UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 22

Docket No. DA-0752-09-0332-I-1

Raul Bencomo,

Appellant,

v.

Department of Homeland Security,

Agency.

February 11, 2011

Thomas G. Roth, Esquire, West Orange, New Jersey, for the appellant.

J. Douglas Whitaker, Esquire, Omaha, Nebraska, for the agency.

Michele L. Kenney, San Diego, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review of an initial decision of the administrative judge that sustained his removal. For the following reasons, the petition for review is DENIED.

BACKGROUND

¶2 The agency employed the appellant as a Criminal Investigator, GS-13. Initial Appeal File (IAF), Tab 8 at 26. By letter dated August 27, 2008, the agency proposed the appellant's removal on the basis of six charges, each

supported by a single specification. *Id.* at 53-56. Under the first charge, the agency alleged that the appellant falsely swore in a written interview that he did not conduct a debriefing with confidential informant SA-913-EP on November 25, 2003. *Id.* at 53. Under the second charge, the agency alleged that the appellant violated supervisory instructions when he failed to inform his supervisor of the full extent to which SA-913-EP was involved in two murders that took place on November 23, 2003. *Id.* Under the third charge, the agency alleged that the appellant was careless or negligent in the performance of his duties when he failed to ensure that information received during the November 25, 2003 debriefing of SA-913-EP was memorialized. *Id.* at 54. Under the fourth charge, the agency alleged that the appellant improperly continued to gather intelligence from SA-913-EP after he was deactivated for cause as a confidential informant. *Id.* Under the fifth charge, the agency alleged that the appellant misdirected government funds in August 2002 when he made a $1,500 payment to an unknown individual who he represented to be confidential informant SA-935-EP. *Id.* Under the sixth charge, the agency alleged that the appellant intentionally misled the agency when he submitted a false document indicating that he had paid $1,500 to SA-935-EP. *Id.*

¶3 The appellant, through his attorney, responded in writing to the notice of proposed removal on November 21, 2008. IAF, Tab 8 at 36-50. On February 9, 2009, the agency issued a decision letter sustaining all of the charges and removing the appellant. *Id.* at 28-34.

¶4 On March 2, 2009, the appellant filed the present Board appeal challenging his removal. IAF, Tab 1. He requested a hearing. *Id.* at 3. After holding the appellant's requested hearing, the administrative judge issued an initial decision sustaining the appellant's removal. IAF, Tab 38. She found that the agency failed to prove the fourth charge, improper use of a confidential informant. *Id.* at 12-14. However, she found that the agency proved the other five charges. *Id.* at

4-12, 14-18. She further found that the penalty of removal was within the tolerable limits of reasonableness for the sustained charges. *Id.* at 19-23.

¶5 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. On petition for review, he challenges each of the sustained charges. *Id.* at 46-94. After successfully requesting an extension of time, PFR File, Tabs 3, 4, the agency filed a response in opposition to the petition for review, PFR File, Tab 5.

ANALYSIS

The first three charges are not barred by judicial estoppel.

¶6 The appellant contends on review that the administrative judge erred in denying his motion to dismiss several of the charges against him under the doctrine of judicial estoppel. PFR File, Tab 1 at 85-94. Judicial estoppel is an equitable doctrine that is used by courts to bar one party from adopting inconsistent positions in the same or related litigation. *Lamberson v. Department of Veterans Affairs*, 80 M.S.P.R. 648, ¶ 16 (1999). Here, the appellant asserts that the agency took a position in this appeal that was inconsistent with the position the Department of Justice took in defending a civil suit in *Padilla v. United States*, 2007 WL 2409792 (W.D. Tex. Aug. 20, 2007), brought in the U.S. District Court for the Western District of Texas under the Federal Tort Claims Act (FTCA) and under *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¶7 The appellant argues that the administrative judge should have applied the doctrine of judicial estoppel to the first three charges. PFR File, Tab 1 at 85-94. Judicial estoppel preserves the integrity of the judicial process by precluding a party from contradicting a tribunal's determination in another proceeding when the determination was based on the position taken by the party in that case. *Tompkins v. Department of the Navy*, 80 M.S.P.R. 529, ¶ 8 (1999) (citing

Teledyne Industries, Inc. v. National Labor Relations Board, 911 F.2d 1214, 1217-18 & n.3 (6th Cir. 1990)). Under that doctrine,

> [w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The appellant specifically argues that the agency took the position in the civil suit that the appellant violated no agency rules or regulations in connection with SA-913-EP, and then charged the appellant with misconduct in connection with the same confidential informant. PFR File, Tab 1 at 88-94. The agency argues that its position in the civil suit was not clearly inconsistent with its position with respect to the first three charges in the present appeal. PFR File, Tab 5 at 34-36.

¶8 In the civil suit, the estates and relatives of six decedents sought relief from the United States for murders committed by a Mexican drug cartel.[*] *Padilla*, 2007 WL 2409792, slip op. at 2. The plaintiffs alleged that, despite knowledge that SA-913-EP participated in a murder in August 2003, the defendants allowed him to continue operating as a confidential informant. *Id.*, slip op. at 3. The plaintiffs further alleged that SA-913-EP was subsequently involved in at least 12 other murders. *Id.*

¶9 The government moved to dismiss the appeal or, in the alternative, for summary judgment. *Id.*, slip op. at 1-2. The government argued that the court

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[*] The plaintiffs sought to hold several federal employees (including the appellant) individually liable under *Bivens*. *Padilla*, 2007 WL 2409792, slip op. at 2. However, because a *Bivens* claim can result only in liability against individual defendants, rather than the government itself, *see Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997), the government was not required to defend against those claims. We therefore do not believe that the agency can properly be estopped from taking a position inconsistent with one taken by the defendants with respect to the *Bivens* claims.

lacked jurisdiction under the foreign country and discretionary function exceptions to the FTCA. *Id.*, slip op. at 7-11. The government further argued that the plaintiffs failed to establish that it or its employees owed a duty to the decedents under Texas negligence law, or that the employees breached any such duty. *Id.*, slip op. at 11. The court adopted each of the government's positions and dismissed the claims. *Id.*, slip op. at 7-13.

¶10 We do not believe that the agency's position in the civil suit should preclude it from bringing the first three charges against the appellant. The dismissal of the civil action was not based on a determination that the appellant's actions were proper. Instead, the court found that the plaintiffs failed to establish that the agency owed a duty of care to the decedents, or that any alleged negligence by agency employees (including the appellant) was the cause in fact of the decedents' deaths. *Id.*, slip op. at 13. Therefore, the agency's position in the present case that the appellant acted improperly is not inconsistent with the position taken by the government and adopted by the court in the civil suit. Rather, before the Board, the agency charged the appellant with making false statements, failing to follow supervisory instructions, and negligently performing his duties by failing to timely inform agency management of the confidential informant's misconduct after the murders. After carefully considering the record, we find that the appellant has failed to show that the government took any position before the district court that is factually or legally inconsistent with the position that it has taken before the Board, and we, therefore, conclude the administrative judge made no error in denying the appellant's motion to dismiss.

<u>The appellant's claim of disparate treatment is not a defense against the charges.</u>

¶11 The appellant argues that none of the first three charges should have been sustained because he established that similarly situated employees were not charged with the same misconduct. PFR File, Tab 1 at 54-55, 61-64, 70. An appellant's allegation that the agency treated him disparately to another employee, without a claim of prohibited discrimination, is an allegation of

disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty, but it is not an affirmative defense. *See Taylor v. Department of Veterans Affairs*, 112 M.S.P.R. 423, ¶ 11 (2009). The appellant's disparate treatment claim therefore does not provide a basis for defeating any of the agency's charges.

The administrative judge properly sustained the charges.

¶12 The first three charges relate to the appellant's actions in connection with the November 25, 2003 debriefing of SA-913-EP. IAF, Tab 8 at 53-54. The fifth and sixth charges relate to a $1,500 payment that was to be made to confidential informant SA-935-EP in August 2002. *Id.* at 54. For the reasons set forth below, we believe that the administrative judge properly sustained the charges.

¶13 With respect to the first charge, the appellant argues that the administrative judge failed to make a finding concerning his intent, PFR File, Tab 1 at 46, 55-57, and that she erred in her credibility determinations and findings, *id.* at 47-54. The agency responds that the administrative judge correctly determined that the appellant intentionally misled the agency. PFR File, Tab 5 at 13-14.

¶14 With respect to the appellant's argument that the administrative judge failed to make a finding concerning his intent, the record shows that she properly addressed the issue of intent. Whether the element of intent has been proven must be resolved from the totality of the circumstances. *See Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 525, ¶ 9 (2008); *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Because there is seldom direct evidence on the issue, circumstantial evidence must generally be relied upon to establish intent. *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986); *Rodriguez*, 108 M.S.P.R. 525, ¶ 9. A conclusion that an appellant has provided incorrect information, however, does not control the question of intent for purposes of adjudicating a falsification charge. *Rodriguez*, 108 M.S.P.R. 525, ¶ 9; *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001).

¶15 In this case, after finding that the appellant provided false information, the administrative judge considered the appellant's claim that he did not recall when the debriefing in question took place and that he therefore did not intend to mislead the agency. IAF, Tab 38 at 7-8. However, the administrative judge did not find the appellant's testimony on that point to be credible. *Id.* at 8. The administrative judge found incredible that the appellant could have been so busy that he would not have recalled SA-913-EP providing details of his involvement in a double murder. *Id.*

¶16 Where, as here, an administrative judge's credibility determinations are based on the observation of the demeanor of witnesses testifying at a hearing, the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Here, there are not "sufficiently sound" reasons for overturning the judge's demeanor-based credibility determinations. We note that the appellant offered the results of a polygraph examination as evidence that he did not intend to mislead the agency. The administrative judge considered the factors, set out in *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 254-55 (1980), which are to be used in determining whether to admit polygraph examinations and in assessing the weight to be given to such evidence. IAF, Tab 38 at 6-7. She determined that the results of the polygraph examination were admissible, but she found that when weighed against the conflicting evidence, the polygraph evidence was not persuasive. Further, in making this credibility-based finding, the administrative judge cited *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), which sets forth the appropriate factors to be considered in making such a determination. Under the circumstances, we find that the appellant has not provided a sufficient basis on review for the Board to overturn the administrative judge's credibility determinations.

¶17 The second and third charges also relate to the appellant's actions in connection with the November 25, 2003 debriefing of SA-913-EP. The agency

alleged that the appellant failed to follow supervisory instructions when he failed to inform his supervisors of information he learned from that debriefing, and that he was negligent in the performance of his duties when he failed to ensure that a report of the debriefing was prepared. As with the first charge, the appellant disputes the administrative judge's factual findings with respect to the second and third charges. PFR File, Tab 1 at 57-70. However, we see no reason to disturb those findings.

¶18 With respect to the fifth and sixth charges, the appellant generally argues that he made the $1,500 payment to SA-935-EP and that the form he submitted indicating payment to SA-935-EP was therefore not falsified. PFR File, Tab 1 at 70-85. However, the administrative judge made a credibility-based finding that the appellant made the payment in question to another individual and falsely claimed that he had made it to SA-935-EP. IAF, Tab 38 at 14-18. She specifically found that the testimony of Special Agent David Weatherly, who witnessed the payment and testified that the woman receiving the payment was not SA-935-EP, was more credible than the appellant's testimony that he paid the $1,500 to SA-935-EP. *Id.* at 17. The appellant also cites polygraph evidence in support of his argument that the fifth and sixth charges should not be sustained. PFR File, Tab 1 at 77-79. The administrative judge admitted that evidence, but she found that it did not outweigh Weatherly's credible testimony. IAF, Tab 38 at 17-18. We see no error in the administrative judge's consideration of the polygraph evidence, or in her credibility determination generally. We therefore find that the appellant has failed to provide sufficiently sound reasons for the Board to disturb that credibility determination. *See Haebe*, 288 F.3d at 1301.

<u>The administrative judge properly affirmed the penalty of removal.</u>

¶19 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. When fewer than all of the agency's charges are sustained, as here, the Board will consider carefully whether the

sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). In such cases, 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).

¶20 Here, the administrative judge found that the penalty of removal was reasonable in light of the serious nature of the appellant's offenses and his status as a law enforcement officer. IAF, Tab 38 at 19-23. Although the appellant does not generally challenge the administrative judge's analysis with respect to penalty, he does raise a disparate treatment claim, which is properly addressed as part of the Board's penalty analysis. Specifically, the appellant contends that he was singled out as the person to be punished for the agency's failure to prevent the murders that took place. However, the appellant's disparate penalty claim is limited only to those charges relating to the November 25, 2003 debriefing of SA-935-EP. *See* PFR File, Tab 1 at 54-55, 61-64, 70. He does not claim that any of the individuals he cites as comparators misdirected funds or falsified an official form with respect to such payment. Those individuals were, therefore, not similarly situated to the appellant, and their more favorable treatment does not establish a claim of disparate penalties. *See Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983) (to establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar); *see also Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010) (for the consistency of the penalty factor to be considered in a penalty determination, there must be a great deal of similarity, not only between the offenses committed and the proposed comparator, but as to other factors, such as whether the employees worked in the same unit, had the same supervisor, and whether the events occurred relatively close in time).

¶21 Overall, we find that consideration of all of the relevant factors supports a conclusion that the removal penalty is within the bounds of reasonableness. In particular, we note that mitigating factors in this case, i.e., the appellant's length of service, his record of duty performance, and his lack of any prior discipline, are greatly outweighed by the seriousness of the offenses. As the deciding official noted in his written analysis of the penalty below, the charged misconduct "cuts directly against the core functions of [the appellant's] position as a federal law enforcement officer," and that any of the charges, standing alone, support the penalty of removal because of the seriousness of the underlying facts. IAF, Tab 8. Accordingly, we affirm the agency's removal action.

ORDER

¶22 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.