

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

	)	
RICHARD J. CANTU,	)	
appellant,	)	DOCKET NUMBER
	)	SF07528410404
v.	)	
	)	DATE: 4 DEC 1984
DEPARTMENT OF THE NAVY,	)	
agency.	)	
	)	

ORDER

The appellant was removed from his position of Storekeeper, WG-5, on charges of absence without leave (AWOL) on a number of occasions. There was no dispute that the appellant was absent from duty on the relevant dates; at issue was only whether or not the agency should have granted him approved leave rather than place him in an AWOL status on those occasions.

On appeal to the Board's San Francisco Regional Office, the designated presiding official analyzed each of the twelve charges of AWOL and found eight of them to have been sustained by the agency by a preponderance of the evidence. He further found that the agency committed procedural error in violating its own procedures by basing some of its AWOL charges on the appellant's failure to supply medical documentation for short absences without having first given him the required written notice that such documentation was

necessary.^{1/} However, he concluded that his error was not harmful for three reasons. First, the appellant had received oral instructions to document every sick leave request. Second, there was no reasonable possibility that the Civilian Personnel Office would have disapproved issuance of such instruction. Third and finally, the failure to follow proper procedure had no actual demonstrated effect on the agency's decision to require documentation for all sick leave requests.

The appellant's petition for review of the initial decision is hereby GRANTED under 5 U.S.C. § 7701(e)(1).

In sustaining eight of the agency's twelve charges of AWOL, the presiding official noted that, although the appellant submitted with his petition for appeal adequate documentation, medical or otherwise, to support a grant of annual or sick leave on five of those eight occasions, that documentation provided no defense to the AWOL charges because it was not submitted to the agency before it rendered its decision to remove him. In support of this conclusion, he cites Foster v. Department of Health and Human Services, MSPB Docket No. DA07528110575 (November 28, 1983), for the proposition that, while such tardy documentation is admissible as evidence in an appellate proceeding before the Board, "it does not provide a defense to an AWOL charge unless it was submitted to the agency before the agency's decision was issued." Initial Decision at 3.

^{1/} The agency's leave rules provide that, if the agency feels an employee is abusing the use of sick leave, it must first counsel him and, if there is then no improvement in the employee's conduct, the agency may issue, after review and approval by its Civilian Personnel Office, a written instruction requiring him to submit medical documentation in support of any request for sick leave.

We disagree. While the medical documentation provided by the appellant in Foster had indeed been before the agency prior to his removal, we clearly reiterated in Foster that our scope of review is not limited to consideration of the administrative record established before the agency and that nothing in law or regulation restricts appellant's opportunity to proffer evidence to counter AWOL charges for the first time on appeal, or the agency's opportunity to rebut an appellant's evidence of that nature.

Id. at 3. More specifically, we have held that, in a case involving AWOL, medical evidence of an appellant's illness, not previously submitted to the agency, may be properly relied on by the appellant in his appeal to the Board.^{2/}

Nunes v. Equal Employment Opportunity Commission, MSPB Docket No. DC07528110716 at 2 (October 6, 1982), citing Zeiss v. Veterans Administration, 7 MSPB 516 (1981).

We therefore conclude that the presiding official erred in holding that none of the documentation submitted by the appellant with his petition for appeal constituted a defense

^{2/} In his petition for review, the appellant contends that he had submitted the relevant documentation to the agency at the time of his absences and, therefore, that it was before the agency prior to its decision to remove him but was ignored by his supervisor. He thus challenges the presiding official's determination to assign greater weight to the credibility of the testimony of his supervisor, who claimed that such documentation was not presented at the time of the absences. However, in light of our finding that documentation submitted at either time must be considered on appeal to the Board, we need not resolve the appellant's challenge of the presiding official's credibility determination in this regard.

to the charges of AWOL. Further, in light of the presiding official's determination, not challenged by the agency, that this documentation was otherwise adequate to support a grant of annual or sick leave in the circumstances underlying five of the AWOL charges against the appellant, we find that the error by the presiding official in not considering this documentation as rebuttal evidence clearly prejudiced the appellant's ability to defend himself against those charges and, therefore, was harmful. Thus, we conclude that the presiding official's error warrants reversal of his initial decision insofar as it pertains to those five charges.^{3/}

Of the three remaining charges sustained by the presiding official, the appellant stipulated to the validity of one before the initial decision was rendered and, in his petition for review, stated that he "realizes he was in error" regarding another. The last charge concerned the following scenario. On January 5, 1983, the appellant called his supervisor in the morning requesting sick leave which was initially granted by the agency on the condition that he submit medical documentation. Later that evening, the appellant experienced marital difficulties and was subsequently arrested and incarcerated for driving while intoxicated. Because he never submitted medical documentation to support his request, the agency converted his sick leave to AWOL for that date. The presiding official sustained the charge based on the lack of documentation.

^{3/} The dates, and number of hours of AWOL, underlying these charges are: 1) September 27, 1982 - 7 hours; 2) January 7, 1983 - 6 hours; 3) July 11 to July 25, 1983 - 67 hours; 4) August 8 to August 15, 1983 - 37 hours; and 5) September 15, September 19-20, 1983 - 19 hours.

In his petition for review, the appellant reasserts his argument that at no time before this incident had he been required in writing to submit a medical certificate for every absence. However, he does not deny the agency's contention that he was verbally instructed to present documentation for this particular sick leave request at the time it was made and again several weeks later. While, as found by the presiding official, the agency's failure to give a written requirement of documentation for any absence was in error, the appellant has not shown that, on this occasion, he was unaware of the agency's desire for such documentation or, thus, that the error prejudiced his ability to defend against this charge. We therefore find the presiding official's conclusion as to this charge to be proper.

In sum, we have found three of the agency's twelve original charges to have been sustained, totaling 17 hours of AWOL. In addition, we note, as did the agency and the presiding official, that the appellant had a prior disciplinary record of a 2-day and a 14-day suspension, both in late 1981, for similar absences of 14 hours and 18 hours, respectively, among other charges. Unauthorized absence is, of course, a serious offense which by its very nature disrupts the efficiency of the service, Desiderio v. U.S. Department of the Navy, 4 MSPB 171 (1980). Further, the Board has sustained removal actions based on short periods of AWOL. See, e.g., Tavitas v. Department of the Air Force, 9 MSPB 423 (1982). Therefore, in light of the seriousness of the offense and the appellant's past disciplinary record for similar offenses, we cannot find that removal is an excessively harsh sanction under the circumstances. Douglas v. Veterans Administration,

5 MSPB 313 (1981).

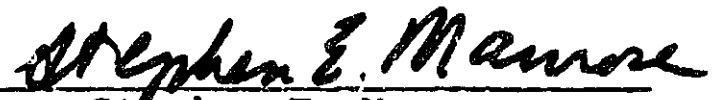
Accordingly, the initial decision is hereby AFFIRMED as MODIFIED above, and the appellant's removal is hereby SUSTAINED.

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

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.


Stephen E. Manrose
Acting Clerk of the Board