

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS E. DODSON, Appellant,)	DOCKET NUMBER
)	CH07528610720
v.)	
DEPARTMENT OF THE ARMY, Agency.)	DATE: <u>DEC 7 1987</u>

Peter B. Brcida, Esquire, Passman and Broida,
Washington, D.C., for the appellant.

Marina D. Yokas-Reese, Esquire, Rock Island, Illinois,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board upon appellant's petition for review of the initial decision issued on January 16, 1987. For the reasons stated below, the Board GRANTS the petition for review and AFFIRMS the initial decision as MODIFIED by this Opinion and Order. See 5 C.F.R. § 1201.115. Appellant's removal is SUSTAINED.

BACKGROUND

The agency removed appellant from his position as Quality Assurance Specialist (Ammunition)¹ because of his disqualification from its Personnel Reliability Program (PRP). Appellant's disqualification from the PRP was based on the following reasons: (a) A history of negligence and delinquency in the performance of his duties, including five instances of "failure to repair to duty" (report timely; while serving in the Air Force, for which he was punished under Article 15 of the Uniform Code of Military Justice, failing to maintain proper control of keys to ammunition storage areas, and a proposed three-day suspension for five other incidents for which he ultimately was counselled; (b) a history of financial irresponsibility, including eight past-due debt accounts; (c) his mental condition, which was diagnosed as an adjustment disorder with work inhibition, mixed personality, narcissism, and paranoia, and which allegedly made him prone to impulsive and ill-considered acts, and resulted in his being denied a security clearance.

Appellant sought agency review of the proposal to disqualify him from the PRP. He challenged the Article 15 punishment, stating that he was suffering from narcolepsy at the time and was on prescribed medication that caused him to oversleep but that the problem was solved when his physician prescribed him a suitable dosage. Concerning the incidents

¹ In this position, appellant was being trained in the transportation and handling of ammunition, including nuclear ammunition.

relating to the proposed three-day suspension, appellant did not deny that they occurred, but asserted that the agency would not have known about them if he had not voluntarily reported them as required by agency regulations. He also alleged that they were within acceptable limits. With respect to his debt delinquency, appellant denied that he incurred one of the debts listed, and attributed some of the debts to his loss of a job, his wife's surgery, her indebtedness, and her loss of a job. As to his mental condition, he alleged that he was emotionally upset because of his wife's request for a divorce and her alleged affair with one of his co-interns in the PRP program. He stated he therefore sought psychiatric help. Nevertheless, the agency disqualified appellant from the program.

Appellant appealed to the Chicago Regional Office alleging, inter alia, that he had committed no offense warranting removal. The administrative judge considered the merits of the charges upon which appellant's disqualification from the PRP was based and found only reasons (a) and (c) sustained. He found that, taken collectively, the incidents under reason (a) suggested a pattern of unreliability and were sufficient to support a finding of disqualification under agency regulation AR 50-5, chap. 3, § 12(a)(3), relating to negligence and delinquency in the performance of duty. With respect to reason (c), the administrative judge noted that each of the three mental health reports submitted suggested that appellant might be

unable to respond appropriately under pressure or when rushed. Thus, he found that appellant was disqualified under AR 50-5, chap. 3, § 12(a)(5), in that he had a mental condition, documented by competent medical authority, that could impair his judgment or reliability in the performance of his duties in a nuclear position. As to reason (b), the administrative judge found no basis under AR 50-5, chapter 3, for appellant's disqualification for financial irresponsibility and found that reason not sustained. He stated that he had considered the mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), and found none that would warrant mitigation. He therefore sustained the removal.

In his petition for review, appellant contends that the administrative judge failed to analyze the Article 15 punishment under the PRP criteria; he reargues the merits of reason (c) in relation to his mental health; and he contends that the administrative judge did not fully consider the *Douglas* mitigating factors.

ANALYSIS

Appellant contends that Article 15 provides that the agency may consider nonjudicial punishment only if there was an indication that the employee exhibited a contemptuous attitude toward the law or other authority. He argues that there was only a showing of his illness and tardiness. He also alleges that the Article 15 punishment was motivated by his supervisor's personal animus against him. Even assuming

that these allegations are true, the remaining specification under reason (a), i.e., appellant's failure to properly maintain control of the keys to the ammunition storage areas, despite counselling for five other incidents based on poor judgment and errors, would be sufficient to support a finding of disqualification, since negligence or delinquency in the performance of duty is a disqualifying factor under AR 50-5, chap. 3, § 12(a)(3).² See Appeal File, Tab 19. Thus, even if appellant has shown error here by the administrative judge, he has failed to show that any such error is reversible. See *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

Appellant alleges that questions regarding his mental health arose after he encountered the PRP co-intern, with whom he alleged his wife was having an affair, at his home. He alleges that, during the incident, he slapped his wife after she slapped him. He states that he reported the incident to the agency and sought counselling. While the incident in itself might not have been a sufficient basis for disqualifying appellant from the program, the mental health reports did indicate, as noted by the administrative judge, that appellant had some psychological problems that

² We note that appellant has not challenged the administrative judge's finding that reason (a) was sustained, as that finding relates to this incident.

could affect his reliability in the performance of his nuclear duties. A report from Dr. Marcus B. Emmons, a psychiatrist, stated that there was "a good possibility that under stress [appellant] would commit impulsive and ill-considered acts." See Agency Exhibit 1, Appeal File, Tab 19. A report by Barbara J. Rapp, a psychologist, states that, when under stress, an individual with appellant's psychological profile "may be self-centered, impulsive and won't think of the consequences of his behavior." See Agency Exhibit 4, *id.* Further, a report submitted on appellant's behalf by Virginia Hoover, a psychologist, indicates that "there may be problems with authority figures if [appellant] is not able to move at his own speed, and is not [sic] rushed." See Appellant's Exhibit 5, *id.*

Under AR 50-5, chap. 3, § 12(a)(5), a disqualifying factor for the PRP is "[a]ny significant physical or mental condition that may impair judgment or reliability as substantiated by competent medical authority, character trait, or aberrant behavior that in the judgment of the commander affects reliable performance of the duties of a nuclear duty position." This regulation gives considerable discretion to the commander to determine whether a person is disqualified under this factor. Based on the medical reports submitted, appellant has shown no abuse of that discretion here.

Appellant contends that, in determining whether mitigation was warranted, the administrative judge should

have specifically considered malice relating to the Article 15 punishment, provocation relating to the incident with his wife and the co-intern, the nature and seriousness of appellant's past offenses, appellant's work record, and appellant's rehabilitation. The fact that the administrative judge did not specifically address each of these factors does not show that he did not consider them. Nevertheless, we will address them on review.

As we have previously found, even if appellant showed malice in regard to the Article 15 punishment, the incident relating to his failure to maintain proper control of the keys was sufficient to find reason (a) sustained. This incident occurred on July 20, 1983, shortly after appellant was counselled for five negligent acts, one of which occurred on June 3, 1983.³ See Agency File, Tab 3.

With respect to the incident involving his wife, even if appellant had adequate provocation, that incident did not, in itself, disqualify appellant. Rather, appellant was disqualified under AR 50-5 chap. 3, § 12(a)(5), based on the psychological profiles.

As to his past offenses, appellant received punishment or counselling for numerous safety infractions in the performance of his duties. While the incidents giving rise to the Article 15 punishment occurred as early as 1971, while appellant was serving in the Air Force, appellant was

³ The June 3, 1983, incident was based on appellant's failure to comply with written instructions regarding the storage of grenades. See Agency File, Tab 3.

charged with six other safety infractions between 1981 and 1983, while he was employed by the agency that is a party to this appeal. Thus, appellant has had a recent history of negligent conduct that reflects unfavorably on his reliability and, accordingly, on his overall performance.

Further, appellant has not shown that he has been rehabilitated. While none of the negligence-based incidents on which the agency relies occurred between 1983 and 1986, that time period is insufficient to show rehabilitation in light of appellant's long history of negligent conduct. Additionally, this conduct, coupled with the psychiatric and psychological reports, establishes by preponderant evidence that appellant was properly found disqualified under the agency's regulations for the PRP. Appellant's disqualification from participation in the PRP was a proper basis for his removal.

Moreover, even if the factors described above supported mitigation of the penalty, we would find that mitigation would be inappropriate in this case. The chief of the agency's Ammunitions School, who was also the proposing official in this case, testified that appellant could not remain in his present position because of his disqualification, and that the agency's efforts to place him in another position were unsuccessful. See Hearing Transcript at 84, 79, 81. See also Memorandum For Record from Richard Paradis (Sept. 30, 1986) at Agency File, Tab 7.

While appellant cites AR 50-5, chap. 3, § 19(b), which provides for restricting individuals impaired by prescribed medication or short-term stress from nuclear duties, such a restriction is inapplicable here. Appellant's alleged impairment based on his reaction to prescribed medication did not occur while appellant was in the PRP. Further, marital stress was not appellant's only problem. Appellant also had a history of negligent performance of his duties and a psychological profile indicating emotional problems. Thus, the factors listed by appellant do not constitute mitigating circumstances in this case, and removal was reasonable.

Appellant contends that the administrative judge erroneously disallowed testimony regarding disparate penalties in relation to other interns in the PRP program who were allowed to remain in the program after engaging in unacceptable conduct. Appellant has not specified the kind of testimony he attempted to elicit or identified the employees involved. Thus, he has not shown that the administrative judge abused his exercise of authority under 5 C.F.R. § 1201.41 in disallowing this testimony.

Finally, appellant asserts that the administrative judge failed to address his claim of privilege under 5 C.F.R. § 1201.72(b). He states that the medical evidence supplied by the agency was conclusory and was not accompanied by testimony. He also states that he objected to the introduction of the evidence relating to his

psychiatric condition because it was not developed in accordance with 5 C.F.R. Part 339. Section 1201.72(b) relates to the scope of discovery of nonprivileged matter. Section 339.101 of Title 5, C.F.R., specifically states that the applicability of this part of the Office of Personnel Management regulations "is defined by the specific regulation governing the personnel decision in which the medical issue arises." The specific regulation involved here is AR 50, chap. 3, § 3(c), which provides that all potentially disqualifying information shall be submitted to the commander for consideration. Accordingly, appellant himself submitted the medical reports. Therefore, appellant has shown no violation of law or regulation by the agency.

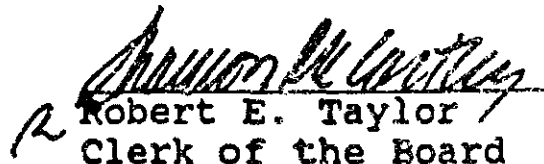
ORDER

This is the Board's final order in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today:

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DEC 7 1987
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Robert E. Taylor
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