UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DWIGHT D. MILES, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER PH07529203201 1 DATE: NOV 27 1992

M. Jefferson Euchler, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellant.

Mathew P. Ross, Esquire, Newport News, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision issued on July 24, 1992, affirming the agency's action suspending him for 45 days. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it.* We REOPEN this case on our own motion under

* After the close of the record on petition for review, see 5 C.F.R. § 1201.114(d), the agency submitted an untimely response to the appellant's petition for review. The Board

5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the 45-day suspension.

BACKGROUND

Dwight D. Miles, a WG-10 Industrial Equipment Mechanic at the U.S. Army Transportation Center at Fort Eustis, Virginia, was suspended for 45 days (mitigated from a proposed 60-day suspension) for misuse of a government vehicle and conduct unbecoming a Federal employee. Specifically, on December 24, 1991, the appellant intentionally used a government vehicle to run over and kill a deer on an area known as "the combat sod," a restricted area on Felker Army Airfield, Fort Eustis. The parties stipulated to the underlying facts. *See* Appeal File (AF), Tab 9, Joint Ex. 1.

On appeal, the appellant argued that he committed no wrongdoing and that his conduct was not unbecoming a Federal employee because the deer had been shot earlier in the day and he killed it to end its suffering. He also argued that the agency failed to prove the charge because his use of the government vehicle was not willful.

The administrative judge found that, despite the appellant's credible testimony concerning his motive, his use of the government vehicle constituted willful misuse, and that his use of a government vehicle to kill a wounded deer was conduct unbecoming a Federal employee. *See* Initial Decision

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has not considered this reply because it was not accompanied by a showing of good cause. *See* 5 C.F.R. § 1201.114(f).

(ID) at 3-4. The administrative judge also found that the appellant's 45-day suspension was reasonable under the circumstances. *See* I.D. at 5-8.

In his petition for review, the appellant asserts that the administrative judge improperly related the "conduct unbecoming a federal employee" charge to the vehicle misuse charge; thereby increasing the severity of this charge to buttress the reasonableness of the 45-day suspension. This resulted, according to the appellant, in the number of charges determining the penalty contrary to the holding in *Southers v. Veterans Administration*, 813 F.2d 1223 (Fed. Cir. 1987). The appellant alsc argues that he was not guilty of misuse of a government vehicle because his misuse was not intentional or willful under *Felton v. Equal Employment Opportunity Commission*, 820 F.2d 391 (Fed. Cir. 1987), since he intended to use the government vehicle for humanitarian purposes and could not have known that such a humanitarian act was outside of the realm of official use. *See* PFR at 4-5.

ANALYSIS

First, we find that the administrative judge did not improperly interrelate the charges upholding the agency's 45-day suspension. The proposal notice and notice of decision specify that the misuse of the government vehicle and the "conduct unbecoming" charges were two separate charges. *See* AF, Tab 3, Subtabs 4i and 4b. The totality of the administrative judge's discussion shows that she also considered the charges to be separate. *See* ID at 2-4. The

administrative judge's reference to the misuse as reflecting conduct unbecoming a Federal employee means only that she recognized that both charges involved misuse of a Federal vehicle, not that she added the conduct unbecoming to the appellant's unauthorized use of the government vehicle to justify the agency's penalty. Nothing in the judge's penalty discussion demonstrates any mischaracterization or interrelating of the two charges in reaching a conclusion upholding the agency's 45-day suspension penalty selection.

Second, this case is unlike *Southers* because here the agency did not charge the appellant with the same misconduct in both charges. One charge relates to the appellant's unauthorized taking of the vehicle onto the restricted area for intended unofficial use. The other charge relates to the type of unofficial purpose for which it was used -- to hit and kill a wounded deer with the vehicle. To be sure both charges involve a vehicle but the charges describe entirely separate acts of misconduct. In *Southers* the agency repeated the same question in different form 19 times to create 19 separate charges. Accordingly, we conclude that this case is entirely distinguishable from the circumstances in *Southers*.

The administrative judge also correctly concluded that the appellant was guilty of "willful misuse" of the government vehicle. Under 31 U.S.C. § 1349(b), "[a]n officer or employee who willfully uses or authorizes the use of [a] passenger motor vehicle ... owned or leased by the United States government (except for an official purpose authorized

by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office." In *Felton*, the court defined "willful" in section 1349(b) to mean "voluntarily and consciously ... with knowledge of or reckless disregard for whether ... the intended use was for other than official purposes."

Here the appellant's use was "willful." Contrary to the appellant's assertion, he voluntarily and consciously used the government vehicle to enter a restricted area. Whatever his motive in entering the area, the fact remains that he used the vehicle with reckless disregard for whether he was using it for official purposes. Although the appellant characterizes his motives for using the vehicle as humanitarian or as responding to an emergency, and states that he had no reason to know his intended use for the vehicle was an unofficial purpose, the evidence shows that the appellant did not secure permission to drive the vehicle onto the restricted area, nor did he secure permission for his intended use. *Compare Felton* at 393 (the agency failed to prove that the appellant knowingly, consciously, and willfully authorized a subordinate employee to use a government vehicle for other than an official purpose where she authorized a subordinate to use a government vehicle to transport her to her car which had broken down and where the employee was needed at work as

expeditiously as possible). *See Madrid v. Department of the Interior*, 37 M.S.P.R. 418, 422 (1988) (the appellant's voluntarily transporting an unauthorized individual in an official government vehicle for personal purposes constituted willful misuse). Also, the more prudent course of action for handling what the appellant perceived to be an emergency situation might have been for him to have telephoned the Fort Eustis game warden about the deer.

We agree with the administrative judge that the appellant's conduct was unbecoming a Federal employee. No specific definition of this term is given in the record, although the proposal notice states that it is "disgraceful" conduct. *See* AF, Tab 4, Subtab 4i. The ordinary meaning of unbecoming is: "unattractive; unsuitable ...; detracting from one's ... character, or reputation; creating an unfavorable impression." *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1538 (1989 ed.). Certainly, running over a deer in a government vehicle, even for humanitarian motives, when a game warden is available, is at the very least unsuitable and tends to detract from one's character because it reflects poor judgment. Both the proposing and deciding officials testified that they considered the use of the government vehicle for this purpose "very serious" misconduct. *See* testimony of proposing official Sills, Hearing Tape 1B; deciding official, Jennings, Hearing Tape, 2A. Under these circumstances, the administrative judge

correctly concluded that the appellant's misconduct was conduct unbecoming a Federal employee.

Although the appellant does not specifically challenge the penalty in this case, we agree with the administrative judge that the penalty is reasonable. The statute provides for a penalty up to and including removal for misuse of a government vehicle alone. *See* 31 U.S.C. § 1349(b). Also, the agency's table of penalties specifically provides for a penalty up to and including removal for a first offense of misuse of a government vehicle. *See* AF, Tab 6, Attachment. Here, the agency's imposition of a 45-day suspension based upon the seriousness of the misconduct is a legitimate exercise of managerial discretion and is not unreasonable. The Board has upheld a 45-day suspension for unauthorized use of a government vehicle and an instance of negligent performance of duties. *See Arnold v. Department of Energy*, 36 M.S.P.R. 561 (1988).

ORDER

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

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.