UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 200

Docket No. CH-0752-07-0532-M-1

Anthony D. Cunningham,
Appellant,
v.
United States Postal Service,
Agency.

October 8, 2009

Anthony D. Cunningham, Cleveland, Ohio, pro se.

Joseph E. McCann, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on remand from the United States Court of Appeals for the Federal Circuit, which reversed our prior decision in the appellant's appeal of his removal. In accordance with the court's decision, we MITIGATE the appellant's removal to a thirty-day suspension.

BACKGROUND

¶2 Effective June 16, 2007, the agency removed the appellant from his Mail Handler position based on a charge of Improper Conduct/Violation of Zero Tolerance Policy after the appellant engaged in a physical altercation with a co-worker, Melvin Allmond, on Postal property. Initial Appeal File (IAF), Tab 5,

Subtabs 4b-4c. The appellant filed an appeal in which he contended that the removal was improper because he was physically assaulted by Mr. Allmond and was merely defending himself. IAF, Tab 1.

¶3 Following a hearing, the administrative judge sustained the charge upon finding that the agency proved that the appellant engaged in the underlying misconduct. Initial Decision (I.D.) at 3-27. The administrative judge further found that the appellant acted in self-defense in that he "retreated in good faith by informing Mr. Allmond on numerous occasions . . . that he did not want to fight," and because he responded to Mr. Allmond's physical aggression with reasonable force. *Id.* at 24-27. In addition, the administrative judge determined that the deciding official believed that the agency's zero tolerance policy required removal for a sustained charge of violence in the workplace, and that he abused his discretion in imposing the penalty of removal without weighing or considering the relevant mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). I.D. at 30-31. She therefore did not afford the agency's penalty determination deference and, instead, found that a thirty-day suspension was the maximum reasonable penalty under the circumstances of the case. *Id.* at 27-32.

¶4 The agency petitioned for review of the initial decision. Petition for Review File, Tabs 1, 3. In an Opinion and Order, the Board granted the agency's petition, reversed the initial decision, and sustained the removal action. *Cunningham v. U.S. Postal Service*, 109 M.S.P.R. 402 (2008). The Board found that the administrative judge erred by accepting the appellant's claim of self-defense because she did not properly consider whether the appellant was free from fault in bringing on the difficulty or whether he took all reasonable steps to avoid the physical altercation in accordance with *Fuller v. Department of the Navy*, 60 M.S.P.R. 187, 190 (1993), *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). *Cunningham*, 109 M.S.P.R. 402, ¶¶ 19-23. The Board further found that the administrative judge erred by rejecting the deciding official's testimony that he

did not base his penalty determination on the agency's zero tolerance policy but on a consideration of the *Douglas* factors. *Id.*, ¶¶ 27-31. The Board found that the deciding official considered the *Douglas* factors most relevant to the case and concluded that there was no basis for disturbing the agency's decision to remove the appellant. *Id.*, ¶¶ 27-32. Therefore, the Board sustained the appellant's removal.

¶5 The appellant then sought judicial review before the Federal Circuit. In a nonprecedential decision, the court left the Board's findings concerning the merits of the charge undisturbed. As to the appropriate penalty, however, the court found that the Board erred by overturning the administrative judge's determination that the deciding official's testimony was not credible, and that the Board erred by granting deference to the deciding official's decision to remove the appellant. *Cunningham v. U.S. Postal Service*, 328 F. App'x 646, 647-48 (Fed. Cir. 2009). The court reversed the Board's penalty determination and remanded the case to the Board "for an appropriate remedy in favor of [the appellant] consistent with this opinion." *Id.*, 648.

ANALYSIS

¶6 When an agency imposes removal under a zero tolerance policy without giving bona fide consideration to the appropriate *Douglas* factors, its penalty determination is not entitled to deference. *See Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 15 (2006), *aff'd*, 218 F. App'x 1001 (Fed. Cir. 2007); *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶ 11 (2000). In such a case, the Board will independently weigh the relevant *Douglas* factors to evaluate the reasonableness of the penalty. *Wiley*, 102 M.S.P.R. 535, ¶ 15; *Omites*, 87 M.S.P.R. 223, ¶ 11.

¶7 Here, the administrative judge found that the deciding official imposed the penalty of removal because he believed that the agency's zero tolerance policy requires removal for a sustained charge of violence in the workplace. I.D.

at 30-31. The court found that "the [administrative judge]'s determination must stand." *Cunningham*, 328 F. App'x at 647-48. Therefore, we must independently weigh the relevant *Douglas* factors to evaluate the reasonableness of the penalty. *See Wiley*, 102 M.S.P.R. 535, ¶ 15; *Omites*, 87 M.S.P.R. 223, ¶ 11.

¶8 When the Board sustains all of the agency's charges, but finds the agency penalty too severe, the Board may only mitigate the penalty to the maximum reasonable penalty. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Omites*, 87 M.S.P.R. 223, ¶ 15. Here, the appellant has at least ten years of satisfactory service and the agency did not cite any prior disciplinary record in its notice of proposed removal or removal decision notice. IAF, Tab 5, Subtabs 4b-4c. Further, the court found that the physical altercation resulted in no serious injury, no weapons were used, and there was "an element of provocation." *Cunningham*, 328 F. App'x at 647-48. As the administrative judge found, the appellant had the opportunity to avoid the altercation by going back into the building and informing the Postal police following Mr. Allmond's initial push. I.D. at 31. Therefore, in accordance with the court's instruction that the administrative judge's credibility determinations must stand, we find that a thirty-day suspension is the maximum reasonable penalty.

ORDER

¶9 We ORDER the agency to cancel the appellant's removal effective June 16, 2007, and substitute in its place a thirty-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶10 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits

due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶11 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶12 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶13 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶14 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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:

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

	DFAS CHECKLIST **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.