BERNARD MONCZEWSKI	DOCKET No. DA07528110443
TIMOTHY SHOWS	DOCKET No. DA07528110442
GERALD SMITH	DOCKET No. DA07528110441
THOMAS VAUGHN	DOCKET No. DA07528110423

v.

DEPARTMENT OF THE AIR FORCE

OPINION AND ORDER

Appellants,[1] Aircraft Ordnance Systems Mechanics with the Department of the Air Force, Barksdale Air Force Base, Louisiana, were removed for their failure to comply with their supervisor's orders to return to their duty stations. The presiding official found that the preponderance of the evidence supported the charge, but that the action was taken in reprisal for appellants' having testified at a grievance hearing. Therefore, she reversed the agency action as she found it to be in violation of 5 U.S.C. § 2302(b)(9).[2]

The agency, in its petition for review, challenges the presiding official's determination that the removal was taken in reprisal for appellants' participation in a grievance hearing. Specifically, the agency contends that the evidence does not establish a casual connection between the protected activity, testifying at the grievance proceeding, and the adverse action. The agency also argues that even assuming a prima facie case of reprisal has been established, the removal should not be reversed unless it is shown that appellants would not have been removed but for their participation in the protected activity.[3]

[1]The cause of action in these four cases arose out of a single incident involving all four appellants, one consolidated hearing was held at which each appellant testified, and the petitions for review in each case raise the same objections. Therefore, we are consolidating the cases under the authority granted in 5 U.S.C. § 7701(f)(1) and 5 C.F.R. § 1201.36.

[2]That section provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-
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> (9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation. . . .

[3]The agency in the case of appellant Vaughn argues that the petition for appeal lacked specificity in raising the affirmative defense, in contradiction of *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). Although the word "reprisal" was not used in this petition, it was apparent from an attachment and evidence given at the hearing that this appellant believed the reason for his removal was his participation in the grievance. Because an affirmative defense may be raised at a hearing and the

The Board, in *Gerlach v. Federal Trade Commission*, 8 MSPB 599 (1981), discussed the analytical process to be followed in adverse action appeals involving claims of reprisal for protected conduct and discrimination on the basis of the protected status. Because the decisions in these cases were issued without the guidance of *Gerlach* and the agency challenges the findings on reprisal, we are GRANTING the petitions for review.

The Board has determined that a claim of reprisal by an employee who testifies in a grievance proceeding constitutes an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). *See Bodinus v. Department of Treasury*, 7 MSPB 385, 387 (1981) (August 27, 1981). As stated by the presiding official, an appellant, in order to establish a prima facie violation of section 2302(b)(9), "must demonstrate that he engaged in an activity protected by the section; that he subsequently was treated in an adverse fashion by the employer; that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity; and that there is a causal connection between the protected activity and the adverse action." Initial Decisions at 16–17, Vaughn Initial Decision at 16; *Bodinus*, *supra*, at 387. The causal connection merely consists of an inference of a retaliatory motive for the adverse action which in almost all situations must be inferred from circumstantial evidence. *Id*; *In re Frazier*, 1 MSPB 159, 186, (1979).

In the instant case, appellants had engaged in the protected activity of testifying at a grievance hearing. Both the proposing official and the deciding official had actual knowledge that appellants had so testified. The agency does not dispute these facts, but it contends that there has been no showing of a causal connection between the protected activity and the adverse action, the final step in establishing a prima facie case of reprisal.

The presiding official addressed the causal connection in her decision and set forth all the evidence to establish this connection. The presiding official relied on the fact that appellants had previously testified, in an employee grievance proceeding, against the proposing official in the present actions, coupled with the harshness of the agency-imposed penalty. She also noted that the proposing official admitted to having a vested interest in the outcome of the grievance. Tr. 48–49. The record reflects, as well, that the charges were intimately connected to their participation in the grievance hearing and the proposals to remove appellants followed their

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agency was apprised of this defense then without taking exception, we are dismissing this argument without further discussion. *See Roberts v. Defense Logistics Agency*, 4 MSPB 56 (1980); *See also, Ketterer v. U.S. Department of Agriculture*, 2 MSPB 459, 463 n. 10 (1980), *Fekete v. Department of Justice*, 8 MSPB 130, 130 n. 3 (1981), approving under appropriate circumstances a presiding official's *sua sponte* action in raising and considering a prohibited personnel practice.

protected conduct by only six days. Although the deciding official did not have any vested interest in the grievance, the presiding official did not find this to be sufficient to rebut any retaliatory motive held by the proposing official. The agency strongly objects to the reliance on these "facts" to support an affirmative defense of reprisal.

However, after considering the agency's contentions in light of these circumstances and the other evidence of record, and because the causal connection generally must be drawn from circumstantial evidence such as that relied on by the presiding official, we do not find that the agency has shown any error in the presiding official's evaluation and conclusion on this connection. Therefore, we find that appellants did establish prima facie violations of section 2302(b)(9).

Even assuming that a causal connection is shown, the agency contends that the action should not be reversed if it is shown that appellants would have been removed even if they had not engaged in the protected activity. The Board, in *Gerlach, supra*, adopted the two-part test enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), for deciding cases of dual motivation such as the instant cases. First, the employee has the burden of establishing by a preponderance of the evidence that the protected conduct was a "substantial" or "motivating" factor in the action. If as we have found here the employee carries this burden, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even if the protected conduct had not taken place. *Gerlach, supra* at 604. Although the presiding official did not have the guidance of *Geralch*, she did correctly follow the test given in *Mt. Healthy* in evaluating the agency's action in the instant cases.

The presiding official, in deciding whether the agency would have removed appellants absent their protected activity, examined the appropriateness of the removal for what she and appellants termed a "de minimus" infraction. Following the Board's guidance for a review of an agency-imposed penalty given in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), the presiding official considered these relevant factors in determining the reasonableness of the agency's penalty: the seriousness of the offense; length of service, past disciplinary record; effect of the offense on performance; alternative sanctions to deter such conduct in the future; and mitigating circumstances.

In each case, appellants, with at least seven years of satisfactory service with the agency, failed to respond immediately to their supervisor's order to return to their duty stations after completion of their testimonies in the grievance hearing. There was an approximate delay of three minutes before each appellant returned to his duty station, and all arrived before their supervisor returned. The

delay in their response was because the employee representative in the grievance had asked to speak to them. Each appellant stated that he had never been involved in a grievance hearing before and that they thought they should speak with the representative (as they were his witnesses) prior to returning to work. However, as noted earlier in this opinion, each appellant returned to his duty station in less than five minutes and was at his respective station when the supervisor returned. The presiding official found under these circumstances that appellants' conduct was *de minimus*. We agree with this evaluation. The agency, in its petition for review, stresses its dependence on command and control on a military base, and therefore argues that appellants' failure to respond to the supervisor's order was especially serious. Although we recognize that appellants' actions as perceived by management is a legitimate concern, we also are cognizant that in the present cases appellants did respond to management's order, although not as expeditiously as management might have desired. Thus, management's concern, although genuine and reasonable in other situations, is overstated in the present cases and not serious enough under the circumstances to override the presiding official's finding that appellants' conduct was *de minimus*.

Furthermore, the only other infraction that each appellant has is a 14-day suspension arising again from a single incident involving an agency investigation. The presiding official decided a written reprimand for the current conduct given the circumstances was "the most stringent penalty the agency should have considered." We agree. Thus, the preponderance of evidence supports the appellant's allegation that reprisal was a substantial factor in their removals, given the vast disparity between the maximum reasonable penalty as determined by the presiding official and the penalty imposed by the agency, in light of the other evidence of record.

Having examined these relevant factors and the agency's interpretations of these factors, given in the petitions for review, we find that the agency has not established any error in the presiding official's evaluations or her decision-making process in arriving at her conclusion to reverse the removals.

Accordingly, the initial decision in each case is AFFIRMED.

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c). The agency is hereby ORDERED to cancel the removals. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Dallas Regional Office in accordance with 5 C.F.R. § 1201.181(a).

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 an 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., *July 1, 1982*