NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

DONNA D. PARRISH,
Petitioner

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent

2022-1170

Petition for review of an arbitrator's decision by Lawrence E. Little.

Decided: December 8, 2022

DONNA D. PARRISH, Douglasville, GA, pro se.

MARGARET JANTZEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, TARANTO and CHEN, *Circuit Judges*.

PER CURIAM.

Donna D. Parrish, Ph.D., appeals from an arbitration decision affirming her removal from federal service for unacceptable performance. Because substantial evidence supports the arbitrator's decision, we *affirm*.

BACKGROUND

In December 2015, Dr. Parrish was hired as a program specialist at the Agency for Children and Families (ACF), a component of the Department of Health and Human Services (HHS). SAppx. 2.[1] As a program specialist, Dr. Parrish's responsibilities included developing relationships with state and local social services agencies and organizations, maintaining state profiles listing relevant policy issues and contact information for state and local agencies, updating a strategic tracker related to HHS programs and initiatives, and organizing conferences with state and local agencies. *See* SAppx. 335–37; SAppx. 340–42; SAppx. 351–55; Appx. 431–32. Dr. Parrish reported to the Regional Administrator, Carlis Williams. SAppx. 14.

In late 2017 and early 2018, Ms. Williams noticed a decline in Dr. Parrish's work performance. SAppx. 17. Ms. Williams initiated several one-on-one meetings with Dr. Parrish from March to May 2018 in which she communicated her concerns to Dr. Parrish and discussed ways for Dr. Parrish to improve her performance. SAppx. 13, 17.

Dr. Parrish's performance did not improve, however, and on May 21, 2018, Ms. Williams issued Dr. Parrish a Performance Deficiency Notice (Notice). SAppx. 334–38.

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[1] "SAppx." citations herein refer to the appendix filed concurrently with Respondent's brief. "Appx." citations refer to the appendix filed concurrently with Petitioner's brief.

The Notice identified aspects of Dr. Parrish's performance that needed improvement and cited specific examples, including repeated failures to update the strategic tracker, failure to provide Ms. Williams with materials needed to attend a conference, and failure to incorporate comments and feedback from Ms. Williams in a conference presentation. SAppx. 335–36. The Notice advised Dr. Parrish that she would be placed on a Performance Improvement Plan (PIP) if her performance did not improve. SAppx. 334, 337.

On June 27, 2018, Dr. Parrish informed Ms. Williams that she was diagnosed with adjustment disorder and depressed mood. SAppx. 13. Dr. Parrish applied for and was granted a short period of leave under the Family Medical Leave Act (FMLA). SAppx. 15.

Dr. Parrish's performance again did not improve, and on August 9, 2018, Ms. Williams issued Dr. Parrish a PIP. SAppx. 339–46. The PIP identified performance deficiencies similar to those identified in the Notice, including failure to update the strategic tracker, failure to prepare and maintain state profiles, and failure to provide support for speaking engagements. SAppx. 340–42. The PIP required Dr. Parrish to meet with Ms. Williams weekly to discuss work assignments, deficiencies, and suggestions for improvement. SAppx. 345. The PIP allowed Dr. Parrish 60 days to improve her performance. SAppx 342.

On October 2, 2018, Dr. Parrish submitted several workplace accommodation requests, including three consecutive days of telework at the end of each week, teleconferencing into meetings, short breaks, and a flexible work schedule. Appx. 802. Ms. Williams immediately approved Dr. Parrish's request for three days of telework. SAppx. 348.

Dr. Parrish's performance did not improve during the period of her PIP. She failed to attend her scheduled meetings with Ms. Williams, declined to attend additional

meetings proposed by Ms. Williams, and failed to submit work assignments. SAppx. 13–15. On November 19, 2018, Ms. Williams notified Dr. Parrish that she proposed to remove Dr. Parrish from federal service for unacceptable performance. SAppx. 347–56. That same day, Dr. Parrish was escorted out of her office, and her computer and access card were confiscated. Appx. 446; Appx. 669.

Dr. Parrish sought representation by the National Treasury Employees Union (Union). SAppx. 2, 17–18. At the Union's request, the deciding official, Joyce Thomas, met with Dr. Parrish and her Union representative on December 10, 2018, to provide Dr. Parrish the opportunity to respond to the proposed removal. Appx. 420; Appx. 430; SAppx. 18. Ms. Thomas then approved Dr. Parrish's removal on January 7, 2019. SAppx. 15.

The Union invoked arbitration. Following a two-day hearing and post-hearing briefing, the arbitrator found that HHS had shown sufficient cause to remove Dr. Parrish and denied Dr. Parrish's grievance. SAppx. 25–26.

Dr. Parrish appeals that decision. We have jurisdiction pursuant to 5 U.S.C. §§ 7121(f) and 7703.

DISCUSSION

We review an arbitrator's decision under the same standard of review that is applied to decisions from the Merit Systems Protection Board. *Miskill v. Soc. Sec. Admin.*, 863 F.3d 1379, 1382 (Fed. Cir. 2017) (first citing 5 U.S.C. § 7121(f); and then citing *Johnson v. Dep't of Veterans Affs.*, 625 F.3d 1373, 1376 (Fed. Cir. 2010)). We thus affirm the decision of the arbitrator unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *Id.* (quoting 5 U.S.C. § 7703(c)(1)–(3)). We review questions of law de

novo and questions of fact for substantial evidence. *See Wrocklage v. Dep't of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McLaughlin v. Off. of Pers. Mgmt.*, 353 F.3d 1363, 1369 (Fed. Cir. 2004). The burden of proving reversible error rests on Dr. Parrish. *See Pucilowski v. Dep't of Just.*, 498 F.3d 1341, 1344 (Fed. Cir. 2007).

To remove an underperforming employee under 5 U.S.C. § 4303, an agency must: "(a) establish an approved performance appraisal system; (b) communicate the performance standards and critical elements of an employee's position to the employee; (c) warn the employee of inadequacies in 'critical elements'; and (d) offer an underperforming employee counseling and an opportunity for improvement." *Santos v. Nat'l Aeronautics & Space Admin.*, 990 F.3d 1355, 1361–62 (Fed. Cir. 2021) (citation omitted). When an agency chooses to terminate an employee after issuing a PIP, the agency must prove that the employee's performance "was unacceptable before the PIP and remained so during the PIP." *Id.* at 1363.

Here, after reciting the relevant sections of HHS's approved performance appraisal system, the arbitrator found that HHS communicated valid performance standards and critical elements to Dr. Parrish and warned Dr. Parrish that she was not meeting those standards, SAppx. 21–23; that Dr. Parrish was offered counseling and was provided a reasonable opportunity to improve, SAppx. 23–24; and that Dr. Parrish's performance was unacceptable both before and after receiving the PIP. SAppx. 24–25.

Substantial evidence supports these findings. The Notice and PIP communicated the performance standards and critical elements of Dr. Parrish's position to her, described specific examples and instances where Dr. Parrish's performance was deficient, and explained what Dr. Parrish was

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