UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 252

Docket No. SF-0752-09-0736-I-1

Wayelon Howard Penland,
Appellant,
v.
Department of the Interior,
Agency.

December 30, 2010

Lesa L. Donnelly, Anderson, California, for the appellant.

Peter E. Mina, Esquire, Washington, DC, for the appellant.

Chandra R. Postma, Esquire, Anchorage, Alaska, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This appeal is before the Board on the agency's petition for review of the initial decision in which the administrative judge sustained the agency's charge against the appellant but mitigated the removal penalty to a demotion. For the reasons set forth below, we GRANT the agency's petition for review and AFFIRM the initial decision as modified by this Opinion and Order, SUSTAINING the removal.

BACKGROUND

¶2 The agency removed the appellant from the position of Airplane Pilot, GS-12, in its Anchorage, Alaska, Regional Office, effective May 27, 2009. Initial Appeal File (IAF), Tab 3, Subtab 4A (letter of decision). The removal was based on a single charge that the appellant lost his Department of the Interior pilot authorization as a result of a Pilot Review Board's recommendation that his qualification card not be reinstated. *Id.*, Subtab 4E at 1-2. The deciding official, Regional Director Harry J. Kieling, sustained the charge and found that removal was warranted to promote the efficiency of the service, taking into account, among other things, the appellant's responses. *Id.*, Subtab 4A. The appellant filed an appeal with the Board. IAF, Tab 1.

¶3 After a hearing, the administrative judge sustained the charge, finding that the agency required the appellant to maintain a pilot authorization as a condition of employment, that the agency revoked the appellant's pilot authorization, and that the agency had a basis for its decision regarding the appellant's pilot authorization.[1] IAF, Tab 22, Initial Decision (ID) at 5-14. The administrative judge also rejected the appellant's claims of harmful procedural error and reprisal for whistleblowing activity. ID at 15-20. The administrative judge, however, mitigated the removal to a demotion to the position of Airplane Mechanic, WG-11. ID at 20-24.

¶4 The agency has filed a timely petition for review, Petition for Review (PFR) File, Tab 1, and the appellant has filed a response in opposition, *id.*, Tab 3.

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[1] The Pilot Review Board acted following an aircraft accident involving the appellant. *See* IAF, Tab 3, Subtab 4F at 1. It recommended to the Associate Director of Aviation Management not to renew the appellant's pilot qualification card, and the Associate Director concurred. *Id.*

ANALYSIS

¶5 In their submissions on review, the parties do not dispute the administrative judge's findings of fact with respect to the agency's charge or the appellant's affirmative defenses; rather, the sole issue before the Board is the administrative judge's decision to mitigate the penalty to a demotion. *See, e.g.*, PFR File, Tab 1 at 13-22, Tab 3 at 8-9. Nonetheless, we affirm the administrative judge's factual determinations, as well as his finding that the agency proved its charge. The initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions in sustaining the charge. *See* ID at 5-14. Furthermore, we discern no error in the administrative judge's findings that the appellant failed to meet his burden of proof as to his affirmative defenses. ID at 15-20. 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), *aff'd*, 139 F. App'x 280 (Fed. Cir. 2005). We additionally find that the agency has fully satisfied its interim relief obligations.[2] *See* PFR File, Tab 1 at 41-42. Nevertheless, for the reasons set forth below, we find that the administrative judge's penalty determination cannot be sustained. Thus, we grant the agency's petition for review for the purpose of addressing the administrative judge's penalty determination.

¶6 The agency argues on review that the administrative judge erred in mitigating the removal penalty to a demotion. PFR File, Tab 1 at 13-22. We agree. Specifically, we find that the administrative judge erred in finding that the deciding official failed to properly consider one of the key *Douglas* factors in this case, the adequacy of alternative sanctions, and in further finding that, even if the deciding official properly considered that factor, the removal of the appellant nonetheless "clearly exceeded the bound of reasonableness." ID at 23.

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[2] The appellant does not complain about interim relief in his response to the petition for review.

¶7 Where, as here, all of the agency's charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Douglas*, 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004).

¶8 Both the notice of proposed removal and the decision letter discuss the *Douglas* factors at length. IAF, Tab 3, Subtabs 4A at 2-5, 4E at 2-6. As the administrative judge recognized in the initial decision, the Board has held that in an adverse action resulting from an employee's failure to maintain a condition of employment, the most relevant *Douglas* factors are (1) the nature of the offense; (2) its effect on an appellant's performance of the job; and (3) the availability and effect of alternative sanctions. ID at 21; *see Shoffner v. Department of the Interior*, 9 M.S.P.R. 265, 267 (1981) (removal for failing to remain qualified for the position due to revocation of the appellant's driver's license). With respect to the nature of the offense and its effect on the appellant's performance of his job, the administrative judge found, and the parties do not dispute, that Kieling determined that removal was appropriate given the nature and seriousness of the sustained conduct that led to the revocation of the appellant's pilot authorization, and the fact that, of the ten major duties identified in the appellant's position description, seven required the incumbent to possess a valid pilot authorization.

ID at 21; *see* Hearing Compact Disc (HCD) (testimony of Kieling); *see* IAF, Tab 3, Subtabs 4A at 2, 4E at 2-3.

¶9 The administrative judge nonetheless found that mitigation of the penalty was warranted on the ground that Kieling failed to properly consider as a key mitigating factor the adequacy of alternative sanctions, namely, reassignment or demotion to the aircraft mechanic position. ID at 21-23. This was error. As the administrative judge recognized in the initial decision, Kieling stated in his decision letter:

> In arriving at an appropriate penalty, I considered your requests that you be able to remain an AMD employee and that you be allowed the opportunity to change to a different position. I conclude that doing either would fail to promote the efficiency of the service. First, in light of the charge of loss of DOI Pilot Authorization you cannot remain in any Airplane Pilot position because you lack the authorization necessary to perform the essential duties of your position. Second, there is no requirement that you be offered employment in another position. However, I did consider an alternative sanction of reassignment, with or without demotion. Regrettably, demoting and reassigning you to another position would not promote the efficiency of the service because of your difficulty getting along with others as well as my determination, based upon my experience with and observation of you, that you do not accept responsibility for your actions and that you do not accept or implement suggestions for improvement.

ID at 22-23; IAF, Tab 3, Subtab 4A at 4-5.[3] Further, as the administrative judge also recognized, Kieling testified at the hearing that he carefully considered this factor in determining that removal was appropriate. ID at 21-22; HCD (testimony of Kieling). Specifically, Kieling testified that the regional office to which the appellant was assigned is small and the only vacant position at the time of the

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[3] The proposal notice contained a *Douglas* factor analysis that stated that the appellant's "difficulties getting along with others" and his "poor rehabilitative potential" were factors to be considered in determining the appropriate penalty. IAF, Tab 3, Subtab 4E at 5-6. The administrative judge correctly determined that the agency provided the appellant adequate notice that these factors would be considered in the penalty analysis. ID at 23 n.8; *see Ward v. U.S. Postal Service*, 112 M.S.P.R. 239, ¶ 9 (2009).

decision notice was an airplane mechanic, WG-11.[4] Kieling also testified that the appellant would have been qualified for that position if he had a current Inspector Authorization (IA) certificate, but that he did not review whether the appellant had a current IA certificate because, based on the appellant's "track record" with the other employees on the hanger floor, a demotion to the airplane mechanic position would not promote the efficiency of the service. ID at 22; HCD (testimony of Kieling).

¶10 Based on the foregoing, the record is clear that Kieling considered a lesser sanction of demotion or reassignment and explained in his decision letter, as well as at the hearing, why that penalty was rejected. In this regard, we note that no rule or regulation appears to require the appellant's reassignment. The initial decision fails to articulate any basis for the administrative judge's conclusion that Kieling's consideration of the availability of alternative sanctions was insufficient. *See* ID at 23.

¶11 Having determined that the agency considered the appropriate *Douglas* factors, the proper inquiry here is whether the agency's penalty selection fell within the tolerable limits of reasonableness. *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Douglas*, 5 M.S.P.R. at 306. The administrative judge determined that, even if Kieling properly considered the availability of alternative sanctions, the penalty of removal nonetheless exceeded the bound of reasonableness, and that, "[i]n light of the appellant's 25 years of service, with no prior disciplinary actions, and his holding of a valid IA certificate," the maximum reasonable penalty for the sustained charge is demotion to an airplane mechanic position. ID at 23-24. This was also error. Because the appellant needed a pilot authorization in order to perform the duties of his position, we find that the agency has established both

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[4] We note that the April 3, 2009 proposal notice stated, "[T]here are no funded, vacant positions within this Division into which I could demote/reassign you." IAF, Tab 3, Subtab 4E at 6.

the reasonableness of its decision to remove the appellant and the requisite nexus between the appellant's loss of his authorization and the efficiency of the service. *See Benally v. Department of the Interior*, 71 M.S.P.R. 537, 539-40, 542 (1996) (removal sustained based on the appellant's loss of his driver's license); *McGean v. National Labor Relations Board*, 15 M.S.P.R. 49 (1983) (license to practice law); *Shoffner*, 9 M.S.P.R. at 268 (driver's license).[5] Under these circumstances, we find that the agency's decision to remove the appellant rather than reassign him fell within the tolerable limits of reasonableness. *See Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 148 (1993).

¶12 In short, the agency's penalty determination was entitled to deference, and the agency has provided a reasoned explanation of its penalty determination. The administrative judge should not have disturbed it. Accordingly, we SUSTAIN the appellant's removal.[6]

ORDER

¶13 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)).

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[5] The result is not changed by administrative judge's characterization of the removal as a "non-disciplinary" action. ID at 21; *cf, Harris v. Department of the Air Force*, 62 M.S.P.R. 524, 526, 529 (1994) (sustaining the appellant's removal based on a single, non-disciplinary charge of "inability to meet the medical standards for [her] position").

[6] The agency has submitted additional documents with its petition for review. PFR File, Tab 1 at 25-67. With the exception of the agency's Certification of Compliance with Interim Relief, *see id.* at 41-42, we have not considered these documents because the agency has failed to show they were unavailable before the record was closed despite its due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115.

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.