UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KRIM M. BALLENTINE, agency, v. DEPARTMENT OF JUSTICE, appellant,	DOCKET NUMBER CH07528510053-1
	DATE May 21, 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

On May 31, 1985, the United States Court of Appeals for the Federal Circuit remanded this case to the Board, upon the Board's motion, for adjudication on its merits. The case is now before the Board upon the agency's petition for review of the presiding official's decision finding only one of the agency's charges sustained and mitigating the penalty. The agency's petition for review is GRANTED.

BACKGROUND

The agency demoted appellant from his position of Chief Deputy United States Marshal, GM-13, U. S. Marshals Service, Eastern District of Michigan, to the position of Deputy U. S. Marshal, GS-9, and reassigned him to the Southern District of Texas. The demotion was based on the following six charges, each supported by several specifications: (1) disrespectful conduct; (2) making threats against fellow employees; (3) sexual harassment; (4) misuse of authority and

position; (5) misuse of government vehicles; and (6) giving false or misleading statements in connection with an investigation. The agency alleged that appellant's conduct violated various rules of the Standard Schedule of Disciplinary Offenses and Penalties for Employees of the U.S. Department of Justice (agency's regulations). The presiding official sustained only one of the charges, misuse of government vehicles, based on the specification that appellant instructed a subordinate to use a government vehicle to transport appellant's brother and the brother's friend.

The presiding official found that the agency did not support the remaining charges by preponderant evidence because the witnesses' statements upon which the agency relied were non-routine, unsigned, or unsworn, or were not corroborated by other witnesses who were allegedly present when the misconduct occurred. Thus, relying on Borninkhof v. Department of Justice, 5 M.S.P.R. 77 (1981), he found them not probative of the charges. The presiding official also found the testimony of the agency's witnesses not credible because of unspecificity, inconsistency with their written statements, or lack of corroboration in statements given by other eyewitnesses.

In considering the reasonableness of the penalty, the presiding official noted that a 30-day suspension was the minimum statutorily-imposed penalty for misuse of a government vehicle under 31 U.S.C. § 638a(c)(2), in effect when appellant was charged, and that the agency's table of penalties for such an offense ranged from an official reprimand to removal. The presiding official also considered appellant's lengthy government service, including his nine years as a manager, his many commendations and awards, and the absence of a past disciplinary record in the agency's notice of proposed removal. Thus, he mitigated the demotion to a thirty-day suspension.

In its petition for review, the agency challenges the presiding official's findings on the five unsustained charges. It contends that that the presiding official erred in

assessing the weight of the written statements of the agency's witnesses and in finding the testimony of some of the agency's witnesses not credible. Thus, the agency contends that the presiding official misapplied Borninkhof. The agency also contends that the presiding official should have drawn an adverse inference from the appellant's failure to testify.

ANALYSIS

The agency contends that the presiding official misapplied Borninkhof, supra, which the agency asserts "stands for the proposition that an unsigned statement made during the course of an agency investigation does not rise to the level of sufficient proof in the face of, among other things, contradictory live testimony at the hearing [original emphasis]. See Petition for Review at 3. It contends that a statement which is uncontradicted or which is not inconsistent with other evidence should be sufficient to support a charge.

We find that the agency has misinterpreted Borninkhof. When hearsay evidence is presented, it "remains for the trier of fact to weigh the probative value of the hearsay evidence in the circumstances of the case." Id. at 84. In determining the weight to be given such evidence, the absence of contradictory or inconsistent evidence and the credibility of witnesses are only some of the factors to be considered by the presiding official. Id. at 87. Thus, there is no merit to the agency's contention that because a statement has not been shown to be contradictory or inconsistent with other evidence, it necessarily follows that it is sufficient to support a charge by preponderant evidence.

The agency also contends that the presiding official should have drawn an adverse inference from appellant's failure to testify. However, there is no requirement that the presiding official do so since drawing of an adverse inference is solely within the discretion of the presiding official. See Book v. United States Postal Service, 675 F.2d 158, 160 & n. 4 (8th Cir. 1982). See also Adams v. Department of

Transportation, 735 F.2d 488, 492 (Fed. Cir. 1984), citing to Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976), and to Book, supra. Thus, the agency has shown no error by the presiding official here.

Moreover, the agency cannot rely on the appellant's failure to testify to support its own case. The agency bears the burden of proving its charges by preponderant evidence, and any adverse inference drawn from appellant's failure to testify is not, per se, sufficient to overcome a lack of evidence to support the agency's charges. See Borninkhof, supra, at 86, 89. The agency's objections to the specific charges are addressed below.

Disrespectful Conduct

With respect to the charge of disrespectful conduct, the agency challenges the presiding official's assessment of certain written statements and testimony. Regarding the presiding official's assessment of the statements made by Deputies James Northrop, Frank Kavanaugh, Kenneth Briggs, Stephen McCormick, Johnnie Bragg, and Michael Sternfeld, we adopt the findings of the presiding official on these issues, finding that the agency has failed to show error in these findings. However, with respect to the statements of Deputy Jack Wolf and Richard Gillen, Chief of the agency's Personnel Operations Branch, we find that the presiding official erred.

Deputy Wolf stated that appellant used profanity in talking to him. The presiding official failed to credit the statement despite appellant's admission that he used profanity in a conversation with Deputy Wolf. The presiding official found that Deputy Wolf did not refer to this incident in his sworn affidavit given in response to the agency's investigation into appellant's use of profanity. In light of appellant's admission, we find that his use of profanity in speaking to Deputy Wolf did constitute disrespectful conduct and that the presiding official erred in not sustaining that specification.

Regarding appellant's use of profanity in his conversation with Richard Gillen, Chief of the Personnel Operations Branch, the presiding official noted appellant's admission that he used profanity to Mr. Gillen. Nevertheless, the presiding official found that Mr. Gillen did not indicate that appellant's conduct was disrespectful and did not recommend disciplinary action against him. We disagree. Mr. Gillen's failure to mention appellant's conduct in his affidavit or to recommend disciplinary action does not establish that he considered appellant's conduct appropriate. Moreover, it was appellant's use of profanity, and not Mr. Gillen's reaction, that was the underlying basis of the chargeable offense. We therefore find that the presiding official erred in not sustaining this specification.

Because we find these two specifications supported by preponderant evidence, we find that the agency proved its charge of disrespectful conduct by preponderant evidence. Further, we find that appellant's conduct violated Rule 18 of the agency's regulations which prohibit disrespectful conduct and the use of insulting, abusive, or obscene language to or about others.

Making Threats Against Fellow Employees

Regarding the charge of threatening fellow employees, we find that the agency has not shown error in the presiding official's findings in relation to appellant's alleged threatening of Deputy Louis Economo. Therefore, those findings will not be disturbed. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133 (1980) (Board will accord due deference to presiding official's credibility findings). See also Jackson v. Veterans Administration, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (Board may not reverse the presiding official based on evaluation of testimonial evidence absent sound reason for doing so); Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985) (credibility determinations

are within the discretion of the presiding official who was present to hear the witnesses and to observe their demeanor).

With respect to appellant's alleged threatening of his subordinates at a December 17, 1981 staff meeting, the agency has also not shown error in the presiding official's findings. The agency contends that the presiding official did not sustain this specification because other employees failed to corroborate Deputy McCormick's statement, which forms the basis of this specification. That statement alleges, inter alia, that appellant, using profanity, improperly threatened employees with firings within three days and stated that he was "going to put pressure on the Supervisors [sic] to come down on" the deputies. Appeal File, Tab 6, Exhibit 34. A review of these allegations shows that, even if proved, they would nevertheless not support the charge of making threats against fellow employees. The agency did not allege that any of appellant's statements suggested harm to his subordinates. See Metz v. Department of the Treasury, No. 85-922, slip op. at 4 (Fed. Cir. Jan. 2, 1986) (setting forth guidelines to be applied in determining whether a statement constitutes a threat). Therefore, we find this specification to be without support.

Sexual Harassment

With respect to the charge of sexual harassment, the agency alleged that appellant made several sexually suggestive statements to Deputy Pamela Kish and on one occasion attempted to grab her arm, asking her why she would not allow him to touch her. Appellant admitted to only one of the specifications under this charge. He admitted that after he sent Deputy Kish on assignment to the Virgin Islands he stated that the reason he sent her there was to "get some color in her life." Deputy Kish stated that she interpreted the statement to mean that she should date black men because of the majority black population in the Virgin Islands. Appellant denied that the statement had sexual overtones. The

presiding official found that Deputy Kish did not explain why she thought appellant believed that she would have a better opportunity to date black men in the Virgin Islands than in Detroit. Thus, he found that specification not supported by preponderant evidence.

As to the remaining specifications, the presiding official found Deputy Kish's testimony not credible. In support of this determination, the presiding official noted that Deputy Kish had traded sexual jokes with other employees. He also noted that none of the alleged witnesses to the incidents alleged in those specifications mentioned them in their statements to agency investigators.

The agency contends that the presiding official erroneously assessed the evidence. It contends that Deputy Kish's trading of sexual jokes had no bearing on the charge against appellant. We agree. Deputy Kish's voluntary participation in sexually-related conversations with her peers is irrelevant to the type of conduct with which appellant is charged here--unsolicited, unwelcome sexual advances which are made a condition of employment and the rejection or acceptance of which is calculated to affect the employee's employment or working environment. See Hosemann v. Technical Materials, Inc., 554 F. Supp. 659, 666 (D.R.I. 1982); Guyette v. Stauffer Chemical Co., 518 F. Supp. 521, 526 (D.N.J. 1981) (non-supervisory employee not subject to liability under Title VII). See also Downes v. Federal Aviation Administration, 775 F.2d 288, 290-93 (Fed. Cir. 1985) (explanation of sexual discrimination and distinction between "quid pro quo" sexual harassment and sexual harassment which creates an intimidating, hostile, or offensive work environment); Barnes v. Costle, 561 F.2d 983, 994 & n. 81 (D.C. Cir. 1977) (discussion of the impact of Title VII of the Civil Rights Act of 1964 on prohibited superior-subordinate sexual relationships and voluntary personal relationships); Hillen v. Department of the Army, MSPB Docket No. DC07528510324 at 6 (January 26, 1986) (prima facie case of sexual harassment established where

evidence showed that appellant's touching of female employee was without her consent and unwelcome, that appellant's conduct was pervasive, and that it affected the employee's work performance).

Nevertheless, we find that the presiding official properly considered evidence that the witness had not previously complained of sexual harassment to a close on-the-job friend with whom she had exchanged sexual comments and that witnesses who were allegedly present at the incident concerned did not mention the incidents in their statements to agency investigators. Thus, we find no error by the presiding official in considering these circumstances in finding Deputy Kish's testimony not credible. See Weaver, id.

The agency also challenges the presiding official's determination that Deputy Kish transferred from the agency's Detroit Office, not because of sexual harassment by appellant, but because of her poor performance evaluation. The agency refers to the Hearing Transcript (Tr.) at 296, 347, 354, and 355 to support its contention. A review of those portions of the transcript shows that Deputy Kish testified that she transferred from the Detroit Office "to get away from" appellant. Tr. at 296. However, she also testified that she received low performance ratings. Tr. at 352-53. Further, the presiding official noted that Deputy Kish was upset over her low ratings. Appeal File, Tab 6, Exhibit 68. That exhibit shows that she told an agency investigator that she was seeking a transfer to "get away primarily from appellant and management in general." In view of the various reasons given by Deputy Kish for her desire to transfer, we find that the presiding official acted within his discretion in determining which reason was more credible. See Weaver, id.

Misuse of Authority and Position

The agency challenges the presiding official's credibility findings relating to the testimony of Deputies Kavanaugh and Kish in support of this charge. As the basis

for the charge, the agency alleged, inter alia, that appellant had ordered Deputy Kavanaugh to pick up appellant's television set and take it to a repair shop, which he did, using a government vehicle. The agency also alleged that appellant ordered Deputy Kish to pick up his wrist watch while she was in official duty status.

The presiding official found Deputy Kavanaugh's statement not credible on the basis that it was too vague in time and detail. A review of the transcript shows that the witness was indeed unable to respond to several specific questions relating to the circumstances surrounding his pick-up of the television set. See Tr. at 72-78. Thus, there was a reasonable basis for the presiding official to find his testimony not credible. See Weaver, id.

The agency also contends that the presiding official erroneously failed to credit Deputy Kish's testimony because she was unable to recall whether appellant or Deputy Willie Greason asked her to pick up the watch. The agency contends that Deputy Kish had testified that any orders that came from Deputy Greason came from appellant. However, the agency has pointed to no supporting evidence for Deputy Kish's assertion. Thus, the presiding official correctly found that Deputy Kish's testimony was not credible and that the agency failed to show that it was appellant who ordered Deputy Kish to perform the errand. See Weaver, id.

Giving False or Misleading Statements in Connection With an Official Investigation

The agency argues that the record shows that appellant gave false statements when he answered in the negative to questions as to whether he had used his government vehicle for other than official business and whether he had ever driven his government vehicle after consuming alcoholic beverages.

In an attempt to show that appellant did use his government vehicle for other than official business, the agency refers to the testimony of Marshal Anthony Bertoni to

show that the agency had issued a memorandum to appellant, placing restrictions on his use of government vehicles. Tr. at 514. However, that testimony merely demonstrates that the memorandum in question had been issued to every employee and that appellant was not singled out for issuance because he misused his government vehicles. Thus, the agency has not shown that the presiding official erred in finding that appellant gave a false answer to this question.

Relating to the question of whether he had ever driven a government vehicle after consuming alcohol, the agency contends that appellant's admission that he had on occasions stopped for a drink on his way home from work was sufficient to show that he had responded falsely to that question. The agency asserts that the question was unambiguous and that the presiding official erred in crediting appellant's explanation that he thought the question meant drinking to excess.

The presiding official noted the testimony of the agency's Personnel Officer that no chargeable offense is committed when an employee has a few drinks after work and then drives his government vehicle home and that a chargeable offense is committed only where the employee's behavior is affected by his consumption of alcoholic beverages. Thus, relying on Cadena v. Department of Justice, 3 M.S.P.R. 390, 393 (1980), the presiding official found that appellant reasonably interpreted the question to mean drinking to excess and that appellant therefore did not have the requisite intent to answer falsely. Based on the evidence presented, we find no error by the presiding official in determining that appellant lacked the intent to give a false statement.

Penalty

In light of the additional sustained charge of disrespectful conduct, we must re-examine the mitigating factors in order to determine the appropriateness of the penalty. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 301, 305-06 (1981) (relevant factors to be considered in

determining whether a penalty warrants mitigation). Appellant's lengthy government service (approximately twenty years at the time of his demotion), his nine years as a supervisor, his commendations and awards, and his apparent lack of a prior disciplinary record are appropriate mitigating factors.

In determining whether these favorable factors are sufficient to warrant mitigation, we must consider the appropriateness of the reassignment, as well as the demotion, since the reassignment was clearly a part of the penalty imposed. See Brewer v. American Battle Monuments Commission, No. 85-2044, slip op. at 5 (Fed. Cir. Dec. 12, 1985). Here, the agency stated in its final decision that appellant was being reassigned because he "[had] lost his effectiveness in dealing with [his] fellow employees assigned to the Eastern District of Michigan . . .." See Appeal File, Vol. II, Tab 1. Both the documentary and testimonial evidence of record show that appellant's relationship with his subordinate employees had significantly deteriorated. Those employees considered appellant responsible for the low morale existing in their work enviroment. We find that the acrimony existing between appellant and the other employees in the Eastern District of Michigan was so pervasive and disruptive that the agency's decision to reassign him was reasonable.

As to that portion of the penalty relating to the demotion, we have considered the fact that appellant was a high-level supervisor, a Chief Deputy, and therefore was charged with a high degree of responsibility for prompting a mutually respectful environment in the workplace and in complying with and enforcing agency regulations. Appellant's disregard for those regulations reflected unfavorably on his position as a supervisor. Nevertheless, considering the favorable mitigating factors in this case, we find a sixty-day suspension to be the maximum reasonable penalty.

ORDER

Accordingly, the initial decision dated October 4, 1985, is AFFIRMED, as MODIFIED by this Opinion and Order, to SUSTAIN the charge of disrespectful conduct and to mitigate the penalty to a sixty-day suspension.

The agency is hereby ORDERED to cancel appellant's removal, to substitute therefor a sixty (60) day suspension, and to award him back pay and benefits in accordance with 5 C.F.R. § 550.805. Any petition for enforcement of this order shall be made to the Chicago Regional Office in accordance with 5 C.F.R. § 1201.182.

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

NOTICE

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. §§ 2000e-5(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(b)(1) 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