

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT R. RANDOLPH,
Appellant,
v.
DEPARTMENT OF EDUCATION,
Agency.

DOCKET NUMBER
BN07528710141

DATE: SEP 7 1988

Albert T. Hamlin, Esquire, Washington, D.C., for the
appellant.

William Haubert, II, Esquire, Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board on appellant's petition for review of an initial decision in which an administrative judge of the Board's Boston Regional Office sustained appellant's removal. The Board DENIES the petition for review for failure to meet the criteria for review. See 5 C.F.R. § 1201.115. The Board REOPENS the case on its own motion, however, 5 C.F.R. § 1201.117, and AFFIRMS the initial decision as MODIFIED.

BACKGROUND

Appellant held the GM-14 position of Director of the Post-Secondary Education Division in the Boston Regional Office of the agency's Office for Civil Rights (OCR). OCR is charged with the responsibility of enforcing civil rights statutes which prohibit discrimination by educational institutions which receive federal assistance. Hearing Transcript (H.T.) at 11. Since 1977 the agency has been under a court order which mandates that OCR begin and end its enforcement activities within stringent timeframes. *Adams v. Bennett*, No. 3095-70 (D.D.C. December 27, 1977 as modified January 17, 1985). The Adams order requires OCR to investigate and issue a Letter of Findings (LOF) within 105 days from receipt of a complete complaint. H.T. at 12. The performance agreements of all OCR regional program managers, including appellant, require, as a critical element, that 100 percent of the Adams due dates be met. H.T. at 142, 188.

As Director of the Postsecondary Education Division, appellant reported directly to the Regional Director and occasionally acted for the Regional Director. H.T. at 175, 194. One of petitioner's duties was to review LOFs. An LOF summarizes the evidence and sets forth the agency's findings and conclusions in a particular case. H.T. at 16-17. Each employee responsible for preparing or reviewing the contents of the LOF signs and dates the carbon portions of the final letter. H.T. at 19-20, 22-23, 32, 33, 88, 90-91, 94-99.

After the Regional Director signs the original bond portion of the LOF, it is returned to the division where it originated, where it is dated and issued to the public parties. H.T. at 125-26. The carbon portion of the LOF, containing the dated signatures of each responsible employee, is maintained in the agency files. H.T. at 22-23.

Appellant was charged with being responsible for the falsification or misrepresentation of the dates of issuance of 4 LOFs, and with being responsible for establishing an office practice in which he repeatedly directed subordinate employees to backdate or misrepresent the dates on official documents. The agency withdrew one charge of falsification of an LOF, and the administrative judge sustained two of the three remaining charges of falsifying LOFs, but did not sustain the charge relating to directing subordinates to backdate official documents. The administrative judge also sustained the penalty of removal.

The appellant argues that there is no credible evidence linking him with any instance of falsification of documents. He claims that he had no responsibility for "dated" LOFs, that he did not know who dated the LOFs in question or when they were dated, and that under office policy he had no responsibility for such knowledge. However, it is clear from the record that, as Division Director, appellant was responsible for meeting Adams deadlines and for ensuring that accurate information

concerning the dates of issuance of LOFs was entered into the agency's computerized case tracking system. H.T. at 150; Agency Response, Tab 2 (Appellant's Performance Management and Recognition System Agreement).

In addition, the administrative judge found that the appellant backdated his signature on the carbons of the two LOFs in question, and that in each case the date he placed next to his signature was the Adams due date for that case. Initial decision at 3, 7-8. The appellant has provided no justifiable basis for disturbing this finding, which is supported by the record. Initial decision at 3-5, 7-8.

Appellant's argument that he was not responsible for the dates placed on the originals of the two LOFs is undercut by several factors. First, he was the director of the office which placed the dates on the LOFs after they were signed by the Regional Director or someone acting for the Regional Director. Second, a secretary from his office testified that she sometimes backdated LOFs when there was a note on the LOF telling her to do so; although she testified that she did not know who had placed the notes on the LOFs, the fact that LOFs were sometimes backdated pursuant to unsigned instructions supports the agency's case. Third, the fact that appellant backdated his signature on the carbons of the LOFs weakens the credibility of his argument that he was not responsible for the backdating of the original LOFs. Fourth, the fact that the dates he placed by

his signatures on the carbons were the Adams dates for those cases lends support to the agency's position that he was also responsible for the backdating of the final LOFs. Fifth, as the administrative judge found, appellant had a strong motive to falsify the dates on the final LOFs, because his performance agreement required that he meet 100 per cent of the Adams deadlines in his office, unless he could show that any delay was not the fault of his office. Initial decision at 11. Finally, appellant himself signed the original of one of the two LOFs for the Regional Director. We find that appellant was responsible for the backdating of the two original LOFs in question.

Our analysis does not end with this finding, however. A charge of falsification of Government documents requires proof that the employee intentionally provided wrong information on the document and that he did so with the intent to deceive the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). Such intent may be proven either directly or through circumstantial evidence. *Id.* at 978. An incorrect statement coupled with the lack of any credible explanation or contrary action by an employee has been held to constitute circumstantial evidence of an intention to deceive. *Kumferman v. Department of the Navy*, 785 F.2d 286, 290-91 (Fed. Cir. 1986). Furthermore, as the administrative judge concluded, "a finding of guilty knowledge may not be

avoided by a showing that the [appellant] closed his eyes to what was going on about him." *Riggin v. Department of Health and Human Services*, 13 M.S.P.R. 50, at 53 (1982), citing *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976).

Appellant argues that the administrative judge erred in finding that the agency proved the necessary intent to falsify. However, appellant's actions of backdating his signature on the carbons of the LOFs combined with the other circumstances mentioned above and the lack of any credible explanation of this backdating lead us to conclude that he intended the backdating of the two original LOFs to occur.*

Appellant next argues that the penalty of removal is unreasonable. He bases this argument only on the seriousness of the penalty of removal and his perception of the agency's case as being unsupported by any credible evidence. However, because we have found the agency's evidence with respect to the two sustained charges to be credible, appellant's argument is without merit. He has

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Appellant has also challenged the agency's action because it was based in part on an investigation by the agency's Inspector General which fails to support a charge that appellant overtly directed subordinates to backdate documents. The administrative judge reached this same conclusion in not sustaining that charge; however, she expressly did not rely on the Inspector General report in holding that appellant backdated documents. Therefore the appellant's argument is not relevant to the charge of falsification.

shown no basis for reversal or mitigation of the penalty. The administrative judge carefully analyzed the agency's choice of a penalty in light of the factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981), and properly concluded that the penalty is appropriate.

Accordingly, the agency action is SUSTAINED. This is the Board's final order in this appeal.

NOTICE TO APPELLANT

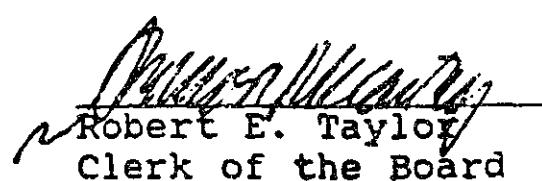
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439.

The court must receive the petition 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:

Washington, D.C.


Robert E. Taylor
Clerk of the Board