



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 19, 2021

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: McKenzie Holmes

Respondent: U.S. Postal Service

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2019-1973](#)

MSPB Docket Number: CH-0752-18-0233-I-1

Issuance Date: February 8, 2021

CHAPTER 75 REMOVAL

- STANDARD OF PROOF
- 5th AMENDMENT, SELF-INCRIMINATION
- DISPARATE PENALTY

The petitioner was a preference eligible city carrier for the agency. The agency removed the petitioner, along with seven other carriers, for purchasing marijuana from a colleague on agency premises, while in a duty status. During the investigation, the petitioner invoked his Fifth Amendment right against self-incrimination and declined to admit to the charge. Each of the seven other carriers admitted to their misconduct.

On appeal to the Merit Systems Protection Board, the administrative judge affirmed the petitioner's removal. He found that the agency proved its charge and that the removal penalty was reasonable. The administrative judge's initial decision became the final decision of the Board, and the petitioner petitioned for review before the court.

Meanwhile, five of the seven other carriers whom the agency removed for the same misconduct filed grievances that went to arbitration. The arbitrator in each case mitigated the removal to a lesser penalty.

Holding: The court affirmed the Board's final decision, finding substantial evidence to support the administrative judge's findings on both the charge and the penalty.

1. In sustaining the charge, the court acknowledged that the only direct evidence supporting the charge was an unclear surveillance video recording that showed the petitioner entering his colleague's Postal vehicle, handing his colleague what appeared to be money, and taking from the cup holder what appeared to be an item in a small plastic bag. Circumstantial evidence came from two agency witnesses who testified that: (1) the petitioner had no official reason to be in his colleague's vehicle at that time, and (2) the actions captured in the recording were consistent with a narcotics transaction, and similar footage was captured of six of the seven other carriers removed as a result of the same investigation.

Regardless of whether this evidence would have been sufficient to prove a criminal charge beyond a reasonable doubt, substantial evidence showed that it was sufficient to satisfy the lesser preponderant evidence standard applicable in a Board proceeding. This is especially so to the extent that the administrative judge's findings were based on credibility determinations, i.e., that the agency witnesses testified credibly regarding their interpretations of the surveillance video and the petitioner's denials were not credible.

2. In affirming the penalty, the court rejected the petitioner's argument that the removal penalty should be mitigated because it was inconsistent with the lesser penalties meted out to the five other carriers pursuant to arbitration awards.
 - A. The petitioner failed to raise this argument before the

administrative judge, even though all five arbitration decisions occurred before the initial decision was issued. Thus, the petitioner was precluded from raising this argument for the first time on judicial review.

- B. Even if he had timely raised the issue, the agency treated all of the proffered comparators similarly because it removed each of them. That this penalty was later mitigated by arbitrators for five employees who pursued grievance arbitration does not reflect any disparate treatment by the agency itself.
- C. Arbitration decisions are not binding on the Board, and the Board's decision does not need to be consistent with arbitration decisions in other cases.
- D. Even if the Board was required to consider the mitigated penalties in the other cases, there was a rationale for treating this petitioner differently. Specifically, the other five employees admitted to their misconduct, but the petitioner in this case failed to take responsibility for his actions.
- E. Regarding the other penalty factors, substantial evidence supported the administrative judge's conclusion that the agency proved by a preponderance of the evidence that it properly weighed the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), in determining the appropriate penalty and that removal was within the tolerable limits of reasonableness.

Judge Newman issued a dissenting opinion. She would have mitigated the penalty in light of the fact that five other carriers who committed substantially the same conduct received lesser penalties than removal.

1. Although the administrative judge inquired about the grievances, they had not been decided at the time of the hearing in the instant case. Neither party submitted the decisions to the Board thereafter.
2. The administrative judge simply deferred to the agency's penalty selection rather than conduct an independent penalty review.
3. The evidence in all five cases was practically identical apart from the petitioner's decision not to confess. The petitioner should not

be penalized for exercising his constitutional right against self-incrimination.

4. Regardless of whether the mitigations in the other cases occurred in the context of grievance decisions, precedent does not support ignoring disparate treatment.
5. The majority's reliance on Supreme Court precedent permitting an agency to consider an employee's invocation of the Fifth Amendment is misplaced. The cases cited only hold that an agency may consider an employee's refusal to testify in ascertaining the truth of a charge; they do not support removing the requirement to consider the consistency of the penalty with those imposed upon other employees in reviewing the reasonableness of the penalty.
6. The Board was established for the purpose of assuring reliability, fairness, and consistency in federal employment actions. The majority decision represents an abdication of the court's responsibility to uphold these principles.

NONPRECEDENTIAL:

Brown v. Department of the Air Force, No. [2020-1702](#) (Fed. Cir. Feb. 12, 2021) (MSPB Docket No. SF-1221-19-0481-W-1): The court affirmed the administrative judge's decision denying corrective action in the petitioner's individual right of action appeal. The court concluded that the petitioner failed to show that the administrative judge erred in his evidentiary rulings or credibility findings. Moreover, the petitioner's arguments regarding the administrative judge's failure to consider the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), were irrelevant because the petitioner failed to demonstrate that she made a protected disclosure that was a contributing factor in her probationary termination, thus the burden never shifted to the agency to establish that it would have taken the action in the absence of a protected disclosure.