

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RICHARD W. GLEIM,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
NY07528810312

DATE: APR 01 1991

Charles Scialla, Charles Scialla Associates, Paterson,  
New Jersey, for the appellant.

Robert G. Doyle, Windsor, Connecticut, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued August 9, 1988, that sustained his removal. The Board GRANTS the petition. See 5 U.S.C. § 7701(e). The initial decision is AFFIRMED AS MODIFIED. The appellant's removal is MITIGATED.

BACKGROUND

The agency removed the appellant from the position of Superintendent, Station/Branch Operations, based on charges of

drinking alcoholic beverages on postal premises while on duty, discarding live mail as waste delay and obstruction of mail, and failing to comply with the Postal Service code of conduct and standards of conduct.

The administrative judge found that the appellant drank alcoholic beverages in the postal facility with his supervisor and one other employee, that he observed one of his employees dumping mail and did not verify that it was waste mail, and that, by these actions, the appellant violated the postal code. He found, however, that the agency did not prove that the appellant instructed employees to put live mail into the trash.

The administrative judge also found that the appellant did not prove that the agency discriminated against him on the basis of his alleged handicap, alcoholism. He found that although, based on the evidence supplied by the appellant and his counsellors at an alcohol rehabilitation facility, the appellant established that he was an alcoholic, the appellant did not show that he was a handicapped person nor that he lacked control of his actions at the time the misconduct occurred.

Finally, the administrative judge found that the penalty of removal was within the bounds of reasonableness for the sustained charges. He found that the appellant knew that mail

was being dumped, that he permitted it to continue, and that this violated the fundamental mission of the Postal Service. He found further that management of the Postal Service had good reason to have lost trust in the appellant as a supervisor.

In his petition for review, the appellant argues that the administrative judge erred in finding that he did not prove his affirmative defense of discrimination on the basis of handicap. The appellant asserts that he proved that he was an alcoholic, that he had been drinking at the time that misconduct occurred, that his drinking impaired his judgment at that time and, thus, that the agency, which was aware of his alcoholism, should have accommodated him before disciplining him.\*

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\*In its response to the appellant's petition for review, the agency argues that the petition is untimely and asks the Board to sanction the appellant for failing to serve the petition on the agency at the time that it was filed with the Board.

The appellant's petition for review is postmarked September 15, 1988, 35 days after the issuance of the initial decision. Thus, it is timely. See 5 C.F.R. § 1201.114(d); *Beer v. Department of the Army*, 2 M.S.P.R. 53, 56 (1980) (the Board considers a mailed petition to be filed on its postmark date). Further, the agency was not harmed by the appellant's failure to serve the petition on it. Shortly after the petition was filed, the agency received copies from both the Board and the appellant and was able to respond. Thus, the Board denies the agency's request for sanctions. Sanctions may be imposed only "as necessary to serve the ends of justice," 5 C.F.R. § 1201.43, a standard not met under the circumstances of this case.

### ANALYSIS

In *McCaffrey v. United States Postal Service*, 36 M.S.P.R. 224, 229 (1988), the Board held that to establish a handicapping condition based on drug or alcohol abuse, the appellant must provide evidence from himself personally, showing a pattern of abuse and its ill effects, and from medical or diagnostic experts as to whether that pattern along with other symptoms demonstrated by the appellant constitutes the handicap of drug or alcohol abuse.

In this case the appellant established that he was an alcoholic. He submitted evidence of a diagnosis of alcohol dependence and of treatment for the condition, and the agency stipulated to the latter. See Appeal File, Tab 19. Having established that he was an alcoholic, the appellant also established that he was a handicapped person within the meaning of the Rehabilitation Act. See *Ruzek v. General Services Administration*, 7 M.S.P.R. 437, 441 (1981). Although, as explained below, the Board has modified *Ruzek* on other grounds, *Ruzek's* holding that an employee who shows that he is an alcoholic or drug addict has also established that he is a handicapped person remains unaffected. Thus, the administrative judge's finding that the appellant did not show that he was a handicapped person is erroneous and misapplies *McCaffrey*, as well as *Ruzek*.

In *Ruzek* at 443-44, the Board held that, in order to afford reasonable accommodation to an employee whose misconduct or poor performance stemmed from a substance abuse problem, the agency was required to offer the employee rehabilitative assistance before initiating disciplinary action. In *Brinkley v. Veterans Administration*, 37 M.S.P.R. 682, 684 (1988), the Board modified that holding by stating that the agency is ~~not~~ required to offer rehabilitative assistance unless the poor performance or misconduct for which disciplinary action is proposed was caused by the handicap or was entirely a manifestation of it. See also *Terry v. Department of the Navy*, 39 M.S.P.R. 565, 569 (1989).

In order to meet the causation test, the appellant must show that, at the time of his misconduct, he was under the influence of intoxicants, and that his analytical judgment or free will was so impaired that he lacked self-control over his actions. See *Seibert v. Department of the Treasury*, 41 M.S.P.R. 133, 137 (1989); *Campbell v. Defense Logistics Agency*, 37 M.S.P.R. 691 (1988). Further, in *Bolling v. Department of the Navy*, 43 M.S.P.R. 668, 672 (1990), the Board held that an addict's possession of the intoxicant to which he is addicted does not per se constitute misconduct that is entirely a manifestation of the addiction and that such a determination would be made on a case-by-case basis. See also *Tierney v. Department of the Navy*, 44 M.S.P.R. 153 (1990). This case presents the related question of whether an addict's

use of the intoxicant to which he is addicted constitutes misconduct that is entirely a manifestation of the addiction.

The Board finds that, as with possession, whether use is entirely a manifestation of addiction depends on the circumstances surrounding the use. A pattern of drinking on the job might be presumed to be a manifestation of alcoholism, and, indeed, might even be considered a part of the pathology of the disease. Proof of an isolated drink or two on the job, however, may not suffice without specific evidence that the employee could not stop himself. Thus, the Board will not establish a per se rule that drinking by an alcoholic, or use of any drug by an addict, is entirely a manifestation of the addiction.

The appellant claims that "his disease led to his obsession with being more concerned about when he could have his next drink [than about his job] and that his obsession impaired his judgment." The record in this case does not, however, support this assertion.

The appellant did not show that he was under the influence of alcohol when he reported for duty or when he took his first drink on the job. Although it is stipulated that the appellant drank on the job as charged, none of the witnesses other than the appellant indicated the extent of his

obsession with alcohol. The proposing and deciding officials testified that they were unaware of the appellant's alcoholism and his good performance and attendance records were not indicative of an employee with a drinking problem. The appellant introduced no testimony corroborating his own statements about his drinking habits. Indeed, the appellant's own brief testimony on this point depicts a man who drank, but not a man "obsessed" with alcohol. Thus, the Board finds that the appellant failed to prove that he was obsessed with alcohol and that his drinking on the job was part of a pattern that was entirely a manifestation of his handicap.

Further, the appellant did not show that his judgment was impaired by alcohol even after he had consumed alcohol on the day of the misconduct. No witness, including the postal inspectors who interviewed the appellant within minutes after the live mail was improperly discarded, indicated that his cognitive and physical faculties were impaired. Thus, the appellant did not show that his drinking deprived him of an understanding of the seriousness of his misconduct or affected his ability to form intent and did not show that his misconduct was caused by his alcoholism. See *Seibert*, 41 M.S.P.R. at 137; *Hougens v. U.S. Postal Service*, 38 M.S.P.R. 135, 148 (1988). Accordingly, we find that the appellant did not establish his affirmative defense of discrimination on the basis of handicap.

For the reasons below, however, the Board finds that the penalty of removal is beyond the bounds of reasonableness in this case.

Although all four persons who were involved in drinking on the job and improperly discarding mail on the same day as the appellant, including the appellant's supervisor, were removed, two were returned to duty. One of these was the employee who actually threw away live mail as waste, a more serious charge than the sustained charge against the appellant of failing to check to see whether discarded mail was waste. Although the employees who were returned to work were not supervisory employees, their return indicates that the agency is willing to allow employees who engage in similar misconduct to continue to encumber at least nonsupervisory positions.

Also, the appellant had 23 years of unblemished and at times outstanding service at the time of his removal, and the appellant's supervisor apparently condoned the misconduct. Additionally, as in *Tierney*, where the Board mitigated the penalty of removal to a 60-day suspension, and in *Bolling*, where the Board mitigated a removal to a 90-day suspension, the appellant recognized his alcoholism and sought help immediately after the incident that led to his removal.

In view of the circumstances described above, the Board mitigates the agency's removal action to a demotion to a

nonsupervisory position with the least reduction in grade and pay.

#### ORDER

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

We ORDER the agency to cancel the appellant's removal and to substitute therefor a demotion, effective April 11, 1988, to a nonsupervisory position with the least reduction in grade and pay. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). If no vacancy exists in such a position, the agency is ORDERED to place the appellant in the highest available nonsupervisory position for which he is qualified until such time as a nonsupervisory position with the least reduction in grade and pay becomes available. See *Jackson v. Veterans Administration*, 31 M.S.P.R. 135, 137 (1986). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's effort to compute the amount of back pay, interest, and benefits due, and to provide all necessary

information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

#### NOTICE 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 Review and Appeals  
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:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.