

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

2008 MSPB 106

Docket No. SF-0752-06-0866-I-1

**Kenneth K. Kamahele,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

May 15, 2008

William McCorriston, Esquire, Honolulu, Hawaii, for the appellant.

Eileen Dizon Calaguas, Esquire, San Bruno, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has petitioned for review and the appellant has cross-petitioned for review of an initial decision that sustained the charges against the appellant but mitigated the penalty from removal to a 90-day suspension. For the reasons set forth below, we GRANT the agency's petition for review (PFR) solely to consider its claim that the administrative judge (AJ) erred in mitigating the penalty. We AFFIRM the initial decision's findings on the charges, REVERSE the initial decision's holding on the penalty, and SUSTAIN the appellant's removal. We DENY the appellant's cross-PFR under 5 C.F.R. § 1201.115 for failure to meet the criteria for review.

BACKGROUND

¶2 The agency removed the appellant from his position as the Assistant Federal Security Director-Screening (AFSD-Screening) of the Honolulu International Airport (HNL). Initial Appeal File (IAF), Tab 5, subtabs 4(B), 4(D). The agency based the action on the following two charges: (I) Inappropriate Conduct Towards Transportation Security Administration (TSA) Employees (five specifications); and (II) Lack of Candor During a Management Inquiry (three specifications). *Id.* In Charge I, specification 1, the agency charged the appellant with suggesting that Screening Managers offer employment applications for Jack-in-the-Box (a fast food restaurant) to screeners who complained or raised issues, and with offering such applications to screeners himself, under similar circumstances. *Id.* Specification 2 charged the appellant with stating, during a staff meeting in late 2003, that if things didn't "start improving here, I know who to get rid of," while pointing his finger at individuals and simulating a gun. *Id.* Specification 3 charged that, according to Lead Transportation Security Screener (TSS) Earl Yamasaki and former Screener Lauren McMillan, the appellant used his hand to simulate a gun while making statements such as, "I will pick off those of you that are becoming a problem," "I'm loading bullets into a gun," and "when I fire I want to make sure they all come out." The agency alleged that these comments were made at "various meetings at various times." *Id.*

¶3 Specification 4 charged that, in May 2005, Lead TSS Janet Thompson was scheduled to be interviewed for a Supervisory TSS position by a panel, that just before the interview started, the appellant entered the room and stated that he would observe, and that his presence would have no effect on the interview. IAF, Tab 5, subtabs 4(B), 4(D). The agency specified that the appellant remained behind Thompson for 10 minutes before leaving the room, and made her very nervous. *Id.*

¶4 In specification 5, the agency charged the appellant with using derogatory terms such as “punk,” “bully” and “scum” while counseling Screener Melvin Ross on July 7, 2005. *Id.* The agency further alleged that the appellant stated during the counseling session that he would put Ross in prison if he had the chance, and that he played an air violin and cut Ross off when Ross tried to explain his conduct. *Id.*

¶5 With regard to Charge II, the deciding official did not sustain the first specification. In specification 2, the agency charged the appellant with denying that he ever had Jack-in-the-Box applications and that he told employees that they should seek a job at a fast food restaurant if they did not like their TSA jobs, in the face of extensive evidence to the contrary. In specification 3, the agency charged the appellant with evidencing a lack of candor when he denied that he ever used his finger and hand to simulate a gun. *Id.*

¶6 On appeal, the appellant alleged that the agency’s action was affected by retaliation and discriminatory stereotypes related to his Polynesian race, color, and national origin, such as his size and stature because he is a large man with big-bones and has dark skin. IAF, Tabs 40 at 9-10, 45, 47 at 3-4. In addition, he asserted that the agency committed harmful procedural error in reaching its decision. IAF, Tabs 40 at 10-13, 45 at 6, 47 at 5.

¶7 The AJ found that to prove Charge I, the agency had to prove that the conduct underlying the specifications occurred, that the conduct was directed toward a TSA employee, and that the conduct was improper, unsuitable, or detracted from the appellant’s reputation. The AJ set forth all of the evidence concerning the specifications and discussed the testimony of the witnesses in detail. The AJ sustained only the part of specification 1 that charged the appellant with suggesting to Screening Managers that they offer employment applications for Jack-in-the-Box to screeners who complained or raised issues, as well as specification 5, finding that the agency did not prove specifications 2, 3, and 4. Thus, the AJ sustained Charge I. Initial Decision (ID) at 3-38. With

regard to Charge II, the AJ did not sustain specification 3 because the agency failed to prove that the appellant ever used his finger and hand to simulate a gun. Thus, the appellant's denial of that action cannot support a finding that he lacked candor. ID at 38-39. However, the AJ sustained specification 2, finding that the appellant's failure to admit possessing and joking about the Jack-in-the-Box applications evidenced a lack of candor. Accordingly, because the AJ sustained one specification, he sustained Charge II. ID at 45.

¶8 With regard to the appellant's affirmative defenses, the AJ found that the appellant failed to prove that his race, national origin, or color were motivating factors in the agency's decision to remove him. ID at 46-48. The AJ found further that, despite the errors committed by the agency's investigators, which were significant, the appellant failed to show that it was more likely than not that the errors could have changed the result of the removal action. ID at 48-54. The AJ then found that a nexus existed between the sustained misconduct and the efficiency of the service. ID at 55. However, the AJ found that, in light of the fact that only two of five specifications in Charge I were sustained and one of two specifications in Charge II was sustained, the reasonableness of the penalty required review. ID at 55-57. The AJ found further that Dennis Clark, the deciding official, did not consider all of the relevant *Douglas* factors, i.e., whether the appellant acted for financial gain, the appellant's dependability during his 4 years of service with TSA, and the fact that the appellant's supervisors at the HNL still had confidence in his work at the time of the removal (the AJ found no evidence in the record that Clark had any contact with the appellant in his performance of his duties since he was the Western Area Director and did not work in Hawaii). ID at 57. Thus, the AJ found that the agency's penalty determination was not entitled to deference and he independently weighed the relevant factors to evaluate the reasonableness of the penalty. The AJ found removal outside the bounds of reasonableness for the sustained misconduct and he mitigated the removal to a 90-day suspension. ID at 58-62.

ANALYSIS

¶9 After considering the parties' arguments concerning the merits of the charges and affirmative defenses, as well as the record evidence and hearing testimony, we find the appellant has not established a basis for granting his cross-PFR. *See* 5 C.F.R. § 1201.115. We therefore deny the appellant's cross-PFR for failure to meet the criteria for review.

¶10 We affirm the AJ's factual determinations, as well as his findings that the agency failed to establish three of its five specifications relating to Charge I, and one of its two specifications relating to Charge II. The initial decision reflects that the AJ considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. In its PFR, the agency has failed to identify any internal inconsistencies or inherent improbability in the AJ's fact finding or other basis sufficient to overcome the special deference which reviewing bodies must necessarily accord the factual determinations of the original trier of fact. Petition for Review File (PFRF), Tab 3. Accordingly, we will not disturb this aspect of the initial decision. *See Dunn v. Department of the Air Force*, 96 M.S.P.R. 166, ¶ 9 (2004). We additionally find, contrary to the appellant's assertion, that the agency has fully satisfied its interim relief obligations. *See* PFRF, Tabs 3, 6, 10. Nevertheless, for the reasons set forth below, we find that the AJ's penalty determination cannot be sustained. Thus, we grant the agency's PFR for the limited purpose of addressing the AJ's penalty determination.

¶11 Where, as here, the Board sustains the agency's charges, but not all of the specifications of those charges, it will review the agency-imposed penalty to determine whether it is within the parameters of reasonableness. *Groeber v. U.S. Postal Service*, 84 M.S.P.R. 646, ¶ 14 (2000), *aff'd*, 13 F. App'x 973 (Fed. Cir. 2001); *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650-51 (1996). The Board's function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been

properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Dunn*, 96 M.S.P.R. 166, ¶ 10; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Dunn*, 96 M.S.P.R. 166, ¶ 10. If the agency's penalty is beyond the bounds of reasonableness, the Board will mitigate only to the extent necessary to bring it within the parameters of reasonableness. *Id.*; *Groeber*, 84 M.S.P.R. 646, ¶ 14; *Payne*, 72 M.S.P.R. at 650-51. We find that, in mitigating the penalty, the AJ did not give appropriate deference to the agency's penalty determination and that the circumstances analyzed under the *Douglas* factors do not warrant mitigation in this case.

¶12 Here, although there is no evidence that Clark, the deciding official, would have removed the appellant based only on the sustained specifications, the agency has never indicated that it would impose a lesser penalty if some of the specifications were not sustained. *See Groeber*, 84 M.S.P.R. 646, ¶ 15. Clark testified at the hearing that, in arriving at the penalty of removal, he had considered the seriousness of the offenses, the nature of the appellant's employment, and the appellant's 4 years of federal service, as well as his ability to be rehabilitated. Feb. 15 Tr. at 177. Clark stated that he thought the appellant's management style of intimidation could not be changed. *Id.* at 178. Clark stated further that he viewed the offenses of inappropriate conduct and lack of candor to be egregious and that either charge would have supported a removal action. *Id.* at 177-78. Thus, Clark's actions and words indicate his belief that the incidents underlying the sustained specifications were serious.

¶13 We find that the AJ improperly weighed the *Douglas* factors and substituted his own judgment for Clark's. Specifically, the AJ found that, although not all of the *Douglas* factors were relevant in this case, Clark admitted

that he did not consider whether the appellant had acted for financial gain or the appellant's dependability during his 4 years of service with TSA. ID at 57.

¶14 However, based on the misconduct with which the appellant was charged, and the fact that there was no obvious financial gain to be had by the appellant from his actions, we find that "financial gain" is not a relevant factor in this case and the AJ erred by considering it. Further, Clark stated that he considered the appellant's length of service and his lack of any prior discipline. Feb. 15 Tr. at 179-81. Thus, in essence, Clark did consider the appellant's dependability during his service with the agency. We therefore find that the AJ inappropriately found that Clark failed to afford proper consideration to several relevant *Douglas* factors and, thus, improperly concluded that he was not required to defer to the agency's penalty determination.

¶15 In these circumstances, we conclude that, notwithstanding the favorable penalty factors upon which the AJ relied, removal is a reasonable penalty. *See Leatherbury v. Department of the Army*, 105 M.S.P.R. 405, ¶ 24 (2007) (an agency may hold a supervisor to a higher standard of conduct for purposes of determining the appropriateness of the penalty), *rev'd on other grounds*, No. 2007-3261, 2008 WL 1868068 (Fed. Cir. Apr. 29, 2008); *Jackson v. Department of the Army*, 99 M.S.P.R. 604, ¶¶ 2, 6 (2005) (removal is a reasonable penalty for conspiracy and lack of candor where supervisory police officers conspired to falsify firearms qualification tests of subordinates and failed to admit the full extent of their misconduct during the subsequent investigation); *Dunn*, 96 M.S.P.R. 166, ¶¶ 2, 6-18 (removal was a reasonable penalty where the employee engaged in conduct unbecoming and exhibited a lack of candor in connection with leaving a tractor-trailer transporting an Intercontinental Ballistic Missile loaded with 66,671 pounds of explosive propellant unattended in a public parking lot, and concealing information concerning the incident, despite numerous opportunities to tell the truth).

¶16 Accordingly, we reverse the initial decision insofar as it mitigated the penalty and we sustain the appellant's removal.

ORDER

¶17 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, www.cafc.uscourts.gov. 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.