

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

73 M.S.P.R. 29

Docket Number DC-0752-95-0333-I-1

CHARLES A. POWELL, JR., Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: JAN 9, 1997

Axel Kleiboemer, Esquire, Washington, D.C., for the appellant.

Scott D. Cooper, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

ANTONIO C. AMADOR, MEMBER, ISSUES DISSENTING OPINION

OPINION AND ORDER

The appellant has filed a timely petition for review of the June 6, 1995 initial decision that sustained his removal. For the reasons discussed below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, REVERSE the initial decision, and DO NOT SUSTAIN the appellant's removal.

BACKGROUND

The agency removed the appellant from the position of GS-8 Computer Operator on January 13, 1995, based on a charge that he had threatened agency employees. Agency File, Tab 4a. Specifically, the agency alleged that on August 31, 1994, during a telephone conversation with Employee Assistance Program (EAP) Counselor Heather Kocher, the appellant threatened to kill five agency employees: Frank Guglielmo, Director of Computer Services Staff (CSS); James Price, Deputy Director of CSS; Douglas Cureton, Acting Assistant Director of CSS; Dorothy Mulhall, Acting Chief Steward of American Federation of State, County, and Municipal Employees (AFSCME) Local 3097; and Floria Mathis, Acting Vice President of AFSCME Local 3097. Agency File, Tabs 4b, 4f. The appellant filed a timely petition for appeal of the agency's action. Initial Appeal File (IAF), Tab 1.

After holding a hearing, the administrative judge sustained the charge, finding that the appellant told Ms. Kocher that he wanted to kill the five named individuals and that this statement constituted a threat. Initial Decision (I.D.) at 2-9. He rejected as unproven the appellant's affirmative defenses of reprisal for protected union activity and alleged whistleblowing. I.D. at 9-11.1 He also found removal was a reasonable penalty for the sustained charge. I.D. at 11-13.

The appellant has filed a petition for review to which he has attached a transcription of his portion of the telephone conversation in which he made the alleged threat. Petition For Review (PFR) File, Tab 1. The transcription does not include new and material evidence that was unavailable before the record closed below, and thus we have not further considered it. 5 C.F.R. § 1201.115(d)(1). The agency has filed a timely response opposing the appellant's petition for review. PFR File, Tab 3.

ANALYSIS

The appellant has failed to show that the administrative judge erred in determining the words he spoke during the conversation.

In his petition for review, the appellant asserts that the administrative judge erred in crediting Ms. Kocher's testimony in determining the actual words spoken by the appellant during their August 31, 1994 conversation. He contends that he stated, "I feel like killing [the five individuals]," and that he repeatedly indicated to Ms. Kocher that he was merely relating his feelings and had no intention of harming anyone. PFR at 11-14.

The appellant has failed to set forth a basis for overturning the administrative judge's credibility determinations concerning what the appellant said during the conversation. The administrative judge set forth his reasoning for accepting Ms. Kocher's testimony that the appellant said he "wanted" to kill the individuals, as opposed to the appellant's testimony that he "felt" like killing the individuals, and for finding that the appellant did not qualify his statement later in the conversation by saying "I'm not saying I'm going to kill anyone, I'm telling you how I feel." I.D. at 2-4, 7. The appellant's mere disagreement with the administrative judge's explained credibility determinations does not provide a basis for Board review. *See, e.g., Chauvin v. Department of the Navy*, 38 F.3d 563, 566 (Fed. Cir. 1994); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). In any event, for the reasons set forth below, we find that whether the appellant stated that he "wanted" to kill the individuals or that he "felt" like killing the individuals is not the deciding factor in determining whether the appellant's statement constituted a threat under the legal standard set forth in *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986).

The agency failed to sustain its burden of proving its charge.

¹ Although the appellant asserts that he "does not concede the correctness of the Initial Decision with respect to the reprisal and whistleblowing aspects of his case," Petition For Review at 14, he has not specified how the administrative judge erred in analyzing those issues. Thus, we have not further considered the administrative judge's findings on those issues.

In his petition for review, the appellant contends that the administrative judge erred in finding that his statements to Ms. Kocher constituted a threat under *Metz*. PFR at 8-11. We agree.

In *Metz*, 780 F.2d at 1002, the U.S. Court of Appeals for the Federal Circuit stated that the Board must use the connotation that a reasonable person would give to the words to determine if the words constituted a threat. It directed the Board to consider the following evidentiary factors in deciding whether an employee threatened his supervisors or co-workers: 1) The listener's reactions; 2) the listener's apprehension of harm; 3) the speaker's intent; 4) any conditional nature of the statements; and 5) the attendant circumstances. *Id.* It further directed the Board to give objective evidence heavy weight. *Id.* at 1003. We find that the most significant factor in this case weighing against finding that the appellant's statements constituted a threat under *Metz* is the attendant circumstances, and thus we will discuss that factor first.

Attendant Circumstances

In determining whether the appellant made a threat, the Board must consider the context in which the appellant made the allegedly threatening statements. *Metz*, 780 F.2d at 1002. Here, the evidence reveals the following factual background leading to the appellant's conversation with Ms. Kocher. The appellant had just been notified on August 31, 1994, of a change in his shift assignment that would interfere with his responsibility to care for his wife's 84-year old grandmother. Hearing Tapes 1B (testimony of Kocher), 3B (testimony of the appellant). Upon the advice of Joel Reed, personnel specialist and part of the team that negotiated the shift change, the appellant attempted to resolve the issue with the union Acting Vice President, Ms. Mathis. Although he was upset when he spoke with Ms. Mathis, he made no threatening remarks during that conversation. Agency File, Tab 4e, AFSCME statement at 5-6; see also Hearing Tape 3A (testimony of Mathis). When the appellant was unable to resolve the matter with Ms. Mathis, he immediately contacted Ms. Kocher, whom Mr. Reed had recommended the appellant talk with for assistance with his problems. The appellant telephoned Ms. Kocher twice before reaching her on August 31, 1994. He immediately expressed to her his frustration and anger with management and union officials whom he believed were responsible for his shift change. Hearing Tapes 1B (testimony of Kocher), 3B (testimony of the appellant). However, according to Ms. Kocher, the appellant had calmed down by the end of their telephone conversation. I.D. at 7; Hearing Tape 2A (testimony of Kocher).

The administrative judge improperly discounted this context, apparently viewing the appellant's argument that his statement should not be considered a threat because it was made to an EAP counselor as an attempt to escape accountability for making a threat. I.D. at 8. We find, however, that the appellant's contacting of an EAP counselor under these circumstances suggests an individual who wants to talk out his frustration rather than one who intends to make a threat without suffering adverse consequences for such utterance.

The administrative judge discussed the appellant's disciplinary record as another attendant circumstance supporting a finding that the appellant made a threat. I.D. at 8. Although the appellant had a prior related disciplinary record and was angry about his

shift change, the administrative judge put unnecessarily heavy reliance on this prior record in determining whether to sustain the charge, as opposed to considering it in evaluating the agency-imposed penalty. See, e.g., *Cummings v. U.S. Postal Service*, 48 M.S.P.R. 17, 22 (1991) (the administrative judge erred in relying on the employee's allegedly contentious nature to infer that the agency's charge of threat against him was true) (citing *Ibrahim v. Department of the Army*, 30 M.S.P.R. 531, 536 (1986)); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (an employee's past disciplinary record is a factor in determining the appropriateness of an agency-imposed penalty); cf. *Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 504 (1995) (the facts that the employee had made other threatening statements at the agency, talked about shooting people, and talked about guns were attendant circumstances suggesting that his statement constituted a threat), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996) (Table). Instead, the appellant's contact of an EAP counselor shows that he acknowledged his difficulty in controlling his anger and evidences a departure from his past conduct. It also demonstrates that he is learning to control his anger and seek out appropriate avenues of release. Thus, his past behavior should not be relied on, as the administrative judge did, to support a finding of a threat.

With regard to assessing the attendant circumstances of the counseling, we are also particularly troubled by the agency's use of the appellant's conversation with an EAP counselor as the basis for his removal. The agency advertised its EAP as "[e]xtending confidential [a]ssistance for [p]ersonal and/or family problems." It encouraged employees to take advantage of the resources available through the program, stating that with professional assistance, personal and family difficulties can often be resolved at an early stage. Under the heading, "Confidentiality," it specifically provided that the program was "authorized by laws which protect the privacy of the individual and confidentiality of records," and that "[a]n employee's job security shall not be affected" by requests for counseling or referral assistance. IAF, Tab 9, Appellant's Exhibit A.

In this regard, we note that the U.S. Supreme Court has recently recognized a federal licensed psychotherapist-patient privilege. In *Jaffee v. Redmond*, No. 95-266, 1996 WL 315841 at *7-8 (U.S. June 13, 1996), the Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." It specifically extended this privilege to "licensed social workers in the course of psychotherapy." *Id.* The Board adopted these findings in *Daniels v. Department of the Air Force*, MSPB Docket No. SF-0752-95-0858-I-1, slip op. at 5 (, 1996).

Jaffee does not dispose of the charge of threat here, however, because the agency obtained a waiver from the appellant to allow the deciding official to talk to Ms. Kocher. Agency File, Tab 4d; Hearing Tape 1A (testimony of Roger M. Cooper); see, e.g., *United States v. Wimberly*, 60 F.3d 281, 285 (7th Cir. 1995), *cert. denied*, 116 S. Ct.

744 (1996).² Moreover, the Court in *Jaffee* noted the possibility of situations in which the privilege must give way, “for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.” *Jaffee*, 1996 WL 315841, at *8 n.19; see also *Daniels*, slip op. at 5-6. Thus, nothing in this decision should be construed to necessarily preclude the finding of a threat even if within an EAP counseling session, dependent on the specific circumstances and how those circumstances comport with the *Metz* criteria.

In any event, in determining whether a threat was made under the legal standard set forth in *Metz*, we must consider all of the attendant circumstances surrounding the appellant's statements, including the advertisement of confidentiality. Here, the appellant testified that he called Ms. Kocher for help in resolving his problems. Hearing Tape 3B. The appellant testified that he assumed his conversation would be kept private because Ms. Kocher was a counselor. Hearing Tapes 3B, 4A. Thus, the lack of notice to the appellant regarding the limits to the agency's EAP confidentiality policy could be viewed by the appellant as an invitation to speak under the understanding that confidentiality was being given. Moreover, Ms. Kocher testified that she understood that the appellant was requesting counseling when he called. Hearing Tape 1B. Ms. Kocher admitted that she did not inform the appellant until after he made the statements that she was going to notify the five employees.

In these circumstances, it would be contrary to the policy and purpose of the EAP to find that the appellant made a threat and to take action against him. An EAP furthers a valuable public policy by encouraging personal problem-solving by employees within a confidential context. See, e.g., *Doe v. Department of Justice*, 753 F.2d 1092, 1099 (D.C. Cir. 1985); *Bandy v. Department of the Navy*, 4 M.S.P.R. 218, 220 (1980); see also 5 U.S.C. § 7904. Here, the appellant was attempting to use the EAP for assistance with his personal and employment-related problems. Ms. Kocher's testimony demonstrates that the agency's EAP was successful in this regard because the appellant had calmed down by the end of their conversation and she did not believe that he would harm himself or others. Hearing Tape 2A; cf. *Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 504 (1995) (the employee's supervisor testified that she believed that the employee was capable of carrying out his threat and that her life and the lives of other agency employees were in jeopardy). Moreover, the record indicates that the appellant did not engage in any further behavior that could be characterized as threatening after his conversation with Ms. Kocher. See, e.g., Hearing Tapes 2B (testimony of Price), 3A (testimony of Cureton); cf. *Kilgour v. Department of Veterans Affairs*, 67 M.S.P.R. 544, 549 (1995) (the employee engaged in threatening misconduct when he went to the Medical Center Director's home unannounced late in the evening in a highly emotional state and subsequently stated that he would “like to” or “was going to” knock the Director's lights out). Further, the record shows that the appellant submitted written apologies to Mr. Cureton and Mr. Price. IAF, Tab 9 (appellant's Exhibits L, N); Hearing Tape 3B (testimony of appellant).

² For this reason, we find it unnecessary to determine whether the Court's holding in *Jaffee* should extend to an unlicensed EAP counselor.

Given the above attendant circumstances, none of the other *Metz* factors are sufficient to establish a threat. However, we find that these other factors also militate against a finding that the appellant's statement constituted a threat.

The Listener's Reaction

In *Metz*, 780 F.2d at 1003, the court stated that the factfinder must examine carefully what reasonable persons who heard the statements actually did. Here, the administrative judge found that Ms. Kocher's actions after she spoke to the appellant -- she asked the appellant to see her the next day and not to report to work -- supported her subjective belief that a threat was made. I.D. at 5. However, the evidence is equivocal and must be evaluated against the background that the alleged threat was made by telephone by an individual Ms. Kocher admittedly had never met. Hearing Tape 1B (testimony of Kocher).

Certain objective reactions of Ms. Kocher show that she did not consider the appellant's statement a true threat. For example, Ms. Kocher testified that she did not contact the police. *Id.* Moreover, despite her testimony that she had a legal and ethical obligation to warn the objects of a threat, she testified to calling only two of the five employees named in the alleged threat, Mr. Cureton and Mr. Guglielmo, and to having left a message on the answering machine of a third, Mr. Price. *Id.* She did not telephone the two union officials named by the appellant, Ms. Mathis and Ms. Mulhall; rather, they found out about the alleged threat only after they called Ms. Kocher. Hearing Tape 3A (testimony of Mathis, Mulhall). Thus, Ms. Kocher's choice of contacts suggests that she was notifying management officials of a personnel problem rather than of a real threat.

The administrative judge considered the reactions of the five individuals named in the alleged threat, relying heavily on the reactions of the management officials to support a finding of threat. I.D. at 5-6. The administrative judge's consideration of this evidence is problematic because he was required to make an assessment of the objective evidence of the listeners' reactions. *Metz*, 780 F.2d at 1002-03. Here, however, where these listeners were actually responding to hearsay since the threat was communicated to these individuals by Ms. Kocher, or double hearsay in the case of Mr. Price,³ any assessment of objective evidence is particularly difficult. Moreover, the administrative judge did not discuss precisely what was said to the individuals or whether he was in a position to assess whether the appellant's statements were accurately reported. I.D. at 3. Therefore, we cannot properly assess the objective evidence of the management officials' responses.

Even assuming Ms. Kocher reported the threat accurately,⁴ the responses of the two management officials who took specific self-protective actions, Mr. Guglielmo and

³ Mr. Price testified that he first learned of the incident through Mr. Guglielmo. Hearing Tape 2A.

⁴ We note that Mr. Cureton testified that Ms. Kocher told him the appellant said words to the effect that, "If [the appellant] could not see [Ms. Kocher], he was going to have to kill someone." Hearing Tape 2B.

Mr. Price, cannot be relied on as determinative of whether a threat was made. Mr. Guglielmo provided a written statement that he carefully looked around as he walked to the parking lot and took precautions coming to and leaving work. Agency File, Tab 4g. Mr. Price provided a written statement that he took time to observe his surroundings when he got out of his motor vehicle. *Id.*, Tab 4h. However, Mr. Guglielmo's statement should be somewhat discounted because Ms. Kocher described his reaction to news of the threat as "irrational," and "hysterical." Hearing Tape 1B.5 Moreover, although Mr. Price testified that he was upset, concerned, and angry, and that he discussed the situation with his wife, Mr. Price did not remember whether Mr. Guglielmo told him exactly what the appellant had said, stating only that Mr. Guglielmo told him his life had been threatened by the appellant. Mr. Price further testified that he did not remember asking Ms. Kocher what the appellant had said when he discussed the situation with her the day after his conversation with Mr. Guglielmo. He indicated that he had already concluded from his discussion with Mr. Guglielmo that he had been threatened.⁶ Further, although he testified that he was concerned because he knew of the appellant's past disciplinary record, he also indicated that this knowledge was not firsthand. Hearing Tape 2A.

In his written statement, Mr. Cureton stated that the situation was stressful for him and his wife, they experienced loss of sleep and early waking, were watchful and suspicious, and thought about getting a guard. Agency File, Tab 4i. He also testified that he was upset and afraid for his life. Hearing Tape 2B. However, he did not testify as to any particular actions he took in response to the appellant's statements. Moreover, although he testified that he was concerned because the appellant had exhibited anger in the past, citing an incident in which the appellant shoved another employee, he admitted that he did not observe the incident. *Id.*

In assessing the objective evidence, the precautionary actions taken by Mr. Guglielmo and Mr. Price should be compared with those of employees in other cases where the Board has found that a threat was made. For example, in *Battle v. Department of Transportation*, 63 M.S.P.R. 403, 406-07 (1994), one of the individuals who was threatened took protective action by altering his driving route to work and wearing a bullet-proof vest. Other agency officials took the employee's threatening language seriously, too. The Chief of Administrative Services secured the building by closing the doors and changing the locks. He hired a security service to provide a guard at the entrance who knew the employee's identity and was to stop him if he tried to enter the building. *Id.* at 407. In *Murphy v. Department of Health & Human Services*, 34 M.S.P.R. 534 (1987), the reaction of the threatened individual (who heard through the report of a co-worker that the employee had threatened to burn her house down) included being upset because her building did not have a fire escape, reporting the statement to the police, and requesting that she be moved from the employee's module.

⁵ Mr. Guglielmo did not testify at the hearing. *I.D.* at 3.

⁶ Mr. Price also testified that he did not learn about the appellant's statements until Mr. Guglielmo telephoned him several days after the incident occurred, probably September 5, 1994, because he had been on vacation at the time of the incident.

Id. at 537. Given that here only two of the five objects of the threat, Mr. Guglielmo and Mr. Price, noted any direct responses that they had in reaction to the appellant's statements and that their reactions did not rise to the kind of active responses the employees took in *Battle* and *Murphy*, those reactions should not be given determinative weight as objective evidence of responses supporting that the appellant made a threat.

Apprehension of Harm

The only person to hear the alleged threat directly, Ms. Kocher, testified that the appellant had "calmed down" by the end of their conversation, and that she did not consider him at that point to be dangerous. Hearing Tape 2A. Further, neither union witness took the alleged threat seriously. Ms. Mathis testified that she had already spoken to the appellant before she learned of the alleged threat from Ms. Kocher, and in that conversation the appellant indicated that he had said something "stupid" to Ms. Kocher. She further testified that she believed she had nothing to worry about. She stated that she did not interpret Ms. Kocher's statements as giving her a warning; rather, it was just something Ms. Kocher said in the course of a telephone conversation that Ms. Mathis had initiated. Ms. Mathis testified that she had no apprehension of harm when she heard of the appellant's statements. Indeed, she stated that the appellant had had a "screaming fit" with her over the telephone concerning his shift change, and that this was not out of his character. She denied that she had told anyone that she was concerned for her safety. Hearing Tape 3A.

Similarly, Ms. Mulhall testified that she did not believe that the appellant made a threat and that, even though she knew that the appellant was upset about the shift change, she was not concerned about his reaction because "that was Charlie." She stated that she did not take the appellant's statements seriously and, when asked if she had any apprehension of harm, replied "absolutely none." Hearing Tape 3A. Thus, the evidence does not show a perception that an attempt to harm would ensue. *See, e.g., Metz*, 780 F.2d at 1002; *Ingram v. Department of Justice*, 44 M.S.P.R. 578, 582 (1990), *aff'd*, 925 F.2d 1479 (Fed. Cir. 1991) (Table).

The Speaker's Intent

Ms. Kocher noted that, by the end of a single telephone conversation, she did not consider the appellant to be an immediate threat to those concerned. Hearing Tape 2A; I.D. at 7. The administrative judge found this irrelevant, citing *Murphy*, 34 M.S.P.R. at 538, apparently for the principle that a subsequent loss of intent does not mean that the appellant did not have the requisite intent to make a threat. I.D. at 7. However, in *Murphy*, the employee made the threatening statement two days after she had received notice of a proposed disciplinary action and thus the statement could not "be excused as a spontaneous thoughtless reaction to the notice." *Murphy*, 34 M.S.P.R. at 538. Here, the "intent," to the extent there was any to begin with, had, according to the agency's chief witness, Ms. Kocher, dissipated by the end of the single telephone conversation. Moreover, the report of the appellant's conversation with the union representative, Ms. Mathis, wherein the appellant stated that he had said something "stupid" to Ms. Kocher, indicates the appellant's lack of intent to make a genuine threat. *See Metz*, 780 F.2d at 1002.

Conditional nature of the statements

The administrative judge did not specifically comment on this factor. Regardless of whether the appellant stated "I feel like killing," or "I want to kill," neither version constitutes a conditional statement. However, we find that both statements are naturally interpreted to convey more a generalized feeling and sense of anger and frustration, that is, "I would like to kill them if I could." Thus, neither could properly be characterized as a particularized and directed threat. See, e.g., *Metz*, 780 F.2d at 1003; cf. *Murphy*, 34 M.S.P.R. at 538 (the employee made a specific reference to burning her supervisor's home).

CONCLUSION

The agency had the burden of proving, by preponderant evidence, that the appellant made a threat. See, e.g., *Battle*, 63 M.S.P.R. at 408. We conclude that it failed to submit evidence adequate to meet this burden. Accordingly, the appellant's removal must be reversed.

ORDER

We ORDER the agency to cancel the appellant's removal and to restore the appellant effective January 13, 1995. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

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,
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
Washington, D.C.

DISSENTING OPINION OF ANTONIO C. AMADOR, MEMBER

I dissent from the majority's finding that the agency failed to prove its charge against the appellant. I would find that the appellant's statement that he wanted to kill five named individuals constitutes a threat under *Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986). However, although I would sustain the charge, I would mitigate the appellant's removal to a 90-day suspension.

The agency proved its charge under *Metz*.

In deciding whether statements constitute threats, the Board is to apply the reasonable person criterion, considering the listeners' reactions and apprehensions, the wording of the statements, the speaker's intent, and the attendant circumstances. *Metz*, 780 F.2d at 1001, 1004. Although the majority purportedly applied these criteria, I believe that it reached the wrong result in concluding that the evidence does not satisfy them.

The Listeners' Reactions

The majority finds that the administrative judge erred in finding that the listeners' reactions supported the charge of threat. I disagree. The majority's own recitation of

the listeners' reactions supports the administrative judge's finding. For example, the majority finds that Ms. Kocher asked the appellant to see her the day after their conversation and not to report to work, and that she attempted to contact three of the five named individuals. Opinion and Order (O&O) at 13-14. It cites Mr. Price's testimony that he was upset, concerned, and angry, that he discussed the situation with his wife, and that he was concerned because he knew of the appellant's past disciplinary record. *Id.* at 15-16. It cites Mr. Cureton's testimony that he was upset and afraid for his life, and that he was concerned because the appellant had exhibited anger in the past by shoving another employee. It also cites evidence that Mr. Cureton and his wife experienced loss of sleep and early waking, were watchful and suspicious, and thought about getting a guard. *Id.* at 16-17.

Moreover, I believe that the majority erred in finding that Mr. Guglielmo's statement that he carefully looked around as he walked to the parking lot and took precautions coming to and leaving work should be "somewhat discounted" because Ms. Kocher described his reaction to news of the threat as "irrational" and "hysterical." O&O at 15. Ms. Kocher's opinion is not relevant to whether Mr. Guglielmo took the appellant's threat seriously. See *Metz*, 780 F.2d at 1002, 1004; see also *Battle v. Department of Transportation*, 63 M.S.P.R. 403, 406 (1994) (although the employee's supervisors did not hear his threats, their reactions are a consideration under *Metz*).

Thus, I would find that the administrative judge did not err in finding that the listeners' reactions supported a finding that the appellant's statement constituted a threat. See, e.g., *Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 504 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996) (Table).

The Speaker's Intent

The majority finds that the administrative judge erred in relying on *Murphy v. Department of Health & Human Services*, 34 M.S.P.R. 534 (1987), to find that the appellant's apparent lack of intent to carry out his threat did not establish that he did not intend to make the threat. It attempts to factually distinguish *Murphy*, finding that the appellant did not intend to make a "genuine threat" because he had calmed down by the end of his conversation with Ms. Kocher and because he told Ms. Mathis that he had said something "stupid" to Ms. Kocher. O&O at 19-20.

I disagree with the majority's analysis of this criterion. The majority itself finds that the appellant told Ms. Kocher that he wanted to kill five named individuals. O&O at 4. It accepts Ms. Kocher's testimony that the appellant expressed his anger with management and union officials whom he believed were responsible for his shift change. *Id.* at 6-7. Thus, Ms. Kocher's recollection of the discussion indicates that the appellant intended to make an implicit threat that he would kill specific agency officials if the agency did not accommodate his desire to maintain his shift assignment. That the appellant's intent "dissipated" after making the statement, O&O at 20, does not support a finding that he did not intend to make a threat, see *Robinson v. U.S. Postal Service*, 30 M.S.P.R. 678, 679, *aff'd*, 809 F.2d 792 (Fed. Cir. 1986) (Table).

Moreover, the majority's attempt to distinguish *Murphy* is unavailing. In *Murphy*, 34 M.S.P.R. at 538, the Board did not indicate that it intended to limit its holding to the

factual situation in that case. Rather, it stated as a general proposition that intent to make a threat should be distinguished from intent to carry out a threat. *Id.* Thus, that Ms. Kocher and the threatened officials did not perceive imminent danger does not detract from the perception of Ms. Kocher and at least three of the officials that a threat had been made. Accordingly, I would find that the administrative judge did not err in finding that the evidence, including Ms. Kocher's explicit testimony, shows that the appellant intended to threaten the five individuals.

Attendant Circumstances

The majority finds that "the administrative judge put unnecessarily heavy reliance on [the appellant's] prior record in determining whether to sustain the charge, as opposed to considering it in evaluating the agency-imposed penalty." O&O at 7. The majority acknowledges that the appellant had "a prior related disciplinary record and was angry about his shift change." *Id.* What the majority does not explain is that the appellant had a disciplinary record of three suspensions for misconduct including disorderly conduct and fighting, disrespectful conduct toward his supervisor, and intentionally causing a computer system to crash by manually resetting its switches. Initial Decision (I.D.) at 8; Initial Appeal File, Tab 3, subtabs 4j-4l. The administrative judge correctly placed heavy reliance on this past misconduct, as it exemplified a history of actually converting anger to violence or sabotage. See *Coleman*, 66 M.S.P.R. at 504-05.

The majority dismisses the principle set forth in *Coleman*. It asserts that the appellant's past behavior should not be relied on to support a finding of a threat because "the appellant's contact of an EAP counselor shows that he acknowledged his difficulty in controlling his anger and evidences a departure from his past conduct," and "demonstrates that he is learning to control his anger and seek out appropriate avenues of release." O&O at 8. The majority cites no support for these speculations. Indeed, one could speculate in the alternative that the appellant's decision to contact an EAP counselor indicates that he had learned that making threats to kill agency officials might be a better means of securing his shift change than sabotaging computers or directly assaulting a co-worker. However, I believe that the Board should base its findings on established law as set forth in *Coleman*, rather than on its own unsupported interpretation of the appellant's motives.

Indeed, the majority's view is contrary to the Board's recent decision in *McCarty v. Department of the Navy*, MSPB Docket No. PH-0752-94-0436-B-1, slip op. at 5-6 (Nov. 1, 1996), in which the Board sustained a charge of "making statements to co-workers that resulted in anxiety and disruption in the workplace." There, the Board approved the administrative judge's "well-reasoned findings" in determining that the knowledge of the employee's co-workers that the employee had weapons, the employee's threatening and intimidating demeanor in the workplace, and the employee's remarks to some co-workers that he was emotionally unstable, supported the charge. *Id.* Similarly, in *Battle*, 63 M.S.P.R. at 407-08, the Board specifically considered the employee's past threatening language and violent actions as attendant circumstances in finding that the agency proved the charge of threat. Likewise, in *Sims v. Department of Defense*, 58 M.S.P.R. 131, 136 (1993), the Board cited the employee's history of making hostile and abusive remarks as an attendant circumstance establishing that the employee's

statement was a threat. Thus, I would find that the administrative judge did not err in finding that the appellant's past disciplinary record supports a finding that the appellant's statement constituted a threat.

Accordingly, I would sustain the charge and find that discipline for the appellant's misconduct promotes the efficiency of the service. See, e.g., *Hutson v. Department of the Interior*, 67 M.S.P.R. 432, 447 (1995) (threatening a government supervisor impairs the efficiency of the service).

The appellant's removal should be mitigated to a 90-day suspension.

In general, I believe that the factors the majority discusses under "attendant circumstances," see O&O at 6-13, should be considered not in determining whether the agency proved the threat charge, but in assessing the reasonableness of the agency-imposed penalty under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). See, e.g., *Franklin v. Department of Justice*, MSPB Docket No. DA-0752-95-0538-I-1, slip op. at 11 (Sept. 20, 1996) (finding that a factor that was not considered in determining whether a charge is sustained may still be considered in determining whether the agency-imposed penalty is reasonable).

For the reasons stated in the majority's opinion, the fact that the appellant made his threat in a conversation with an EAP counselor is a significant mitigating circumstance in this case. Similarly, as the majority explains, the appellant's personal situation, his later retraction of the threat, and his expression of remorse in writing letters of apology to two of the named individuals are mitigating circumstances under *Douglas*. In addition, as the administrative judge found, the appellant had 15 years of government service and a good performance record. I.D. at 11. However, the appellant's misconduct was serious and he had a substantial disciplinary record. Thus, under all of the circumstances of this appeal, I would impose a 90-day suspension for the offense of threatening agency officials. See *Douglas*, 5 M.S.P.R. at 305-06.