment difficulties with Reed, that Funches did not prove that what Davis discussed with Reed was a discussion of confidential information. Funches had the burden of proof to prove that any comments Davis made to Reed consisted of confidential information as opposed to non-confidential information or gossip. Officer Williams found that Funches failed to meet his burden of proof on that issue. There is substantial evidence in the record to support Officer Williams' factual finding and her finding was neither arbitrary or capricious, and

accordingly, it is affirmed. *See, Miss. Board of Veterinary Medicine v. Geotes*, 770 So. 2d 940 (Miss. 2000).

As to Funches' remaining appeal issue – that he was not appointed to the Associate Manager Finance Senior position because he refused the sexual advances of his superior – Officer Williams found that a tangible employment action had occurred because he was not awarded the promotion. However, that fact alone is insufficient for Funches to prevail. Funches must also prove if the “acceptance or rejection of the harassment was the cause of the employment action.” Stated another way, was Funches' refusal of any sexual advances the cause in fact of his failure to receive the MDA - Associate Manager Finance Senior promotion.

Again, Funches had the burden of proof to prove that the reason he did not receive the promotion was because he refused the sexual advance of his supervisor. *See, Mississippi Employee Appeals Board Rule XXB. and Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993). Hearing Officer Williams found, as a fact, that Funches failed to meet his burden of proof on that issue. Findings of fact by a hearing officer, if supported by substantial evidence and not arbitrary or capricious, will not be disturbed on appeal. *See, generally, Childs v. Hancock County Board of Supervisors*, 1 So. 3d 855, 861 (Miss. 2009), *Mississippi Board of Veterinary Medicine v. Geotes*, 770 So. 2d 940 (Miss. 2000). In this case, there is substantial credible evidence and sufficient facts to support Officer Williams' factual findings, that Funches failed to meet his burden of proof that his denial of the MDA - Associate Manager Finance Senior promotion was because of sexual harassment. Further, since there were sufficient facts for Hearing Officer Williams' factual findings, those findings were not arbitrary or capricious.

For the forgoing reasons, the Mississippi Employee Appeals Board, *en banc*, affirms Hearing Officer Williams' April 10, 2013, Order and her October 17, 2013, Order in all respects.

SO ORDERED, THIS THE 3 DAY OF February, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD,
En Banc



MICHAEL N. WATTS,
For the Employee Appeals Board, En Banc