

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

2007 MSPB 294

Docket No. CH-0752-07-0231-I-1

**Lawson A. Rose,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 10, 2007

Lawson A. Rose, Westmont, Illinois, pro se.

Maryl R. Rosen, Esquire, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that affirmed his removal. We DENY the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the ID as MODIFIED by this Opinion and Order with respect to the merits of the charge, still SUSTAINING the appellant's removal.

BACKGROUND

¶2 Effective January 31, 2007, the agency removed the appellant from his position as a preference-eligible PS-4 Regular Mail Handler with the agency's

Cardiss Collins Postal Facility (Cardiss Collins) in Chicago, Illinois, based on a charge of Unacceptable Conduct/Violent and Threatening Behavior Towards Co-Workers. Initial Appeal File (IAF), Tab 7, Subtab 4 at 2, Subtab 4B at 1, 3. The agency based its charge on a November 5, 2006 incident in which the appellant went to Cardiss Collins's attendance control office¹ and allegedly shouted at Mail Processor Clerks Janice Dean and Roslyn Oliver, "Give me my [time] card before I blow your brains out." *Id.*, Subtab 4D at 1. After Ms. Dean and Ms. Oliver informed him that his card was not in the office, the appellant left the office, then returned about ten minutes later and allegedly acted as though he was "holding a machine gun/firearm and making machine gun sounds while pointing at Ms. Dean and Ms. Oliver." *Id.* He then allegedly laughed and walked away. *Id.*

¶3 The appellant appealed his removal to the Board and requested a hearing. IAF, Tab 1. He denied threatening anyone and argued that the agency's action was taken in retaliation for his prior equal employment opportunity (EEO) activity.² *Id.* at 3, Tab 12 at 3. The administrative judge (AJ) apprised the appellant of the burden and elements of proof as to his affirmative defense. IAF, Tab 12 at 3.

¶4 After a hearing, the AJ issued an ID affirming the agency's action. IAF, Tab 15 (ID). The AJ found that the agency proved its charge by preponderant evidence, ID at 3-14, that the action promotes the efficiency of the service, ID at 15, and that the penalty of removal is reasonable, ID at 15-18. The AJ further found that the appellant failed to prove his affirmative defense. ID at 14-15.

¶5 The appellant has filed a PFR in which he asks the Board to consider documents that he filed in another Board appeal. Petition for Review File

¹ The ID identifies this office as the Absence Control office. IAF, Tab 15 (ID) at 3.

² In his petition for appeal, the appellant also alleged discrimination on the basis of religion and sex. IAF, Tab 1 at 3. However, he withdrew those affirmative defenses during the prehearing conference. IAF, Tab 12 at 3.

(PFRF), Tab 1 at 6. On review, the appellant disputes the merits of the charge and the penalty and appears to reassert his affirmative defense. PFRF, Tab 1. The agency has filed a response in opposition to the petition. PFRF, Tab 7. The appellant has filed a reply to the agency's response. PFRF, Tab 8. We have not considered the reply because the appellant submitted it after the record closed on review and he has not shown that it contains evidence not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i); *Greenough v. Department of the Army*, 73 M.S.P.R. 648, 651, *review dismissed*, 119 F.3d 14 (Fed. Cir. 1997) (Table).

ANALYSIS

The Board will not consider the documents that the appellant cites in his PFR.

¶6 On PFR, the appellant asks the Board to consider several documents that he claims he submitted as evidence in an appeal that he filed with the Board in November 2006.³ PFRF, Tab 1 at 6. The appellant does not submit these documents with his PFR, nor has he shown that they were unavailable before the close of the record below despite his due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the PFR absent a showing that it was unavailable before the record was closed despite the party's due diligence). Thus, we will not consider these documents.

The appellant's petition does not provide a basis for Board review.

¶7 In general, the appellant merely disagrees with the AJ's explained fact findings and credibility determinations. Thus, his petition does not provide a basis for reversing the ID. *See Weaver v. Department of the Navy*, 2 M.S.P.R.

³ On November 29, 2006, the appellant filed a Board appeal challenging his indefinite suspension from service effective November 6, 2006. *See Rose v. U.S. Postal Service*, MSPB Docket No. CH-0752-07-0121-I-1 (Initial Decision, Jan. 29, 2007).

129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Accordingly, we will not consider the appellant's petition further, except to the extent that it presents arguments relevant to the issues discussed below.

The AJ erred in analyzing the charge.

¶8 We have reopened this case because we find that the AJ erred in not analyzing the charge under *Metz v. Department of the Treasury*, 780 F.2d 1001, 1002-03 (Fed. Cir. 1986). The AJ correctly noted that, in deciding whether statements constitute threats, the Board applies the reasonable person standard, considering the listeners' reactions, the listeners' apprehension of harm, the speaker's intent, any conditional nature of the statements, and any attendant circumstances. *Metz*, 780 F.2d at 1002-03; ID at 2-3. However, the AJ then incorrectly identified the charge as "making statements that caused anxiety and disruption in the workplace" and stated that, "because intent is not an element of the charge, the appellant's intent is irrelevant to determine whether he engaged in the charged misconduct" ID at 3; IAF, Tab 12 at 2. Accordingly, the AJ did not analyze the charge under *Metz*.

¶9 As noted above, the charge in this case is Unacceptable Conduct/Violent and Threatening Behavior Towards Co-Workers. IAF, Tab 7, Subtab 4D at 1. When an agency's charge is labeled as a threat, the Board will require the agency to meet the requirements set forth in *Metz*. *Roseberry v. Department of Veterans Affairs*, 51 M.S.P.R. 172, 175-76 (1991) (the Board did not sustain the agency's charge of "insolent, insubordinate and threatening behavior" as it failed to satisfy the *Metz* standard); *cf. Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 203-04 (1997) (because the agency charged the appellant with "improper conduct," it was not required to prove a threat under *Metz* even though the narrative description of the misconduct accompanying the charge described the appellant's behavior as threatening). The AJ therefore erred by not applying *Metz* in her analysis of the agency's charge.

¶10 Notwithstanding this error, we find it unnecessary to remand this case for further proceedings. Instead, we rely on the AJ's adequate fact findings and analyze the evidence at this level under the standard set forth in *Metz*, considering the individual *Metz* factors. See, e.g., *Larry v. Department of Justice*, 76 M.S.P.R. 348, 357 (1997); *Greenough*, 73 M.S.P.R. at 652, 654.

The agency proved its charge under *Metz*.

¶11 In addition to Ms. Dean and Ms. Oliver, the following witnesses provided testimony regarding the first two *Metz* factors, the listeners' reaction and apprehension of harm: Calmal Buford, the supervisor to whom Ms. Dean and Ms. Oliver first reported the November 5, 2006 incident; Demeitrus Williams, Manager of Distribution Operations and the supervisor to whom Ms. Buford reported the incident, Hearing Transcript (HT) at 68-69, 73; Barbara Reynolds-Morgan, Acting Senior Manager of Distribution Operations and the supervisor to whom Mr. Williams reported the incident, HT at 75, 114; and deciding official Larry Muse, Senior Manager of Distribution Operations, HT at 129-30.

¶12 Ms. Dean testified that she felt "kind of scared" and "shocked" by the appellant's actions on November 5, 2006, and did not report the incident until the next day because she was in shock and did not consider it a threat until the following day. HT at 8-9, 27; ID at 4. She also testified that after the incident she was "scared" and concerned about returning to work and remains afraid because she does not know what the appellant is going to do. HT at 13-15; ID at 4, 12. In addition, she testified that she does not want to see the appellant return to Cardiss Collins. HT at 14; ID at 4.

¶13 The AJ stated in the ID that Ms. Oliver was visibly upset on the witness stand and cried during her testimony. ID at 12. Ms. Oliver testified that she was "shocked" after the incident and later realized that both she and Ms. Dean had their lives threatened but did not report the incident on November 5, 2006, because it occurred on a Sunday and there were no managers present to report the incident to. HT at 43-44, 46; ID at 5. In addition, she testified that she is afraid

of the appellant and worries that he might come back and “do something” to her, reasoning that, if he threatened her for not having a card, there is no telling what he will do to her if he loses his job. HT at 48-49; ID at 5, 12. Ms. Oliver testified that “if he loses his job it might be a disaster . . . I don’t want to die.” *Id.*

¶14 Ms. Buford testified that on November 6, 2006, she noticed Ms. Dean and Ms. Oliver staring into space and asked them what was wrong because they are usually happy-go-lucky and friendly. HT at 64, 66; ID at 6, 12. She testified that they replied, “We’ve been threatened . . . he’s going to kill us,” and then described the incident of the previous day. HT at 66-67; ID at 6, 12. Ms. Buford also testified that, when Ms. Dean and Ms. Oliver were recounting the incident, their demeanor “was scary” and “in some part of the conversation I think they maybe shook.” HT at 71. She further testified that Ms. Oliver told her that she had been unable to sleep the night of the incident. HT at 71; ID at 6.

¶15 Mr. Williams testified that he learned of the incident from Ms. Buford, who told him that Ms. Dean and Ms. Oliver had been threatened and were very afraid. HT at 75; ID at 6. He also testified that, after meeting with the appellant, he checked on Ms. Dean and Ms. Oliver to see if they were alright because they were afraid. HT at 88. In addition, Mr. Williams testified that, when he reported the incident to Ms. Reynolds-Morgan, he told her that Ms. Dean and Ms. Oliver waited a workday to report the incident because they were afraid. HT at 76-77; ID at 7.

¶16 Ms. Reynolds-Morgan testified that on November 6, 2006, Ms. Dean and Ms. Oliver told her that they were afraid that the appellant would “do something” because he had come to the window of the attendance control office and said that he was going to “do them bodily harm.” HT at 123. She said that, because Ms. Dean and Ms. Oliver were “very, very afraid” of the appellant, after the meeting on November 6, 2006, she informed them that the appellant had been placed on

“emergency placement,” his access card had been deactivated, and he would not be able to get in the building. HT at 122-24; ID at 10.

¶17 Mr. Muse testified that, when he interviewed Ms. Dean and Ms. Oliver regarding the incident on November 5, 2006, he asked them if they felt threatened or scared, and they “emphatically said, yes” HT at 132; ID at 16.

¶18 In the ID, the AJ noted that Ms. Dean and Ms. Oliver attempted to retract their complaints against the appellant about three weeks before the hearing and informed the agency that they would not testify at the hearing absent a subpoena from the AJ. ID at 12; *see* IAF, Tab 11, Exhibits 6, 7. The AJ found that, “based on their testimony during the hearing, it is clear Ms. Dean and Ms. Oliver requested not to participate in this appeal because they remain afraid of the appellant.” ID at 12.

¶19 The AJ also found that Ms. Buford, Mr. Williams, and Ms. Reynolds-Morgan provided straightforward, consistent, unbiased, and corroborative testimony. ID at 12. She concluded that “[c]learly, the women were afraid and believed the appellant intended to cause them physical harm.” *Id.*

¶20 On review, the appellant alleges that Ms. Dean’s and Ms. Oliver’s failure to report their November 5, 2006 encounter with him until the following day is inconsistent with their claim that they were afraid following the incident. PFRF, Tab 1 at 3.

¶21 In the ID, the AJ addressed why Ms. Dean and Ms. Oliver did not report the November 5, 2006 incident until the next day, stating as follows:

Although Ms. Dean and Ms. Oliver did not report the incident until the following workday, the record demonstrates they had to leave the Absence Control office shortly after the incident occurred, to process mail for the remainder of their shift. Moreover, this incident occurred on a Sunday, and there were no managers to report it to.

ID at 12.

¶22 The appellant alleges on review that Ms. Oliver's testimony that there were no managers present on the date of the incident "is an outright lie." PFRF, Tab 1 at 2. This argument is mere disagreement with the AJ's explained fact findings and credibility determinations and, as such, does not warrant disturbing the ID. *See Weaver*, 2 M.S.P.R. at 133-34.

¶23 Further, even if there were managers present at Cardiss Collins on November 5, 2006, Ms. Dean's and Ms. Oliver's failure to report the incident until the next day does not disprove their expressed concern for their safety. Both Ms. Dean and Ms. Oliver testified that they were shocked by the appellant's actions and Mr. Williams testified that he informed Ms. Reynolds-Morgan that they did not report the threat immediately because they were afraid. HT at 9, 43-44, 76-77; ID at 4-5, 7. In light of the testimony concerning Ms. Dean's and Ms. Oliver's reactions to the November 5, 2006 incident, we agree that their failure to report the incident immediately is more likely attributable to their fear and shock in response to the events of November 5, 2006, than to a belief that the appellant's conduct was not threatening. In any event, Ms. Dean's and Ms. Oliver's failure to report the incident immediately does not outweigh all of the other evidence, described above, that indicates that they perceived the appellant's behavior as threatening.

¶24 The third *Metz* factor, the speaker's intent, also supports the conclusion that the appellant's statement and gesture were threats. Whether an employee intends to carry out a threat is irrelevant to whether an employee intends to make a threat. *See Greenough*, 73 M.S.P.R. at 652. The statement at issue was an expression of the appellant's intention to kill Ms. Dean and Ms. Oliver and there is no evidence that the appellant intended his conduct to be humorous or that he was just "blowing off steam." We also note that the deciding official, Mr. Muse, determined that the appellant made the threat intentionally and maliciously. HT at 137. Considering these circumstances, it is apparent that the appellant intended to express violent thoughts towards Ms. Dean and Ms. Oliver.

¶25 The fourth *Metz* factor is the conditional nature of the statement. The use of conditional language weighs against a finding of threat under *Metz*, 780 F.2d at 1003 ("an employee who [makes] a generalized conditional statement is less likely to have intended to threaten a co-worker than an employee who stated a simple threat"). The statement at issue here was clearly conditional because the appellant threatened to "blow [Ms. Dean's and Ms. Oliver's] brains out" if they did not give him his time card. IAF, Tab 7, Subtab 4D at 1. However, when the appellant returned to the window and pointed at Ms. Dean and Ms. Oliver as though he had a machine gun, the appellant essentially communicated to Ms. Dean and Ms. Oliver that he considered them to have fulfilled the condition that he had placed on his earlier statements. Thus, while the conditional nature of the appellant's prior statement might have weighed against finding that the appellant made a threat, his subsequent gesture of pointing at Ms. Dean and Ms. Oliver as though he had a machine gun, thereby essentially accusing them of fulfilling the condition, supports a finding that the appellant threatened Ms. Dean and Ms. Oliver.

¶26 Further, the conditional nature of a statement does not necessarily preclude its being an actionable threat. *Hutson v. Department of the Interior*, 67 M.S.P.R. 432, 438 (1995). For example, threats of bodily harm with a firearm, even if conditional, are unsettling per se, and thus support a finding that they constitute a threat. *See Greenough*, 73 M.S.P.R. at 651, 655.

¶27 Turning to the fifth and final *Metz* factor, the 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. *Powell v. Department of Justice*, 73 M.S.P.R. 29, 33 (1997). As previously noted, the context for the appellant's comments was his inability to find his time card. The appellant's problems finding his time card were not attendant circumstances warranting a finding that his statement and gesture were not threats. *See, e.g., Sands v. Department of Labor*, 88 M.S.P.R. 281, ¶ 11 (2001).

¶28 In addition, the evidence shows that Ms. Buford, Mr. Williams, and Ms. Reynolds-Morgan acted with concern for the employees' safety. Ms. Buford showed her concern for Ms. Dean and Ms. Oliver by reporting the incident to Mr. Williams, HT at 75, who, along with Ms. Reynolds-Morgan, took steps to ensure the safety of other employees by placing the appellant on emergency off-duty status effective November 6, 2006, IAF, Tab 7, Subtab 4H; HT at 122-24.

¶29 In light of these circumstances, we find that the agency has shown by preponderant evidence that the appellant's statement and gesture as set forth in the proposed notice of removal constituted threats under *Metz*. Accordingly, we sustain the charge.

The agency's action promotes the efficiency of the service and removal is a reasonable penalty.

¶30 Although not challenged on review, we find that the AJ correctly found that the action promotes the efficiency of the service. ID at 15. The Board has held that threatening a government employee impairs the efficiency of the service and provides a basis for removal of the employee who made the threat. *Hutson*, 67 M.S.P.R. at 447; ID at 15.

¶31 In assessing the reasonableness of the agency's penalty, the AJ considered the relevant documentary evidence and the hearing testimony of Mr. Muse and noted that the Board has repeatedly upheld removal penalties in threat cases. ID at 15-17. She reviewed Mr. Muse's reasoning and found that, although the agency failed to present evidence which would explain Mr. Muse's assertions concerning the notoriety of the appellant's conduct or his lack of rehabilitative potential, removal did not exceed the bounds of reasonableness in light of the seriousness of the offense and the Board's precedent finding that removal is a reasonable penalty under similar circumstances. *Id.* Recognizing that the Board must accord proper deference to the agency's primary discretion in managing its workforce, we see no reason to disturb this finding. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

¶32 We thus find that the AJ correctly upheld the appellant's removal.

ORDER

¶33 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, 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 must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order

before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling 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 do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.