UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VITO T. BONACCHI, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER AT07528810493 DATE: APR 14 1989

Daniel P. Gallagher, Paterson, New Jersey, for the appellant.

Joseph G. Hopkins, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that affirmed the agency's action removing him from the position of Supervisor, Station/Branch Operations, Union Park Branch, Orlando, Florida. For the reasons discussed in this Opinion and Order, the petition is DENIED because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and

AFFIRMS the initial decision as MODIFIED by this Opinion and Order. The Board MITIGATES the penalty of removal to a demotion to a nonsupervisory position.

BACKGROUND

The appellant was removed effective May 27, 1988, based on three separate charges: (1) Violating the sanctity of the mail; (2) violating the agency's Standards of Conduct with respect to desertion of the mail; and (3) obstructing the mail. *See* Initial Appeal File (IAF), Tab 4, Subtabs 4A, 4D. Specifically, the agency alleged that on April 9, 1988, the appellant instructed a postal custodian to discard a cart filled with second-class and bulk business mail that should have been processed for address correction prior to being discarded. *See id.*

On appeal to the Board's Atlanta Regional Office, the administrative judge determined that the agency's allegations constituted one act of misconduct, i.e., improperly disposing of mail, and sustained the charge. She found that the agency had proven by a preponderance of the evidence that the appellant had improperly disposed of 171 second-class items of mail and 122 pieces of bulk business mail that had not been fully processed. However, she found that the appellant was not shown to be responsible for 12 first-class letters that were also found scattered throughout the dumpster behind the Union Park Branch where the other improperly disposed mail was retrieved.

The administrative judge also held that the agency showed that its action promoted the efficiency of the service and that the penalty of removal was reasonable. In making her penalty determination, the administrative judge found that: (1) The appellant had a record of 7 years of service with the agency without prior disciplinary record, and his testimony concerning his personal problems at the time of the incident did not warrant mitigation of the penalty; (2) his misconduct was serious since (a) he had signed a statement which both acknowledged the sanctity of the mail, and the possible criminal ramifications for either obstructing or retarding the mail, (b) section 666.85 of the Employee and Labor Relations Manual stated that it is a crime to quit voluntarily or desert the mail before making proper disposition, (c) section 668.27 of the manual noted that it is a crime for individuals to knowingly and willfully obstruct the mail and (d) the nature of his work was to provide for the safe and efficient delivery of the mail; (3) the appellant's status as a supervisor required that he be held to a higher degree of responsibility; and (4) she did not believe that the appellant had displayed remorse for his action. *See* Initial Decision at 7-8.

The appellant's petition for review, to which the agency has responded in opposition, contends that the agency failed to prove its case by a preponderance of the evidence and points to alleged mitigating factors. The appellant also has submitted a copy of his medical history compiled by the Veterans Administration, and asserts that the administrative judge erred by allegedly declining to accept it into evidence at the prehearing conference.

ANALYSIS

1. The appellant has not shown any basis to disturb the administrative judge's findings of fact.

We do not find any merit in the appellant's contentions that the administrative judge's factual assessments were incorrect. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982). Our review of the record discloses that the administrative judge's findings of fact, summary of the evidence on the disputed questions of fact, and credibility determinations are fully supported and consistent with our decision in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-62 (1987). In the initial decision, the administrative judge found that: (1) The appellant had changed his version of the events from the time of the prehearing conference to the hearing, Initial Decision at 2-3; (2) Mr. Perkins, the custodian who disposed of the mail at the appellant's direction, lacked a "discernible motive to incriminate

appellant", *id.* at 6, while the appellant had several reasons for changing his version of the events; (3) the appellant's hearing testimony was implausible in relation to the consistent testimony of the agency's witnesses, *id.* at 2-5; and (4) the appellant's "newly found" recollection of the events at issue provided at the hearing, *id.* at 4, was in sharp contrast to the "thoughtful and careful" responses of Mr. Marine, one of the appellant's subordinate clerks, *id.* at 5. In view of the administrative judge's reasoned credibility determinations, we do not discern any reason to substitute the Board's judgment of the evidence for that of the administrative judge in this case. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985).

2. The appellant has not shown that the administrative judge committed procedural error.

Additionally, the appellant alleges that the medical report prepared by the Veterans Administration, which he attached with his petition for review, should have been admitted into evidence by the administrative judge at the prehearing conference. The appellant's allegation is not supported by the record. The administrative judge summarized the proceedings of the prehearing conference in a memorandum dated July 12, 1988. *See* IAF, Tab 8. In her memorandum, the administrative judge recorded her approval and disapproval of the witnesses requested by the parties and the documents they planned to offer at the hearing. The

administrative judge noted that the appellant had "no further documents" to offer. The summary did not indicate that the appellant had proffered the medical history, or that the administrative judge had declined to accept it into evidence. The administrative judge served copies of the memorandum on the appellant, his representative, and the agency's representative, and afforded them until July 20, 1988, to file any written exceptions to the accuracy or inclusion of the summary of the prehearing conference. *See id.* Neither the appellant nor his representative filed any exceptions to the summary, or any objection to the administrative judge's alleged rejection of the appellant's medical record at the prehearing conference.

Accordingly, the appellant cannot now object for the first time to the administrative judge's conduct of the proceeding below and to her alleged rejection of his medical record. *See, e.g., Twine v. Department of Health and Human Services*, 36 M.S.P.R. 388, 393 (1988); *White v. Department of the Navy*, 32 M.S.P.R. 600, 602 (1987). *See also Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Even were we to consider the appellant's contention, under 5 C.F.R. § 1201.41(b)(3), the administrative judge has wide discretion to rule on offers of proof and to receive relevant information. *See, e.g., Robertson* v. *Department of the Navy*, 29 M.S.P.R. 466, 471 n.5 (1985), *aff'd*, 809 F.2d 788 (Fed. Cir. 1986) (Table). The appellant has not shown, even assuming that the administrative judge erred in not

admitting the medical record, that the error prejudiced his substantive rights. *See id.; Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

3. The penalty of removal is unreasonable.

Finally, the appellant points to mitigating factors in this case that go to the propriety of the penalty of removal. We find that the penalty of removal is unreasonable under all the circumstances of this case.

In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Board held that it has the authority to mitigate an agency-imposed penalty found to be "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." *Id.* at 284. Factors to consider in assessing the appropriateness of the penalty were set forth in *Douglas*. *Id.* at 305-06. We shall review the most relevant factors in this case.

In *Mapp v. United States Postal Service*, 24 M.S.P.R. 11, 12 (1984), an action that was factually similar to the instant case, we determined that the penalty of removal was unreasonable and mitigated a Postal supervisor's removal to demotion to a nonsupervisory position, where the supervisor had 24 years of unblemished service, the improperly disposed mail consisted of obsolete advertising circulars, and the supervisor did not benefit tangibly from the disposal. In the instant case, the appellant's action of directing a subordinate to throw away unprocessed magazines and newspapers constituted serious misconduct. Nevertheless, it

is undisputed that the appellant, who has not been criminally charged for his action, did not (a) delay, obstruct or tamper with deliverable mail, or (b) take any tangible benefit from the disposal. *See Smith v. United States Postal Service*, 31 M.S.P.R. 508, 510 (1986); *Mapp*, 24 M.S.P.R. at 12. *See also Womack v. United States Postal Service*, 22 M.S.P.R. 196, 198-200 (1984) (Postal supervisor's removal for directing subordinates to violate procedures, resulting in a delay of mails, was mitigated to a 45-day suspension due to his 15 years of good service without prior disciplinary record, and the weakness of the agency's evidence, despite the fact that he was on notice of the seriousness of his misconduct), *aff'd*, 776 F.2d 1064 (Fed. Cir. 1985) (Table); *Rasmussen v. United States Postal Service*, 7 M.S.P.R. 245, 248-49 (1981) (Postal supervisor's removal for 5 days' AWOL and abridging his fiduciary duty by not correcting employees' salary overpayments mitigated to a demotion to a nonsupervisory position upon considering his 12 years of supervisory service without past disciplinary record and that the allegations did not involve criminal misconduct, fraud, deception, misappropriation of funds, or unjust enrichment). In the present case, the mail which was discarded was of *de minimis* value and would have been disposed in the same dumpster in which it was found, although the magazines' identifying labels would have first been removed and mailed back to the senders' addresses in

order to inform the senders that the mail was not deliverable.

The appellant's offense is, nevertheless, serious, particularly since he occupies a supervisory position and therefore is held to a higher standard of care in his work performance. He was also on notice concerning the importance of the rules he violated by his act. However, he has approximately 7 years of service with the agency, and 3 years of military service with the U.S. Marine Corps. His work performance is satisfactory and he has no prior disciplinary record. Although his misconduct was directly related to the mission of the agency, the charge against the appellant was based on a single instance of poor judgment.*

Mr. Hudson, a Postal inspector who investigated the appellant's conduct, testified that (a) the appellant's return to duty would set a bad example for the agency's employees and impair the agency's reputation, and (b) he had

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* We acknowledge the existence of other circumstances in this case, specifically the appellant's unrebutted testimony that at the time of his misconduct (a) he was on valium for pain related to a war injury, and (b) his poor judgment may have been attributable to his concern about a recent incident involving his daughter's use of drugs on March 25, 1988, about 2 weeks before his misconduct. *See* Initial Decision at 3, 5; IAF, Tab 4, Subtab 4C; Appellant's Hearing Testimony. It is difficult to assess what effect, if any, his daughter's drug problem had on the appellant's judgment. Furthermore, although the administrative judge did not question the appellant's assertion that he was taking valium at the time of the incident at issue, *see* Initial Decision at 3, he did not present any medical evidence showing that his misconduct was attributable to his alleged impaired judgment as a consequence of taking the valium. *See, e.g., Hawkins v. United States Postal Service*, 35 M.S.P.R. 549, 552 (1987).

lost confidence in the appellant. However, this judgment appears unsupported because it is based on the appellant's single lapse in his supervisory responsibilities and no demonstrable harm to the reputation of the agency has been shown. Finally, while the appellant denied committing any misconduct at the hearing and never acknowledged willfully throwing out the material, he expressed remorse for his action to the deciding official and stated that he should suffer the consequences. *See* IAF, Tab 4, Subtabs 4B and 4C.

Under the facts and circumstances of this case, we find that the maximum reasonable penalty for the appellant's misconduct is a demotion to a nonsupervisory position. This penalty recognizes the seriousness of the appellant's misconduct and its stringency will ensure that he refrains from such misconduct in the future. Furthermore, the severity of the penalty will put other employees in the Union Park Branch on notice that such conduct will not be tolerated. *See, e.g., Mapp*, 24 M.S.P.R. at 12.

ORDER

The agency is ORDERED to cancel the appellant's removal and to replace it with a demotion to the next lower-grade nonsupervisory position for which he is qualified. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with its regulations, no later than 60 calendar days after the date of this decision. The appellant 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 the appellant 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 the appellant 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 this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

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 appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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