

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

2009 MSPB 49

Docket No. DA-0752-08-0416-I-1

**Lemorn B. Jones,
Appellant,**

v.

**United States Postal Service,
Agency.**

April 1, 2009

James G. Pratt, Mesquite, Texas, for the appellant.

Suzanne V. Delaney, Esquire, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal for unacceptable attendance. We GRANT the petition and REOPEN the appeal in order to consider the effect of an arbitration decision vacating the appellant's prior 14-day suspension. For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The appellant's removal is AFFIRMED.

BACKGROUND

¶2 On May 7, 2008, the agency proposed the appellant's removal from his position as a Mail Handler, based on a charge of unacceptable attendance. Initial

Appeal File (IAF), Tab 8 at 42. The agency cited 11 instances of unscheduled absences between January 16 and April 18, 2008. *Id.* The agency also noted that the appellant had received a 14-day suspension on August 29, 2007, for unacceptable attendance. *Id.* at 43. On May 27, 2008, after the appellant had an opportunity to respond to the proposed removal, the agency issued a decision letter removing him effective June 10, 2008. *Id.* at 36.

¶3 On May 30, 2008, the appellant filed a Board appeal challenging his removal.¹ IAF, Tab 1. He requested a hearing. *Id.* at 2. After holding the appellant's requested hearing, the administrative judge issued an initial decision affirming the removal. IAF, Tab 14. She found that the agency proved its charge, *id.* at 3-6, and that the penalty of removal was reasonable and promoted the efficiency of the service, *id.* at 7-9. In her analysis of the penalty, the administrative judge referred to testimony from the deciding official that she had considered the appellant's 14-day suspension in making her penalty determination. *Id.* at 9. The administrative judge found that the deciding official's consideration of the appellant's prior disciplinary record was consistent with *Bolling v. Department of the Air Force*, [9 M.S.P.R. 335](#), 339-40 (1981). *Id.* at 9 n.11.

¶4 The appellant filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. On petition for review, he argues that he has new evidence. *Id.* at 4. He has attached to his petition for review an arbitration decision issued on September 10, 2008. *Id.* at 8-10. In that decision, the arbitrator vacated the appellant's 14-day suspension for unacceptable

¹ The appellant filed his appeal before the effective date of the removal action, and therefore the appeal was premature. See *Barrios v. Department of the Interior*, [100 M.S.P.R. 300](#), ¶ 6 (2005); [5 C.F.R. § 1201.22](#)(b). However, the appeal became ripe for the Board's adjudication when the removal became effective on June 10, 2008, and therefore it was appropriate for the administrative judge to process the appeal. See *Barrios*, [100 M.S.P.R. 300](#), ¶ 6.

attendance dated August 29, 2007. *Id.* at 10. The appellant also argues that the administrative judge erred by failing to admit into evidence a handwritten note from the appellant's union Branch President indicating that the appellant had a live grievance concerning the suspension while this matter was pending. *Id.* at 4. The appellant further contends that the agency violated the National Agreement with the union and that the arbitration decision rendered the removal action moot. *Id.* at 4-5.

¶5 The agency has responded in opposition to the petition for review.² PFR File, Tab 3 at 9-17. The agency argues that the arbitration decision was erroneous and that the suspension should not have been vacated. PFR File, Tab 3 at 12-13. The agency also argues that the fact that the suspension was vacated is not a basis for reversing the removal. *Id.* at 13-15. Finally, the agency argues that the administrative judge properly excluded the handwritten note from the appellant's union Branch President. *Id.* at 16.

² The agency's response was filed the day after the filing deadline. PFR, Tab 3; *see* PFR File, Tab 2. The agency moved for leave to file late on the grounds that the responsible attorney inadvertently "calendared the deadline for filing a response to the PFR . . . on the wrong date." PFR File Tab 3 at 7. The Board generally will not consider an untimely filing absent a showing of good cause. [5 C.F.R. § 1201.114\(f\)](#). To establish good cause for an untimely filing, a party must show that he "exercised due diligence or ordinary prudence under the particular circumstances of the case." *Schroeder v. Office of Personnel Management*, [106 M.S.P.R. 125](#), 127 (2007). A transposition error in calendaring a deadline does not constitute the exercise of due diligence or ordinary prudence. *See, e.g., Roush v. Department of the Interior*, [59 M.S.P.R. 113](#), 116 (1993) ("An error by the agency's clerical staff does not constitute good cause."); *Lapedis v. Department of Health and Human Services*, [47 M.S.P.R. 337](#), 340, *aff'd*, 949 F.2d 403 (1991) (Table) ("The mere fact that the agency miscalculated the time for filing its response . . . does not establish good cause for the untimely response."); *Gaff v. Department of Transportation*, [45 M.S.P.R. 387](#), 390 n. 2 (1990) ("miscalculation of the filing deadline does not constitute good cause"); *cf. Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶¶ 5-8 (2007) (finding that the error of the appellant's representative in recording a refiling deadline did not establish good cause for the delay in refiling, but waiving the deadline on other grounds in the interest of justice). We have therefore not considered the agency's response in reaching our decision.

ANALYSIS

¶6 The appellant argues that the removal action is arbitrary in light of the arbitration decision vacating his earlier suspension. PFR File, Tab 1. However, we find that the cancellation of the suspension does not warrant an outcome different from the one reached in the initial decision.

¶7 We note that, at the time she issued the initial decision, the administrative judge was unaware that the arbitrator had vacated the appellant's 14-day suspension.³ Therefore, the administrative judge was correct to apply *Bolling* to consider the appellant's prior discipline. Under *Bolling*, the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling*, 9 M.S.P.R. at 339-40. However, the Board has a policy of not considering prior discipline that has been overturned in grievance proceedings at the time of Board review. See *U.S. Postal Service v. Gregory*, [534 U.S. 1, 10](#) (2001) (citing *Jones v. Department of the Air Force*, [24 M.S.P.R. 429](#), 431 (1984)). We must therefore evaluate the agency's penalty determination without consideration of the vacated 14-day suspension as prior discipline.⁴ See *Rush v. Department of the Air Force*, [69 M.S.P.R. 416](#), 418-19 (1996).

³ The arbitration decision was issued 2 days before the initial decision was issued. See IAF, Tab 14; PFR File, Tab 1 at 10. However, there is no indication in the record that either party notified the administrative judge of the existence of the arbitration decision. It is entirely possible that neither party had received the arbitration decision at the time the initial decision was issued.

⁴ To the extent that the appellant is arguing that the arbitration decision invalidates the entire removal action, we are not aware of any support for that position. The suspension that was the subject of the arbitration decision was not directly connected to the charge in this removal action. It is relevant only to the appropriate penalty. Nevertheless, we have reviewed the record and have found no error by the administrative judge in sustaining the charge.

¶8 The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). In her decision letter removing the appellant, the deciding official enumerated the *Douglas* factors she had considered in determining the appropriate penalty. IAF, Tab 8 at 26. Among the factors she cited were the nature of the charge, the appellant's length of service, the consistency of the penalty with penalties given in similar circumstances, and the appellant's potential for rehabilitation. *Id.* at 26-27. We find that the deciding official considered the relevant *Douglas* factors and that the penalty of removal is within the tolerable limits of reasonableness for the charged misconduct, even in the absence of any prior discipline. With regard to the 14-day suspension, neither the proposal letter nor the decision letter cites the 14-day suspension as an aggravating factor in imposing the removal penalty. Nor does the hearing testimony of the deciding official indicate it was so considered. There is therefore no evidence that the agency impermissibly relied upon the 14-day suspension. *See Jinks v. Department of Veterans Affairs*, [106 M.S.P.R. 627](#), 636 (2007). On the other hand, the agency permissibly relied upon the suspension as evidence that the appellant had previously been warned about the conduct and was aware that additional violations would result in discipline. *Id.* at 637. His continued unscheduled absences despite such notice justify his removal.⁵ *See*

⁵ Because we have considered the reasonableness of the agency's selected penalty without consideration of the appellant's 14-day suspension, we need not address the appellant's argument concerning the administrative judge's decision to exclude a handwritten note referencing the existence of a grievance relating to that suspension.

We have also not considered the appellant's argument on petition for review that the agency violated the National Agreement. Although the appellant alleged harmful error below, at the prehearing conference, he was unable to identify a rule, regulation or National Agreement provision that the agency allegedly violated. Therefore, the administrative judge did not include harmful error as an issue to be resolved in the summary of the prehearing conference, which stated that "additional issues are

Fleming v. U.S. Postal Service, [30 M.S.P.R. 302](#), 308-10 (1986) (the Postal Service may properly remove an employee for using unscheduled leave when the leave was not requested in accordance with the agency's leave-requesting procedures and when the employee was on clear notice that such unscheduled absences could result in discipline).

ORDER

¶9 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

precluded in this appeal.” In that summary, the administrative judge ordered the appellant to submit a copy of the rule, regulation, or National Agreement provision that he claimed had been violated no later than August 15, 2008, and explained that if he failed to do so, his harmful error claim would not be accepted as an issue to be adjudicated in the appeal. IAF, Tab 10 at 1-2. The parties were given an opportunity to object to the summary by August 15, 2008. *Id.* at 3. The appellant neither objected, nor submitted any further information regarding his harmful error claim. Thus, the Board need not consider this claim further. *See Crowe v. Small Business Administration*, [53 M.S.P.R. 631](#), 634-35 (1992) (an issue is not properly before the Board where it is not included in the administrative judge's memorandum summarizing the prehearing conference, which states that no other issues will be considered, unless either party objects to the exclusion of that issue in the summary).

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.