

ROGER CABRAL

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Docket No.
PH07528010331

OPINION AND ORDER

Appellant, Roger Cabral, was suspended for thirty-one days from his position with the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (agency), based upon the charge of unauthorized use of a government vehicle, in violation of 31 U.S.C. § 638a(c)(2). Appellant filed a timely appeal of this decision with the Board's Philadelphia Regional Office. A hearing was held at appellant's request. The presiding official sustained the suspension in his initial decision dated November 12, 1980, finding that the agency had proven by a preponderance of the evidence that appellant had used the Government vehicle for other than official use and that the thirty-one day suspension was for such cause as would promote the efficiency of the service.

Appellant filed a timely petition for review in which he makes a number of allegations. First, he contends that the presiding official erred in his determination that no double jeopardy occurred in the procedures used in effecting the suspension. Second, appellant alleges that the agency should have been estopped from suspending him because he had relied to his detriment on the agency's earlier issuance of a proposed reprimand. Finally, he argues that harmful error occurred because the Board's Philadelphia Regional Office failed to timely enforce the Board's regulations requiring an agency to respond to a petition for appeal under 5 C.F.R. §§ 1201.22(b) and 1201.43(b). These contentions cannot be sustained.

Appellant claims that he was subject to double jeopardy because his supervisor initially proposed a reprimand for the charged conduct but the deciding official canceled the proposed reprimand and instead proposed a thirty-one day suspension. The minimum penalty required by 31 U.S.C. § 638a(c)(2) is a one month suspension. This latter proposal was then acted upon by the agency.

The prohibition against double jeopardy applies to criminal charges only. *Dejoy v. Department of Health and Human Services*, 3 MSPB 96 (1980); *see also Stevenson v. United States*, 155 Ct. Cl. 592 (1961). The charge in this case is not a criminal charge and therefore the prohibition against double jeopardy is not applicable.

Furthermore, based on the facts of this case, the Board finds that cancellation of the proposed agency action, not decided on the merits,

did not bar the subsequent adverse action for the same reason. Cf. *Adkins v. Hampton*, 586 F.2d 1070 (5th Cir. 1978); *McGhee v. Johnson*, 420 F.2d 445 (10th Cir. 1969); *Jenkins v. Macy*, 357 F.2d 62 (8th Cir. 1966); *Pixler v. Veterans Administration*, 3 MSPB 63 (1980); *Dejoy*, *supra*.

Appellant next contends that he relied to his detriment upon the agency's issuance of a reprimand because he signed admissions prior to and relating to the reprimand. He therefore argues that based upon the decision in *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975), the agency should have been precluded from canceling the reprimand and issuing the thirty-one day suspension. This position is not well-taken.

This Board recently considered the doctrine of equitable estoppel in cases before it. In *Shelley v. OPM*, 6 MSPB 228 (1981), this Board held that where a statute in question affects substantive rather than procedural rights, and allows for no discretion on the part of the administrative agency, an agency cannot be stopped from enforcing that statute. *Id.*, 230.

In the appeal now before the Board, the adverse action taken against appellant was based on the following statutory provision:

Any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft, or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if the circumstances warrant.

31 U.S.C. § 638a(C)(2).

Since the statutorily imposed penalty is obviously substantive rather than procedural, and since it allows for no discretion on the part of an agency to take an adverse action less than a one month suspension, the agency cannot be estopped from enforcing the statute in this case. The *Wharton* decision is inapposite to the case at hand because that case involved the Government's exercise of its discretion to bring suit, whereas this case involves the duty of an agency to follow the mandate of Congress and impose a suspension of at least one month against an employee who willfully uses a Government-owned passenger motor vehicle for other than official purposes.

Finally appellant contends that harmful error occurred because the Board's Regional Office did not timely notify the agency that its failure to respond to appellant's petition for appeal within a reasonable period of time could lead to a dismissal, pursuant to 5 C.F.R. § 1201.43(b). Appellant alleges that because of this error he was denied a fair hearing and consideration of the issues raised in his defense.

Although the presiding official did not timely notify the agency that a failure to respond could be grounds for dismissal, pursuant to 5 C.F.R. § 1201.143(b), no harm to appellant's substantial rights resulted. Appellant was afforded a hearing at which he had the opportunity to call his own witnesses, cross-examine agency witnesses and present other evidence. Appellant was also given the opportunity to file a post-hearing brief.

Under the circumstances, the Board finds that even assuming, *ar-guendo*, that the presiding official's conduct was error as alleged by appellant, appellant has failed to show any prejudicial harm to his substantial rights. *Karapinka v. Department of Energy*, 6 MSPB 114 (1981).

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 4, 1981*