HAROLD W. MARTIN
v. Docket No. AT075209044
DEPARTMENT OF TREASURY
U.S. CUSTOMS SERVICE

BRUCE BROWN
DANIEL CHAREST
v. Docket No. SF075209127
DEPARTMENT OF JUSTICE
IMMIGRATION AND
NATURALIZATION SERVICE

DIRK A. DICK
JEFFREY OTHERSON
v. Docket No. SF075209119
DEPARTMENT OF JUSTICE
IMMIGRATION AND
NATURALIZATION SERVICE

OPINION AND ORDER

Each of the above appellants was indefinitely suspended from his position by his employing agency. The indefinite suspensions were all taken pursuant to the shortened notice period provided for by 5 U.S.C. § 7513(b)(1) where "... there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, ..." The cases present similar issues and are hereby consolidated for adjudication. 5 C.F.R. § 1201.36(a).

The Department of Justice has moved to have the appeal of appellant Dick dismissed. In support of this motion, the agency has submitted a copy of Dick's resignation retroactively effective on the date of his suspension, and a copy of the SF–50 personnel form effecting Dick's resignation. Appellant Dick's representative has responded, but has not objected to the agency's motion. Accordingly, since the record reflects that appellant Dick no longer has an appealable action before the Board, his appeal is hereby DISMISSED.

I. STATEMENT OF FACTS

Appellant Martin was indefinitely suspended from his position as Supervisory Customs Patrol Officer by the United States Customs Service, Mobile, Alabama. Three reasons, all based upon the same occurrence, were given for the action: (1) unauthorized interception of oral communications; (2) conduct prejudicial to the best interest of the service; and, (3) interfering with the rights of another. The

proposal notice details the facts and evidence possessed by the agency at the time it took the suspension action:

> As a result of allegations that certain conversations were being intercepted without authorization within the Office of District Patrol, Mobile, Alabama, a search of the office of Mr. James T. Wyatt, Director, District Patrol, Mobile, Alabama, was conducted on July 31, 1979, by Special Agents of the Office of Internal Affairs, U.S. Customs Service. Based upon this seach [sic], it was learned that a person or persons had been monitoring and/or reacording [sic] conversations in the aforementioned office. Specially, evidence revealed that the ceiling tiles had been altered to permit the housing of a monitor or recorder between the office of Mr. Wyatt and the office shared by SCPOs Brazell/McKnight.
>
> On August 2, 1979, a staged conversation between Mr. Wyatt and Special Agent Alex L. Higdon and Vicky T. Clanton, Office of Internal Affairs, was conducted at 3:00 p.m. During the conversation Special Agent Clanton raised the ceiling tile in Mr. Wyatt's office and observed a ceiling tile in the office of SCPOs McKnight/Brazell, which adjoins Mr. Wyatt's office, raised approximately one foot. However, the latter tile was immediately dropped back into position. At this point, Special Agent Clanton rushed to the office SCPOs Brazell/McKnight and found SCPOs Brazell and McKnight in the office. When SCPO McKnight saw Special Agent Clanton, he stated, "Dumb, wasn't it?"
>
> A federal search warrant, which had been obtained on August 1, 1979, was immediately executed and evidence was discovered that implicated you and SCPOs Brazell and McKnight in the monitoring and/or recording of telephone and priviledged (sic) conversations.
>
> Examples of some of the items seized included a tape recorder and tape. The tape recording contained a telephone conversation between you and another individual. Your voice was considerably louder than the other person's, indicating that the recording was made from the telephone you were using. Additional segments of the same tape also contained recordings of conversations held in Patrol Director Wyatt's office between Messrs. Wyatt and Higdon and Wyatt and Harvey Perry, District Director, Mobile. When interviewed, Messrs. Wyatt, Higdon, and Perry indicated under oath that they had no knowledge that their conversations had been recorded.
>
> With respect to the aforementioned conversation between Mr. Wyatt and Mr. Higdon, it occurred on January 26, 1979, and

concerned information supplied to Internal Affairs by a Customs employee under a pledge of confidence.

Subsequently, another federal search warrant was obtained on August 3, 1979. During the resulting search of your office, five additional cassette tapes were obtained.

Conduct such as that described in the aforementioned specification is considered to be in violation of Title 18, United States Code, Sections 2518 and 2511....[1]

The agency based its action on the search warrants and the preliminary report, and also cited its need for further investigation into appellant's involvement. The preliminary report also states that the matter had been referred to the U.S. Attorney's office for possible action. The presiding official sustained the action, and Martin has petitioned for review.

The remaining appellants, Brown, Charest, and Otherson, were suspended indefinitely from their positions as Border Patrol Agents by the Immigration and Naturalization Service, Chula Vista, California. The actions were based on a 6–count federal grand jury indictment charging, in count one, that the agents had conspired to defraud the government by interfering with the lawful functions of the Border Patrol in three ways: (1) by unjustifiably beating illegal aliens during their apprehension and detention; (2) by providing improper guidance of training to Border Patrol trainees; and, (3) by concealing the unjustified maltreatment of the illegal aliens. Count two charged that in a specified violent incident, Otherson and Brown, while acting under color of law, deprived an inhabitant of the State of California of his civil rights without due process of law. Count three charged Otherson with deprivation of civil rights with reference to another specified incident of violence against aliens, and count four charged Otherson, Brown, and Charest with deprivation of civil rights with reference to that same incident of violence. Count five concerned only Dick, whose appeal has been dismissed. Count six charged Charest with perjury.

The presiding official who adjudicated the appeals of Brown and Charest found that the agency had a reasonable basis for taking the suspension actions. The actions were sustained and their representative, the International Brotherhood of Police Officers, petitioned for review.

The presiding official who adjudicated Dick and Otherson's appeals also found a valid basis for the actions, but reversed upon

[1]The former statutory provision contains the requirements which must be met before a judge may enter an order authorizing or approving the interception of wire or oral communications and also sets out the factors which must be considered by a judge before entering such an order. The latter enumerates violations of 18 U.S.C. chapter 119, including § 2518, which can result in a fine and/or imprisonment.

finding that the indefinite suspensions were not reasonably necessary. This finding was based on evidence that other employees, charged with more serious criminal violence, including murder, were not suspended but were reassigned to other duties pending the resolution of the charges against them. This same evidence was considered, but rejected, by the presiding official in the appeals of Charest and Brown. The Department of Justice has petitioned for review of the Otherson initial decision. In addition, the Office of Personnel Management (OPM) has intervened in support of the Justice Department's petition for review.

II. ISSUES

By order dated March 2, 1981, the Board identified issues as pertinent to these appeals, and afforded all parties the opportunity to submit briefs addressing, in essence: under what circumstances is an indefinite suspension initially valid; under what circumstances does an initially valid suspension become invalid; the manner in which an employee can obtain termination of an indefinite suspension if warranted; and, related sub-issues.

Comments were filed by: the Office of Personnel Management (OPM); the Department of Justice, Immigration and Naturalization Service (INS); the Department of the Treasury, U.S. Customs Service (Customs); American Federation of Government Employees, AFL-CIO (AFGE); International Brotherhood of Police (IBPO); and, Frank G. Taylor of Sintz, Pike, Campbell & Duke, Mobile, Alabama, who has adopted the comments submitted by IBPO and AFGE. All of these comments have been fully considered and are referenced in this decision where relevant.

III. DISCUSSION

It would be helpful, at the outset, to examine the definition of the term "suspension" which is set forth at 5 U.S.C. § 7501(2). That provision defines a suspension, for the first time statutorily, as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." According to the legislative history of the Civil Service Reform Act, (C.S.R.A.), Congress' intent in enacting this provision was to adopt, rather than change, the definition of "suspension" utilized by the former Civil Service Commission (C.S.C.).[2] The former C.S.C. had defined a suspension as "an action placing an employee in a temporary non-duty and non-pay status for disciplinary reasons *or for other reasons pending inquiry.*" Former FPM Supp. 752–1, S1–6(a). (Emphasis supplied.)

[2]"For the first time, the term *suspension* is defined in statutory language as a disciplinary action temporarily denying an employee his duties or pay. The bill follows the definition of the term previously adopted by the Civil Service Commission in its policy issuances." Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, Vol. II at 1511.

The most essential criterion of an action, if it is to meet the definition of "suspension" set forth at 5 U.S.C. § 7501(2), is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. Although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. *See Erdwein v. United States*, 215 Ct. Cl. 54 at 65, n.8 (1977). Such an action imposed with no ascertainable end in sight is not sustainable as a suspension, because of failure to meet the criterion of temporariness.

All of the indefinite suspension actions herein were purportedly imposed pending resolution of possible criminal misconduct by the appellants. As the Board noted in *Cuellar v. United States Postal Service*, 8 MSPB 282, 284 (1982), "[i]n passing the Reform Act, Congress maintained the 'crime exception' now contained in 5 U.S.C. § 7513(b)(1) as the only instance in which an agency's need to protect its employees, property, and/or reputation could outweigh the employee's right to 30 days' notice [of an adverse action]." Courts have examined, and given approval to, suspension actions taken on shortened notice and based on examinations into charged criminal conduct. *See Coleman v. United States Postal Service*, No. 79–4751 (S.D.N.Y. May 21, 1980), (approving, "[a]s a practical matter," an indefinite suspension based upon an arrest on a serious charge and an arraignment on the basis of a felony complaint); *Jankowitz v. United States*, 533 F.2d 538 at 543 (Ct. Cl. 1976), (holding "eminently fair" an indefinite suspension based upon an indictment because "[r]ecognizing that he might well have been acquitted, the agency even-handedly rejected the 'knee-jerk' approach, giving plaintiff a chance to save his job if exonerated.")

Another reason courts have approved of indefinite suspensions based upon examinations into criminal charges was set forth in *Polcover v. Department of the Treasury*, 477 F.2d 1223, 1231–1232 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). Quoting from *Silver v. McCamey*, 221 F.2d 873, 874–875 (D.C. Cir. 1955), the court specifically warned of the dangers of subjecting an employee to an administrative hearing while criminal action is pending:

> [w]e agree ... that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the adminitrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

See also Peden v. United States. 512 F.2d 1099, 1103 (Ct. Cl. 1975).

As has been stated, indefinite suspensions are based upon "reasonable cause." The definition of "reasonable cause" was explored by INS at 12–13 of its petition for review of the *Dick and Otherson* decision. As INS notes, "reasonable cause" is virtually synonymous with the "probable cause" which is necessary to support a grand jury indictment. Before returning an indictment, a Federal grand jury must be satisfied that "there is probable cause to believe that a crime has been committed and that the accused has probably committed it." 8, Moore's Federal Practice, "Rules of Criminal Procedure," Part III, at 6–18, 2d ed., 1978. "Probable cause" is defined as "reasonable cause," or

> [a]n *apparent state of facts* found to exist upon reasonable inquiry (that is such inquiry as the given case renders convenient and proper,) which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case that a cause of action existed.

Black's Law Dictionary, Revised 4th Ed., 1968, at 1365.

Based upon this analysis, the Board agrees with INS that an indictment is sufficient, while an investigation, in and of itself, is insufficient, to give rise to "reasonable cause" to believe the employee has committed a crime for which imprisonment could be imposed.[8] An arrest or investigation may, however, be accompanied by such circumstances as would give rise to a "reasonable cause." INS has cited as examples: an employee arrested and held for further legal action by a magistrate; an investigation resulting in evidence supporting a reasonable cause to believe; a "criminal information," (which differs from an indictment only in that it is brought by a prosecutor instead of by a grand jury); and, certain egregious acts detrimental to the accomplishment of the agency's mission, such as murder or national security offenses, brought to the agency's attention via the news media. Of course, the underlying facts and circumstances on which the agency bases its "reasonable cause to believe" must be proven by a preponderance of the evidence in order for the action to be sustained. 5 U.S.C. § 7701(c)(1)(B).

An indefinite suspension based on reasonable cause to believe that a crime has been committed for which imprisonment may be imposed must meet the "efficiency of the service" standard of 5 U.S.C. § 7513(a). Thus, there must be a nexus between the crime the

[8]This is consistent with guidance provided in the former FPM Supp. 752–1, S5–3b: "An agency cannot invoke the 'crime' provision solely on evidence that the employee was arrested. However, if the agency has evidence that the employee was arrested *and held for further legal action by a magistrate or was indicted by a grand jury, then* the agency would have reasonable cause for believing the employee guilty of the crime."

employee is reasonably believed to have committed and his position. That is, as INS has stated in its petition,

> the agency must prove that the charges may reasonably be expected to interfere with or prevent effective performance of the duties and responsibilities of the agency.

See Merritt v. Department of Justice, 6 MSPB 493 (1981); *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978); *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977); *Jankowitz v. United States*, *supra*, at 549.

Another element of the agency's proof is the reasonableness of its penalty. *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Thus, agencies must show that a lesser penalty would be ineffective under the circumstances of the particular case.

Indefinite suspensions are not based upon provable misconduct but upon the examination into that misconduct. *Jankowitz v. United States*, 533 F.2d 538 (Ct.Cl. 1976). Therefore, an indefinite suspension may be found to have been reasonable when imposed, although facts later developed may cause the Board to find that an agency acted unreasonably in failing or refusing to vacate the action. In this regard, however, the Board notes that before an agency or before the Board, the bare facts of a subsequent acquittal does not demonstrate that an indefinite suspension had been unjustified. An acquittal because a jury or a judge was not convinced beyond and to the exclusion of all "reasonable doubt," *Speiser v. Randall*, 357 U.S. 513 (1978), is not binding on an administrative agency, *Alsbury v. United States Postal Service*, 392 F. Supp. 71 (C.D. Calif. 1975), *aff'd*, 530 F.2d 852 (9th Cir. 1976), because the standard of proof before the Board is the "preponderance of the evidence." The Board concludes that where, after a full review of the attendant facts and circumstances, an indefinite suspension is found to have been reasonably imposed and maintained, the Board will sustain the action.

Because a suspension is by definition temporary, an indefinite suspension must have a determinable condition subsequent which will bring the action to an end. Accordingly, the Board's order sustaining the action would explicitly or implicitly mandate that the agency move expeditiously, and that the suspension terminate upon the occurrence of the condition subsequent. Noncompliance with these terms of the order could be brought to the Board's attention via 5 C.F.R. § 1201.181, which provides:

> Any party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction. Submission of this petition shall be made to the field office which rendered the initial decision. The petition shall specifically set forth the reason why the petitioning party believes there is noncompliance.

The Board agrees with OPM that this provision gives an appellant the procedural opportunity to argue that conditions have occurred which should have brought about a termination of his suspension.

Having set forth the principles which the Board must use to determine the validity of indefinite suspensions, we will now apply them to the specific cases before us.

IV. APPLICATION TO INDIVIDUAL CASES

MARTIN

Appellant Martin was indefinitely suspended from his position as Supervisory Customs Patrol Officer upon charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The agency took the position that the action was appropriate in view of Martin's role as supervisory law enforcement official in an agency (Customs Service) which has a mission of law enforcement.

The record indicates that the agency had received only a preliminary investigative report and that further investigation, or further analysis of the information and materials obtained was ongoing. The Board finds that this continuing investigation, taken together with the search warrants, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action, provides sufficient basis for "reasonable cause." While an investigation should not *per se* form the basis for an indefinite suspension, it may provide such a basis where, as is the case herein, it is accompanied by evidence which is sufficient to afford "reasonable cause to believe. . . ." Further, the ongoing agency investigative process and the referral to the U.S. Attorney support the "temporary" nature of the suspension. Finally, the Board finds the suspension action reasonable, *Douglas, supra*, and also concludes that the action was taken for such cause as will promote the efficiency of the service, in view of appellant's position as a law enforcement officer. Accordingly, the indefinite suspension action taken against Martin is sustained.

OTHERSON, BROWN, AND CHAREST

These appellants were indefinitely suspended from their positions of Border Patrol Agents upon being indicted for, essentially, conspiring to deprive and actually depriving persons of their civil rights. *See Statement of Facts, supra.* The Board agrees with the presiding official that the suspensions were based upon reasonable cause to believe that crimes had been committed for which sentences of imprisonment could be imposed, and that the charged offenses bore a direct relationship to appellants' duties and to the accomplishment of the agency's mission. Also, since the appellants had been indicted and criminal proceedings were ongoing, the suspensions do contain

clear conditions subsequent and so can be considered "temporary." The issue, then, is whether the agency has proven the reasonable necessity for the suspensions in view of the evidence that other Border Patrol Agents, accused of violence towards aliens, were not suspended but merely reassigned pending resolution of the charges against them.

Chief Agent Cameron testified in both hearings as to his reasons for indefinitely suspending appellants. In addition, Investigators McGaskill and Gregg testified that Mr. Cameron had stated to them what a tough, difficult decision it had been, and that he had considered several factors in reaching his decision.[4] As to Mr. Krohn, an Agent who was indicted for assault to commit murder and assault with a deadly weapon, Mr. Cameron testified that he had been reassigned rather than suspended because the agency considered that the evidence the State had did not support the charge. That opinion appears credible to this Board, in view of the fact that Agent Krohn was subsequently tried and acquitted.

Appellants were charged with conspiracy and with the commission of several incidents of planned, brutal behavior towards aliens. The cases of the other employees do not contain charges of such sustained, repeated, and cooperative behavior as was allegedly engaged in by these appellants. In view of the nature and seriousness of the charges and the direct relationship between the charges, and appellants' positions and the agency's mission, the Board finds that the indefinite suspensions were reasonably necessary. Accordingly, the actions taken against Border Patrol Agents Otherson, Brown, and Charest are sustained.

In sustaining the indefinite suspensions in these cases, the Board does so only for such time as the investigations and criminal proceedings are resolved. Continuance of the suspensions beyond such time is unauthorized.

Examination of the records herein reveals little information as to the current status of the cases. Charest's record indicates that he was acquitted and that his suspension was thereupon terminated. Otherson was convicted of conspiracy to deprive civil rights and deprivation of civil rights, fined, and sentenced. *See* Judgement, filed in the office of the Clerk, U.S. District Court, Southern District of California, on March 19, 1980. The record contains no information as to what action, if any, was taken by the agency with respect to Otherson following his conviction. The most current information in the record as to the results in the proceedings against Brown is that

[4]The record shows that Mr. Cameron acted in conformity with the Board's opinion in *Douglas, supra*, at 330, that agencies should "exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation[s]."

there was a mistrial and that the actions were "cont. to 1–21–80 9 a.m. Further Proceedup (sic) - Otherson, Dick, Brown." *See* court record, forwarded by Justice Department cover-letter dated January 16, 1980. The Martin record is also lacking in current information regarding proceedings in his case.

V. CONCLUSION

Accordingly, the initial decision in the case of appellant Martin is AFFIRMED as modified by this Opinion and Order. The initial decision in the cases of appellants Dick and Otherson is VACATED as to Dick and REVERSED as to Otherson. The action indefinitely suspending Otherson is SUSTAINED. Appellant Dick's appeal is DISMISSED. The initial decision in the cases of appellants Brown and Charest is AFFIRMED as modified by this Opinion and Order.

This is the final decision of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Appellants are 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 appellants' receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *June 1, 1982*