

LERoy LANCASTER
v.
DEPARTMENT OF THE NAVY

Docket No.
PH07528010056

OPINION AND ORDER

Appellant, Leroy Lancaster, was removed from his position as a Motor Vehicle Operator with the Department of the Navy, Naval Supply Center, Norfolk, Virginia ("agency") effective April 19, 1980. The action was based on the charge of theft of government property. Specifically, appellant was charged with: (1) on March 17, 1980, pumping five (5) gallons of gasoline from a government-owned gas truck into a five-gallon can and placing the can into the trunk of his car, intending to use the gasoline for personal use; (2) on March 5, 1980, pumping three (3) gallons of gasoline directly from a government-owned gas truck into his own vehicle; and (3) pumping gasoline from government-owned gas trucks into his own vehicle approximately once a week since Christmas 1979.

Appellant filed a petition for appeal with the Board's Philadelphia Field Office. Appellant did not deny the charges but argued that the penalty imposed by the agency was too harsh. Following a hearing, the presiding official issued an initial decision in which he held that the agency had supported its action by a preponderance of the evidence and appellant's removal was for such cause as would promote the efficiency of the service. In so doing, the presiding official considered but rejected the evidence presented by appellant in support of his argument that the penalty of removal was too harsh.

Appellant filed a timely petition for review in which he again contends that the penalty of removal is too severe for the charged conduct. In addition, he alleges that his statement to the agency admitting the charges was misconstrued as to the third charge, because he did not take gasoline continuously since December 1979 but only took gasoline during a one-week period in December 1979.

This Board held in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), that the Board may mitigate an agency-imposed penalty if it determines that the penalty imposed is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable.

In order to make this determination the Board, in *Douglas*, set out numerous factors that it would consider. In light of the factors stated in *Douglas*, the Board will now consider the appropriateness of the agency-imposed penalty in this case.

The offense sustained in the instant case, theft of government property, was serious and had a direct impact on the agency's ability to accomplish its mission. According to agency testimony, that mission is

to supply the fleet with supplies (Tr. 12). The agency also argued that its employees had been repeatedly warned about the seriousness of theft of government property and that "grave consequences" would follow such action.

The record also establishes that removal was within the range of penalties for a first offense of theft of government property. Of the three other employees charged with theft since 1977, two had been removed and the third had resigned during the notice period (Tr. 10-11).

In support of mitigation, appellant stated that he had seventeen years of government service without any discipline, was truly repentant for stealing the gasoline and cooperated fully in the agency investigation of the charges. In addition, appellant produced evidence, both testimonial and documentary, as to his good character.

Mr. Briscoe Boddie, a foreman at the agency and a deacon at New Calvary Baptist Church of which the appellant is a member, testified at the hearing that appellant has had the best of character during the 25 years that he has known appellant (Tr. 16) and that for the 15 years that he knew appellant on the job, appellant had an unblemished character (Tr. 18). In addition to Mr. Boddie's testimony concerning the character of appellant, a few individuals furnished statements concerning appellant's character. In a memo from the Reverend Larry S. Howard, Pastor of St. Paul's Christian Methodist Episcopal Church, Norfolk, Virginia, Reverend Howard stated that the appellant has been a leading citizen and layperson in the church community. Dr. Milton A. Reid, the minister in the New Calvary Baptist Church, Norfolk, Virginia, in a letter dated March 24, 1980, attested to appellant's excellent reputation in the community and church. Also contained in the appellate file is a memorandum dated March 21, 1980, prepared by W. Simmons. Mr. Simmons stated that appellant, while under his supervision from July 1972 through July 1974, was an average and punctual employee.

Under the particular circumstances of this case the Board finds that the agency imposed penalty of removal was not clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable.

In deciding whether to impose a lesser penalty, the agency's deciding official considered appellant's past record as well as the documentary evidence of appellant's good character contained in the record. He did not find that these factors warranted a reduction in penalty. He also concluded that in view of the agency mission, appellant's removal was necessary to maintain general discipline and morale.

Theft of government property "carries on its face prejudice to the service" and "is without question related to the faithful and loyal performance of his duties . . . *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978). The thefts in this case were serious offenses which had a direct impact on the agency's ability to accomplish its mission. These offenses were committed despite appellant's being on

clear notice of the consequences that would follow such action. The Board also notes that the decision to remove appellant was consistent with penalties imposed in other cases of theft of government property by other shipyard employees.

Accordingly, the petition for review is DENIED, and the initial decision is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 § 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., *June 9, 1981*