UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

75 M.S.P.R. 57

Docket Number SF-0752-94-0781-R-1

STUART A. CROUSE, Appellant,

v.

Department of the Treasury, Agency, and

OFFICE OF PERSONNEL MANAGEMENT, Petitioner.

Date: May 22,1997

Arthur W. Lazear, Esquire, Oakland, California, for the appellant.

Alysia Cuilwik, Esquire, Washington, D.C., for the agency.

Lorraine Lewis, Esquire, and Steven E. Abow, Esquire, Washington, D.C., for the petitioner.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The Director of the Office of Personnel Management (OPM) has petitioned the Board pursuant to 5 U.S.C. § 7703(d) for reconsideration of the Board's final decision on the appellant's appeal. *Crouse v. Department of the Treasury*, 70 M.S.P.R. 623 (1996). For the reasons set forth herein, we hereby DENY the petition for reconsideration. We AFFIRM the final decision as MODIFIED herein.

BACKGROUND

The agency proposed to demote the appellant from the position of Supervisory Police Officer, Lieutenant, TR-083-10, to the nonsupervisory position of Police Officer, TR-083-07. The agency based its proposal on two charges: (1) violation of established agency policy regarding security procedures at employee egress; and (2) unacceptable and inappropriate behavior by a supervisor. Notice of Proposed Reduction-in-Grade, Initial Appeal File (IAF), Tab 3, subtab 4f. The unacceptable and inappropriate behavior charge concerned a conversation between the appellant and the subordinate employee who had reported the incident underlying the violation of security procedures charge,

Sergeant Scheppler. The agency described the unacceptable and inappropriate behavior charge as follows:

At approximately 0815 hours, while you proceeded through the employee egress area on your way to the Old Mint building, you asked Sergeant Scheppler if you and she could talk off the record. She replied in the affirmative and the two of you stepped into Security's Lower Control Room. You then closed the control room door halfway, stood very close to her and stated in a harsh manner that whatever she said to Chief Pettit or Inspector Harrison could be used against you and that she needed to be careful of what she said to them. You then stated that they were trying to fire you and that your career was on the line. While you stated this, you were pointing at her chest with your fingers. Sergeant Scheppler stated that she felt threatened by your actions because she feared retaliation when she cooperated in an investigation of your conduct.

I believe that such conduct is unacceptable and inappropriate. It appears that you were attempting to persuade Sergeant Scheppler into not cooperating fully in the investigation of your conduct. Even if this was not your intent, you should have realized how your words and manner would have been perceived by a subordinate employee who was being asked in the investigation of this incident to discuss your behavior. Such conduct is especially egregious given that your position as a Supervisory Lieutenant includes, among other responsibilities, evaluation of Sergeant Scheppler's performance, determination of her work assignments, and approval or disapproval of her leave requests.

Id. at 3. The agency proposed the penalty of reduction in grade notwithstanding several mitigating factors because

these [mitigating factors] are outweighed by your deliberate failure to follow established security procedures, and your subsequent inappropriate and unacceptable misconduct in attempting to persuade a subordinate supervisory police officer into not cooperating fully in the investigation of this incident.

Id. at 5.

In his response to the proposed reduction in grade, the appellant denied that he had attempted to persuade Sergeant Scheppler into not cooperating in the investigation of his security violation. IAF, Tab 3, subtab 4e at 3. The appellant claimed that he told Sergeant Scheppler that because he had already admitted his misconduct, it did not matter what she said to his superiors about the incident. IAF, Tab 3, subtab 4e at 3. He claimed that he had given Sergeant Scheppler no cause to be intimidated. *Id.* In fact, he had admitted his security violation to his superiors before the conversation with Sergeant Scheppler occurred. IAF, Tab 3, subtab 4g.

The agency decided to demote the appellant based on the two charges, using specifications for the unacceptable and inappropriate behavior charge substantially identical to those in the proposal notice. The agency rejected the appellant's response to that charge:

You were charged with "Unacceptable and Inappropriate Behavior By a Supervisor," not with attempted intimidation. Accordingly, any arguments you have made regarding a charge of intimidation are inapplicable.

Decision on Notice of Proposed Reduction-in-Grade, IAF, Tab 3, subtab 4b at 6.

The appellant timely appealed the reduction in grade. At the hearing, the agency's deciding official was asked by agency counsel to describe the basis of the unacceptable and inappropriate behavior charge.

Q. . . . With respect to the second charge, what conduct was it of Mr. Crouse that constituted inappropriate behavior by a supervisor?

A. He attempted to obstruct investigation into the first charge and he attempted to intimidate a subordinate.

Hearing Transcript (HT) at 97. The deciding official testified that this charge was more egregious than the violation of security procedures because "it was an attempt to use power and authority to controvert our system, to inhibit an investigation." *Id.* at 104. The deciding official repeatedly referred to an attempt by the appellant to impede the investigation into the security violation by intimidating Sergeant Scheppler into changing her testimony. *Id.* at 113, 123, 125, 126-27, 129, 133.

The appellant's supervisor, who proposed the action, also testified. The supervisor described the conduct underlying the second charge as a conversation between the appellant and Sergeant Scheppler in which he told her that she should be careful about what she told agency investigators because they were out to get his job and his career was on the line. *Id.* at 61. The supervisor testified that he had lost confidence in the appellant's ability to function as a supervisor and that he believed a demotion to a nonsupervisory position was appropriate because the appellant attempted to subvert the investigation and to intimidate a subordinate. *Id.* at 65-67.

In the initial decision, the administrative judge mitigated the demotion to a 90-day suspension. Initial Decision, IAF, Tab 18. The administrative judge sustained the violation of security procedures charge based on the appellant's admission. *Id.* at 4. The administrative judge, however, did not sustain the unacceptable and inappropriate behavior charge, which she construed as a charge of "unacceptable and inappropriate behavior as a supervisor with the intent to impede or interfere with an investigation." *Id.* While the administrative judge found the conversation occurred as described in the agency's proposal and decision, she concluded that the agency failed to prove by preponderant evidence that the appellant intended to persuade Sergeant Scheppler to change her report of his security violation. *Id.* at 6. The administrative judge found that Sergeant Scheppler overreacted to the appellant's angry manner during the conversation. *Id.* The administrative judge relied upon Sergeant Scheppler's testimony that she had always found the appellant somewhat intimidating, and the fact that the appellant had admitted that he violated security procedures to agency management before he spoke to Sergeant Scheppler. *Id.*

The agency filed a petition for review challenging the administrative judge's construction of the unacceptable and inappropriate behavior charge as including an intent to impede the investigation. Petition for Review File (PFRF), Tab 1. The Board denied the agency's petition for review, but reopened the case on its own motion "to consider whether an administrative judge may incorporate pertinent parts of the agency's narrative description and the deciding official's testimony in characterizing the

elements of the charge." *Crouse v. Department of the Treasury*, 70 M.S.P.R. 623, 626 (1996). The Board affirmed the initial decision, deciding that the administrative judge did not err in her characterization of the second charge or her determination not to sustain it. *Id.* at 627. The Board noted that an administrative judge must determine the essential elements of a charge, and that a charge should be construed in light of its specifications. *Id.* at 628. The Board held that when an agency charges an employee with general misconduct or unacceptable behavior and the specifications and evidence indicate that the agency is charging the employee with serious misconduct, the administrative judge should not analyze the charge as a lesser offense. *Id.* The Board found that the language of the agency's proposal and decision notices and the testimony of the deciding official indicated that intimidating Sergeant Scheppler was the gravamen of the agency's unacceptable and inappropriate behavior charge. *Id.* at 628-29.

ANALYSIS

The administrative judge did not disregard the agency's charge or improperly insert an element of intent into the charge.

The Board's decision does not, as OPM suggests, permit an administrative judge to disregard the agency's charge and substitute a characterization of the essence of the charge based on all the evidence in the record. Rather, the Board's decision holds the agency to the charge as described in the proposal and decision notices. Contrary to the agency's and OPM's contentions, the agency included an element of intent in the unacceptable and inappropriate conduct charge.

It is well established that the Board may review the employing agency's decision on the adverse action solely on the grounds invoked by the agency. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). In order for an action to withstand Board review, however, the agency must prove all the essential elements of its charge. *King v. Nazelrod*, 43 F.3d 663, 666 (Fed. Cir. 1994). Whether the agency must prove intent depends on the agency's charge. *Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 599 (1996). Certain charges, such as theft and falsification, include an element of intent by their very nature. *See*, *e.g.*, *Nazelrod*, 43 F.3d at 666; *Murray v. Department of the Army*, 40 M.S.P.R. 250, 255 (1989). Other charges include an element of intent because the agency specifically charges the employee with willful or intentional misconduct. *See*, *e.g.*, *Roof v. Department of the Air Force*, 53 M.S.P.R. 653, 658 (1992); *Corley v. Federal Aviation Administration*, 4 M.S.P.R. 338, 344 (1980).

Here, the agency captioned its charge "unacceptable and inappropriate behavior by a supervisor." This charge does not necessarily indicate intentional misconduct. The essential elements of the charge are: (1) the employee was a supervisor; (2) the employee engaged in specified conduct touching upon his or her role as a supervisor; and (3) the conduct was improper, or detracted from the appellant's character or reputation as a supervisor. *See*, *e.g.*, *Rogers v. Department of Justice*, 60 M.S.P.R. 377, 388 (1994). *Cf. Miles v. Department of the Army*, 55 M.S.P.R. 633, 637 (1992) (in order to sustain a charge of conduct unbecoming a Federal employee, the agency must

demonstrate that the conduct in question was unattractive, unsuitable, or detracting from the employee's character).

When charging an employee with unacceptable supervisory conduct, the agency must specify the objectionable conduct in which the employee engaged and explain why the conduct was improper or deleterious to the employee's supervisory role. *See*, *e.g.*, *Rogers*, 60 M.S.P.R. at 388 (sustaining charge of improper supervisory conduct based on giving subordinate an inflated performance rating, which was contrary to regulation and constituted preferential treatment). In its specifications the agency may incorporate an element of intent by claiming that the employee engaged in intentional misconduct or that the conduct was improper because of the employee's intent. *See*, *e.g.*, *Huisman v. Department of the Air Force*, 35 M.S.P.R. 378 (1987). *See also Pflanz v. Department of Transportation*, 21 M.S.P.R. 71, 73 (1984) (a charge must be construed in light of its accompanying specifications and circumstances), *aff'd*, 776 F.2d 1058 (Fed. Cir. 1985). The agency did so here.

> I believe that such conduct is unacceptable and inappropriate. It appears that you were attempting to persuade Sergeant Scheppler into not cooperating fully in the investigation of your conduct. Even if this was not your intent, you should have realized how your words and manner would have been perceived by a subordinate employee who was being asked in the investigation of this incident to discuss your behavior.

Notice of Proposed Reduction-in-Grade, IAF, Tab 3, subtab 4f at 3. *See also* Decision on Notice of Proposed Reduction-in-Grade, IAF, Tab 3, subtab 4b at 4. The agency specified that the appellant's discussion with Sergeant Scheppler was unacceptable and inappropriate because he intended to persuade her into not cooperating with the investigation. *Id.*; HT at 97. Thus, the agency was required to prove that the appellant intended to impede the investigation. Here, the administrative judge found that the appellant did not intend to impede the investigation, and that Sergeant Scheppler's intimidation was an unreasonable reaction. OPM does not challenge these findings. Thus, the agency did not prove an essential element of its charge of unacceptable and inappropriate supervisory conduct.*

By considering the testimony of the deciding official in determining the elements of the agency's charge in this case, we do not suggest that an administrative judge may disregard the charge as framed in the proposal and decision notices and substitute his or her own understanding of the essence of the charge based on all the evidence in the record. We agree with OPM that the Board should not have to look outside the agency's proposal and decision notices to determine the elements of the agency's charge. Here, however, those documents described the unacceptable and inappropriate conduct charge as an attempt to impede the investigation, yet denied that this was the charge. Thus, it was appropriate to look to the deciding official's testimony to support an interpretation of these documents. After all, the agency official who

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* The Board has recently clarified the scope of its review of an agency's penalty determination when not all of the agency's charges are sustained. *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 527 (1996). Application of the *White* standard would not change our determination that a 90-day suspension is the appropriate penalty for the one sustained charge in this case.

decides to take a disciplinary action certainly knows the reasons for the action and can be expected to accurately explain those reasons.

Precedent of the Federal Circuit does not compel a contrary result. OPM relies upon *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir.), *cert. denied*, 117 S. Ct. 62 (1996), in which the Federal Circuit held that an arbitrator erred by reversing a disciplinary action after finding that the employee engaged in the charged misconduct -- sexual harassment and notoriously disgraceful conduct -- because the agency did not show that the employee intentionally committed the misconduct. The court held that the Civil Service Reform Act does not limit disciplinary actions to cases of intentional misconduct. *Id*. Rather, an agency may discipline an employee “for such cause as will promote the efficiency of the service.” *Id*. (quoting 5 U.S.C. § 7513(a)). The court stated that after finding that the employee engaged in the charged misconduct, the arbitrator should have considered whether the misconduct affected the efficiency of the service. *Id*.

Our holding in this case does not conflict with *Frazier*. We do not hold that the agency proved that the appellant committed the charged misconduct, but that he cannot be disciplined because he did not act with improper intent. Rather, we hold that the agency did not prove that the appellant committed the charged misconduct. The agency charged the appellant with intentional misconduct, and did not prove the element of intent. The court’s decision in *Frazier* does not suggest that where an agency charges an employee with intentional misconduct, it is not required to prove the element of intent.

OPM also argues that in *King v. Nazelrod*, 43 F.3d 663, 666 (Fed. Cir. 1994), the Federal Circuit held that an agency may not alter the nature of the captioned charge in its specifications supporting the charge. In *Nazelrod*, the court affirmed the Board’s decision holding that the agency did not prove its charge of theft because it did not prove that the employee acted with the requisite intent. *Id*. The court rejected OPM’s argument that the charge, while captioned theft, should be construed in light of the specifications which indicated that the employee was not charged with the common law crime of theft. The Court held that the agency must prove all the elements of the substantive offense it has charged. *Id*. We believe OPM interprets *Nazelrod* too narrowly. *Nazelrod* stands for the proposition that an agency must be prepared to prove its accusations against an employee, not for a hypertechnical distinction between the caption and specifications of a particular charge. Here, as part of its charge, the agency claimed that the appellant attempted to impede an agency investigation. IAF, Tab 3, subtab 4f at 3 and 5; HT at 97. The agency was required to prove this accusation. *See Nazelrod*, 43 F.3d at 666 (“[I]t is the burden of the agency to prove the requisite intent if intent is an element of the offense charged.”)

We are not persuaded by OPM’s argument that the agency did not charge the appellant with attempting to impede the investigation, but only considered his intent to do so as an aggravating factor in assessing the proper penalty. We agree that an agency may charge an employee with an offense that does not include an element of intent, but consider the fact that the employee intentionally committed the offense as an aggravating factor in assessing the penalty. *See Murray v. Department of the Army*, 40 M.S.P.R. 250, 255 (1989) (a charge of creating a disturbance does not include an

element of intent, but the employee's intent is a factor to be considered in determining the penalty). However, that is not what happened here. As discussed above, the agency's proposal and decision notices as written incorporate an element of intent into the unacceptable and inappropriate conduct charge. If the agency meant for the appellant's intent to be considered only as an aggravating factor in assessing the penalty, not as an element of the charge, it should not have identified this intent as the reason why the conversation constituted unacceptable and inappropriate supervisory behavior.

We also disagree with OPM's assertion that the Board's decision effectively deprives employees of their due process right to notice of an agency's charges against them by allowing administrative judges to change the agency's charges based on the testimony at the hearing. Here, the agency described its unacceptable and inappropriate behavior charge as an attempt to impede the investigation by intimidating Sergeant Scheppler. The appellant's response to the proposal notice reflects that he and his counsel understood this to be the basis of the charge. The deciding official also understood this to be the basis of the charge. In accordance with the due process requirements of notice and an opportunity to respond, we have required the agency to prove that charge. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); 5 U.S.C. § 7513(b) (1994). *See also Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989) (the Board is required to review a disciplinary action on the grounds invoked by the agency).

In conclusion, we have not permitted an administrative judge to replace an agency's charge. The agency possesses the authority to frame the charge against an employee. However, this authority carries the concomitant responsibility of clearly notifying the employee of the charge. An agency that carelessly drafts its notice to include elements beyond those that it actually intends to prove will find itself in the same position as the agencies in this case and in *Nazelrod*.

ORDER

We DENY the petition for reconsideration and AFFIRM our final decision AS MODIFIED herein. This is the final order of the Merit Systems Protection Board in this appeal. 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,
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
Washington, D.C.