# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD

74 M.S.P.R. 65

Docket Number DA-0752-96-0187-I-1

## PERCY A. WILSON, Appellant,

## v.

## DEPARTMENT OF VETERANS AFFAIRS, Agency.

Date: MAR 31,1997

Leodis C. Matthews, Esquire, Matthews & Kelso, Frankfurt, Germany, for the appellant.

Paul H. Cassou, Esquire, New Orleans, Louisiana, for the agency.

### BEFORE

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

Member Amador issues a separate opinion.

### OPINION AND ORDER

The appellant timely filed a petition for review of the April 25, 1996, initial decision that sustained the agency's action. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED, still SUSTAINING the agency's demotion action.

### BACKGROUND

Effective November 26, 1995, the appellant, a Supervisory Police Officer, GS-0083-11, was demoted to the position of Maintenance Worker, WG-4749-08, for endangering the safety of co-workers, causing injury to a co-worker through carelessness and negligence, and failing to carry out instructions on several occasions. IAF, Tab 10, Subtabs 4b, 4c. The administrative judge found that the agency sustained one of its three charges, that the appellant's abandonment of agency investigators was careless and negligent and could have resulted in endangering their safety or causing them injury on agency premises. The agency charged that, on June 15, 1995, the

appellant informed his supervisor, Chief White, that he was responding to a disturbance call being handled by one other officer. Chief White instructed the appellant to take two investigators as additional back-up. Enroute to the disturbance, one of the investigators told the appellant the name of the individual causing the disturbance. Upon hearing the name, the appellant made a statement that he was afraid of the individual and walked off in another direction. A few minutes later the appellant returned to his office, was questioned by Chief White, and was instructed to return to the disturbance. While the administrative judge sustained only one of the agency's three charges, he still found that the demotion penalty was within the bounds of reasonableness. IAF, Tab 18, at 13-14.

## ANALYSIS

The appellant filed a petition for review alleging that the administrative judge sustained a charge other than that alleged by the agency, failed to consider relevant mitigating factors, erroneously considered past disciplinary actions, and erred in finding that the appellant failed to establish an affirmative defense of retaliation. We have reviewed the appellant's claims and find they do not provide a basis for Board review. We reopen this case for the limited purpose of re-examining the penalty in light of a recent change in the standard used to review penalties in cases where fewer than all the charges are sustained.

In cases in which only some of the charges are sustained, the Board has long recognized that the scope of review cannot be identical to that in cases where all the charges are sustained. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981); *Brown v. Department of the Air Force*, 67 M.S.P.R. 500, 508-09 (1995). The administrative judge found that while the agency's penalty was based on all three charges, the penalty of demotion was still within the bounds of reasonableness. IAF, Tab 18, at 12-13, Subsequent to the issuance of the initial decision, however, the Board adopted a different standard of review for cases in which fewer than all of the charges are sustained. *White v. United States Postal Service*, MSPB Docket No. SL-0752-95-0304-I-1 (Oct. 8, 1996). Under this standard, instead of deferring to the agency's penalty selection and determining the "maximum reasonable" penalty for the sustained charges, the Board will independently and responsibly balance the relevant *Douglas* factors to determine a reasonable penalty.

Accordingly, we now re-examine and balance the relevant *Dougla*s factors to determine a reasonable penalty for the sustained charge.1 It is well-established that an employee in a law enforcement position is held to a higher standard of conduct than other employees. *Jones v. Department of the Army* 52 M.S.P.R. 501, 506-07 (1992), *aff'd,* 912 F. Supp. 1397 (D. Kan. 1995). The appellant supervised three police lieutenants and 15 officers at the agency's medical center. As a supervisor, the

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[1] In determining a reasonable penalty in cases where not all of the charges are sustained, the Board will consider statements by deciding officials concerning what penalties they would have imposed for the sustained charges. *White*, slip op. at 12. The deciding official, however, testified that he did not consider each charge individually, but rather, only as a whole. Hearing Tape 1, Side B.

appellant is also held to a higher standard of conduct. *See Caster v. Department of the Army*, 62 M.S.P.R. 436, 444 (1994), *aff'd sub nom. Manning v. Merit Systems Protection Board,* 59 F.3d 180 (Fed. Cir. 1995) (Table). The sustained charge of abandonment of fellow police officers went to the heart of the appellant's duties, not just as a supervisory police officer, but also as a law enforcement officer.

The appellant, who was 54 years old at the time of the hearing, testified that he had worked in the law enforcement field since he was 19 years old; first, as an air policeman in the service and then as a police officer in California for 19 years. In 1983 or 1984, the appellant began working for the Federal government, holding a number of different positions in the security field at the Meir Island Naval Shipyard. Hearing Tape 3, Side B. During his 18 months at the agency, however, he received an admonishment for failure to carry out instructions and a 10-day suspension for three instances of failure to carry out instructions and one instance of intentional concealment of material facts. IAF, Tabs 1, 10, Subtabs 4nn, 4mm. Further, a demotion is consistent with the agency's table of penalties. IAF, Tab 10, Subtab 4pp. We note, in fact, that the agency could have removed the appellant for the incident in question. In light of his ongoing disciplinary problems, we find that the appellant has not shown potential for rehabilitation in the law enforcement field.2 Poor judgment is particularly egregious when the employee manifesting it occupies a supervisory position of substantial responsibility and trust within law enforcement. *See Lindsey v. Department of Justice*, 16 M.S.P.R. 310, 313 (1983). Further, given the available vacancies within the agency, we find that demotion and reassignment of the appellant to the position of Maintenance Worker, WG-8, is the reasonable penalty for the appellant's misconduct. IAF, Tab 10, Subtab 4d.

## ORDER

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 further review of the Board's final decision in your appeal.

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[2] In his petition for review, the appellant also claims that the administrative judge erred when, by failing to recognize that the appellant received a unified penalty arising out of the same circumstances, he did not adjudicate the reasonableness of the appellant's alleged reassignment. In ruling on the penalty, the administrative judge is required to consider the appropriateness of the reassignment, as well as the demotion, if the reassignment was clearly a part of the penalty imposed. *See Brewer v. American Battle Monuments Commission*, 31 M.S.P.R. 243 (1986). Under the circumstances of this case, the administrative judge, in considering the reasonableness of the demotion, necessarily considered the appropriateness of the appellant's reassignment. Moreover, even if the administrative judge did not review the reasonableness of the reassignment, the Board itself is now conducting such an examination.

*Discrimination Claims: Administrative Review*

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC 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.§ 7702(b)(1).

*Discrimination and Other Claims: Judicial Action*

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court 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)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

*Other Claims: Judicial Review*

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(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.

SEPARATE OPINION OF ANTONIO C. AMADOR, MEMBER

I write separately to indicate that I do not find it necessary to reopen this case to apply the Board's new **standard of penalty review as set** forth in *White v. U.S. Postal Service,* 71 M.S.P.R. 521, 525-26 (1996); I note that I did not join in my colleagues' decision when the Board issued *White* on October 8, 1996.

When he issued his April 25, 1996 initial decision in the case now before us, the administrative judge applied the standard articulated in *Douglas v. Veterans Administration, 5* M.S.P.R. 280, 308 (1981). Not having sustained all the charges, the administrative judge considered carefully whether the sustained charges merited the penalty imposed by the agency. I discern no reason, where the administrative judge has applied proper legal precedent, to modify an initial decision based on a case issued almost six months later. I therefore would deny the petition for review and affirm the initial decision.