UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 154

Docket No. DA-0752-09-0172-I-1[1]

Sherman Howard,

Appellant,

v.

Department of the Air Force,

Agency.

July 26, 2010

Marshall D. White, Esquire, San Antonio, Texas, for the appellant.

Charles R. Vaith, Esquire, Lackland Air Force Base, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the bench decision that affirmed his removal. For the reasons set forth below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115 and AFFIRM the bench decision as MODIFIED, still AFFIRMING the removal action.

[1] Due to staffing issues at the Dallas Regional Office, the case was adjudicated in the Denver Field Office.

BACKGROUND

¶2 Effective November 20, 2008, the agency removed the appellant from the position of Auditor, YA-511-02, based on the following charges: (a) use of government resources for personal gain; (b) outside employment during paid duty hours; (c) falsification of material facts and deliberate misrepresentation; (d) threatening bodily harm (two specifications); and (e) failure to disclose outside employment. Initial Appeal File (IAF), Tab 7, Subtabs 4a, 4f. The appellant filed a timely appeal with the Board. IAF, Tab 1. Following a hearing, the administrative judge issued a bench decision sustaining charges (a), (b), and (e) in their entirety, as well as the first specification of charge (d), concerning the appellant's threatening statements that he had made to a coworker, Melanie Schneider, in fall 2005. IAF, Tab 48 (Aug. 31, 2009 Bench Decision). The administrative judge rejected the appellant's affirmative defenses and further found that the removal penalty was reasonable and for such cause as promotes the efficiency of the service. *Id*.

¶3 On PFR the appellant argues, among other things, that the administrative judge erred in considering his performance as an aggravating factor under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). PFR File, Tab 3. The agency has filed a response in which it argues that the appellant's PFR does not meet the criteria for review. PFR File, Tab 4. The agency does not contest the administrative judge's finding that it failed to prove the falsification charge or the second specification of the threat charge. *Id*.

ANALYSIS

¶4 Having considered the appellant's arguments on PFR, we discern no basis for overturning the administrative judge's findings with respect to the charges and affirmative defenses. We further find that the administrative judge did not commit any procedural error that adversely affected the appellant's substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

However, we agree with the appellant that the administrative judge erred in her analysis with respect to the reasonableness of the penalty.

¶5 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*, 5 M.S.P.R. at 306. Where, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Id*. at 308. In such a case, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Here, the deciding official testified that the threat charge alone would have warranted a lesser penalty, but that charges (a) and (b), standing alone, would have warranted removal. Hearing Transcript, Day 1 (HT1) at 21, 49 (James Salter). Since charges (a) and (b) were sustained, we have the authority to mitigate the removal to the maximum reasonable penalty.

¶6 The record reflects that the deciding official considered the appellant's poor performance as an aggravating factor weighing in favor of removal, although the proposal notice did not mention the appellant's poor performance as an aggravating factor. IAF, Tab 7, Subtabs 4a, 4b, 4f; HT1 at 37, 59. It is error for an agency to rely on matters affecting the penalty it imposes without including those matters in the proposal notice, and in such a case the agency's penalty determination is not entitled to deference. *See, e.g., Parbs v. U.S. Postal Service*, 107 M.S.P.R. 559, ¶ 23 (2007), *aff'd*, 301 F. App'x 923 (Fed. Cir. 2008) (declining to defer to the agency's penalty determination where the deciding official considered prior discipline not mentioned in the proposal notice); *Langham v. U.S. Postal Service*, 92 M.S.P.R. 268, ¶¶ 6-7 (2002) (declining to defer where the deciding official considered the intentional nature of the misconduct as an aggravating factor and the proposal notice did not allege that

the misconduct was intentional). The remedy for the error is for the Board to conduct its own analysis of the reasonableness of the penalty. *Parbs*, 107 M.S.P.R. 559, ¶ 24; *Langham*, 92 M.S.P.R. 268, ¶ 7. However, as the appellant notes on PFR, the administrative judge also considered performance as an aggravating factor. Bench Decision at 17. Because the administrative judge failed to remedy the deciding official's error, we do so now by conducting a new analysis of the reasonableness of the penalty in light of the relevant *Douglas* factors, without consideration of the appellant's performance.

¶7 We note that the appellant has nearly 34 years of service with the agency and no prior discipline. Another significant factor weighing in favor of mitigation is that the appellant's lower-level supervisors initially turned a blind eye to his misconduct.[2] *See Wells v. Department of Defense*, 53 M.S.P.R. 637, 645 (1992) (finding supervisors' condonation of the appellant's disregard of timekeeping regulations a significant mitigating factor); *but see Herrera-Martinez v. Social Security Administration*, 84 M.S.P.R. 426, ¶ 16 (1999) (although condonation may be a mitigating factor, the Board has not always found that condonation warrants mitigation), *review dismissed*, 250 F.3d 755 (Fed. Cir. 2000) (Table). Most notably, when Schneider reported the appellant's threatening statements to Sylvia Lampman, who, at that time, supervised both Schneider and the appellant, Lampman failed to take action or report the matter up the chain of command. HT1 at 195 (Schneider); HT2 at 33-34 (Lampman). Indeed, the appellant was not informed of Schneider's allegations until 3 years later, when the agency proposed his removal. Additionally, the appellant's second-level supervisor, Patrick Fravel, testified that he had heard reports of the

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[2] The appellant contends that the action should be reversed entirely on grounds of agency condonation; however, condonation serves as a possible basis for penalty mitigation, not outright reversal. *See, e.g.*, *Els v. Department of the Army*, 82 M.S.P.R. 27, ¶¶ 10, 15 (1999) (sustaining charge of misuse of government vehicle despite supervisory authorization, which was considered as a mitigating factor).

appellant's unauthorized use of government resources about 2 years prior to the agency investigation that led to the appellant's removal, but did not take action at that time. HT1 at 189-90 (Fravel).

¶8 Nevertheless, we find that consideration of all the relevant factors supports a conclusion that a removal penalty is within the bounds of reasonableness. The Board has held that for an employee to conduct personal business while he is presumed to be performing the official duties of his position violates the trust the agency has placed in the employee and destroys the confidence established in the employer-employee relationship. *Cohen v. Internal Revenue Service*, 7 M.S.P.R. 57, 61 (1981) (affirming removal for conducting personal business on government time notwithstanding the appellant's 13 years of service, unblemished record, and absence of progressive discipline). Moreover, the record reflects that the appellant's misuse of government time and resources was repeated and intentional, and committed for personal gain, in support of his paid teaching position at a local community college. With regard to notice, the record reflects that in 2005 and 2006, the appellant signed a certification acknowledging that he had read both Air Force Instruction 36-703, which sets out agency policy regarding use of government resources, and the supplement thereto, which sets out reporting requirements for outside employment. *See* IAF, Tab 7, Subtabs 4g8b, 4g8c, 4g10, 4g11. As for the sustained specification of threatening bodily harm, the Board has routinely held that removal is a reasonable penalty for threatening coworkers. *See, e.g.*, *Rose v. U.S. Postal Service*, 109 M.S.P.R. 31, ¶ 31 (2007). In sum, notwithstanding the appellant's decades of service, lack of prior discipline, and his supervisors' initial condonation of some of the charged misconduct, we cannot say that removal is outside the bounds of reasonableness. Accordingly, we affirm the agency's removal action.

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 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.