

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN GAMBLE,
Appellant,
v.
DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
PH07529110617

DATE: MAY 11 1992

Simon W. Tache, Esquire, Philadelphia, Pennsylvania, for
the appellant.

Robert Janes, Esquire, Warminster, Pennsylvania, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of the October 4, 1991, initial decision that did not sustain the appellant's fifteen-day suspension. For the reasons discussed below, we GRANT the agency's petition, REVERSE the initial decision in part, and SUSTAIN the 15-day suspension.

BACKGROUND

The appellant was suspended for fifteen days from his position of Boiler Plant Operator, WG-10. The agency charged

the appellant with a first offense of sleeping on duty where life or property is endangered and a first offense of endangering the safety of other personnel. See Initial Appeal File (IAF), Tab 5(4b, 4g). In connection with the first charge the agency stated that, on January 19, 1991, three witnesses observed the appellant sleeping on duty. See *id.* The agency stated that the second charge was based on security reports which showed that the appellant rigged the doors leading to the boiler room with metal pipes with the intent that the objects would fall to the floor when the doors opened, creating a noise which would awaken him. See IAF, Tab 5 (4g at 2).

On appeal, the administrative judge sustained the first charge, finding that it was more likely true that the appellant was sleeping on duty and that such inattentiveness had the potential of endangering human life and property because the boilers were left unattended. IAF, Tab 10 at 7-8. She reversed the second charge, however, finding that, while the agency's witnesses were credible, the agency failed to prove the charge by preponderant evidence, despite their testimony, because of the lack of physical evidence (the agency did not keep the object as evidence) and the absence of evidence of intent. IAF, Tab 10 at 8-9. After rejecting the appellant's discrimination and harmful error claims, the administrative judge mitigated the 15-day suspension to 8 days, finding that the agency had allocated 8 days to the first charge and that an 8-day suspension was the maximum

reasonable penalty under the circumstances.* IAF, Tab 10 at 9-14.

ANALYSIS

The agency's petition for review argues that it proved the second charge by preponderant evidence. We agree. In support of this charge, the agency presented the testimony of three witnesses, LCDR Hogan, CDO Henshaw, and Officer Battle, who all gave the following version of events. See Hearing Tapes 2 and 3. They looked through the glass on one of the doors leading to the boiler room and saw that the appellant was sleeping on duty. When they opened the door, a pipe fell to the floor. The three men observed that two other doors leading to the boiler room were also rigged with pipes. In addition, Officer Otis Mackey testified that he had talked to the appellant while checking the boiler room on his normal patrol. The appellant told him that anyone who came to the boiler room should wear protective clothing and that the appellant then pointed to the pipes and the edge of the front door (Officer Mackey reported the incident and it was this report that led the three witnesses mentioned above to inspect the boiler room).

The administrative judge reversed this charge based on the following factors: (1) None of the agency's witnesses testified that they saw the appellant place the pipes over the

* We note that the administrative judge did not order interim relief, finding it to be inappropriate in light of the suspension action here.

doors; (2) the appellant was not the only person who had access to the boiler room; (3) although the administrative judge was "convinced" that the agency witnesses saw and heard something fall to the floor, the agency did not keep the object as physical evidence--thus in the absence of physical evidence, the administrative judge could not make a finding as to its size and weight or the likelihood of injury; (4) the agency produced no evidence of intent and the appellant "fully" denied the charge; and (5) while the agency's witnesses were credible, their testimony standing alone did not constitute preponderant evidence.

We find, however, that the administrative judge's reasons for reversing the charge simply do not withstand scrutiny. In reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving her findings only as much weight as may be warranted by the record and by the strength of her reasoning. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The administrative judge specifically found that the agency's witnesses were credible and that she was convinced that they did see and hear an object fall to the floor when the door was opened. IAF, Tab 10 at 8-9. While the administrative judge described the appellant as having "fully" denied the charge, she did not state that she found his testimony credible. In this regard, we note that the

appellant also denied the first charge of sleeping on duty which was sustained by the administrative judge. Hearing Tape 4a.

In addition, the first factor cited by the administrative judge is not material because the agency's evidence so clearly supports the charge. While others had access to the boiler room, the testimony of Officer Mackey is sufficient to overcome the second factor relied on by the administrative judge. In view of the administrative judge's finding that the agency witnesses were credible and that she was convinced that they saw and heard something fall to the floor, the agency's failure to keep the object as evidence is immaterial. Cf. *Jones v. Department of Agriculture*, 19 M.S.P.R. 133, 134 n.2 (1984) (where the record contained ample corroborating evidence to support the agency's charge, the agency's failure to produce any of the appellant's written solicitations on which the charge was based was immaterial). Finally, to the extent that intent is an element of this charge, Officer Mackey's statement and the very fact of rigging the doors would clearly be sufficient to establish the same. See *Kumferman v. Department of the Navy*, 785 F.2d 286, 290 (Fed. Cir. 1986) (intent may be proven directly or derived from circumstantial evidence).

Accordingly, we find that the agency's charge is supported by a preponderance of the evidence, and that the 15-day suspension action is reasonable and promotes the efficiency of the service.

ORDER

This is the order of the Merit Systems Protection Board in this case, in accordance with § 1201.113(c).

RIGHT TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC 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. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court 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)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(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:

Washington, D.C.



Robert E. Taylor
Clerk of the Board