UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 245

Docket No. NY-0752-05-0252-I-1

Richard B. Martin,

Appellant,

v.

Department of Transportation,

Agency.

August 14, 2006

Harvey A. Levine, Esquire, New York, New York, for the appellant.

Brunhilda Sanders-Lane, Esquire, Jamaica, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision which sustained the agency's charges but mitigated the agency's chosen penalty from a demotion to a 30-day suspension. The appellant has filed a cross-petition for review. For the reasons set forth below, we GRANT the agency's petition, DENY the appellant's cross-petition, REVERSE the initial decision regarding the penalty, and SUSTAIN the appellant's demotion to the position of Aviation Safety Inspector Operations, FG-1825-14.

BACKGROUND

¶2 The appellant was demoted from the position of Supervisory Aviation Safety Inspector, FV-1825-K, to the position of Aviation Safety Inspector Operations, FG-1825-14, based on charges that he misused government resources, interfered with an official investigation, and made false statements during an official investigation. Initial Appeal File (IAF), Tab 1; Tab 5, Subtabs 4A-4B. As specifications of the charge of misuse of government resources, the agency claimed that the appellant "regularly conducted extended non-work-related Internet searches during business hours, most of which were for images of female celebrities," and that an analysis of the hard drive on his official government computer revealed "71 pictures of nude or partially nude men and women, some of which depict sexual acts." IAF, Tab 5, Subtab 4F at 1-2.

¶3 On appeal, the appellant contested the agency's charges, arguing, with respect to the charge of misuse of government resources, that his computer may have been accessed by other individuals and that the nude and sexually explicit images found on his hard drive may have been placed there due to "involuntary pop-ups." IAF, Tab 1 at 4; *see* IAF, Tabs 9, 15. After conducting a hearing, the administrative judge found that the agency proved by preponderant evidence both specifications of the first charge. Initial Decision (ID) at 7-32. However, the administrative judge found that the agency failed to meet its burden of proof with respect to the remaining charges. *Id.* at 32-60. In reviewing the agency's penalty determination, the administrative judge determined that, based on the testimony presented, "the deciding official conceded [that] the first charge, standing alone, warrants something less than the selected penalty." *Id.* at 67. As a result, the administrative judge mitigated the penalty of demotion to a 30-day suspension. *Id.* at 69.

¶4 The agency has filed a petition for review of the initial decision, arguing that the administrative judge erred in mitigating the penalty. Petition for Review File (PFR File), Tab 1. The agency does not contest the administrative judge's

findings that it failed to prove by preponderant evidence the remaining charges brought against the appellant. The appellant has filed a cross-petition for review, contesting the administrative judge's finding which sustained the second specification of the first charge, and arguing that the 30-day suspension imposed by the administrative judge should be further reduced to 15 days. PFR File, Tab 4.

ANALYSIS

The appellant's cross-petition for review

¶5 The appellant asserts that the administrative judge erred in sustaining Specification 2 of the first charge—that he misused government resources by possessing 71 pictures of nude or partially nude men and women, some of which depicted sexual acts, on the hard drive on his official government computer—and in not further mitigating the penalty of demotion to a 15-day suspension. PFR File, Tab 4. We note that the appellant does not contest the administrative judge's decision to sustain Specification 1 of the first charge.

¶6 We have considered the appellant's assertions and find that they constitute mere disagreement with the administrative judge's explained factual findings, credibility determinations, and legal conclusions; therefore, they do not provide a basis for Board review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Accordingly, the appellant's cross-petition for review is DENIED.

The agency's petition for review

¶7 The agency contends that the administrative judge erred in mitigating the appellant's demotion to a 30-day suspension. PFR File, Tab 1. We agree.

¶8 When not all of the charges are sustained, as in the present appeal, the Board will consider carefully whether the sustained charge merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). If fewer than all of the charges are sustained and the agency has not

indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The Board likewise may mitigate to the maximum reasonable penalty for the sustained misconduct when the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty, or when the chosen penalty exceeds the tolerable bounds of reasonableness. *Id.*; *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 135 (1997).

¶9 In the present appeal, the administrative judge mitigated the penalty because he found that the deciding official, Mr. Martin J. Ingram, conceded in his hearing testimony that "the first charge, standing alone, warrants something less than the selected penalty." ID at 67. In support of this finding, the administrative judge quoted portions of the hearing transcript in which Mr. Ingram discussed the severity of Specification 2 of the first charge and its relation to the chosen penalty. *Id.* at 66-67. On petition for review, the agency contends that the administrative judge erred in mitigating the appellant's demotion to a 30-day suspension, arguing that the chosen penalty of demotion was reasonable and supported by the nature of the sustained charge, that the deciding official clearly determined that demotion was the most appropriate penalty for the sustained charge, and that the administrative judge improperly substituted his judgment for that of the deciding official. PFR File, Tab 1 at 7-16. The appellant, in his cross-petition for review, contests the agency's arguments and, as noted above, contends that the administrative judge did not sufficiently mitigate the penalty. PFR File, Tab 4.

¶10 After reviewing the record, in particular the hearing testimony of Mr. Ingram, we find that the agency has not indicated that it desires a lesser penalty be imposed on the sustained charge. During the hearing, Mr. Ingram noted that the appellant "as an office manager . . . is responsible [for] creat[ing] a model

work environment," and that he "felt that by viewing sexually explicit materials [the appellant] did not set the example . . . [he] need[ed] to set . . . [since] from that example everything else filters down within the office and within the aviation community." Hearing Transcript (HT) at 413. The discovery of the sexually explicit photos on the hard drive of the appellant's official government computer "concerned [Mr. Ingram] a lot because [the agency has] a lot of trust in a field office manager . . . and to find something of that nature without any previous reports of it . . . was real significant." *Id.* at 394-95. According to Mr. Ingram, the appellant "violated the trust and confidence required of the management official within the [agency]." *Id.* at 414. However, despite the "egregious" nature of the charge, misconduct that "could lead to removal," Mr. Ingram "felt that removal would not be appropriate" due to the resources already invested in the appellant by the agency. *Id.* at 407, 414; *see id.* at 436-37. Ultimately, for each charge brought against the appellant, Mr. Ingram noted that the maximum penalty was removal, and he "felt that any singular one of the three could sustain the demotion penalty, which [the agency] thought was extremely fair." *Id.* at 465.

¶11 Under the circumstances presented in this appeal, we find that the agency has not indicated that it would have imposed a lesser penalty for the sustained misconduct. As discussed above, Mr. Ingram repeatedly addressed the severity of the appellant's misconduct, particularly in light of the appellant's supervisory position, and noted that demotion was reasonable for any one of the charges brought. Furthermore, although the initial decision quoted a portion of Mr. Ingram's testimony which indicated that he may have considered a lesser penalty, his quoted testimony is ambiguous at best and, moreover, speaks only to Specification 2 of the first charge. *See id.* at 467-70. The questioning from the administrative judge that elicited the responses cited in the initial decision did not take into account the appellant's misconduct which led to Specification 1 of the first charge—that the appellant spent an excessive amount of time accessing non-

work-related websites with his government computer—about which the administrative judge did not question Mr. Ingram until a later point in the hearing. *See id.* at 470-71. Finally, neither the notice of proposed demotion nor the decision to demote indicates that the agency would have selected a lesser penalty for the first charge alone. Therefore, we find that the agency has not indicated that it would have imposed a lesser penalty for the sustained misconduct.

¶12 We also note that Mr. Ingram considered all of the relevant mitigating factors in imposing the appellant's demotion. In reaching the decision to demote the appellant, Mr. Ingram considered the record evidence, the appellant's written and oral responses to the notice of proposed demotion, the range of punishment set forth in the agency's Table of Penalties, and the relevant *Douglas* factors. *See* IAF, Tab 5, Subtabs 4B-4G. He acknowledged the existence of mitigating factors in this case, including the appellant's length of service and past job performance. IAF, Tab 5, Subtabs 4B-4C. However, such mitigating factors were outweighed by, *inter alia*, the seriousness of the sustained misconduct and the appellant's past disciplinary record, particularly in light of the appellant's position as a supervisor. *See* IAF, Tab 5, Subtabs 4B-4C, 4F.

¶13 Finally, we find that the agency's decision to demote the appellant is within the tolerable bounds of reasonableness. In assessing whether the agency's chosen penalty is within the tolerable bounds of reasonableness, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. *Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 9 (2003). Agencies are entitled to hold supervisors, like the appellant, to a higher standard of conduct than non-supervisors because they occupy positions of trust and responsibility. *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff'd*, No. 05-3335 (Fed. Cir. May 4, 2006) (NP); *Brown v. U.S. Postal Service*, 64 M.S.P.R. 425, 433-34 (1994). The Board's role is not to displace the judgment of senior agency

managers who must have confidence that employees—particularly those in a supervisory role—will act appropriately at all times. *See Gebhardt*, 99 M.S.P.R. 49, ¶¶ 18, 21; *see also Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001) (the agency has primary discretion in maintaining employee discipline and efficiency; the Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised). Here, the sustained specifications evince serious misconduct, particularly for a supervisor whose duties and responsibilities include serving as "a role model for employees and . . . enforce[ing] the rules against computer misuse and access to sexually explicit materials." IAF, Tab 5, Subtab 4C at 1; *see Cobb v. Department of the Air Force*, 57 M.S.P.R. 47, 51-54 (1993) (finding the penalty of removal to be within the bounds of reasonableness for a charge of misuse of government resources arising from an appellant's personal use of a government computer). The appellant spent an excessive amount of work time using the internet for personal use, and the presence of sexually explicit material on the hard drive of his government-issued computer raises concerns about his ability to function as an effective supervisor. *See* IAF, Tab 5, Subtabs 4B, 4J, 4Q. In addition, the appellant's prior disciplinary record, which consists of a letter of admonishment for misconduct, and the agency's Table of Penalties support a finding that the chosen penalty of demotion is within the tolerable bounds of reasonableness. *See* IAF, Tab 5, Subtabs 4K, 4M.

¶14 In sum, based on a consideration of the factors outlined above, we find that the agency's decision to demote the appellant to the position of Aviation Safety Inspector Operations, FG-1825-14, a non-supervisory position, must be upheld.

ORDER

¶15 For the foregoing reasons, the initial decision is REVERSED with respect to the penalty, and the agency's demotion of the appellant to the position of

Aviation Safety Inspector Operations, FG-1825-14, is SUSTAINED. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.