UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL P. SULLIVAN, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER BN0752920115-I-1 DATE: JAN 0 4 1993

Cornelius J. Sullivan, Esquire, Sullivan & Walsh, Mattapan, Massachusetts, for the appellant.

Lawrence T. McDonough, Boston, Massachusetts, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant timely petitions for review of the May 21, 1992 initial decision that sustained his removal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the removal action.

BACKGROUND

The agency removed the appellant from the PS-5 position of Distribution Clerk based upon the charge of engaging in conduct violative of the agency's standards of conduct. Appeal File (AF), Tab 3, Subtabs 1, 2. The agency alleged that the appellant's conduct on October 4, 1991, toward Robert D. Porter, Supervisor of Mail Processing, violated a January 29, 1991 last-chance settlement agreement (agreement) that resolved an October 18, 1990 proposed removal action against the appellant. *Id.*, Subtab 2.

The appellant filed a timely petition for appeal with the Board. After a hearing, the administrative judge found: (1) The Board had jurisdiction over the appeal; (2) the agency supported its charge by preponderant evidence; (3) the appellant was bound by the terms of the agreement because (a) his representative signed it on his behalf and he reaped the benefits thereof, and (b) it was not "unfair" to him, as he alleged; (4) the appellant's actions on October 4, 1991, could not be excused even if, as he alleged, agency management was out to "get rid" of him; and (5) the penalty of removal was reasonable. AF, Tab 9. Therefore, the administrative judge affirmed the agency's removal action. Initial Decision (ID) at 13.

The appellant's timely petition for review, Petition for Review File (PFRF), Tab 1, asserts: (1) He should not be held to the terms of the agreement because (a) he did not sign it and it was entered into without his knowledge or consent, and

(b) management entered into it in bad faith, *id.* at 2; (2) his actions did not rise to a violation of the agreement, *id.*; (3) management engaged in a "conspiracy" to "gang up on" and "get" him and other union officials for their union activities, *id.* at 2-6; (4) the appellant may not be legally removed for his "vigorous representation" as a union steward, *id.* at 7-9; (5) he established below a prima facie showing of reprisal for his union activities but the administrative judge failed to address that claim, *id.* at 9-10; and (6) the penalty of removal is too harsh and should be mitigated.[1] *Id.* at 10-11. The agency has not responded to the petition.

ANALYSIS

The pertinent terms of the agreement.

The settlement agreement provided that a removal action that the agency had proposed on October 18, 1990, would be

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[1] Along with his petition the appellant has submitted a copy of the initial decision in this appeal. He has also submitted copies of, but no explanation for, the following documents that are not a part of the record below: (1) An undated statement purportedly signed by James G. Olsen; (2) an undated "[i]nterview" with Paul Mulgrew, purportedly signed by James G. Olsen and Paul Mulgrew; (3) an October 17, 1991 "[i]nterview" with Lillian O'Neal purportedly signed by James G. Olsen and Lillian O'Neal; and (4) an October 9, 1991 statement regarding the appellant's placement in an off-duty status, purportedly signed by Irene Lavery. PFRF, Tab 1.

The initial decision is, of course, already a part of the record. Appeal File (AF), Tab 9. As to the witnesses's purported statements, the appellant has made no showing that they constitute new and material evidence that was unavailable, despite due diligence, before the record closed below. Therefore, we have not considered them. *See* 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980).

held in abeyance for a 1-year period. AF, Tab 3, Subtab 6. It further provided, in pertinent part, as follows:

> During this abeyance period, [the appellant] agrees to conduct himself in a professional, courteous, and businesslike manner at all times. If at any time during the [abeyance] period, [he] fails to conform his behavior to Section 666 of the Employee and Relations Manual [ELM], the removal action will be re-imposed without further right of appeal through Grievance/Arbitration.... [The appellant] further agrees and understands that if he violates this agreement, a new effective date for his removal will be set immediately with no minimum notice required.

Id.

The agency's charge.

In its November 22, 199[illegible]oval proposal notice, the agency alleged that the ap[illegible]ant violated ELM 661.53, Unacceptable Conduct,[2] and ELM 666.2, Behavior and Personal Habits,[3] and thus violated the agreement by failing to conduct

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[2] According to the removal proposal notice, this provision states as follows:

> No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

ELM 661.53, AF, Tab 3, Subtab 2B.

[3] The agency stated in its removal proposal notice that this section provides as follows:

> Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation. Employees are expected to

himself in a professional, courteous, and businesslike manner during a meeting with Supervisor Porter on October 4, 1991. AF, Tab 3, Subtab 2.

On appeal to the Board, the administrative judge stated as follows with regard to the agency's charge:

> The agency removed the appellant for violation of the agency's standards of conduct and for violation of the terms of a last-chance agreement. Specifically, the agency charged that on October 4, 1991 at approximately 1:40 a.m., the appellant did not conduct himself in a professional, courteous and businesslike manner as he had promised to do in an agreement reached between him and the agency on January 29, 1991.

ID at 1-2. In her initial decision, the administrative judge considered the appellant's conduct on October 4, 1991, not only as the basis for the breach of the settlement agreement, but also as comprising the agency's charge underlying the removal action. Therefore, upon sustaining that charge, she affirmed the removal action. ID at 6-7, 13. For the reasons explained below, however, we do not concur in this analysis of the settlement agreement.

The agreement specifically provided that, on a breach of its terms by the appellant, the removal action that was proposed on October 10, 1990, would be "re-imposed."[4] AF, Tab

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> maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

ELM 666.2, AF, Tab 3, Subtab 2B.

[4] Although the agreement also provided that the previously proposed removal would be "re-imposed" without the requisite "minimum notice," the agency, by proposing the appellant's removal on November 22, 1991 and effecting it on January 18, 1992, and by affording the appellant a 10-day period in which

3, Subtab 6. Although the appellant waived his right to challenge such a re-imposed removal action "through Grievance/Arbitration," *id.*, the agreement did not state that he waived his right to appeal it to the Board. *Id.*; *see Ferby v. United States Postal Service*, 26 M.S.P.R. 451, 454-56 (1985).

According to the terms of the agreement then, it was the merits of the removal action proposed on October 18, 1990, that were properly at issue in the appellant's petition for appeal to the Board.[5] *See Brin v. United States Postal Service*, 49 M.S.P.R. 549, 550-52 (1991); *see generally Stewart v. United States Postal Service*, 926 F.2d 1146 (Fed. Cir. 1991). In its October 18, 1990 removal proposal notice, the agency had charged the appellant with violating the agency's standards of conduct on September 12, 1990, toward a Supervisor of Mails, Julia E. Butler. AF, Tab 3, Subtab 9.

Under the circumstances of this case, which are very similar to those in *Brin*, we find that the agency effected the removal it had initially proposed, rather than a separate removal based upon new charges, and that its reference in the November 22, 1991 removal proposal notice to the appellant's

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to reply to the proposal notice and the opportunity to be represented and to review the material relied upon by the agency for its action, actually accorded the appellant the statutory rights provided under 5 U.S.C. § 7513(b). *See* AF, Tab 3, Subtabs 1, 2, 6.

[5] Absent a showing of bad faith or duress, the Board has the authority to accept into the record and enforce the terms of a last-chance settlement agreement. *See Romano v. United States Postal Service*, 49 M.S.P.R. 319, 322 (1991).

conduct on October 4, 1991, constituted only a statement of its reasons for finding that he had violated the agreement; the basis for the removal remained the same as it was when the agency initially proposed to take action--i.e., the appellant's alleged conduct on September 12, 1990. *Brin*, 49 M.S.P.R. at 551-52; AF, Tab 3, Subtabs 2, 6, 9.

The agency met its burden of proof below with regard to the removal action that was proposed on October 18, 1990.

The agreement provided that the "Notice of [Proposed] Removal issued to [the appellant] on [October 18, 1990 was] for just cause." AF, Tab 3, Subtab 6. We find that, by agreeing to this provision, the appellant conceded that the agency had just cause for imposing that removal action. The appellant's stipulation suffices to sustain the agency's action. *See* 5 C.F.R. § 1201.63; *Swift v. Office of Personnel Management*, 48 M.S.P.R. 441, 445 (1991) (a stipulation is sufficient to prove the fact alleged).

Accordingly, we sustain the removal action that was proposed on October 18, 1990 and reimposed on November 22, 1991.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final

decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.