UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LUCILLE F. HOLLAND Appellant, v. DEPARTMENT OF DEFENSE Agency.	DOCKET NUMBER PH-0752-99-0010-I-1 DATE: August 17, 1999

Lonnie Howie, Sr., American Federation of Government Employees, Odenton, Maryland, for the appellant.

Loren L. Baker, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

1 The agency petitions for review of an initial decision that mitigated the appellant's removal to a 60-day suspension. For the reasons discussed below, we GRANT the agency's petition, REVERSE the initial decision with respect to the penalty, AFFIRM the initial decision with respect to the other issues, and SUSTAIN the removal action.

BACKGROUND

2 Effective October 10, 1998, the agency removed the appellant from her GS-3 Cashier position, based on charges of (1) rude and discourteous behavior toward customers and (2) failure to follow procedures. Initial Appeal File (IAF), Tab 5, Subtabs 4b, 4f. In support of these charges, the agency specified as follows:

> On April 20, 1998, Mr. & Mrs. Forrest Calhoun processed through your check out lane. During this process, Mrs. Calhoun had taken the time to arrange the coupons in monetary order, least amount on top and highest at the bottom; for the

multiple purchase coupons (2) she marked on the coupon which purchase she had made. Mrs. Calhoun then placed the coupons on the belt behind the divider. You picked up the coupons and threw them back on the belt with coupons flying all over the place among the grocery items. Mrs. Calhoun explained to you that she had put them in order, at which you snapped[,] "I don't do them that way." Mrs. Calhoun attempted to pick the coupons up again and hand them to you. Mrs. Calhoun had already identified, on the coupons, which purchase she had made for the two (2) coupons that had multiple purchases. However, to further aggravate the situation, and in a very insolent manner, you asked her what purchases had been made and more rudely asked if Mrs. Calhoun had other coupons in the batch for the same items. In addition, when Mrs. Calhoun arrived home and began putting her groceries away, she discovered that you had failed to remove a $.75 coupon.

On March 27, 1998, Mr. Gene Moon, Assistant Commissary Officer, received a telephone complaint from a customer stating that she had laid her coupons on the register belt and you picked them up and said[,] "[W]e don't do this here," and threw them back at her.

On January 24, 1998, Ms. Lisa Anders[e]n processed through your check out lane. Ms. Anders[e]n placed her coupons on a box of donuts so that you could easily retrieve them. You proceeded to throw the coupons over the conveyor belt and the scanner. Subsequently[,] one of the coupons was scanned into the cash register. After reviewing all of the coupons, you called someone to clear the register. As you rang up Ms. Anders[e]n's order, you spoke to her in a condescending manner.

In addition to your rude and discourteous behavior on January 24, 1998, you failed to follow procedures when processing Ms. Anders[e]n's order. Specifically, you intermittently stopped the processing of her groceries in order to continue to eat chips. You failed to follow the written instructions for the Customer Service Department that you signed on January 7, 1998 [which prohibited eating on the job in the check-out area, IAF, Tab 5, Subtabs 4l, 4m].

Your rude and discourteous behavior and failure to follow instructions negatively reflect[] on the service provided by the Commissary to our patrons. This type of behavior cannot and will not be tolerated. This is not your first offense. On May 24, 1997 you were given a three (3) day suspension for rude and discourteous behavior and on February 12, 1998 you were given a 10-day suspension for rude and discourteous behavior and notification that this was your third offense. This proposed action is considered the minimum action necessary to promote the efficiency of the service.

IAF, Tab 5, Subtab 4f.

3 On appeal, the administrative judge held a hearing and then issued the initial decision. Initial Decision, IAF, Tab 10. The administrative judge did not sustain the specification involving the telephone complaint on March 27, 1998, but sustained the remaining specifications and both charges. She found, in addition, that there was a nexus between the sustained charges and the efficiency of the service. She mitigated the penalty of removal to a 60-day suspension, however, finding that the agency could not rely on the appellant's past disciplinary record because the cited disciplinary actions did not satisfy the criteria under *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981), and that the appellant had been employed by the agency for approximately 28 years, and there was no evidence to indicate that her performance appraisals have been less than fully successful. *Id.*

4 The agency has timely filed a petition for review, arguing that the administrative judge misapplied *Bolling* and otherwise erred by mitigating the agency-imposed penalty. Petition for Review File, Tab 1. The appellant has not filed a response.

ANALYSIS

The appellant's past disciplinary record may be considered in determining the penalty under the circumstances.

5 In *Bolling*, 9 M.S.P.R. at 338-39, the Board noted that, prior to the passage of the Civil Service Reform Act of 1978 (CSRA), the scope of review of prior disciplinary records in adverse-action appeals was set forth in the Federal Personnel Manual (FPM) at FPM Supp. 752-1, S4-3b(a), as follows:

> When an employee has been subjected to disciplinary action for one or more past offenses and the agency uses his disciplinary record as part of the basis for a current adverse action against him, the specificity and detail required of the agency--and also the extent of review and consideration required of either the agency or the [Civil Service] Commission [the Board's predecessor] on appeal--depend on whether the past disciplinary action meets three criteria: First, the employee was informed of the action in writing; second, the employee was given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action; and third, the action was made a matter of record. … On appeal, if the employee takes issue with the merits of the past action, the documentary record of the past action … will be reviewed to determine the validity of that action as one of the reasons for the current action. It will be found a valid reason unless, upon review, the agency or the Commission determines the disciplinary action was unreasonable, arbitrary, or capricious. … If the employee does not raise an issue about the past action, only the occurrence of that action need be verified. A cited disciplinary action will be found a valid reason if it is in fact a matter of record.

Bolling, 9 M.S.P.R. at 338-39 (emphasis added).

The Board then noted in *Bolling* that, "[i]n conformity with this provision, the practice of the ... Commission ... was to give a challenged past record a full, *de novo* review if the three criteria were not met, but a limited review of the record if they were." *Id.* at 339 (emphasis added). The Board further noted that the CSRA "effected no substantive changes in the area of the proper scope of review of challenged prior disciplinary records." *Id.* (emphasis added). The Board then held that, "where the three criteria set forth at the former FPM Supp. 752-1, S4-3b(1), *supra*, are met, the challenged prior disciplinary actions will receive only a limited review" and that "such a challenged prior action will be discounted only if it is 'clearly erroneous' in the sense that it leaves the Board with the 'definite and firm conviction that a mistake has been committed.'" *Id.* at 340 (emphasis added). The Board then applied this standard and found that, because the challenged prior disciplinary actions satisfied the three criteria, they warranted only a limited review by the Board and that the administrative judge correctly found they could be considered in selecting the penalty. *Id.*

Thus, *Bolling* addressed the Board's scope of review of a prior disciplinary record that is challenged on appeal. It did not directly address situations, as here, where the appellant never challenged on appeal the validity of the prior disciplinary record on which the agency relied in determining the penalty. Regarding situations such as this, *Bolling* quoted with apparent approval the rule set forth in the former FPM that, where an appellant does not challenge the past disciplinary record, "only the occurrence of that action need be verified." Here, the appellant never challenged the validity of the prior disciplinary record on which the agency relied in determining her penalty, and the record evidence confirms the occurrence of the prior disciplinary actions for rude and discourteous behavior. IAF, Tab 5, Subtabs 4n, 4o.

We therefore agree with the agency's argument on review that the administrative judge erred by applying the *Bolling* criteria to discount the appellant's prior disciplinary record. *Cf. Lockridge v. U.S. Postal Service*, 72 M.S.P.R. 613, 626 (1996) (where an appellant challenges a prior disciplinary action, the Board's review of the action is limited to the criteria set forth in *Bolling*), *aff'd*, 121 F.3d 727 (Fed. Cir. 1997) (Table), *cert. denied*, 118 S. Ct. 1107 (1998); *Lovenduski v. Department of the Army*, 64 M.S.P.R. 612, 615 (1994) (although the appellant's prior counselings were not made a part of the record, the Board considered them in reviewing the penalty where the appellant did not challenge their accuracy); *Morgan v. Department of Defense*, 63 M.S.P.R. 58, 61 (1994) (the Board applied the *Bolling* criteria where the appellant challenged the validity of the prior disciplinary action); *Taylor v. Department of Justice*, 60 M.S.P.R. 686, 689-90 (1994) ("If, in challenging his removal, an employee also attacks the validity of a prior disciplinary action which the agency considered in reaching the removal decision, the Board's review of the prior action is limited to determining whether it was clearly erroneous."); *but cf. Toth v. U.S. Postal Service*, 76 M.S.P.R. 36, 40 (1997) (although the appellant did not specifically challenge the prior disciplinary action, the Board found that it could not be considered as to the penalty, in light of "the complete lack of record evidence upon which to determine whether the *Bolling* criteria were met and the uncertainty about whether the suspension was 2 or 7 days long").

The agency-imposed penalty of removal is not beyond the limits of reasonableness under the circumstances.

Where, as here, the Board has sustained all of the agency's charges, the Board will review the agency-imposed penalty only to determine if the agency considered the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Board will modify the agency's chosen penalty only if it finds that the agency's judgment clearly exceeded the limits of reasonableness. *Id.*[*]*

Here, the administrative judge found that the appellant engaged in rude and discourteous behavior toward agency customers on two occasions and also violated the agency procedure prohibiting the consumption of food or beverage at work stations. The appellant has not challenged the administrative judge's findings in this regard, and we discern no obvious error in it. The sustained charges go to the core of the appellant's job as a cashier, and reflects badly upon the agency's reputation for customer-friendliness. *See* Hearing Tape (HT) 1B (testimony of Mary McGee, the agency's Assistant Store Manager and deciding official); IAF, Tab 5, Subtab 4e.

The appellant was previously disciplined for similar misconduct when she was suspended for 3 days in May 1997 and for 10 days in February 1998. The agency contended, and the appellant has not disputed, that her February 1998 suspension was based on her third documented offense of this nature, so that her April 1998 offense was her fifth documented offense of this nature (discounting the March 27, 1998 specification which the administrative judge did not sustain). Moreover, she repeatedly engaged in, and was counseled against, such behavior even before her May 1987 suspension. HT-1A (testimony of Cuc Green, the agency's Customer Service Manager and proposing official), HT-1B (testimony of McGee); IAF, Tab 5, Subtab 4h.

The appellant has approximately 28 years of service with the agency. However, despite repeated counselings and progressive discipline, she failed to modify her rude and discourteous behavior. Her conduct deeply disturbed and offended the agency's customers and reflected badly on the agency's reputation. HT-1A (testimony of Lisa Andersen and Elaine Calhoun); IAF, Tab 5, Subtabs 4i (Calhoun's letter to the agency), 4k (Andersen's letter to the agency). Moreover, she failed to offer any explanation for her behavior either before the agency or before the Board, IAF, Tab 5, Subtab 4h, HT 1B, and never acknowledged that such behavior was improper or expressed any remorse. She thus failed to demonstrate any rehabilitative potential. *See Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 137 (1997). Under these circumstances, we find that the agency-imposed penalty of removal was not beyond the tolerable limits of reasonableness. *See Wilson v. Department of Justice*, 68 M.S.P.R. 303, 309-10 (1995) (removal for disrespectful conduct and use of insulting, abusive language); *Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316-17 (1993) (removal for insolent disrespect

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toward supervisors); *Peters v. Federal Deposit Insurance Corporation*, 23 M.S.P.R. 526, 529 (1984) (removal for discourteous and unprofessional conduct), *aff'd*, 770 F.2d 182 (Fed. Cir. 1985) (Table).

ORDER

13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

Notice to the appellant regarding your further review rights

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

* In reviewing the agency-imposed penalty, the administrative judge applied the standard of review set forth in *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 525-26 (1996). Initial Decision at 6. This was error because *White* involved a situation, unlike here, where not all of the agency's charges were sustained by the Board. The standard of review set forth in *White* was overruled by *LaChance v. Devall*, No. 98-3213 (Fed. Cir. May 20, 1999).