

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID W. COOK

v.

DEPARTMENT OF THE ARMY

)
)
) MSPB DOCKET NUMBER
) NY07528210056
)
)

OPINION AND ORDER

Appellant filed an appeal with the Board's New York Regional Office challenging a 40-day suspension for excessive absenteeism, imposed by the Department of the Army (agency), effective November 2, 1981.

Appellant was charged with excessive absenteeism and non-availability for work. Removal was proposed but the deciding official modified the penalty to a 40-day suspension. The records indicate that appellant used 398 hours annual leave, 409 hours sick leave, and 680 1/2 hours leave without pay (LWOP) over a 3 year period from 1979 through 1981. All of the leave was approved with the exception of 6 1/2 hours in 1981.

The presiding official reversed the suspension, finding that the agency, having approved the appellant's leave, although clearly excessive, could not use such leave as a basis for an adverse disciplinary action. See Initial Decision at 2.

The agency filed a petition for review, contending that the presiding official erred in failing to address Federal Personnel Manual (FPM) Chapter 752, Subchapter 3, paragraph 3-2b(4)(c). The agency contends that the suspension should be sustained pursuant to this provision.

FPM Chapter 752, Subchapter 3, paragraph 3-2b(4) (c) provides an exception to the general rule that an adverse action cannot be based on an employee's use of approved leave. The following three criteria must be met to satisfy the exception:

(1) The record showed that the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job;

(2) The absence or absences continued beyond a reasonable time and the employee was warned that adverse action might be initiated unless the employee became available for duty on a regular, full-time or part-time basis; and

(3) The agency showed that the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis.

However, FPM Chapter 752, Subchapter 3, paragraph 3-2b(4) (c) also states the exception is only applicable under unusual circumstances, i.e., when the employee is unable to return to duty because of the continuing effects of illness or injury. It does not apply to repeated absences to attend to personal affairs, as these situations would presumably be under the control of the employee and thus the agency could have legitimate reasons for denial of leave.

It is clear that agencies have authority to deny leave for unjustified absences. See Lawson v. Government Printing Office, MSPB Docket No. DC07528010040 (October 16, 1981). The presiding official found that had the agency been more businesslike it would have denied appellant's leave and thus would have placed him on notice that his attendance was less than acceptable. It did not, however, do so.

The presiding official also found that when an agency approves leave, it releases the employee from the obligation to report, and, therefore, such absence is not considered to be a breach of the employer-employee relationship, and thus an adverse action based on a record of approved leave would not promote the efficiency of the service.

We find that FPM Chapter 752, Subchapter 3, paragraph 3-2b(4) (c) should be applied only in unusual cases, and is not warranted in this case. Therefore, we find no error in the presiding official's findings.

Accordingly, the petition for review is hereby DENIED.

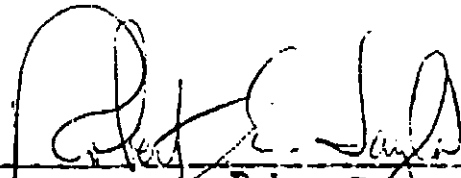
This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review 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:

JUL 9 1984

(Date)



Robert E. Taylor
Secretary

Washington, D.C.