UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH C. BASHAW, ERNEST M. SPURLOCK, Appellants, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBERS DA07528610312 DA07528610313 Date: FEB 21 1989

R. Travis Douglas, Esquire, Douglas & Douglas, Kenner, Louisiana, for the appellants.

William P. Joyce, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Vice Chairman Johnson dissents.

OPINION AND ORDER

The agency timely petitioned for review of the July 10, 1986, initial decisions that reversed its actions demoting and suspending the appellants.[1] For the reasons discussed below, the Board GRANTS the petitions under 5 U.S.C. § 7701(e)(1). With respect to appellant Spurlock, the Board REVERSES the initial decision and SUSTAINS both the charges against the appellant and the agency's demotion and suspension actions. With respect to appellant Bashaw, the Board AFFIRMS

[1] Because appellants Bashaw and Spurlock were demoted and suspended for the same reason, the two cases were consolidated at the request of the parties. However, because the analyses of the two cases were materially different, the administrative judge issued a separate decision for each appellant.

the initial decision as MODIFIED by this Opinion and Order, and does NOT SUSTAIN either the charges or the agency's actions.

BACKGROUND

The appellants were demoted and suspended[2] from their positions as Border Patrol Agents with the Department of Justice's Immigration and Naturalization Service (INS) for allegedly violating Agency Operating Instruction § 208.8. That provision states in part that, "[w]hen it comes to the attention of any Service employee that a [national of the Soviet Union] may be seeking asylum, the district director will be notified immediately and furnished all the pertinent facts of the case . . . ." *See* Spurlock Appeal File (S.A.F.), Tab 6; Bashaw Appeal File (B.A.F.), Vol. I, Tab 7.

While on duty during the night of October 24, 1985, the appellants took into custody Miroslav Medvid, a Soviet Seaman, who had deserted his ship. While appellant Spurlock interrogated Medvid through an interpreter, appellant Bashaw remained present in the office and performed various administrative tasks incidental to the processing of the crewman for possible deportation. On completing the interrogation, Spurlock determined that Medvid was not seeking political asylum in the United States and advised Bashaw to that effect. Spurlock nevertheless annotated Form I-213,

---

[2] Appellant Bashaw was demoted from GS-9 to GS-7 and suspended for forty-five days. Appellant Spurlock was demoted from GS-9 to GS-7 and suspended for ninety days.

"Record of Deportable Alien," to show that "[s]ubject claims he jumped ship in the United States for political and moral reasons." Bashaw then contacted the shipping company which represented Medvid's ship and requested that it send a representative to the Border Patrol station to return the crewman to his vessel. *See* S.A.F., Tab 6. Medvid was then forcibly returned to his ship. *Id.*

The appellants appealed their demotions and suspensions to the Board's Dallas Regional Office, contending that they had not violated agency regulations, but, rather, had conducted themselves properly under the circumstances. After a hearing, the administrative judge reversed the agency's actions with respect to both appellants. He found that the charges against them could not be sustained because the agency failed to carry its burden of proving by preponderant evidence that the operating instruction in question had been violated. With regard to appellant Spurlock, the administrative judge found that: (1) The agency had failed to prove that Medvid had requested political asylum; (2) Medvid specifically stated that he was not seeking asylum; and (3) Operating Instruction § 208.8 therefore did not apply and could not have been violated. With respect to appellant Bashaw, the administrative judge found that Bashaw's lack of knowledge of Medvid's reference to "political reasons" for deserting his ship was fatal to the agency's case, since proof of this knowledge was an essential ingredient of the charge against him.

ANALYSIS

The appellants were charged with the specific misconduct of violating Agency Operating Instruction (OI) § 208.8. As noted above, that provision requires agency employees to notify their district directors immediately when it comes to their attention that a Soviet national may be seeking asylum in the United States. The administrative judge found that, because Medvid was a Soviet national who had stated in response to questioning that he was not seeking asylum, OI § 208.8 did not apply, and the appellants could not properly be charged with violating that regulation. In its petition for review, the agency contends that the initial decision is based upon a basic misinterpretation by the administrative judge of the regulation in question. We agree.

The Board has the authority to reject an administrative judge's decision in a particular case and to substitute its own determinations, giving the administrative judge's findings only so much weight as may be warranted by the record and by the strength of the administrative judge's reasoning. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1330 (Fed. Cir. 1985); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982). Under the provisions of 5 U.S.C. § 7701(c)(1)(B), the agency must support its reason for the actions taken against the

appellants by a preponderance of the evidence.[3] In this regard, the administrative judge may not construe either the nature or the wording of the charges made by the agency against the appellants too technically. *See Brown v. United States Coast Guard*, 10 M.S.P.R. 573, 577 (1982).

We find that the administrative judge mischaracterized and misinterpreted the agency's charges against the appellants. The administrative judge determined that an employee needed to "deliberately" violate OI § 208.8 in order to be found guilty of violating that regulation. *See* Spurlock Initial Decision at 4-5. Having found that the agency had failed to prove this particular element of the charges, the administrative judge concluded that the agency had not proven its charges by preponderant evidence. We find this analysis to be incorrect because the charges against the appellants specifically concerned only "noncompliance with regulations issued by the service." The charges neither indicated nor implied that the appellants had "deliberately" violated OI § 208.8 but, rather, merely stated that they had failed to follow the required agency procedure in processing Medvid's deportation.

Actual knowledge (or lack thereof) of the regulation in question was not an element of the charges against the appellants. Just as ignorance of the law is no excuse in

---

[3] "Preponderance of the evidence" is defined as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

general, the appellants here may be found culpable of violating agency regulations that relate to the exercise of their duties. The INS Officers' Handbook (M-68) states on page fifteen under "Devotion to Duty":

> Keep well informed on changes in laws, rules and regulations applicable to Immigration and Naturalization matters. Officers should keep themselves informed as to current affairs. It is helpful to know the geography, history, and customs of countries from which aliens come to the United States, and from foreign countries to which they (the officers) may be assigned or detailed to perform their duties.

S.A.F., Tab 6. Although the appellants claimed ignorance of OI § 208.8 prior to the incident in question, they acknowledged having read and understood the Officers' Handbook. *See id.*; B.A.F., Vol. I, Tab 7; Hearing Transcript (H.T.) at 23, 54. Moreover, the appellants should have been aware of the notification requirement here at issue since they had received training in administering appropriate asylum procedures. *See* B.A.F., Vol. V, Bonnette Deposition at 6, 12.

Violation of OI § 208.8 does not require an employee of the INS to be certain that a Soviet national is applying for asylum in the U.S., but only that the employee be aware that the Soviet national "may" be seeking asylum in this country. Such a determination necessarily depends on an analysis of what a reasonable and knowledgeable Border Patrol Agent may perceive about the situation at hand, considering <u>all</u> of the circumstances.

The evidence of record supports the charge against appellant Spurlock.

In this case, the record establishes that, after giving due consideration to the available information in his possession regarding Medvid's desertion from his ship, appellant Spurlock clearly should have known that he had an unusual case on his hands, possibly involving a Soviet national seeking asylum. Since OI § 208.8 requires INS employees to notify their superiors in just such a situation, appellant Spurlock's failure to do so resulted in his violation of that regulation.

The fact that Medvid told Spurlock during the interview that he had jumped ship "for political and moral reasons" raised the question of asylum and triggered Spurlock's obligation to notify his district director. That Medvid had previously told Spurlock that he was not seeking asylum is not dispositive. Under all of the circumstances in this case, Medvid's final explanation for jumping ship was sufficient to raise asylum as a possibility.

Appellant Spurlock testified that he knew that political asylum cases were normally processed by contacting the district director. *See* H.T. at 13, 21, 24. He further testified that he was aware that, in all cases when faced with a sensitive matter or a question as to the best manner in which to proceed, he was to contact a supervisor or the district director. *See* H.T. at 23, 40. We find that the circumstances surrounding appellant Spurlock's case, viewed in

their totality, were more than sufficient to have alerted a reasonably prudent Border Patrol Agent that the Soviet national in custody "may" have been an individual seeking asylum in the United States.

The agency failed to prove its charge against appellant Bashaw.

By contrast, the evidence of record shows that appellant Bashaw had no reason to believe that Medvid may have been seeking asylum. Bashaw did not conduct the interview with Medvid and was not aware that Spurlock had reported on the INS deportation form that Medvid jumped ship "for political and moral reasons." *See* H.T. at 57 and 74. Indeed, the only relevant information Spurlock relayed to Bashaw from the interview was that Medvid was not seeking asylum. *Id.* at 75. Accordingly, because OI § 208.8 only requires employees to contact their district director when it comes to their attention that a national of the Soviet Union "may" be seeking asylum, appellant Bashaw cannot be found to be in noncompliance with that instruction.

The agency's selected penalty with respect to appellant Spurlock was reasonable and promoted the efficiency of the service.

The administrative judge reversed the agency's actions for lack of evidence and consequently did not reach the questions of whether the charges, if proven, warranted disciplinary action, and, if so, whether the agency's selected penalties were reasonable and promoted the efficiency of the service under 5 U.S.C. § 7513(a). In making such

determinations, the Board will review the penalty imposed to determine if the agency considered the appropriate factors[4] and exercised its management discretion within tolerable limits of reasonableness under all the relevant circumstances. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment obviously exceeded the limits of reasonableness, is it appropriate for the Board to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* at 306.

The Board has held that the failure of an employee to follow agency regulations or procedures may provide grounds for disciplinary action by the agency. *See, e.g., Lewis v. Department of the Air Force*, 28 M.S.P.R. 483 (1985); *MacCormac v. Department of the Air Force*, 26 M.S.P.R. 611 (1985). Having found the agency's charges against appellant Spurlock proven by preponderant evidence, we conclude that the agency's selected penalty (i.e., demotion from GS-9 to GS-7 and a 90-day suspension) is reasonable and promotes the efficiency of the service.[5]

---

[4] Among the relevant factors in the instant case are: (1) The nature and seriousness of the offense and its relation to appellant Spurlock's duties, position, and responsibilities; (2) the appellant's past disciplinary record; (3) the appellant's past work record; and (4) the notoriety of the offense or its impact upon the reputation of the agency.

[5] The penalty selected was within the range of appropriate penalties as provided for by the agency's schedule of disciplinary offenses and penalties. *See* B.A.F., Vol. 3, Tab 4.

The agency submitted convincing evidence demonstrating that it had considered the relevant factors in determining the appropriate penalty to impose on appellant Spurlock. *See* B.A.F., Vol. 5, Deposition of INS Commissioner Alan Nelson. In the course of making his determination, the agency's deciding official weighed the seriousness of the offense against the appellant's unblemished disciplinary record and successful work record. *Id.* at 32-33. He also took into account the tremendous public and Congressional interest generated by the unique nature of the case -- interest which had a significantly adverse impact upon the reputations of the INS and the Border Patrol. *Id.* at 31. Finally, after listening to the appellant's personal reply to his notice of proposed adverse action, the deciding official sustained the charges against him, but determined that the proposed relocation of the appellant to a different duty station would not be necessary. *Id.*

ORDER

Accordingly, the Board SUSTAINS the demotion and suspension actions against appellant Spurlock.

The agency is ORDERED to cancel the demotion and suspension actions against appellant Bashaw. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within 20 days of the date this decision becomes final.

The agency is also ORDERED to issue a check to appellant Bashaw for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. Appellant Bashaw is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform appellant Bashaw in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to appellant Bashaw for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

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

NOTICE TO APPELLANTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeals if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your requests to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

OPINION OF VICE CHAIRMAN MARIA L. JOHNSON
DISSENTING FROM THE OPINION AND ORDER

The majority has determined that only appellant Spurlock was in noncompliance with Agency Operating Instruction § 208.8. In making that determination, the majority found that appellant Bashaw had no reason to believe that Medvid may have been seeking asylum. I am not persuaded by the majority's reasoning.

Both appellants were of equal rank, and both individuals participated in the decision not to seek guidance or instructions from their district director. Regardless of what Bashaw heard or was told by Spurlock, the circumstances of the Soviet sailor jumping ship alone should have alerted both men to the possibility that Medvid may have been seeking asylum. In this regard, it is undisputed that both Bashaw and Spurlock were aware that Medvid was a crewman from a Soviet vessel. It is also a fact that they both knew that Medvid had jumped off his ship and swam ashore. Further, appellants Bashaw and Spurlock both considered the matter at hand to be sensitive and out of the ordinary. See H.T. at 11-14, 55-56. Indeed, appellant Bashaw specifically stated that he had never encountered or dealt with a Soviet crewman who had deserted his ship, and that he felt that that fact alone made this case unusual. *Id.* at 55. Because there was no requirement in OI § 208.8 that an INS employee ascertain a definitive answer concerning whether a Soviet national was seeking asylum before triggering the employee's obligation to contact his

district director, I believe that the agency proved its charges against both appellants and that both individuals therefore should be disciplined.

Finally, although I believe that some form of discipline is warranted to promote the efficiency of the service, I find the combined penalties of demotions and suspensions to be unreasonably severe under the circumstances. While it is true that the appellants used very poor judgment in handling this incident, their violation of agency regulations did not result from any willful malfeasance. Accordingly, I believe that the agency's selected penalties of demotions and suspensions went beyond the bounds of reasonableness. Demotions alone should have been sufficient to protect the agency from any possible future misjudgments by the appellants.

FEB 21 1985
(Date)

Maria L. Johnson,
Vice Chairman