UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 134

Docket No. DA-0752-08-0392-I-1

Parnell K. Curtis,

Appellant,

v.

United States Postal Service,

Agency.

July 17, 2009

Darwin McKee, Esquire, Austin, Texas, for the appellant.

Evette R. Young, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that sustained the agency's removal 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(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision as MODIFIED, still sustaining the appellant's removal.

BACKGROUND

¶2 The appellant is a preference-eligible disabled veteran and was employed by the agency as a Mail Processing Clerk. Appeal File (AF), Tab 8, Subtabs 4d,

4x. He was removed effective May 3, 2008, for unacceptable attendance/failure to meet the attendance requirements of his position. *Id.*, Subtabs 4e, 4i. The charge stated that the appellant had shown a "lack of dependability in reporting and not being available for duty when needed and as scheduled." *Id.*, Subtab 4i. Specifically, the agency cited 81 days of absence from work from May 31, 2007 to September 25, 2007, of which 1 day was unscheduled sick leave, 3 days were absence without leave (AWOL), and the rest (77 days) were unscheduled leave without pay (LWOP). *Id.*; *see also* Subtabs 4f, 4q. The appellant does not dispute that he incurred the unscheduled absences charged. AF, Tab 14.

¶3 The appellant's unscheduled sick leave and LWOP were approved leave. AF, Tab 8, Subtab 4q. David Stark, Supervisor of Distribution Operations on the appellant's tour, testified that the appellant called in regularly during this time to a call-in system. Hearing CD (HCD). Stark stated that he approved LWOP because the appellant did not have accrued sick leave. *Id.*

¶4 Stark sent the appellant a letter dated July 18, 2007, stating that the agency's records showed he had been absent since June 24, 2007, and that he was to contact his supervisor. AF, Tab 8, Subtab 4o. It also stated that the appellant had the responsibility to report for duty as scheduled and to provide acceptable medical evidence of his inability to work during his absence. *Id.* The letter warned the appellant that disciplinary action could result from failure to meet those requirements. *Id.* On July 31, 2007, Stark sent the appellant another letter directing him to report for an investigative interview on August 6, 2007. AF, Tab 8, Subtab 4m. On September 12, 2007, Stark sent a third letter directing the appellant to appear for a pre-disciplinary interview on September 18, 2007, regarding his failure to return to duty or provide documentation for his absence. *Id.*, Subtab 4j. The letter stated that should he fail to appear, the agency would proceed with corrective action. *Id.* The appellant did not appear for either

interview. HCD (testimony of Stark and the appellant).[1] The Notice of Proposed Removal (NPR) was then issued on October 1, 2007. *Id.*, Subtab 4i.

¶5 During a meeting to respond to the NPR, the appellant gave the deciding official, Chul Kim, Manager of Distribution Operations, copies of two agency return-to-work medical certificates. HCD. One of the forms the appellant provided is dated September 12, 2007, and states that he was unable to work due to depression from June 24 to September 24, 2007. AF, Tab 8, Subtab 4c. The second form, which is undated, states that the appellant was unable to work from May 31 to October 22, 2007. *Id.* It provides undefined "ICD-9" codes and does not identify a medical condition. *Id.*[2] The appellant, in his oral response to the NPR, told Kim that he had post-traumatic stress disorder (PTSD), and he asserted that all his absences were due to depression and PTSD. HCD. The appellant's attendance records show that he continued to be absent on unscheduled leave or was AWOL until the date of his removal. AF, Tab 8, Subtabs 4f, 4h. The appellant testified that these absences were in part due to PTSD. HCD. Kim testified that the appellant's medical clearance forms did not meet the requirements of the agency's Employment and Labor Manual (ELM) so as to justify his absences. HCD. He stated that he removed the appellant after giving him an opportunity to return to work and then resign in lieu of removal. *Id.*

¶6 After a hearing, the administrative judge (AJ) sustained the charge, finding that the agency proved the appellant's attendance was unacceptable because the appellant was absent for 81 days and did not provide appropriate medical

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[1] The appellant testified that he contacted Stark to inform him of the medical basis for his absences and that Stark rescheduled both interviews at his request. HCD. Stark stated that the appellant never contacted him. *Id.* The AJ made no finding regarding this conflicting testimony, and the appellant did not raise the matter on PFR.

[2] There is a third form in the record dated July 31, 2007, also containing undefined codes and stating that the appellant was unable to work from June 24 to August 23, 2007. AF, Tab 8, Subtab 4l. There is no evidence establishing when or to whom the appellant provided this form.

documentation. AF, Tab 21 (ID). The AJ also held that the penalty was reasonable. *Id.*

¶7 The appellant has filed a PFR asserting that he did not call his union steward as a witness because he did not anticipate the need for the steward's testimony, because the agency officials' statements were inconsistent with their prior explanations of their action. Petition for Review File (RF), Tab 1. The appellant also provides copies of work clearance forms that he says show his absences were due to depression. *Id.* In addition, the appellant argues that the ID was in error because proper consideration was not given to relevant factors in the penalty determination, i.e., his length of service, his performance while he was on the job, and the possibility of rehabilitation through the Employee Assistance Program (EAP). *Id.* The agency has filed a response in opposition to the PFR. RF, Tab 3.

ANALYSIS

¶8 The appellant has not submitted new and material evidence, nor has he shown that the AJ made an error of law or regulation affecting the outcome. The appellant's assertion regarding his union steward suggests that he may wish to produce this testimony to impeach the credibility of management officials who testified at the hearing. However, evidence offered merely to impeach a witness's credibility is not generally considered new and material. *See Bucci v. Department of Education*, 42 M.S.P.R. 47, 55, (1989).[3] The work clearance forms submitted by the appellant were contained in the record below and, therefore, also are not new and material evidence. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). Furthermore, we do not find error in the penalty analysis that affects the outcome of the case. Therefore, the PFR does

[3] There also is no showing that the appellant requested and was not allowed to call the union steward as a rebuttal witness at the hearing. Therefore, there is no determination by the AJ that could have been erroneous.

not meet the criteria for granting review under 5 C.F.R. § 1201.115(d). We reopen the appeal, however, to clarify the grounds for affirming the appellant's removal.

¶9 The agency's charge of unacceptable attendance was based on absences totaling 81 days, of which 1 day was approved sick leave, 3 days were AWOL, and 77 days were approved LWOP. With regard to the single day of sick leave, we note that an agency cannot discipline an individual for his use of approved sick leave. *Ryan v. Department of the Air Force*, 107 M.S.P.R. 71, ¶ 6 (2007) (citing *Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401, 404 (1997)); *Gartner v. Department of the Army*, 104 M.S.P.R. 463, ¶ 7 (2007). Therefore, we do not take into consideration the appellant's use of 1 day of approved sick leave in deciding this appeal. We next examine whether the appellant's use of 77 days of unscheduled but approved LWOP and 3 days of AWOL constitutes unacceptable attendance/failure to meet the attendance requirements of his position. *See Gartner*, 104 M.S.P.R. 463, ¶ 10 (combining consideration of AWOL and LWOP absences to determine if charge of excessive absences could be sustained).

The appellant's attendance was unacceptable.

¶10 An agency's approval of unscheduled leave generally precludes the agency from taking adverse action on the basis of those absences. *Combs v. Social Security Administration*, 91 M.S.P.R. 148, ¶ 14 (2002) (citing *Rabago v. Department of the Army*, 25 M.S.P.R. 530 (1985)); *Holderness*, 75 M.S.P.R. at 404. An exception to this general rule exists, however, where an employee makes excessive use of unscheduled LWOP. *Ryan*, 107 M.S.P.R. 71, ¶ 5; *Holderness*, 75 M.S.P.R. at 404; *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984). The exception permitting an adverse action for excessive use of unscheduled LWOP is applicable to the appellant's 77 days of LWOP.

See Combs, 91 M.S.P.R. 148, ¶ 14 (applying this exception to a charge of inability to maintain regular attendance).[4]

¶11 In order to take an adverse action against an employee based on excessive use of unscheduled LWOP, an agency must show that: (1) The employee was absent for compelling reasons beyond his control so that the agency's approval or disapproval of leave was immaterial, because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. *Ryan*, 107 M.S.P.R. 71, ¶ 5; *Holderness*, 75 M.S.P.R. at 404; *Cook*, 18 M.S.P.R. at 611-12. In addition, an adverse action should be taken only under unusual circumstances, such as when the employee cannot return to duty because of the continuing effects of illness or injury. *Gartner*, 104 M.S.P.R. 463, ¶ 9; *Combs*, 91 M.S.P.R. 148, ¶ 13.

¶12 In this case, the appellant has at all times asserted that he was incapacitated for duty. HCD. He also has produced forms signed by his physician stating that he was unable to work during the entire period for which he had unscheduled absences. AF, Tab 8, Subtabs 4c, 4l. Furthermore, although the agency found the appellant's medical documentation inadequate under the ELM, it does not dispute that he had incapacitating medical conditions. We find that the agency may rely upon the appellant's representations that he was unable to work, for which it approved LWOP in lieu of sick leave. Therefore, we find that the record shows

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[4] There is also an exception permitting an agency to discipline an employee for failing to follow leave-requesting procedures, even though the agency approves the leave, where the employee was on notice of the agency's requirements. *Holderness*, 75 M.S.P.R. at 404; *Fleming v. U.S. Postal Service*, 30 M.S.P.R. 302, 308 (1986). In this case, however, the exception is not applicable, because the appellant was not charged with failing to properly request leave.

that the agency's approval or disapproval of the appellant's leave was immaterial, because he could not work.

¶13 The appellant's absences on AWOL and LWOP, together totaling 80 days, clearly continued beyond a reasonable time. The agency warned the appellant in its letter of July 18, 2007, that disciplinary action could result if he failed to return to work. AF, Tab 8, Subtab 4o. The appellant also had prior discipline for unscheduled absences, i.e., a February 2006 suspension and an April 2007 Letter of Warning. *Id.*, Subtabs 4r, 4u. Furthermore, Stark and Kim testified that the appellant's extended absence resulted in untimely mail deliveries and caused changes in other employees' schedules and workloads. HCD. We therefore find that all three of the above criteria for taking an adverse action based on excessive use of unscheduled LWOP have been met. It also appears, based on his testimony and record of continuing absences, that the appellant was unable to return to work because of the effects of his medical conditions. *Id.*, Subtabs 4f, 4h; HCD. Accordingly, we find that the agency's removal of the appellant for unacceptable attendance, i.e., his excessive use of unscheduled LWOP in conjunction with the AWOL absences, was properly sustained. *See Gartner*, 104 M.S.P.R. 463, ¶¶ 10-11.

Removal is a reasonable penalty for the appellant's unacceptable attendance.

¶14 The appellant asserts on PFR that the ID was in error because it did not give due consideration to certain factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), i.e., his length of service, his performance while he was on the job, and the possibility of rehabilitation through EAP. RF, Tab 1. The appellant's argument lacks merit. The deciding official, Kim, testified that he considered the appellant's length of service in determining the penalty for the appellant's unscheduled absences. HCD. He also stated that the appellant was a good employee when he was at work, but that he was not there when needed. *Id.* He indicated that he weighed the possibility of rehabilitation when he permitted the appellant to come back to work, but did not

consider if the appellant had received EAP assistance when he issued the removal. *Id.* Kim emphasized the seriousness of the appellant's offense, since his absences imposed a burden on the agency and adversely affected mail delivery. HCD.

¶15 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. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Douglas*, 5 M.S.P.R. at 306. The agency did so here. Its action to remove the appellant for unacceptable attendance, based on LWOP and AWOL absences totaling 80 days, was clearly reasonable. Therefore, its decision must be affirmed.

ORDER

¶16 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, 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:

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