UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EUGENE ANDERSON, appellant, v. U.S. POSTAL SERVICE, agency.	DOCKET NUMBER DE07528510032 DATE: NOV 27 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

Ellingwood concurs in part and dissents in part.

OPINION AND ORDER

The appellant petitioned the Board's Denver Regional Office for appeal of the agency's action removing him from the position of City Letter Carrier, effective November 1, 1984. The agency based its action on charges of deviating from his assigned route, falsely stating that he needed overtime, and fraudulently misrepresenting the time worked.[1]/ The total time involved was two hours and nine minutes.

The presiding official found on appeal that the agency proved the charges by preponderant evidence. She found further, however, that the appellant proved his removal was a pretext for

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1/ While the agency characterized its first charge as "unacceptable work performance," "deviation from assigned route" appears to be as much "misconduct" as the two other charges which the agency characterized as such.

racial (black) discrimination. She then found removal to be an overly harsh penalty and mitigated the penalty to a 60-day suspension.[2]/

The agency filed a petition for review of the initial decision arguing that the presiding official erred in mitigating the penalty and in finding that the agency's reasons for removing the appellant were pretextual. We hereby GRANT the agency's petition under 5 U.S.C. § 7701(e)(1).

The appellant had alleged before the presiding official that three non-black employees who committed similar offenses received only letters of warning. He also alleged a pattern of discrimination. We have reviewed the evidence of record in support of these claims and find it insufficient to prove racial discrimination.

The record contains copies of letters of warning to two non-black employees for deviating from their assigned routes. However, these employees were charged with only one incident each, and they were not charged with misrepresenting the hours worked. Further, one incident involved only a 20-minute deviation.

In addition to the two letters of warning in the record, a third non-black employee, Larry McDonald, testified at the hearing on appeal that he received a letter of warning and was required to take a one-hour lunch break for several months as a result of his being observed expanding his lunch hour on a day when he had been allowed to work overtime. McDonald was permitted to replace the time reported but not worked during overtime hours.

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[2]/ The presiding official erred in mitigating the penalty after finding prohibited discrimination. If the appellant had proved his defense that the action on appeal was based on racial discrimination, the removal should have been reversed under 5 U.S.C. § 7701 (c).

Mr. Gene Reynolds, another agency employee, testified that James Morganfield, the appellant's supervisor and the proposing official in this case, asked him for certain information regarding the frequency of personal telephone calls by two employees who were black. The appellant proffered this testimony in support of his claim of a pattern of racial (black) discrimination. Reynolds further testified more generally as to his feeling that black males were discriminated against at his station. In the absence of any evidence regarding the racial composition of the office or actions taken against other black employees, we can not find that this evidence proves that the appellant's removal was a pretext for racial discrimination.

The presiding official found that the fact of an investigation held in the appellant's case and not in the cases of the three other employees noted above, who deviated from their mail routes and/or expanded their lunch hours, constituted evidence of discrimination. We disagree and find that factual differences explain the difference in treatment. The three other employees were observed in undertaking the prohibited activity by either the postmaster or by a supervisor. The charges against the appellant stemmed from an investigation following a complaint by a postal patron who reported seeing the appellant's postal vehicle at his home during the workday over a period of time.

Contrary to the presiding official's findings on the discrimination claim, the Board concludes that the appellant did not support his affirmative defense of racial discrimination by preponderant evidence. See Weaver v. Department of Navy, 2 M.S.P.R. 129, 133 (1980) (in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning). We

agree, however, with the presiding official's determination that the agency proved its charges against the appellant by a preponderance of the evidence. We shall therefore consider the appropriateness of the removal penalty under Douglas v. Veterans Administration, 5 MSPB 331 (1981).

The charges sustained against the appellant are very serious, in our view. As the postmaster testified, the appellant's actions reflected negatively on his integrity as a Postal Service employee. On the other hand, the appellant had 20 years of federal service and had worked for the Postal Service for almost eight years with no meaningful prior disciplinary record. 3/ Also, while the charges sustained against the appellant are more serious than the offenses for which the employees noted above received letters of warning, we believe that removal is comparatively still too harsh a penalty in this case. Although the postmaster, who was the deciding official in this case, testified that progressive discipline need not be applied in fraud cases, we find that this appellant should have the opportunity for rehabilitation. We therefore conclude that the maximum reasonable penalty in this case is a 60-day suspension.

Accordingly, the initial decision dated March 20, 1985, is hereby AFFIRMED as MODIFIED herein. The agency is ORDERED to cancel the removal action against the appellant, substitute a 60-day suspension without pay, and award the appellant back pay and other benefits for the appropriate time period under its regulations. Proof of compliance with this order shall be submitted by the agency to the Clerk of the

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3/ In discussing the appropriateness of the penalty, the presiding official considered the appellant's prior discipline consisting of a letter of warning for not closing the door of his vehicle while delivering mail. The postmaster testified that he considered the appellant's past record in deciding to remove the appellant. The appellant's removal notice, however, does not mention the agency's consideration of any prior disciplinary actions. We find, nonetheless, that even upon consideration of the letter of warning, the penalty of removal is excessive in this case. See Plath v. Department of Justice, 11 MSPB 65, 66-67 (1982).

Board within twenty (20) days of the issuance of this opinion. Any petition for enforcement of this order shall be made to the Denver Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

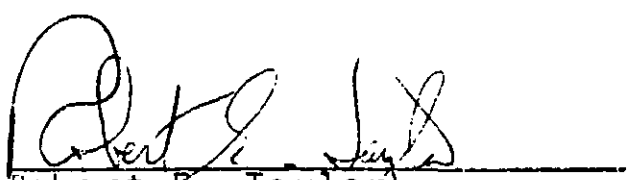
The appellant has the statutory right under 5 U.S.C § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The

statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

OPINION OF CHAIRMAN HERBERT E. ELLINGWOOD CONCURRING IN PART AND DISSENTING IN PART

While I concur with the majority's factual findings and legal conclusions concerning the merits of the charges and the appellant's affirmative defense, I cannot concur with the majority's holding with respect to mitigation of the removal penalty to a 60-day suspension.

The majority's holding is based primarily on the principles of "progressive discipline" and "like penalties for like offenses." The majority finds that the appellant had no meaningful prior disciplinary record, and that while the appellant's misconduct was more serious than that of the three employees who received letters of warning it did not warrant a penalty of removal.

I believe that the majority's analysis fails to appreciate the significance of the distinction between the appellant and those allegedly similarly situated. The other employees were charged with either deviating from their assigned routes or expanding their lunch hours. They were not charged additionally, as was the appellant, with misrepresenting hours worked and falsifying requests for overtime. The appellant's conduct in stating on three consecutive days that he needed overtime to complete his route and thereafter taking personal time during duty hours constituted deliberate falsification which obviously undermines the agency's needed trust in the appellant as an

employee. Based on these considerations, I would hold that the agency's selection of the removal penalty was within the bounds of reasonableness.

I therefore respectfully dissent in that regard.

Herbert E. Ellingwood

Herbert E. Ellingwood, Chairman

Washington, D.C.