

by management that he did not like. Mr. Howard maintained that appellant was not “singled out for harassment by management” and that other employees “received correct[ive] action for not following instructions, besides him.” He also noted that other union stewards did not receive similar disciplinary action. Mr. Howard related that on October 20, 2003 appellant’s supervisor, Sharon Parr, instructed him to case mail for two hours on another route and then return to his own route. Instead, he worked three and a half hours on the other route and then refused to give Mr. Howard the rest of the mail to deliver so that he could finish his route in a timely manner. He also related that on February 16, 2004 appellant refused to follow Ms. Parr’s instructions to give the keys to his vehicle to an employee on another route.

In a statement received by the Office on March 23, 2004, appellant indicated that on October 17, 2003 he called the union president because management was “refusing to hear a grievance on its last day as a result of not allotting me union time for grievances.” He stated that management then “began to issue this onslaught of discipline as retaliation for my [tele]phone call to the union on October 17, 2003.” Appellant related that on October 20, 2003 his supervisor refused to decide on his request for union time and yelled at him. He further noted that he had overtime taken away from him on that date and that he received a letter of warning for failing to follow instructions. Appellant filed a grievance regarding the letter of warning which was sustained. He next asserted that on October 23, 2003 his supervisor, Ms. Parr, denied his request for union time and told him “in a very nasty and unprofessional manner to hit off the clock.” On October 27, 2003 he received a seven-day suspension for failing to follow instructions on October 23, 2003. The employing establishment also placed appellant on an emergency suspension on November 8, 2003. He filed a grievance about the emergency suspension, which was sustained by an arbitrator on January 27, 2004. Appellant further noted that he received a 14-day suspension on November 26, 2003 for failing to follow instructions and a 14-day suspension on December 8, 2003 for failing to maintain a regular work schedule. He contended that management tampered with his mail such that he did not receive the December 8, 2003 suspension notice in a timely manner. Appellant received a notice of proposed removal on December 26, 2003 for failing to follow instructions and unbecoming conduct. He stated that on January 16, 2003 management instructed him to return his vehicle to the coworker on his former route even though he had received written approval to switch the vehicle to his new route.¹

The record contains statements by supervisors and managers at the employing establishment regarding the incidents for which appellant received disciplinary action, copies of the disciplinary action, copies of grievances filed as a result of these actions and the subsequent denials or sustaining of these grievances. Appellant’s grievances regarding a notice of removal for failing to follow instructions on December 12, 2003, allegations of mail tampering in connection with a notice returning him to duty on November 26, 2003, the denial of union time on April 3, 2003 and the posting of a vacation chart on April 4, 2003 were denied.

Appellant filed a grievance alleging error in being put on emergency placement on November 7, 2003. The grievance indicated that he arrived at work on a nonscheduled day to retrieve magazines, which he stated that a church did not want and that he was going to “take to give to a black history museum.” Mr. Howard told him to leave the mail but he did not.

¹ Appellant also submitted medical evidence to the Office.

Mr. Howard placed him on emergency placement “for taking mail (2nd class flats) from the unit” without authorization. In an award summary dated January 27, 2004, an arbitrator sustained appellant’s grievance filed as a result of the employing establishment placing him on emergency placement. The arbitrator stated: “The grievance is sustained. All record of [appellant’s] placement on [e]mergency [p]lacement is to be removed from his personnel file. Any pay lost to him is to be restored at the straight time rate.”²

By decision dated September 8, 2004, the Office denied appellant’s claim on the grounds that he did not establish an emotional condition in the performance of duty. The Office found that he had not alleged any compensable employment factors.

On June 5, 2005 appellant, through his attorney, requested reconsideration. In support of his request, he submitted a decision from an arbitrator dated January 30, 2004. The arbitrator sustained his grievance concerning the letter of warning he received on October 21, 2003 for failing to follow instructions. He noted that on October 20, 2003 a carrier, Steve Harrison, objected to his assignment of an additional one-half hour of work and asked appellant, his union representative, for advice. Appellant instructed him to fill out a request for union time, which he submitted to Ms. Parr, who refused to accept the form. The arbitrator related:

“Mr. Harrison walked over to [appellant] and again sought his assistance. [He] and Mr. Harrison returned to talk to Ms. Parr and [appellant] explained to Ms. Parr that she was in violation of Article 41. Ms. Parr instructed Mr. Harrison and [appellant] to go back to work.... Mr. Harrison and [appellant] walked back towards their cases and Mr. Harrison stopped [appellant] to ask what he should do. Five or ten seconds later Ms. Parr, according to [appellant], approached them in a nasty demeanor and demanded that they return to their cases.”

The arbitrator stated:

“It appears to this [a]rbitrator that this is a case where management decided to dig in its heels and show [appellant] who was really the boss. While maybe they believe that is necessary and this [a]rbitrator has no way of knowing that, this was not the best case to pick for such purposes. Management does have the right to direct its work and [appellant] must understand that to improperly challenge management’s decisions could be taken to border on insubordination. However, I do not think that was the case here. Mr. Harrison was required to obey the orders of Ms. Parr and then file a grievance. I am certain that [William] Barnes, Administrative Vice President, would agree with that. The fact that Ms. Parr dug in her heels only five or ten seconds after the parties left her desk added to the hostile atmosphere and was unnecessary. By the same token, [appellant] needs to treat Ms. Parr with the respect of her office and job title. I believe that [appellant] has attempted to diffuse other grievable incidents when he asked management to come to him, in his capacity as Steward, before the incidents become a problem. However, he testified that management has not been cooperative. That statement

² Appellant further filed a grievance alleging that he was denied representation in an interview arising from the events of November 7, 2003; however, this grievance was denied on March 5, 2004.

was un rebutted by management. I believe that [appellant] followed his instructions, but not as quickly or quietly as management would have liked.

“For all of the foregoing, the grievance is sustained and the letter of warning shall be dismissed from [appellant’s] personnel file.”

By decision dated August 17, 2005, the Office denied modification of its September 8, 2004 decision.

LEGAL PRECEDENT

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

Administrative and personnel matters, although generally related to the employee’s employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁵ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁶ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁷

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁸ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that

³ 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁵ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 556 (1991).

⁶ See *William H. Fortner*, 49 ECAB 324 (1998).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁸ See *Michael Ewanichak*, 48 ECAB 364 (1997).

workplace harassment or unfair treatment occurred.⁹ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.¹¹

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹² If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹³

ANALYSIS

Appellant attributed his emotional condition to harassment and unwarranted disciplinary action by management. Specifically, he alleged that, after he called the union president on October 17, 2003 complaining about management's refusal to hear a grievance, he received an "onslaught of discipline as retaliation." The Board has held that actions of an employer which the employee characterized as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment or discrimination did in fact occur.¹⁴ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.¹⁵ Mr. Howard related that appellant was not singled out for discipline but instead had difficulty following instructions. He noted that other union representatives did not receive similar disciplinary action. Appellant has not submitted any evidence to establish that the disciplinary actions taken by the employing establishment were a result of harassment or discrimination.

⁹ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁰ See *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

¹⁴ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004).

¹⁵ *Id.*

Regarding appellant's allegations that the disciplinary actions taken by the employing establishment were unwarranted, the Board has held that, although the handling of disciplinary actions is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.¹⁶ An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹⁷ In this case, appellant's grievances regarding a notice of removal for failing to follow instructions on December 12, 2003, allegations of mail tampering in connection with a notice returning him to duty on November 26, 2003, the denial of union time on April 3, 2003, the denial of representation in an interview arising from the events of November 7, 2003 and the posting of a vacation chart on April 4, 2003 were denied and thus are not considered to be factors of employment. Appellant also filed a grievance regarding his placement on emergency suspension on November 8, 2003. In a decision dated January 27, 2004, an arbitrator sustained his grievance and found that "[a]ll record of [his] placement on Emergency Placement is to be removed from his personnel file" and any lost pay restored. As the arbitrator found that the employing establishment erred in its disciplinary action, appellant has established a compensable employment factor.¹⁸ Appellant also submitted an arbitrator's decision dated January 30, 2004, sustaining his grievance of a letter of warning for failing to follow instructions on October 20, 2003. The arbitrator determined that appellant needed to treat his supervisor with respect and that, while he followed instructions, it was "not as quickly or as quietly as management would have liked." He further determined that management could direct the work of its employees and that appellant's challenging of decisions of management "could be taken to border on insubordination." The arbitrator stated, however, that he did "not think that was the case here" and concluded that the letter of warning issued by the employing establishment was improper. This is not, therefore, a case involving the mere modification or rescission of a personnel action, or of the employing establishment choosing to lessen a sanction in its administrative discretion.¹⁹ Instead, the present case involves a finding by the responsible adjudicating official that a personnel action by the employing establishment in issuing the letter of warning was in error. Consequently, appellant has established a compensable factor of employment in the issuance by the employing establishment of the October 20, 2003 letter of warning.

As appellant attributed his emotional condition, in part, to errors by the employing establishment in two administrative matters, the case presents a medical question regarding whether his emotional condition is due to the compensable employment factors. The Office, therefore, must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The

¹⁶ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁷ *Id.*

¹⁸ *See Abe E. Scott*, 45 ECAB 164 (1993).

¹⁹ *See Dennis J. Balogh*, 52 ECAB 232 (2001) (finding that the mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse).

case will be remanded to the Office for this purpose.²⁰ After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 17, 2005 and September 8, 2004 are set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: January 20, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

²⁰ See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).