

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,)
)
Petitioner,) Docket No. HQ12068310017
)
v.) Date: 05 NOV 1984
)
JEROME HOBAN,)
)
Respondent.)

FINAL DECISION AND ORDER

On June 19, 1984, Administrative Law Judge Frank W. Vanderheyden (ALJ) issued a Recommended Decision in this case, which came before the Board upon the Special Counsel's (OSC) complaint for disciplinary action pursuant to 5 U.S.C. § 1206(a) and (g). OSC charged that respondent had (1) significantly changed the duties of Vernon Mize, an employee, in reprisal for his protected disclosure of information in violation of 5 U.S.C. § 2302(b)(8); (2) violated 5 U.S.C. § 2302(b)(4) by willfully obstructing the right of Mize to compete for employment; (3) violated § 2302(b)(4) by deceiving and willfully obstructing the right of Charles Manuel to compete for employment; and (4) granted a preference for employment not authorized by law to Ronald Dreveskracht in violation of 5 U.S.C. § 2302(b)(6).1/

1/ 5 U.S.C. § 2302(b)(4), (6) and (8) provide:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

* * * *

Following a lengthy hearing and the submission of posthearing briefs, the ALJ sustained all four charges.^{2/}

On July 26, 1984, respondent filed timely exceptions to the ALJ's Recommended Decision. See 5 C.F.R. § 1201.129(b). OSC filed a response to the exceptions on September 6, 1984.

FOOTNOTE 1/ Continued.

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

* * * *

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

* * * *

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for --

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

^{2/} OSC also filed a motion for clarification of the Board's policy permitting replies to exceptions. Although the Board's regulations do not provide for replies, the Board has now directed the Office of the Clerk to notify parties that they may reply to exceptions within 20 days of receipt.

The Board has carefully considered the Recommended Decision and the record in light of the exceptions, response and the parties' post-hearing briefs. The Board hereby ADOPTS AS MODIFIED the ALJ's Recommended Decision and incorporates it into this Final Decision and Order.

I. The Factual Charges

During the relevant time frame, Jerome Hoban, respondent, was a GS-9 Chief of Police at the Veterans Administration Medical Center (VAMC), comprising Palo Alto and Menlo Park, California. He supervised 15 officers, a detective and a clerk-typist, ranging in grade from GS-4 through 7. Vernon Mize, first employed at VAMC in 1974 as a GS-4 officer, was promoted through the ranks to GS-6 supervisory police officer with the rank of Corporal by 1977. In December 1977, respondent appointed Mize to the position of "Lieutenant Hospital Police Supervisor, Day Watch Commander, and Assistant Chief, Hospital Police," making him the senior police supervisor in the section. Recommended Decision (R.D.) 2-3. In June 1978, respondent appraised Mize's performance with regard to 34 supervisory abilities and accorded Mize the highest rating in all categories.

On May 24, 1979, Mize wrote to the Inspector General of the Veterans Administration (IG) and to Congressman McCloskey expressing his concern over matters directly related to the operation of the VAMC. The letters basically sought legislation to improve the retirement benefits of VA officers, documented the rise in criminal activities at the VAMC, cited the need for

additional officers and a better grade structure for them, reported the great volume of non-police duties assigned, and reported that officers were only given a can of mace for self-defense. Mize informed respondent of his intent to send these letters. When the letters were received by the addressees, inquiries were made to the VAMC, and the displeasure of those in charge was made quite evident to Mize. R.D. 4-7.

In July or August, 1979, pursuant to a contact made by a reporter, Mize and others at the VAMC supplied information concerning their perceptions of improper management. These officers talked to the reporter only after receiving clearance from the VAMC management. Subsequently, a series of news articles appeared. Shortly thereafter, Mize was sent to Menlo Park to supervise 1-2 officers; he previously supervised approximately 15 officers. He was also relieved of his responsibility of compiling statistical reports, denied access to files, and assigned to parking enforcement for 3 weeks, i.e., writing tickets for illegally parked vehicles. He was also assigned to the graveyard shift; since his appointment in 1977 to senior police officer, Mize had worked the day watch. The title of "Lieutenant" was also revoked. Again, in 1980, Mize wrote to Congressman McCloskey complaining of improper procedures at the VAMC. R.D. 10-12.

In November 1980 a new position of detective was created at the VAMC. Mize wished to be considered for the position. On November 25, 1982, respondent rated Mize, giving him a lowered

performance evaluation even though, prior to Mize's letters and the newspaper articles, respondent had not noticed any deterioration in Mize's performance. R.D. 13-16.

The detective's position was formally announced on November 20, 1980. On November 4, the day the position was approved, a performance appraisal for Ronald Dreveskracht, a GS-5 officer at a VAMC in San Francisco, was prepared and sent directly to respondent via a laundry truck which traveled between the VA facilities. An undated Form 171 for Dreveskracht accompanied the evaluation. However, this original appraisal form was not the one utilized to rate Dreveskracht's performance for competition for the detective's position. A second perfect appraisal, unsigned and unseen by Dreveskracht, was used to rate him as highly qualified though he was not one of the five highest ranking candidates. R.D. 16-17; 21-24.

Charles Manuel, an officer at VAMC Allen Park, Michigan, also applied for the detective's position and was among the five highest ranking candidates. When respondent called to interview Manuel sometime during December,^{3/} he spoke with Manuel's supervisor regarding Manuel's abilities. Manuel was off duty that day, but returned respondent's call upon returning to work. Respondent and Manuel spoke and, at the conclusion of the

^{3/} While there was much conflict regarding the facts surrounding the treatment of Manuel, the ALJ made specific credibility findings and determined that these events transpired.

conversation, respondent told Manuel that he would be in touch with him. Respondent reported to the personnel specialist that Manuel had not been interviewed because he did not return his telephone calls. Respondent stated that he spoke with Manuel only after he had made his final selection for the position. R.D. 17-21.

II. Analysis

Respondent submitted lengthy, narrative exceptions which, for the most part, focus on the ALJ's evaluation of the evidence, but are couched in conclusory terms. In most of these exceptions, respondent simply disagrees with the ALJ's findings and reiterates the arguments submitted in his post-hearing brief, without any references to the record to support his contentions. Those exceptions wherein respondent cites the record to support his allegations of error are addressed below. The Board finds that the remaining exceptions were adequately resolved by the ALJ and, accordingly, these exceptions are rejected for the reasons given by the ALJ.

With regard to respondent's exceptions to the ALJ's credibility determinations concerning testimony and documentary evidence, the Board finds no error.^{4/} In the Recommended Decision, the ALJ thoroughly discussed his consideration of the witnesses' demeanor and the substance of their testimony in determining their veracity. He also reviewed the documentary

^{4/} Respondent excepted to the credibility determinations made by the ALJ on pages 9, 18-21 and 29 of the Recommended Decision.

evidence, comparing it with the testimony, to ascertain the inherent truthfulness of that evidence. Respondent's exceptions to the ALJ's credibility findings failed to show that they are not entitled to deference. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

The remainder of respondent's exceptions which cited record references can be grouped generally into several categories by topic: the change in Mize's duties, Mize's reasonable belief in his disclosed statements, and respondent's appraisal of Mize.

As to the change in Mize's duties, respondent takes exception to a perceived implication that Mize, a supervisory police officer, received a promotion when respondent appointed him to "Lieutenant-Hospital Police Supervisor, Day Watch Commander, and Assistant Chief, Hospital Police."^{5/} He also takes exception to the finding that, as the result of 1979 letters from Mize to his Congressman and the IG and a series of newspaper articles to which Mize and others had contributed information, Mize was sent to Menlo Park, a small facility, as a supervisor and was assigned to parking enforcement.^{6/} These exceptions relate to the charges in Count I that respondent unlawfully changed Mize's duties in reprisal for protected disclosures.

^{5/} Respondent's Exceptions at 6, objecting to Recommended Decision at 3.

^{6/} Respondent's Exceptions at 10, objecting to Recommended Decision at 10.

The ALJ did not find or imply that Mize was promoted when he was given his new position and titles; to the contrary, he carefully stated that Mize did not receive any increase in grade. R.D. 3. The ALJ merely recounted the increase in Mize's duties as evidenced both by testimony and documentary evidence. Further, the ALJ found from the "concatenation of the evidence," not simply from the two changes which respondent cites, that the duty changes which Mize suffered were significant and "abrupt and swift," following the appearance of the newspaper articles, and thus were the result of protected disclosures. R.D. 10-12; 28-29. The Board finds no error.

Respondent also excepts to the finding of fact and conclusion of law that Mize's statements in the 1979 letters to his Congressman and the IG, and his responses to questions by a reporter were protected.^{7/} The exceptions state that "while many of the allegations he [Mize] made contained some technical element of truth, they were purposefully presented in an entirely misleading manner" with "the intent to create an implication of lax law enforcement," Exceptions at 8, and object to the conclusion that Mize was a protected whistleblower, Exceptions at 20.

The ALJ reviewed and made his findings upon all the evidence, not simply this cited disclosure which dealt with alleged lax law enforcement. Moreover, in addressing the

^{7/} Respondent's Exceptions at 8, objecting to the Recommended Decision at 9, and Respondent's Exceptions at 20, objecting to the Recommended Decision at 26.

"whistleblower" protection set forth in 5 U.S.C. § 2302(b)(8), the Board has held that the employee need not prove that the condition reported establishes mismanagement, but "he must only show the reported condition was one which he reasonably believed to constitute one of the situations specified." Ramos v. Federal Aviation Administration, 4 MSPB 446, 448 (1980). The whistleblower's evidence must show that "a reasonable person in the employee's position would believe" that the matter reported was prohibited by § 2302(b)(8).8/ The Board finds no error.9/

Respondent objects to the finding of fact and conclusion of law that respondent acted improperly in his 1980 appraisal of Mize, which relates to the charge in Count II that respondent unlawfully interfered with Mize's right to compete for promotion.10/ Also related to Mize's appraisal is respondent's exception to the ALJ's characterization of the testimony of Mr. Smith, a personnel specialist.11/

8/ Even one of respondent's witnesses admitted that Mize could have reasonably believed that criminal laws should be enforced against VA patients. Tr. 1280.

9/ While respondent states that, with regard to disclosures to congressmen and the media, "many of the allegations he [Mize] made contained some technical element of truth," Exceptions at 8, he also posits that "most, if not all, of the allegations made by Mize and those attributed to him in the newspapers were completely erroneous." Exceptions at 23. These two statements are in direct opposition; such inconsistency bolsters the ALJ's findings and credibility determinations.

10/ Respondent's Exceptions at 14, objecting to the Recommended Decision at 15, and Respondent's Exceptions at 23, objecting to the Recommended Decision at 30.

11/ Respondent's Exceptions at 16, objecting to the Recommended Decision at 17.

Again, the ALJ considered the evidence as a whole, including the statements made by respondent in Mize's exit interview and respondent's admission that he considered Mize's disclosures in the appraisal. All the evidence taken together led to the conclusion that respondent downgraded Mize to inhibit his chances to compete for promotion to a detective's position. Further, the ALJ did not "infer that Alan Smith was merely speculating" in his testimony. Respondent's exception is weakly based upon semantics. The Board finds no error.

Relating to the charge in Count IV that respondent granted unlawful advantage to Ronald Dreveskracht, respondent excepts to the alleged implication of a "conspiracy between Chiefs Hoban and Hanson to appoint Ronald Dreveskracht to the GS-7 position of detective."12/ The ALJ did not hint that there was any conspiracy between the two police chiefs, but rather summarized the record evidence. The Board finds no error.

Respondent excepts to one additional finding of the ALJ which the Board sustains. With regard to Mize's change in duties, the ALJ found that respondent "made and carried out the decision to reduce the grade of Mize." R.D. 11. This is not correct. However, as the ALJ had correctly stated previously at R.D. 3 that Mize had received no increase in grade when he

12/ Respondent's Exceptions at 15, objecting to the Recommended Decision at 16.

assumed his new title of Lieutenant and Assistant Chief, this misstatement is not harmful error and does not alter the final outcome in this case. See Karapinka v. Department of Energy, 6 MSPB 114 (1981).

III. The Penalty

Pursuant to 5 U.S.C. § 1207(b), the Board has authority to impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1000. In the past, the Board has not had the opportunity to consider the criteria to be used in the selection of a penalty in a Special Counsel disciplinary action. However, we have considered a similar issue in the context of employee appeals from agency adverse actions. See, e.g., Douglas v. Veterans Administration, 5 MSPB 313 (1981).

In Douglas and its progeny, we have held that penalties should be selected only after a "responsible balancing of the relevant factors in the individual case." Douglas, 5 MSPB at 322. Which factors are relevant in an individual case, of course, may vary. Such factors generally include, but are not limited to, the nature and seriousness of the offense; the employee's job level; past disciplinary record; past work record; length of service; potential for rehabilitation; mitigating factors; and the adequacy of alternative sanctions to deter similar conduct in the future. Id. In our view, the method

for selecting penalties in adverse action cases is a rational scheme for ensuring that the penalty matches the character of the offense and, for that reason, we adopt it in disciplinary cases brought by the Special Counsel.

We find that ALJ Vanderheyden properly analyzed the relevant factors and recommended the appropriate penalty, a reduction-in-grade. There is no dispute over the seriousness of the offenses. And, as the ALJ stated,

[h]is [respondent's] job level, that of police chief, has a certain degree of prominence, particularly within the VAMC, and brings him in frequent contact with the public. Respondent is in a supervisory capacity, and without fair and equal treatment to his staff and applicants alike the morale of the employees is reduced. The ability of respondent to continue to perform as a supervisor of others has been damaged by his unlawful conduct, and attendant notoriety.

R.D. 35. Given these circumstances, a substantial penalty is required to deter similar conduct in the future. And, because it was the supervisory function which respondent abused, the penalty of reduction in grade to a non-supervisory position of GS-5 police officer is appropriate.

IV. Conclusion

Accordingly, the Board AFFIRMS the findings of fact and conclusions of law of Judge Vanderheyden, and ADOPTS AS MODIFIED, and incorporates herein, his Recommended Decision as the final decision of the Board.

This is the final decision of the Board. The Veterans Administration is ORDERED to reduce Jerome Hoban from his

position of GS-9 Chief of Police to GS-5, Step 1, Police Officer. VA shall file a report of compliance with this decision with the Special Counsel within 30 days of the date of this Order. Respondent may obtain judicial review of this Order in an appropriate United States Court of Appeals. See 5 U.S.C. § 1207(c).

FOR THE BOARD:

A handwritten signature in black ink, reading "Stephen E. Manrose", is written over a horizontal line.

Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.

