

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 2**

Docket No. AT-0752-07-0092-I-1

**Sylvester Christopher,
Appellant,**

v.

**Department of the Army,
Agency.**

January 8, 2008

Joree G. Brownlow, Bartlett, Tennessee, for the appellant.

Allen S. Black, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that mitigated the appellant's removal to a 14-day suspension. For the reasons stated below, we GRANT the agency's petition under 5 C.F.R. § 1201.115, AFFIRM in part and REVERSE in part the initial decision to SUSTAIN the agency's charge of falsification, and AFFIRM the agency's removal action.

BACKGROUND

¶2 The appellant was a WG-3801-11 Metal Worker Welder with the agency's Memphis District of the Army Corps of Engineers. Initial Appeal File (IAF), Tab 3, Subtab 4a. The agency proposed the appellant's removal based on 3 charges:

(1) inappropriate comments in the workplace (1 specification); (2) “[f]alse statements” on his Optional Form (OF) 306, “Declaration for Federal Employment” (5 specifications); and (3) violation of the agency’s policy on violence in the workplace (1 specification). *Id.*, Subtab 4d. The first charge was based on the appellant’s March 8, 2006 statement to a coworker that, if he did not receive a promotion to a leader’s position, he “would go out to [his] car, get [his] gun and shoot the place up and shoot somebody.” *Id.* at 1. The second charge was based upon falsifications in his October 6, 2003 OF 306 that were discovered by the agency while conducting a background check of the appellant, revealing that he had prior criminal convictions that he had not disclosed on his OF 306. *Id.* at 1-2. The third charge was based on the appellant’s March 8, 2006 statement to a coworker. *Id.* at 2-3. The agency removed the appellant effective October 16, 2006, and the appellant appealed to the Board. IAF, Tab 1, Tab 3, Subtabs 4a-4b.

¶3 After a hearing, the administrative judge found that the agency proved by preponderant evidence that the appellant made inappropriate comments in the workplace.* Initial Decision (ID) at 2-4. The administrative judge found further, however, that the agency failed to prove that the appellant intentionally falsified his OF 306. ID at 4-7. The administrative judge then mitigated the penalty of removal to a 14-day suspension and ordered the agency to provide interim relief to the appellant if a petition for review was filed by either party. ID at 7-11.

¶4 The agency has filed a petition for review asserting that the administrative judge erred in finding with regard to the false statements charge that the

* The administrative judge correctly merged the charge of violating the agency’s policy on violence in the workplace with the charge of making inappropriate comments in the workplace because these two charges were based on the same act of misconduct and because proof of one charge automatically constitutes proof of the other. ID at 2 n.*; IAF, Tab 3, Subtab 4d; *see Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 18 (2006).

appellant's partial disclosure of his criminal history on his OF 306 showed that he did not intend to deceive the agency. Petition for Review File (PFRF), Tab 1 at 2. The agency also asserts that the administrative judge made fact findings and credibility determinations that are inconsistent with the record evidence. *Id.* The appellant has responded to the agency's petition for review and maintains that the agency has not complied with the May 14, 2007 initial decision's order to provide interim relief. PFRF, Tabs 3, 4.

ANALYSIS

The agency has complied with the initial decision's order for interim relief.

¶5 When an administrative judge has ordered interim relief under 5 U.S.C. § 7701(b)(2)(A), an agency must submit a certification with its petition for review that it has either provided interim relief or that it has made a determination that the appellant's return to, or presence in, the workplace would be unduly disruptive. 5 C.F.R. § 1201.115(b); *DeLaughter v. U.S. Postal Service*, 3 F.3d 1522, 1524-25 (Fed. Cir. 1993). If the agency determines that the appellant's return to the workplace would be unduly disruptive, the agency must nevertheless provide pay, compensation, and all other benefits during the interim relief period. 5 U.S.C. § 7701(b)(2)(B).

¶6 When an appellant alleges noncompliance with an interim relief order, the Board's authority is restricted to reviewing whether an undue disruption determination was made when required, and whether the appellant is receiving appropriate pay and benefits. *King v. Jerome*, 42 F.3d 1371, 1374-75 (Fed. Cir. 1994); *Powers v. Department of the Treasury*, 86 M.S.P.R. 256, ¶ 6 (2000). An agency's failure to provide the required certification with its petition for review or to provide evidence of compliance in response to a Board order on that subject may result in dismissal of the agency's petition for review. 5 C.F.R. § 1201.115(b)(4).

¶7 The agency's petition for review included a certification of compliance with the interim relief order stating that the agency is providing the appellant with interim relief as of the date of the initial decision. PFRF, Tab 1 at 17-18. The agency also submitted a copy of the June 12, 2007 letter it issued to the appellant informing him that: He had been placed back in a pay status as of the date of the initial decision; he would receive the appropriate pay and benefits for the interim relief period; and, because placing him back in his original workplace would cause an undue disruption to the workforce, he would be reassigned to a different position during the interim relief period. *Id.* at 19.

¶8 The appellant argues that the agency, by placing him in a different position from the position he occupied at the time the agency took its action, failed to comply with the administrative judge's interim relief order. PFRF, Tab 4 at 5-8. Because the agency promptly notified the appellant that he would be reassigned to prevent disruption in the workplace, we find that it has shown that it made the undue disruption determination when required, and provided to the appellant proper and timely notification of that determination. *See Jerome*, 42 F.3d at 1374-75; *Manning v. Department of Defense*, 62 M.S.P.R. 456, 458-59 (1994).

¶9 Additionally, the appellant initially claimed that the agency failed to comply with the interim relief order by failing to pay him from the date of the May 14, 2007 initial decision; however, he later submitted evidence allegedly showing that, although the agency had begun paying him, it had not properly restored his annual leave. PFRF, Tab 3 at 3-4, Tab 5. We find that, because the agency has certified that it timely took the appropriate administrative action to result in the issuance of pay to the appellant for the interim relief period, and because the appellant's evidence shows that he is receiving pay and benefits from the agency during the interim period, the agency has complied with the interim relief order. *See Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 7 (2006), *aff'd*, 218 F. App'x 1001 (Fed. Cir. 2007); *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶¶ 4-8 (2000), *aff'd sub nom. Sheehan v. Department of*

the Navy, 240 F.3d 1009 (Fed. Cir. 2001). Thus, we find no basis for dismissing the agency's petition for review for failure to comply with the interim relief order.

The administrative judge correctly sustained the charge of inappropriate comments in the workplace.

¶10 Neither party contests the administrative judge's findings with respect to the charge of making inappropriate comments in the workplace. ID at 2-4. Based on our review of the record, we discern no error in the administrative judge's conclusion that the agency proved the charge by preponderant evidence. *See 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*). The findings in the initial decision on the agency's charge of inappropriate comments in the workplace are therefore sustained.

The administrative judge erred by not sustaining the charge of false statements.

¶11 An OF 306, "Declaration for Federal Employment," requires applicants to provide general information about their backgrounds, including their criminal history. IAF, Tab 3, Subtab 4g at 4-5. Item 9 of the OF 306 asks as follows:

During the last 10 years, have you been convicted, been imprisoned, been on probation, or been on parole? (Includes felonies, firearms or explosives violations, misdemeanors, and all other offenses). If "YES," use item 16 to provide the date, explanation of the violation, place of occurrence, and the name and address of the police department or court involved.

Id., Subtab 4g at 4. The OF 306 requires that the applicant for federal employment certify, to the best of his knowledge and belief, that the information he provides on the OF 306 is "true, correct, complete, and made in good faith." *Id.* at 5. In response to item 9 of the OF 306, the appellant checked "YES," and, in the space provided under item 16, he wrote: "My wife and I had a domestic squabble between [19]96 & [19]97. I was placed on probation but all that has been taken care of." *Id.* at 4-5. In its notice of proposed removal, the agency

alleged that the appellant made false statements on his October 6, 2003 OF 306 by failing to disclose that he was arrested, charged, and convicted of assault on 4 separate occasions between December 1994 and November 1999, for which he was sentenced to and served periods of incarceration (specifications 1-4), and that he was charged and convicted of contempt of court in 2001 (specification 5). IAF, Tab 3, Subtab 4d at 1-2, Subtab 4g at 6-9.

¶12 To establish a charge of falsification, the agency must prove, by preponderant evidence, that the appellant: (1) supplied wrong information; and (2) did so with the intention of defrauding, deceiving, or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed. Cir. 2002); *Naekel v. Department of Transportation*, 782 F.2d 975, 977-78 (Fed. Cir. 1986). Falsification and fraud cases often turn on proof of the element of intent. A finding that an appellant has provided incorrect information, however, cannot control the question of intent for purposes of adjudicating a falsification charge. *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001). Whether intent has been proven must be resolved by the totality of the circumstances. *Id.*; *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Although intent is generally proven by circumstantial evidence, *Riggin v. Department of Health & Human Services*, 13 M.S.P.R. 50, 52 (1982), the Board must also consider the appellant's plausible explanation as an element of the totality of the circumstances, *Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, ¶¶ 6-7 (1998). The specific intent to make a false or fraudulent statement may be inferred when the alleged misrepresentation is made with reckless disregard for the truth. *Id.*, ¶ 7; *McCreary v. Office of Personnel Management*, 27 M.S.P.R. 459, 462 (1985).

¶13 The appellant testified that he told Dennis Jerrell, the Human Resource Specialist who oversaw the appellant's completion of his pre-employment paperwork, that he had been convicted of some misdemeanor charges. Hearing Transcript (HT) at 82. He testified that he showed Mr. Jerrell the statement he

wrote on his OF 306 regarding the “domestic squabble” between him and his wife, and that Mr. Jerrell told him that this statement was “fine for now” and that the agency could “do an investigation” later on if necessary. HT at 80-83. Thus, the appellant contends, “That’s why I put it down because [Mr. Jerrell] approved it.” HT at 82. He testified that all of his criminal convictions were related to his disputes and domestic violence with his wife. HT at 78. The appellant testified that, at the time he completed his OF 306, he recalled that he was arrested and convicted of assault in King County, Washington, and in Shelby County, Tennessee. HT at 84-85, 94-95. He testified that he spent 47 days incarcerated in King County, Washington, and 157 days incarcerated in Shelby County, Tennessee. HT at 84-85; IAF, Tab 3, Subtab 4g. He also served in a work-release program for 30 days. HT at 78, 112. The appellant testified that, because he did not remember the dates of his criminal charges at the time he completed the OF 306, he “put down what [he] thought would be sufficient enough information” so that the agency would have had enough information if it needed to “do an investigation.” HT at 88-89, 108. The appellant did not recall whether he was under time constraints at the time he completed his OF 306. HT at 102.

¶14 In his stipulation of testimony, Mr. Jerrell stated that he has worked in the human resources area for 18 years and has served in his Human Resource Specialist position since January 2000. IAF, Tab 23 at 3. Mr. Jerrell stated that he was present and remembers when the appellant completed his OF 306; he stated that he administered the appellant’s oath of office on October 6, 2003, and that he never swears in an individual as an employee if there is a question as to whether all of the individual’s documents and materials are complete and in order. *Id.* He also stated that he always tells each applicant that he cannot advise them what to put down on the OF 306 but that the applicant must complete the form to the best of his memory and as completely as possible. IAF, Tab 23 at 4. Mr. Jerrell stated that, at the time the appellant completed his OF 306, the appellant did not inform him that he had been charged or convicted of any crimes.

Id. Mr. Jerrell interpreted the appellant's OF 306 "domestic squabble" statement as follows:

[T]hat on an occasion that the police were called out to the [appellant's] home because [the appellant] and his wife were disturbing the peace or were somehow involved in a petty argument, and that [the appellant] was fined or his charge was set aside and would be dismissed if he stayed out of trouble for a specific period.

Id.

¶15 The administrative judge found that the appellant lacked the intent to deceive the agency. *Id.* at 7. The administrative judge concluded that, while the appellant's "domestic squabble" explanation of his affirmative response to item 9 in the space provided under item 16 of the OF 306 was facially incomplete because it did not contain required information such as the date and explanation of the violation, the appellant's attempt to explain what had happened showed that he was not trying to cover up his criminal history. *Id.* In support of his finding, the administrative judge specifically cited the fact that the appellant did not have any history of criminal charges "not related to domestic abuse." *Id.*

¶16 The Board will normally accord due deference to an administrative judge's credibility assessment of the appellant. *Weaver*, 2 M.S.P.R. at 133. However, in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only as much weight as may be warranted by the record and by the strength of the administrative judge's reasoning. *Id.* When an administrative judge's findings are not based on the observation of witnesses' demeanor, the Board is free to re-weigh the evidence and to substitute its own judgment on credibility issues. *Haebe*, 288 F.3d at 1302. In this case, the initial decision's findings do not indicate that the administrative judge relied upon the demeanor of the witnesses.

¶17 The administrative judge's finding that the appellant's partial disclosure on his OF 306 indicated that he lacked any intent to deceive is not in accord with

prior Board cases which have found that an employee intended to mislead the agency where he knowingly revealed some, but not all, requested information when completing employment forms. *See, e.g., Reed v. Office of Personnel Management*, 74 M.S.P.R. 616, 620-21 (1997) (finding that the appellant knowingly submitted incorrect information on his employment forms when he disclosed only a single warrant and not all of his prior arrests, criminal charges, and convictions of which he was aware at the time he completed the forms); *Harmon v. General Services Administration*, 61 M.S.P.R. 327, 332 (1994) (finding that the appellant's intent to deceive the agency could be inferred from his reckless disregard for the truth when he deliberately and repeatedly claimed in his application for federal employment that he had obtained a college education when he had actually only attended a few general classes on a college campus), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table); *Devitto v. Office of Personnel Management*, 61 M.S.P.R. 297, 299-302 (1994) (sustaining the charge of intentional falsification of employment documents where the appellant disclosed some, but not all, of his prior arrests and convictions in reckless disregard for the truth); *Buhl v. Office of Personnel Management*, 37 M.S.P.R. 305, 311 (1988) (finding that the appellant deliberately concealed two of his prior arrests despite having listed his most recent arrests on his application for federal employment). Further, we find that the appellant's own testimony does not support the administrative judge's finding that the appellant did not intend to deceive the agency when he failed to disclose his prior convictions because the appellant testified that he recalled his 1995, 1997, and 1998 convictions for assault (specifications 1-3) at the time he completed the OF 306. HT at 84-85, 94-95.

¶18 Additionally, in finding that the appellant lacked the intent to deceive the agency, the administrative judge also credited the appellant's testimony that he informed Mr. Jerrell of his criminal convictions over Mr. Jerrell's stipulation of testimony that the appellant did not inform him of any convictions. ID at 6-7. We find it inherently improbable that Mr. Jerrell, a seasoned human resources

professional, would have administered the oath of office to the appellant based on the appellant's OF 306, as completed, if the appellant had actually informed him of his multiple convictions and incarcerations for assault. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 461 (1987) (the inherent improbability of the witness's version of events is a factor that an administrative judge must consider to resolve credibility issues). Instead, we find that Mr. Jerrell's interpretation of the appellant's "domestic squabble" statement in the space provided under item 16 of his OF 306 is plausible, considering the scant information the appellant provided on that form. Therefore, contrary to the administrative judge's conclusion, we find that the appellant's failure to report his prior convictions and incarcerations for assault is not plausibly accounted for by his explanation that he informed Mr. Jerrell of his prior convictions and that Mr. Jerrell reviewed the appellant's statement on his OF 306 and found it sufficient. *See Buhl*, 37 M.S.P.R. at 311.

¶19 The totality of the circumstances establishes that the appellant knowingly did not disclose his 1995, 1997, and 1998 convictions for assault, despite his recollection of these convictions at the time he completed his OF 306. Instead, we find that the appellant, in reckless disregard for the truth, wrote in the space provided under item 16 of his OF 306 only that he and his wife were involved in a "domestic squabble" between 1996 and 1997 because he intended to deceive the agency. *See Blake*, 81 M.S.P.R. 394, ¶ 27. Thus, because we find that the agency has established by preponderant evidence that the appellant intentionally made false statements on his OF 306 based on specifications 1-3 of the charge, we sustain the charge of falsification. Because proof of one specification is sufficient to sustain a charge, we do not address the additional specifications regarding the appellant's 1999 conviction for assault and 2001 conviction for contempt of court (specifications 4-5). IAF, Tab 3, Subtab 4d; *see Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (where more than one event or factual specification supports a single charge, proof of one or more,

but not all, of the supporting specifications is sufficient to sustain the charge); *see also Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, ¶ 10 (2001) (where the proven charges were sufficient to warrant the penalty imposed by the agency, it was not necessary to address the agency's arguments that additional specifications of one charge should have been sustained), *aff'd*, 30 F. App'x 973 (Fed. Cir. 2002).

The agency's selected penalty of removal is within the tolerable limits of reasonableness.

¶20 The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Where, as here, the agency's charges are sustained, the Board will modify an agency-imposed penalty only when it finds that the agency failed to weigh the relevant factors under *Douglas* or the penalty imposed clearly exceeded the bounds of reasonableness. *Jacoby v. U.S. Postal Service*, 85 M.S.P.R. 554, ¶ 15 (2000).

¶21 The Board has consistently held that the penalty of removal for falsification of government employment documents is within the bounds of reasonableness because such falsification raises serious doubts regarding the appellant's honesty and fitness for employment. *See, e.g., Phillips v. Department of the Interior*, 95 M.S.P.R. 21, ¶¶ 16, 18 (2003), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005); *Wayne v. Department of the Navy*, 55 M.S.P.R. 322, 330 (1992). Here, the appellant not only falsified employment documents, but he also made inappropriate comments in the workplace.

¶22 The record reflects that the agency conducted a thorough analysis of the relevant *Douglas* factors. IAF, Tab 3, Subtabs 4b, 4c. In considering the seriousness of the offenses, the agency found that the appellant's prior criminal convictions for assault indicate that his inappropriate comment in the workplace, which was of a violent nature, was not inadvertent, but intentional, and that this

behavior creates the possibility of a dangerous and unacceptable situation for the employees of the agency. *Id.*, Subtab 4c. The agency also considered the appellant's successful performance during his 3-year tenure as a federal employee, but found that it was outweighed by the seriousness of the offenses and his lack of potential for rehabilitation. *Id.* Thus, we find that the agency considered all of the relevant factors and that the penalty of removal does not exceed the bounds of reasonableness.

¶23 Accordingly, we affirm the appellant's removal.

ORDER

¶24 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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.