DEARIE JENKINS
AND
LYNDA CLARK
v.
INTERNAL REVENUE SERVICE

DOCKET NO.
PH075209160

OPINION AND ORDER

Appellants,[1] Revenue Representatives with the Internal Revenue Service (IRS), were removed from their positions for giving false information about their IRS employment in connection with a federal mortgage loan application made by Dearie Jenkins in violation of section 211.1 of the agency's Handbook of Employee Responsibilities and Conduct.[2] The presiding officials found the charges to be supported by the preponderance of the evidence, but both found that there was discrimination based on appellants' sex and/or race in the imposition of the penalty. Further, the presiding officials noted that even if there had been no discrimination, removal was too harsh a penalty. Therefore, they reversed the agency's actions.

The agency, in its petition for review, contends both that the presiding officials had no authority to reverse an agency action solely on the basis that the penalty was too severe, and that its action may only be reversed if there is a clear abuse of discretion in selection of the penalty. Further, the agency alleges that the appellants failed to establish a prima facie case of discrimination. The Office of Personnel Management (OPM) filed a brief in support of the agency's position.

[1]Since both appellants were involved in the same offense, supplying false information to the mortgage company, we are consolidating the cases for review. 5 U.S.C. § 7701(f)(1). While appellants' attorneys have objected to consolidation, the Board finds that the statutory standard has been met and that this action will not prejudice either party in that proper consideration will be given to the evidence developed in each case separately, as appropriate. The agency, in its petition for review, objects to the presiding official's consideration of discrimination in Lynda Clark's case because she had filed a discrimination complaint with the agency. Since this appellant had apparently filed a timely formal complaint of discrimination with the agency, the Board was without jurisdiction prior to the issuance of an agency decision or the passage of 120 days. 5 C.F.R. § 1201.154(a). Nevertheless, since 120 days have now elapsed since the filing, the Board may assert jurisdiction over the appeal. *Christo v. U.S. Postal Service*, 3 MSPB 145, 149–50 (1980).

[2]This section states in part: "An employee may not engage in any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct or any behaviour, activity, association or relationship which tends to discredit himself or the service."

As the agency and OPM challenge the presiding official's review of the penalty and in light of the recent Board decision on our authority to reduce or modify agency-imposed penalties, *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), we are GRANTING the petition for review to consider the issues raised.

The Board, for reasons set forth in *Douglas, supra*, concluded that we do have the authority to mitigate agency-imposed penalties. We there discussed, at 332–33, the scope of our review of agency penalties. After noting that a penalty should only be selected following full consideration of the relevant factors, we held that the purpose of our review is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. *See Snipes v. U.S. Postal Service*, 6 MSPB 16 (1981). The most relevant factors in the present cases are: the nature of the offense; the type of employment; past disciplinary record; past work record; effect of the offense on the employer-employee relationship; and consistency of penalty with others imposed for same or similar offenses.[3] Because appellants presented the dissimilarity in penalties as the basis for the discrimination allegation, we will consider the agency's challenge to the discrimination determination when this consistency in penalties is discussed.

The agency based its charge against Ms. Jenkins upon seven (7) specifications which outlined the acts of the appellant in misrepresenting her position and income in connection with her loan application to the extent of asking another employee, appellant Lynda Clark, to sign the FHA form as her supervisor. The agency charge against Ms. Clark was based on two (2) specifications that she misrepresented her own position in signing as Ms. Jenkins' supervisor on the FHA form and that she verified false information concerning Ms. Jenkins' employment with the agency. The agency averred that appellants' positions required contact with the public and involved the handling of taxpayers' monies and various financial statements. Consequently, the agency contended appellants' actions in supplying this false information would cause their supervisors to doubt their integrity and honesty in handling the duties of their positions and create a serious breach in the employer-employee relationship.[4] The presiding officials, in sustaining the charges,

[3]These and other factors are set forth in *Douglas, supra, at 332.*

[4]In *Gamble v. U.S. Postal Service*, 6 MSPB 487 (1981), the Board upheld the removal of a Custodian for dishonest conduct in improperly receiving welfare benefits. We held that "the deliberate falsification of documents for the purpose of defrauding the government of public funds is sufficient to raise a presumption that such conduct impairs the efficiency of the public service." In this case, appellants' conduct, falsification of financial documents, raised the presumption that the conduct impaired the efficiency of the service, which appellants have failed to rebut.

agreed with the agency's evaluation of the effect of appellants' conduct on the service. However, balanced against these factors are appellants' length of service, thirteen years for one and eight years for the other, a satisfactory work record, no prior disciplinary actions, and an alleged inconsistency in the imposition of penalties for similar offenses.

Appellants presented evidence below that a white, male employee had been charged with violation of the same regulation, but that he had only been demoted. They further alleged that his conduct was as serious as theirs, and that, therefore, there was disparate treatment in the imposition of penalties. They alleged that this variance was due to discrimination. The presiding officials found discrimination on the basis of this alleged disparity in the penalties imposed for violation of the same agency regulation and the agency's failure to explain adequately why the employees were penalized differently.

The white male's conduct which violated the pertinent regulation, section 221.1, entailed: (1) engaging in a "shoving match" with another individual at a party; (2) purportedly backing into another vehicle in a parking lot and telling someone that he drove away without leaving a note; (3) while soliciting investors for a planned business, giving the impression of concealment of unauthorized outside employment; and (4) using official time to discuss contemplated and actual business ventures. In addition, this employee was charged with accepting a discount in purchasing merchandise; engaging in outside employment without obtaining written permission; and distributing advertisements in a space occupied by the IRS. The agency argued that the circumstances in this case accounted for the differences in penalties and that the agency did not consider the conduct of the white male as serious as that of the appellants.

The presiding officials found the conduct of the male employee to be as serious as that of appellants and found the agency's explanation of the variance to be insufficient. After examining the record, we find that the charges lodged against the male and female employees are substantially different and not of comparable seriousness. The male employee's conduct which violated the same general regulations appellants were charged with violating, entailed his bragging of his own misconduct which was unsubstantiated. The agency investigated the charge involving the traffic accident and found that there was no record of such an accident. The "shoving match" occurred in a bar with some of his co-workers after they had been drinking. The agency viewed the male employee's activity as not criminal in nature whereas appellants' activity, falsification of a federal loan application, was seen as being criminal. Jenkins, Tr. 119. In any event, such conduct was not seen as being as serious as appellants' deliberate attempt to obtain the benefit of a loan on the basis of false information. The other charges against the male

involved use of official time for personal business. Although this is unacceptable conduct, the agency did not equate this conduct with appellants' conduct. Jenkins Tr. at 121.

Considering these facts, we find that the agency presented a rational basis for the variance in penalties. The Board has, previously, held that where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove by a preponderance of the evidence a legitimate reason for the difference before the penalty can be upheld. *See Woody v. General Services Administration*, 6 MSPB 410, 411 (1981). Because the nature of the misconduct differed, we find that the agency has shown by the necessary quantum of evidence that there was a rational basis for the variance in treatment. Accordingly, we must re-examine appellants' allegation of discrimination.

The agency argues that the allegation of disparate treatment in the imposition of a penalty is insufficient to establish a prima facie case. The court, in *Green v. Armstrong Rubber Company*, 612 F.2d 967 (5th Cir., 1980), *rehearing denied*, 615 F.2d 919 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 227 (1980), considered the allegation of racial discrimination with regard to a discharge for violation of work rules. The court held that the plaintiff (employee) "must first demonstrate by a preponderance of evidence either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not similarly punished." *Green*, *supra* at 968. In the instant case, appellants have failed to show that the white male employee engaged in similar conduct. Therefore, we hold that appellants have failed to establish a prima facie case of discrimination.

We must now determine whether the relevant factors discussed previously warrant reduction of the agency-imposed penalty under the authority to modify such penalties determined in *Douglas*, *supra*.[5] The only mitigating factors to consider in appellants' cases with the elimination of dissimilar treatment are their length of service, work record and disciplinary record. Balanced against these factors is the agency's need for honesty and integrity in employees who deal with the public and their monies. We find that under these circumstances removal was reasonable.

Accordingly, the initial decisions are REVERSED and the agency actions are AFFIRMED.

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

Appellants are hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's deci-

[5]We noted in *Gamble*, *supra*, at 490 n. 6, that "removal is not necessarily warranted merely because there is the requisite nexus between the misconduct and the efficiency of the service."

sion on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby notified also of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. Appellants who file a civil action in a U.S. District Court concerning the Board's decision on the issue of discrimination have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. A civil action or petition for judicial review must be filed in an appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *October 29, 1981*