ALAN R. HOOVER
v.
DEPARTMENT OF THE ARMY

DOCKET NO.
PH07528110045

OPINION AND ORDER

The Board, having fully considered the agency's petition for review of the initial decision issued on February 6, 1981, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

Appellant's removal from a supervisory position was proposed on grounds that he knowingly made false statements in completing an official record.

The facts of this case revolve around an injury appellant sustained on October 29, 1979. It is now established that appellant's injury occurred as a result of appellant and another employee engaging in conduct described by appellant as "horseplay." However, by his own admission, appellant first claimed that his injury occurred when his knee locked while walking up some steps. This original story was given by appellant in connection with the preparation of a Form DA 1051, which must be filled out when an injury occurs at an Army worksite. That information was also used in preparation of a Form CA–1, a Department of Labor Workers' Compensation Form. Appellant later came forward with the correct information, leading to the discovery of this discrepancy and the proposal to remove him from his supervisory position.

The presiding official held that appellant's false report caused preparation of a false Form DA 1051. However, the presiding official also held that appellant did not intend to falsely prepare, or cause to be prepared, a false Form CA–1. After finding that the charge was sustained only to the extent that it related to the preparation of form DA 1051, the presiding official reduced the penalty to a ten-day suspension.

In its petition for review of that decision, the agency essentially makes two arguments. The first relates to the presiding official's findings, the second to whether the presiding official had the authority to mitigate an agency-imposed penalty.

As to the first of the agency's arguments, the Board finds that the presiding official's findings are supported by the record. The agency simply did not carry its burden of showing that appellant intended to falsify a form CA–1, or that he knew, or should have known that such a form would be prepared. Therefore, all the agency proved was

that appellant caused the falsification of a form DA 1051, a far lesser offense.

The agency's second argument relates to the Board's authority to mitigate penalties. Recently the Board had occasion to address this issue, *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), and decided that the Board's review of an agency-imposed penalty is essentially a determination of whether that penalty was imposed after all relevant factors were considered by the agency, and a balance was reached within the "tolerable limits of reasonableness." *Id.*

Clearly, as the presiding official noted, the penalty imposed in this case cannot be sustained where the only charge supported in the record is of minor importance and represents appellant's first disciplinary problem in nineteen years as a government employee.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Regional Office within ten (10) days of the date of this order.

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).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
*Secretary.*

WASHINGTON, D.C., *November 24, 1981*