UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GLENN D. PARSONS v. DEPARTMENT OF THE AIR FORCE	DOCKET NUMBER DA07528010170

OPINION AND ORDER

This case is before the Board for the second time. In an Opinion and Order issued June 11, 1981, we denied review of the November 13, 1980 Initial Decision upholding the removal of appellant, Glenn D. Parsons, from the position of Fire Fighter at Tinker Air Force Base. The agency, the Department of the Air Force, had taken the removal action because appellant falsified a Standard Form (SF) 71 and was absent without authorization (AWOL).1/ Pursuant to 5 U.S.C. 7703, appellant sought judicial review in the United States Court of Appeals for the District of Columbia Circuit. On May 6, 1983, the Court remanded the case to the Board to consider the appropriateness of the penalty imposed upon appellant in light of Douglas v. Veterans Administration, 5 MSPB 313 (1981). See Parsons v. United States Department of the Air Force, 707 F.2d 1406 (D.C. Cir. 1983).

On remand, a second hearing was held, and the parties were afforded the opportunity to present further evidence and argument

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1/Appellant was charged with being AWOL for three days, but the presiding official found that his absence on two of the three days was authorized. He was AWOL only on March 22, 1980.

on the penalty issue. The presiding official2/ concluded that i deciding to remove appellant the agency had not properly considered the relevant factors as required under Douglas. In an Initial Decision dated December 30, 1983, he therefore mitigated the penalty imposed upon appellant to a 45-day suspension.

The agency now petitions for review, asserting that the decision of the presiding official was based upon an erroneous interpretation of statute or regulation. See 5 C.F.R. 1201.115(b). Specifically, the agency contends that the presiding official's decision to mitigate constituted an improper substitution of his judgment for that of the agency and was therefore contrary to the Board's ruling in Douglas. Appellant has responded to the agency's petition, urging that it be denied. Because the presiding official's analysis was not entirely consistent with applicable precedents, we GRANT the petition for review.

The Board does accord considerable deference to agency penalty determinations. As we stated in Douglas, 5 MSPB at 332-33, "the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." We added, however, that deference is not appropriate where the Board finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness." Id. at 333. In such cases, it is appropriate for the Board "to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Id. See also

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2/The presiding official who issued the first Initial Decision on this appeal no longer works in the Board's Dallas Regional Office. On remand the case was heard by a different presiding official.

Davis v. Department of the Treasury, 8 MSPB 17, 19 (1981). In remanding this case to the Board, the Court stated, "The Air Force must present at least a prima facie case to the MSPB establishing that it considered the factors relevant to this particular case and that it reasonably chose to impose this particular penalty." 707 F.2d at 1412. Douglas holds:

> An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its fact (sic) inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty . . . the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge(.)

Id., 5 MSPB at 334 (footnote omitted). Douglas had not yet been issued when the agency first decided to remove appellant, but the agency's internal regulation on "Discipline and Adverse Actions," AFR 40-750 (Appellant's Exhibit F), pursuant to which this action was taken, includes guidance on penalty selection which parallels that contained in the Douglas decision. The agency basically contends that, even in light of appellant's challenge (before the Court of Appeals and on remand) to the severity of the penalty imposed upon him, the penalty of removal was justified, and that the presiding official's conclusion to the contrary was erroneous.

The presiding official correctly found that the agency did not properly consider the relevant penalty-selection factors. The agency's deciding official, Chief James W. Dunkin, acknowledged under cross examination that he would have removed appellant for falsifying the SF-71 no matter what his prior record was, even if it was unblemished (Tr. 80) 3/; that he did not think about imposing a lesser penalty (Tr. 84); and that falsification of a document amounts to fraud, which results in automatic termination (Tr. 93). In response to essentially leading questions pertaining to the Douglas factors posed by the agency's representative he gave affirmative answers, see, e.g., Tr. 15, 19, 34-36, 91, which might appear to reflect some consideration on his part of those factors, but when the agency's representative asked him to reconcile the apparent discrepancy between automatically firing someone who falsifies a document and considering the individual's work record and other matters his answer was unclear and internally inconsistent. (Tr. 91-92). Chief Dunkin did not give meaningful consideration to potential mitigating factors, as required under both Douglas and AFR 40-750.

Because the agency did not properly consider the relevant factors, the presiding official was required to specify how the penalty imposed upon appellant should be corrected to bring it within the parameters of reasonableness. The agency contends that the presiding official gave insufficient weight to appellant's past disciplinary record, which consisted of a reprimand for "failure to honor a valid and legal debt and failure to keep (his) agreement to liquidate said legal indebtedness."4/

3/References to "Tr." are to the transcript of appellant's November 1, 1983 hearing on remand.

4/In its petition for review, the agency characterizes the offense for which appellant was reprimanded as going back on his word or not being straightforward and truthful with his supervisors. The letter of reprimand itself is not in the record, but it is apparent from the wording used to describe the offense in the notice of proposed removal issued to appellant (quoted in the text of this Opinion and Order) that the gravamen of the offense was nonpayment, not dishonesty.

The degree of consideration the agency itself gave appellant's past disciplinary record is difficult to measure. While the notice of proposed removal issued to him stated that it was considered, Chief Dunkin's testimony on the point was ambiguous.5/ The presiding official noted that "While . . . the determination of an appropriate penalty for a current charge of misconduct may include consideration of prior discipline for unrelated charges, the fact is that in this case appellant has received only a reprimand for failure to properly discharge a debt." (Initial Decision at 4). Regardless of whether the agency considered the reprimand or not, the presiding official did consider it, although he accorded it little weight. Given the record before him, he should not have considered it at all.

In Bolling v. Department of the Air Force, 8 MSPB 658 (1981), we held that an agency may utilize a prior disciplinary action as an aggravating factor justifying the imposition of an enhanced penalty, and the employee may not relitigate the prior action in the context of a current appeal, if three criteria are met: the employee was informed of the action in writing; the employee had an opportunity to dispute the action by having it reviewed on the merits by a higher authority than the one taking the action; and the action was made a matter of record. In this case, the Bolling criteria were not met. Appellant was therefore entitled to de novo review of the incident which led to his prior reprimand. Johnson v. Department of the Air Force, 11 MSPB 493 (1982).

5/He said that the prior reprimand was considered, but that the penalty of removal would have been imposed even if appellant had had no prior record. (Tr. 78-80).

It is apparent from the testimony of both Chief Dunkin and appellant that appellant's reprimand concerned his alleged failure to discharge a single debt to his former landlady. (Tr. 37-41, 128-31). The landlady sent letters about the debt to appellant's place of employment, and appellant's superiors discussed the matter with him, but there is no evidence that his nonpayment had any actual or potential deleterious effect on his performance or on the agency's ability to carry out its mission. Therefore, under Byars v. Department of the Army, 8 MSPB 561 (1981), and Monterosso v. Department of the Treasury, 6 MSPB 573 (1981), it did not promote the efficiency of the service to discipline appellant for his failure to pay the debt promptly. The agency was not entitled to rely on the debt incident to support its decision to impose the harshest available penalty on appellant for his subsequent misconduct.

The agency asserts that the presiding official erred in finding "that previous removal actions taken by Chief Duncan (sic) against firefighters were not analogous to appellant's case." (Petition for Review at 2). Chief Dunkin testified that in 1977 or 1978 he decided to remove two fire fighters who disobeyed direct orders to go to fire fighting school at another base. (Tr. 26, 32). The agency's contention that these cases were comparable to appellant's lacks merit. The other employees were guilty of insubordination; appellant was AWOL one day and falsified a request for sick leave for that day. Virtually any sort of misconduct can be characterized as a failure to obey some order, rule, regulation, or standard. It does not follow, however, that insubordination on one hand, and AWOL combined with falsification on the other hand, should both be categorized for penalty purposes as "deliberate attempts to evade orders from a supervisor for purely personal reasons" (Petition for Review at 2) and penalized in the same fashion, without regard to the circumstances.

Before the presiding official, appellant argued that he was disciplined more harshly than other employees at Tinker Air Force Base found to have falsified documents and/or been AWOL. He introduced copies of decision letters issued in 57 other cases (Appellant's Exhibits E1-E57) in which, he contended, the agency imposed much less severe penalties on similarly situated employees than on him. Where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the challenged penalty can be upheld. Woody v. General Services Administration, 6 MSPB 410, 411 (1981). The presiding official did not make detailed findings on this issue. After reviewing the record in its entirety, we conclude that the agency did not establish a legitimate reason for the apparent disparity in treatment between appellant and other agency employees who committed similar offenses.

To show that the penalty of removal imposed on appellant was not inconsistent with the penalties imposed in other cases, see Douglas, 5 MSPB at 332, the agency cited the cases of the two fire fighters who were removed for disobeying orders. As already noted, these were not the same as appellant's case. In addition, the agency relied on a compilation of information designated Agency Exhibit 1. This document is a summary of certain disciplinary actions taken three to four years before appellant was removed. (Tr. 107-16). Most of the entries refer to removals for deliberate falsifications of travel vouchers. One refers to a removal for falsification of a doctor's statement. Three others refer to "removal from position" (presumably demotions or reassignments), as opposed to removal from employment, for falsification or misrepresentation, thereby indicating that removal from employment is not always the penalty for falsification.

Indeed, one other entry on Agency Exhibit 1 refers to a one-day suspension imposed on someone for deliberate falsification. In no instance is any information regarding the specifics of any offense or the individual's past disciplinary record noted. For these reasons the document lacks probative value and is insufficient to rebut appellant's disparate treatment allegations.

The agency did not attempt to show that appellant's case was not actually comparable to any of the 57 cases upon which his disparate treatment claim was based. Nor did the agency attempt to explain why lesser penalties were imposed in so many apparently similar cases.6/ Of the 57 employees who were allegedly treated more leniently than appellant, three were removed just as he was. See Appellant's Exhibits E7, E11, E39. Factually, however, the cases of these three individuals were not comparable to appellant's.7/ The penalties imposed in the other 54 cases

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6/The agency stipulated that the copies of decision letters appellant introduced into evidence were authentic. (Tr. 136). A question was raised as to the relevance of disciplinary actions taken after appellant was removed, but the agency's objection on this ground was overruled. (Tr. 141). The parties were given an opportunity to submit written closing arguments. Appellant did so, but the agency did not.

7/Appellant's Exhibit E7 pertains to an individual who (according to the Notice of Proposed Removal the agency issued, which was upheld in its entirety), was required to support every absence with a doctor's statement, who was AWOL two days rather than one, who falsified not only a doctor's statement but also a letter from Consumer Credit Counseling Service, and who had twice been suspended for misconduct before the agency proposed removal. Appellant's Exhibit E11 pertains to an individual who was AWOL "in excess of ten days" (apparently almost continuously) and who falsified a doctor's statement. Appellant's Exhibit E39 pertains to an individual who was AWOL for five days, who failed to request leave according to established procedures on three of those days, and who had been disciplined for similar offenses on three prior occasions.

ranged from a one-day suspension to a 20-day suspension. While some of the cases may be distinguished from appellant's on factual grounds, see, e.g., Appellant's Exhibits E4, E33, 8/ others closely resemble his, see, e.g., Appellant's Exhibits E5, E16, E26. 9/ Read together, Appellant's Exhibits E1-E57 reveal a tendency on the part of the agency to suspend rather than remove employees who commit minor AWOL and/or falsification offenses. "Perfect consistency" is not required, see Douglas, 5 MSPB at 333, but the agency did not begin to explain why appellant was disciplined more severely than so many other employees.

The agency's principal justification for removing appellant was that the offense of falsification is extremely serious, especially in light of appellant's duties as a fire fighter. See Douglas, 5 MSPB at 332. (Throughout these proceedings, the agency has stressed the falsification charge, treating the AWOL charge as relatively trivial.) The agency contends that the presiding official improperly substituted his judgment for that of the agency when he concluded that the offense of falsification did not warrant removal under the circumstances of this case.

8/Appellant's Exhibit E4 pertains to an individual who was suspended for five days for allowing "marijuana and paraphernalia" to be transported onto the base. Appellant's Exhibit E33 pertains to an individual who was suspended for one day for counterfeiting a parking permit.

9/Appellant's Exhibit E5 pertains to an individual who was suspended for ten days for being AWOL one day and submitting a falsified doctor's statement to justify that absence. Appellant's Exhibit E16 pertains to an individual who was suspended for 14 days for being AWOL for a number of days, failing to request leave in accordance with established procedures, and falsifying a doctor's statement. Appellant's Exhibit E26 pertains to an individual who was suspended for 14 days for being AWOL and falsifying a VA form.

Falsification will not invariably result in removal; the circumstances of each individual case must be taken into account. Cade v. U.S. Postal Service, 8 MSPB 362, 363 (1981); Klein v. Department of Labor, 6 MSPB 249, 250 n.1 (1981). The Board does not condone appellant's falsification of a leave request form. This act, however, was collateral to appellant's AWOL offense which, in turn, both sides have viewed as minor. Moreover, while appellant cannot evade responsibility for signing a form which contained incorrect information, the seriousness of his offense is tempered because--as the Court of Appeals pointed out, 707 F.2d at 1412--his supervisors presented him with a completed form to sign even though they knew his request for sick leave was fraudulent. He did not take the initiative in preparing and submitting the SF-71.

That appellant worked as a fire fighter rather than in some other capacity makes no difference. All federal employees are, of course, expected to be trustworthy and to maintain high standards of integrity. See 5 U.S.C. 2301(b)(4). Chief Dunkin implied that a fire fighter whose trustworthiness has been called into question in any way must necessarily be removed, but never cogently explained why, and we can discern no basis for such an approach to discipline. Indeed, it would not be possible for the agency to proceed in such a manner and still give meaningful consideration to the requirements of AFR 40-750 and Douglas.

After independently reviewing the relevant penalty-selection factors in accordance with Douglas we conclude, as did the presiding official, that the penalty of removal was beyond the bounds of reasonableness in this case. Several mitigating factors, which the agency ignored, are present: Appellant's performance was satisfactory, he had never had attendance problems before, the only past disciplinary action to which he was ever subjected cannot

legally be held against him, and there is a serious question whether the penalty originally imposed upon him was consistent with the penalties imposed in comparable cases. The maximum reasonable penalty the agency could have imposed for the sustained charges of unauthorized absence for one day and falsification of a related leave request form was a 45-day suspension.10/ Accordingly, the initial decision is hereby AFFIRMED as MODIFIED. The agency is ORDERED to cancel the removal action and substitute in lieu thereof a suspension of 45 days. The agency is also ORDERED to award back pay and benefits 11/ in accordance with 5 CFR Section 550.805. This is the final decision of the Board in this appeal. 5 C.F.R. 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeal for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUN 21 1984
(Date)
Washington, D.C.

Paula A. Latshaw
PAULA A. LATSHAW
ACTING SECRETARY

10/The presiding official incorrectly held that a 45-day suspension "would be a reasonable penalty" (emphasis added) without explicitly finding, pursuant to Davis, 8 MSPB 17, that it would be the maximum reasonable penalty the agency could have imposed. To the extent that the presiding official thus committed an error of law, the error is rectified in this Opinion and Order.

11/See Robinson v. Department of the Army, MSPB Docket No. SF07528310135, (June 12, 1984).