UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARBARA WRIGHT, Appellant, v. FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, Agency.	DOCKET NUMBER BN07528610058-1 DATE: APR 13 1989

William J. Lafferty, Esquire, Boston, Massachusetts, for the appellant.

Keith May, Burlington, Massachusetts, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Vice Chairman Johnson concurs in the result.

OPINION AND ORDER

This case is before the Board pursuant to the agency's and appellant's petitions for review of the initial decision issued on December 1, 1986, reversing the agency's action removing appellant from her position. For the reasons set forth below, the Board GRANTS both petitions, REVERSES the initial decision, and SUSTAINS appellant's removal.

BACKGROUND

Appellant appealed to the Board's Boston Regional Office from the agency's action removing her from her position as an Air Traffic Control Specialist, GS-11, for failure to satisfactorily complete upgrade training required for progression to full performance level. The administrative judge duly convened the hearing appellant requested. After the agency presented the testimony of the deciding official, appellant moved for summary judgment, claiming that the agency had failed to present a prima facie case supporting the appropriateness of the penalty. The administrative judge granted the motion and issued an initial decision reversing the agency's action. On petition for review, the Board found that the administrative judge had erred in granting appellant's motion for summary judgment prior to the conclusion of the agency's case-in-chief. *See Wright v. Federal Aviation Administration*, 31 M.S.P.R. 473 (1986). The initial decision was vacated and the case remanded to the Boston Regional Office for a full adjudication of the merits as well as a resolution of the penalty issue. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

On remand, the administrative judge considered appellant's allegation that her failure to progress to full performance level resulted from ineffective training. He found that by not affording appellant proper training, the

agency had violated the merit principle set forth at 5 U.S.C. § 2301(b)(7) which states that employees should be provided effective training where such training would result in better organizational and individual performance. The administrative judge concluded that based on 5 U.S.C. § 2302(b)(11), the agency had committed a prohibited personnel practice by taking an action which violated a merit system principle. Accordingly, he reversed the action.

ANALYSIS

In its petition for review, the agency contends that certain of the administrative judge's factual findings and conclusions are not supported by the record. We agree.

The administrative judge should have found that the charges against appellant were sustained.

The administrative judge failed to make a specific finding as to whether the charges against appellant were sustained by preponderant evidence, but instead found that the agency had committed a prohibited personnel practice requiring reversal of the action. Proper disposition of the case requires that a decision be reached on the merits of the case prior to consideration of appellant's affirmative defenses. *See* 5 C.F.R. § 1201.56(a)(ii); *Gadsden v. Department of the Air Force*, 27 M.S.P.R. 74, 75-76 (1985); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

Although the administrative judge failed to make the ultimate determination of whether the agency had proven its charge by preponderant evidence, he did find that appellant failed Phase XI, Radar Control Training,[1] and that she did not dispute the fact of her failure. *See* Remand Initial Decision (R.I.D.) at 4. The administrative judge should have found the charges sustained by preponderant evidence based on the following: (1) The agency charged appellant with failing to complete her training, specifically, Phase XI; (2) her training records reflect such failure, *see* Agency File, Tab 7; and (3) appellant admitted that she received a failing grade for this portion of her training.

Each subpart of the training issue must be addressed separately.

The basis for the administrative judge's reversal of this action was his finding that appellant received ineffective training at Phase VIII, the associate radar course, and that despite having passed Phase VIII, her training deficiencies at that level were directly related to her performance deficiencies identified at Phase XI. However, in finding that appellant received inadequate training, the administrative judge improperly melded two

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[1] The notice of proposed removal advised appellant that despite the maximum amount of training allowed in Phase XI, she still demonstrated deficiencies in separation, coordination and communication, traffic management and control judgment, and operation methods and procedures. *See* Agency File, Tab 2.

separate issues, namely, whether appellant received the training due her under the Instructional Program Guide (IPG), and whether, overall, the training she received was effective, as required by 5 U.S.C. § 2301(b)(7). Proper disposition of appellant's allegation that she received inadequate training requires analysis of both issues. *See Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 42-45 (1987) (failure to provide training through a performance improvement period prior to taking a Chapter 75 action is not a prohibited personnel action under 5 U.S.C. § 2302(b)(11), but is relevant to a consideration of the propriety of the penalty), *aff'd*, 836 F.2d 1097 (Fed. Cir. 1987) (Table).

Appellant did not establish a basis for her failure of Phase XI training.

The administrative judge found that appellant did not receive the training required by the IPG, relying almost exclusively on the testimony of Mr. Nocosia-Russin, a former classmate and developmental controller who, like appellant, passed Phase VIII but failed Phase XI. Mr. Nocosia-Russin testified that the IPG manual then in effect required, for Phase VIII training, eight formal problems[2] of the radar

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[2] Mr. Nocosia-Russin testified at first that twelve problems were required, but on cross-examination stated that the correct number of problems required by the IPG was eight. *See* hearing testimony of Ralph Nocosia-Russin, at Tape 8.

associate variety.[3] *See* hearing testimony of Ralph Nocosia-Russin, at Tape 8. Mr. Nocosia-Russin testified that he could not recall receiving even one such problem with the required accompanying critical evaluation. *Id.* Appellant generally concurred with Mr. Nocosia-Russin's description of the training they received at Phase VIII. *Id.* at Tape 9. In response to this contention, the agency provided the testimonies of Mr. Charles Peahl, Assistant Manager for Training, and Mr. James Lucas, Manager, Air Traffic Division. Both men testified generally that appellant, in fact, received all the training that was then required. *Id.* at Tapes 2 and 4.

We find, as did the administrative judge, that such generalizations do not refute Mr. Nocosia-Russin's specific testimony as to the requirements of the IPG[4] and the agency's failure to comply with them. In so finding, we accept the administrative judge's conclusion that Mr. Nocosia-Russin was a credible and articulate witness who described his training candidly and in great detail. *See* Initial Decision (I.D.) at 7; *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (Board must necessarily give due deference to the credibility findings of the administrative judge).

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[3] Phase VIII also required a larger number of problems in non-radar control, but appellant does not dispute that she received these problems.

[4] The IPG itself was not made a part of the record.

Finding that appellant did not receive all the training due her under the IPG with respect to Phase VIII, however, does not establish that the agency's action should be reversed without a further finding that the training appellant missed at Phase VIII caused her to fail Phase XI. We do not find that appellant has established such a link. The fact that Phase VIII included radar, as well as non-radar, functions, and that Phase XI was known as Radar Control Training, is insufficient to show that, had appellant received all eight problems in Phase VIII, she would have passed Phase XI. The agency's testimonial and documentary evidence suggests that such a conclusion cannot be drawn, and that Phase VIII was not intended to prepare developmentals for Phase XI, but for Phases IX and X, both of which appellant passed. *See* Agency File, Tab 7E, hearing testimony of Charles Peahl, at Tape 5. Even Mr. Nocosia-Russin, the employee who went through the same training as appellant, testified only that, had he been more proficient at Phase VIII, he "theoretically" could have passed Phase XI. *See* hearing testimony of Ralph Nocosia-Russin, at Tape 8. We do not find that appellant has established that her failure to receive all the Phase VIII training due her under the IPG caused her to fail Phase XI.

Implicit in the analysis of an alleged § 2301(b)(7) violation is the recognition that agencies have a paramount interest in setting goals and allocating funds accordingly.

The other training issue which needs to be addressed is whether the training appellant actually received was violative of the merit principle set forth at 5 U.S.C. § 2301(b)(7), which states that employees should be provided effective training where such training would result in better organizational and individual performance. Because the Board has not previously done so, we take this opportunity to set forth an analytical framework for determining whether an agency has violated this merit principle.

A literal reading of § 2301(b)(7) suggests that "effective training" is designed to advance two interests: the overall performance of the organization and the employee's individual performance.[5] While an agency's training program should ideally promote both interests to the maximum extent, it would be a rare case in which an employee could not show that additional or different training might have led to some improvement in her performance, even though at a prohibitive cost to the

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[5] While we recognize that appellant in this case encumbered a designated developmental position, the dual purposes to be served by training, generally, are reflected as well in the statutory provisions, regulations, and implementing Federal Personnel Manual provisions relating to the establishment of training programs in the Federal service. *See* 5 U.S.C. § 4103(a); 5 C.F.R. § 410.301(a)-(c); Federal Personnel Manual Chapter 410, Subchapters 1-5a and 3-1b(2).

agency, considering the benefit derived. To allow employees to determine the extent and nature of the training to which they are entitled would ignore the paramount interest of agencies in setting goals and priorities and in allocating funds accordingly. Yet this is essentially what the administrative judge did in this case by reversing appellant's removal based on his finding that the agency failed to provide her with training that "would have helped [her] to improve her performance." *See* I.D. at 13. In so doing, he failed to consider whether providing appellant with such training would have also served the agency's interest in promoting better organizational performance.

We hold that, in order to establish a § 2301(b)(7) violation, an employee must show that she did not receive at least the minimum training reasonably calculated to give her the skills and knowledge required to do the job; that additional or different training would have provided those skills; and that such training could have been provided in a cost-effective manner in light of the agency's mission and its need to apportion limited resources among its numerous programs and objectives. Agencies must have the freedom to establish their priorities within the confines of budgetary restrictions, and the Board must give maximum deference to such managerial decisions. Thus, the Board will find a violation of § 2301(b)(7) only when an appellant can show that, with respect to her training, the agency's action amounted to an abuse of discretion.

Appellant did not establish a § 2301(b)(7) violation.

Appellant first suggested that, had she received the revised Phase VIII training, she could have passed Phase XI. This contention is based on the undisputed fact that, after appellant completed Phase VIII, it was revised to provide a greater emphasis on the radar portion of that phase of training. The record reflects that appellant, along with approximately 12,000 others, received training under the accelerated program that was designed to accommodate the heavy influx of trainees hired after the air traffic controllers' strike of 1981, see Agency File, Tab 7E, and that the current training was developed in 1984, well after appellant had completed the program. See hearing testimony of Charles Peahl, at Tape 3. Both Mr. Peahl and Francis Bujak, one of appellant's instructors, testified that the revised training reflected a change in emphasis from manual control to radar control, see Tapes 4-6, but neither witness suggested that appellant's training was inferior or that it left her ill-prepared for the remaining phases of her training. Accordingly, we reject appellant's invitation to infer that her training was ineffective because it was subsequently revised. See *Benton v. Department of Labor*, 25 M.S.P.R. 430, 435 (1982) (appellant's contention that there was a strong inference that her performance standards were unworkable and arbitrary because they were subsequently replaced was found to be without merit). Assuming arguendo

that appellant might have profited under the revised Phase VIII training, we find that it would pose too great a burden on the agency to offer that training to all employees previously trained under the requirements which then existed. Moreover, absent any evidence that failures like appellant's were common and resulted from poor Phase VIII training, the fact that 12,000 employees were trained under the same plan would create an inference that it properly prepared developmentals for the remaining phases of their training.[6]

Appellant also contends that her training was ineffective because during Phases IX and X (phases she passed), she worked under three temporary supervisors, and was therefore hampered by a lack of continuity in supervision. Mr. William Yuknewicz, appellant's lead instructor, testified that temporary supervision was common, and that temporary supervisors often made the best instructors because their experience was generally the most recent. *See* Tape 6. Moreover, Mr. Peahl testified that the three individuals responsible for appellant's training were experienced air traffic controllers and experienced instructors. *See* Tape 4. We find, therefore, that appellant's training was not rendered ineffective by virtue of the fact that, for a portion of the time, she had temporary supervision. An agency's budget need not be

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[6] The record fails to indicate that appellant attempted to secure such contrary evidence through the Board's discovery procedures.

unduly strained by guaranteeing that all training will be provided with a continuity of supervision, and that where it is impossible to so provide, the training will be repeated.

Similarly, appellant argues that she did not receive the assistance offered other developmentals that "could have" made the difference between success and failure in Phase XI. *See* R.I.D. at [illegible]. While appellant offered testimony which arguably showed that other developmentals received additional problems or practice time, this testimony was rebutted by the testimony of agency witnesses.[7] Assuming arguendo that appellant established that she did not receive the exact number of additional problems or the identical amount of practice time as other developmentals, we find that it would pose an undue hardship on the agency to assure such precise equality in each phase of training, considering the agency's overall mission of training the nation's civilian air traffic controllers.

We conclude, therefore, that appellant has not established that the training afforded her was ineffective and violative of 5 U.S.C. § 2301(b)(7). She failed to show that the agency abused its discretion and that, overall, she did not receive at least the minimum training reasonably calculated to give her the skills and knowledge required to do the job; that additional or different training would have

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[7] Although we accept the administrative judge's finding that Mr. Yuknewicz' testimony on this point was less than credible, the administrative judge failed to mention the testimony of another agency witness who testified in accord with Mr. Yuknewicz. See testimony of Mr. Peahl at Tape 4.

provided those skills; and that such training could have been provided in a cost-effective manner in light of the agency's mission and its need to apportion limited resources among its numerous programs and objectives. *See Billings v. Department of Transportation,* 36 M.S.P.R. 421, 424 (1988), *aff'd,* 861 F.2d 728 (Fed. Cir. 1988) (Table) (the agency's developmental program that the employee failed was, by its very nature, a continuous opportunity to improve period). *See also Woodby v. Department of Justice,* 11 M.S.P.R. 593, 596 (1982). In view of our finding that appellant has failed to establish that her training violated 5 U.S.C. § 2301(b)(7), we need not address her further contention that, in effectuating her training, the agency committed a prohibited personnel practice.

The penalty of removal was reasonable.

In her cross petition for review, appellant contends that the agency did not meet its burden of showing that the penalty of removal was reasonable. Assuming, without deciding, that the Board should consider mitigating penalties even though the employee was in an "up or out" program, *but cf. Gaudette v. Department of Transportation,* 832 F.2d 1256, 1257 (Fed. Cir. 1987); *Griffin v. Defense Mapping Agency,* No. 86-520, slip op. at 4-5 (Fed. Cir. Jan. 11, 1989), we conclude that the penalty selected in this case was reasonable. The record reflects that the agency effected this action pursuant to its

Employment Program for Developmental Air Traffic Control Specialists, Order 3330.30C. *See* Remand File, Tab 6.

Specifically, that order provides that when an employee fails training, the only alternative to removal is, under certain limited circumstances, one position change, i.e., a reassignment or demotion to a less complex facility. This exception to separation is permitted for developmentals who do not progress to the full performance level, but who have successfully completed enough of the training program to demonstrate that it would be beneficial for the agency to retain them in the program. All such position changes are contingent upon available vacancies, recommendation of the employee by the manager of the losing facility, indication of acceptance by the manager of the receiving facility, and voluntary acceptance by the employee. *Id.* Therefore, in keeping with the unique nature of the agency's mission, penalties less severe than removal are not involuntarily imposed. *See Gaudette v. Department of Transportation, Federal Aviation Administration*, 32 M.S.P.R. 375, 379 (1987), *aff'd*, 832 F.2d 1256 (Fed. Cir. 1987). In the instant case, the agency offered appellant two positions at lower level facilities, both of which she declined. *See* Agency File, Tabs 7B and 7C. We find, therefore, that the agency did meet its burden of showing that removal was, in this case, a reasonable penalty.

Appellant did not establish harmful error.

Finally, appellant argues, in her cross petition for review, that the agency committed harmful procedural error by misleading her into believing that it was taking a Chapter 43 action against her, instead of a Chapter 75 action. This argument, raised before the administrative judge, was adequately addressed in the remand initial decision, and we concur in those findings. Appellant's argument that, had she known that the agency was processing a Chapter 75 action, she would have made a plea for mitigation is further weakened by our finding above that the agency complied fully with Order 3330.30C. Accordingly, we find no error.

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.