

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEVIN J. O'HARA,
Appellant,

v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER
NY07528710235

DATE: JAN 25 1988

John G. Carney, Esquire, Mineola, New York, for the
appellant.

Margaret Solinger, Esquire, New York, New York, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency has petitioned for review of the July 10, 1987, initial decision that reversed its removal action. For the reasons set forth below, the Board GRANTS the agency's petition, VACATES the initial decision with respect to the charge of unauthorized use of a government vehicle, and REMANDS the case to the New York Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

The appellant was removed from his position as a Criminal Investigator with the U.S. Customs Service based on five charges: (1) Engaging in actions adversely affecting public confidence in the agency; (2) use of a government vehicle for other than official purposes; (3) improper use of badge and agency I.D.; (4) misuse of classified or sensitive information; and (5) engaging in actions that adversely affected, or tended to adversely affect, the efficiency of the Customs Service or public confidence in the integrity of the agency. The charges were based upon the appellant's actions of pulling over and temporarily detaining a female motorist, of allegedly making improper advances toward that individual, and of driving to her office the next day with his government vehicle in order to discuss his personal interest in real estate with her. After considering the appellant's oral and written replies to the notice of proposed removal, the agency's deciding official found all of the charges against the appellant to be supported by the evidence of record, and concluded that the appellant's removal was warranted to promote the efficiency of the service.

The appellant appealed his removal to the Board's New York Regional Office. After a hearing, the administrative judge reversed the agency's action, finding that the agency had failed to prove any of its charges by preponderant evidence. The administrative judge determined that:

(1) The appellant had not abused his agency badge and identification; (2) he had not misused classified or sensitive information; (3) the appellant's actions did not adversely affect the agency's efficiency or the public's confidence in the agency's credibility and integrity; and (4) the appellant had not misused a government vehicle. In making these determinations, the administrative judge found that the appellant's version of events was more persuasive and that he was more credible than the agency's complaining witness.

ANALYSIS

The administrative judge must make findings of fact, credibility determinations, and conclusions of law based upon the substance of each of the stated charges.

In its petition for review, the agency contends, inter alia,¹ that the administrative judge erred by ignoring the specification supporting its charge of unauthorized use of a

¹ The agency also challenges the administrative judge's findings of fact and credibility determinations. The Board must necessarily afford special deference to the administrative judge's findings regarding credibility where such findings are based on the demeanor of the witnesses. See *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985). In this case, the administrative judge found that the appellant's version of events was more persuasive and his testimony more credible than that of the agency's complaining witness. He based this finding on detailed and fact-specific credibility determinations made after listening to the extensive hearing testimony of both parties. The agency's mere disagreement with the administrative judge's findings of fact, credibility determinations, and conclusions does not warrant further Board review. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982).

government vehicle, and improperly basing his decision not to sustain that charge on events and findings actually related to the other charges. We agree.

The Board's regulations require that each initial decision contain findings of fact and conclusions of law, as well as the reasons or bases therefor, upon all material issues of fact and law presented on the record. 5 C.F.R. § 1201.111(b)(1). The initial decision must disclose the evidentiary basis for its factual findings, set forth those findings clearly, resolve issues of credibility, and include the administrative judge's conclusions of law. See, e.g., *Allen v. Department of the Air Force*, 34 M.S.P.R. 318, 320 (1987); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

The factual basis for the charge of unauthorized use of a government vehicle brought against the appellant was that he had allegedly used a government automobile for other than official purposes by driving to a real estate broker's office during work hours to discuss his personal interest in real estate. These grounds were detailed in the agency's single specification for the charge in the notice of proposed removal, were addressed by the agency in its closing argument, and also were the subject of testimony during the hearing. The administrative judge nevertheless ignored the stated basis for the charge and found, instead, that the agency had failed to prove the charge because the appellant's actions on the preceding day constituted the

"act[s] [of] a good samaritan" and did not "by [any] stretch of the imagination" demonstrate "willful or unauthorized use" of an official vehicle under 31 U.S.C. § 1349(b).² See initial decision at 10. The administrative judge made no findings or conclusions relative to the agency's specification for the charge. However, because the charge of unauthorized use of a government vehicle is factually and legally distinct from the other four charges brought against the appellant, separate findings of fact, credibility determinations (as necessary), and conclusions of law should have been made. See, e.g., *Addison v. Department of the Treasury*, 30 M.S.P.R. 615, 617-18 (1986). We therefore find that this case must be remanded to the regional office for a determination on this issue.

² Section 1349(b) of title 31 of the United States Code provides, in pertinent part, that:


An 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) . . . shall be suspended without pay by the head of the agency . . . for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.

ORDER

Accordingly, the Board REMANDS this case to the New York Regional Office. On remand, the regional office shall prepare and issue a new initial decision making findings of fact and conclusions of law that address all of the material issues concerning the charge of unauthorized use of a government vehicle.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board