UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 26

Docket No. DA-0752-12-0081-I-1

Kenneth G. Voss,

Appellant,

v.

United States Postal Service,

Agency.

April 3, 2013

Steve Segovia, Madisonville, Texas, for the appellant.

Ronnie D. Compton, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision, which sustained the agency's charge of unsatisfactory safety performance and affirmed the agency's removal action. For the reasons set forth below, we GRANT the petition for review. We SUSTAIN the agency's charge of unsatisfactory safety performance and VACATE the portion of the initial decision concerning the

reasonableness of the penalty. We REMAND the appeal to the Dallas Regional Office for proceedings consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The agency removed the appellant from his position as a City Carrier in Bryan, Texas, effective October 19, 2011. Initial Appeal File (IAF), Tab 5 at 22. The agency proposed his removal based on the charge of unsatisfactory safety performance after he had a traffic accident on June 16, 2011, while operating an agency vehicle, his second accident involving a postal vehicle in less than 2 years.[2] *Id.* at 44-46. The agency stated that the appellant's postal vehicle struck a parked car, which in turn hit another parked car, damaging all three vehicles. *Id.* at 44, 53. The agency's Safety Review Board determined that the accident was both preventable and the appellant's fault. *Id.* at 44, 47-54. The appellant grieved the proposed removal, and he appealed to the Board after the agency issued a Step B decision effecting the action. *Id.* at 18-21; IAF, Tab 1.

¶3 After a hearing, in which the appellant was represented but did not testify, *see* IAF, Tab 1 at 10; IAF, Tab 10, the administrative judge found that the agency proved the charge by preponderant evidence, IAF, Tab 11, Initial Decision (ID) at 3-5. The administrative judge likewise found that the agency proved that the penalty was reasonable and promoted the efficiency of the service. ID at 6-8. The appellant has filed a petition for review. Petition for Review (PFR) File,

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] The appellant was found to be at fault in another accident in August 2009. IAF, Tab 5 at 44, 56-57. Although the agency originally proposed his removal for unsatisfactory safety performance as a result of that accident, it downgraded the penalty to a 7-day suspension that would be removed from his file if no additional infractions occurred before August 19, 2011. *Id.* at 55. The accident at issue in this matter occurred on June 16, 2011. *Id.* at 44.

Tab 1. The agency has responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶4 The appellant has not challenged the administrative judge's findings that the agency proved its charge and established a nexus between the charge and the efficiency of the service. The record supports the administrative judge's findings on these issues, and we therefore AFFIRM those findings.

¶5 The appellant's arguments on review largely pertain to the penalty determination.[3] He asserts, inter alia, that the administrative judge failed to consider his comparator evidence and that the penalty of removal is inconsistent with the penalty given another employee for a similar offense.[4] PFR File, Tab 1 at 3. The comparator employee, a part-time flexible City Carrier, caused two preventable motor vehicle accidents within an 8-month period of time. *See* IAF, Tab 1 at 38-43. The appellant introduced evidence regarding the agency's treatment of the comparator into the record, *id.*, and he examined the proposing and deciding officials, Sherry Bridges and Myron Kelly, regarding this matter, Hearing Compact Disc (HCD). Nevertheless, the administrative judge did not specifically address the issue in the initial decision. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must

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[3] The appellant also asserts that the agency failed to conduct timely grievance proceedings. PFR File, Tab 1 at 3-5. Although he claims that his representative may have asserted this argument before the administrative judge, *id.* at 3, we found no such evidence in the record. This is a new issue on review, and the Board need not review it. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

[4] The appellant also argues that the administrative judge did not consider the fact that the police did not issue a traffic citation. *See* PFR File, Tab 1 at 6. He includes with the petition for review a copy of his driving history. *Id.* at 8. This appears to be a new argument on review. *See Banks*, 4 M.S.P.R.at 271. The driving history pre-dates the close of the record, and the appellant has not explained why he failed to submit it earlier. *See* PFR File, Tab 1 at 8; *see also Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). To rectify that omission, we GRANT the petition for review, VACATE the initial decision with respect to the penalty determination, and REMAND the appeal for further adjudication.

¶6 The consistency of an agency-imposed penalty with those imposed on other employees for the same or similar offenses is one factor the Board will consider in determining whether the penalty is reasonable. *See Yeager v. General Services Administration*, 39 M.S.P.R. 147, 151 (1988); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those in his comparator's case. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). If an appellant shows that the charges and circumstances surrounding the charged behavior of another employee are substantially similar, then the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 10 (2010); *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6 (2010). To trigger the agency's burden, the appellant must show that there is enough similarity between both the nature of the misconduct and other factors, such as whether the appellant and the comparator were in the same work unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time, to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 & n.4 (2012); *Lewis*, 113 M.S.P.R. 657, ¶¶ 12, 15. However, the Board does not have hard and fast rules regarding the "outcome determinative" nature of these factors. *Lewis*, 113 M.S.P.R. 657, ¶¶ 12, 15. Once the agency's burden is triggered, the Board will consider

whether the agency actually treated similarly-situated employees differently, whether the difference in treatment was knowing and intentional, whether the agency began levying a more severe penalty for an offense without giving notice of a change in policy, and whether an imposed penalty was appropriate for the sustained charges. *Id.*, ¶ 15 & n.4 (noting that these factors are consistent with the court's rationale in *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009)). Again, these considerations are relevant, but not outcome determinative. *Id.*, ¶ 15 n.4.

¶7 Here, the relatively small amount of record evidence shows a substantial similarity between the appellant's charged behavior and the comparator's charged behavior. Like the appellant, the comparator was a City Carrier at the Bryan, Texas, Post Office. IAF, Tab 1 at 38, 40. Additionally, like the appellant, the comparator was charged twice with unsatisfactory safety performance because of accidents involving a postal vehicle. *Id.*; *see* IAF, Tab 5 at 44-46, 55-57. Her first accident, in which she damaged the postal vehicle, resulted in a 7-day no-time-off suspension that was later downgraded to a 1-year letter of warning. IAF, Tab 1 at 38-39. Her second accident, in which she damaged a customer's mailbox, resulted in a 7-day suspension that was later downgraded to a 2-year letter of warning. *Id. at* 40-42. Although the proposing official here, Bridges, was not directly involved in the comparator's case, Bridges was on the supervisory team at the Bryan Post Office when the accidents took place.[5] *Id.*

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[5] Bridges testified that she had been assigned to the Bryan Post Office as a supervisor since 2000. HCD. She testified that she had investigated a different accident involving the comparator that was deemed to have been unavoidable, but she was not responsible for investigating the comparator's accidents at issue here. HCD. The record is silent as to whether the management team at the Bryan facility changed significantly between 2006 and 2011. *See Boucher*, 118 M.S.P.R. 640, ¶ 22 (although the appellant and the comparator had different first-line supervisors, they worked under the same plant manager at the time of their offenses and at the same post office); *see also Williams*, 586 F.3d at 1368-69 (the fact that two employees were supervised under different chains of command may sometimes justify different penalties, but the record must be

at 38, 41. The comparator's October 5, 2005 and May 31, 2006 accidents occurred within an 8-month period of time, a shorter period than the 22 months that elapsed between the appellant's accidents. *See id.* at 38, 40; IAF, Tab 5 at 44, 56-57. As with the appellant, the agency determined that the comparator's driving errors caused her accidents, and it deemed the accidents preventable. IAF, Tab 1 at 38, 40; IAF, Tab 5 at 44, 47-54. Thus, we find that the appellant made an initial showing that there is enough similarity between the nature of the misconduct and the other factors to trigger the agency's burden to prove a legitimate reason for the difference in treatment. *See Boucher*, 118 M.S.P.R. 640, ¶¶ 20 & n.4, 24; *Villada*, 115 M.S.P.R. 268, ¶¶ 10-11.

¶8 The hearing testimony offers no insight into the agency's justification for the differing penalties. Bridges could not account for the difference in treatment, even in light of the shorter period of time that elapsed between the comparator's two accidents. Instead, she testified that the agency "review[s] each accident individually." HCD; *cf. Lewis*, 113 M.S.P.R. 657, ¶ 16. Kelly testified that he was unfamiliar with the comparator's case but had removed another employee for repeated accidents in a previous assignment with the agency. HCD.

¶9 The agency briefly addressed the appellant's disparate penalties argument in its Step B decision pertaining to his grievance. IAF, Tab 5 at 19-20. It stated that the district safety office downgraded the report of the comparator's accident to an "incident" and that there "was no severe damage to the vehicle." *Id.* at 20. In contrast, the agency asserted that the appellant damaged three vehicles in his second accident, including two vehicles owned by customers. *See id.* at 18, 20-21. Although a greater amount of property damage by the appellant might justify differing treatment, the written record is incomplete on this matter, and the parties offered no relevant testimony. For example, the record does not contain

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fully developed with respect to why the different chains of command would justify different penalties).

information regarding the full extent of the property damage that the appellant's accident caused, the agency's cost of repairing such damage, whether the postal vehicle was still operable, or whether excessive speed or distraction were factors in the appellant's second accident. We lack much of the same information with respect to the comparator's accidents. In both cases, the employee struck and caused an undisclosed amount of damage to private property with a postal vehicle. Further, although the 5-year lapse of time between the second accidents of the appellant and the comparator may be a legitimate factor in the agency's stricter treatment of the appellant, the record does not include any evidence that the agency changed its policies or notified its workforce of any change in its policies regarding penalties for safety violations during that period of time. *See Boucher*, 118 M.S.P.R. 640, ¶ 27. The limited evidence of record is insufficient to distinguish the appellant's case and justify the difference in discipline.

¶10 The facts necessary to resolve the question of whether the agency met its burden to show a legitimate reason for the difference in treatment are not in the record. *See Villada*, 115 M.S.P.R. 268, ¶ 12. Accordingly, we REMAND the appeal for the administrative judge to reconsider the reasonableness of the penalty in light of the appellant's claim of disparate penalties. On remand, the administrative judge shall allow the parties to submit supplemental evidence and argument, including a hearing, if requested, so that he may analyze the

appellant's claim based on a fully-developed record. *See Williams*, 586 F.3d at 1366, 1369; *Villada*, 115 M.S.P.R. 268, ¶ 12.

FOR THE BOARD:

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

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

Kenneth G. Voss v. United States Postal Service

MSPB Docket No. DA-0752-12-0081-I-1

¶1 I concur with the disposition of this case. The precedents cited are controlling, and I believe they are being applied correctly. I write separately, however, because this case illustrates concerns I expressed previously with the Board's decisions in *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268 (2010), and *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), which in my opinion relaxed the long-established test for impermissible disparity in penalties. I cautioned that the result would be to insert the Board into the minutia of basic agency management decisions regarding reasonable penalties for unacceptable conduct – and here we are.

¶2 Prior to *Villada* and *Lewis*, the facts of the present case would have been adequate to sustain the initial decision and the reasonableness of the agency's penalty. But under the new heightened standards we must now remand this case to the administrative judge to further develop the facts and to determine whether removal is a consistent penalty with an identified comparator, whom I believe the record establishes is clearly distinguishable. This is taxing on the time, energy and resources of the Board and the agency without any corresponding added efficiency of the service.

¶3 As I said in my dissenting opinion in *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012), the Civil Service Reform Act's scheme for employee discipline should tolerate localized or organizational differences in penalties, so

long as the penalty in any particular case is reasonable and consistent under the balancing of all appropriate *Douglas* factors.

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Mark A. Robbins
Member