UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

REX W. ROYSTER, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER SF07529302091I1 DATE: AUG 13 1993

Rex W. Royster, Fairfield, California, pro se.

Phillis Morgan, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the agency's petition for review of an initial decision dated April 15, 1993, which reversed the agency's action removing the appellant based upon charges of off-duty misconduct. For the reasons discussed below, we GRANT the petition for review, REVERSE the initial decision in part regarding nexus, AFFIRM the initial decision in part regarding the sustained charge, and SUSTAIN the agency's removal action.

BACKGROUND

The appellant has been employed as a correctional officer for the Federal Bureau of Prisons since December 1989, working in a facility housing female prisoners. On December 12, 1992, the agency removed the appellant from his position based on off-duty misconduct, involving threatening and abusive conduct towards three women. Initial Appeal File (IAF), Tab 3, Subtabs 4b and 4c. Specifically, the agency charged the appellant with: (1) Harassing one woman both by phone and in person; (2) threatening another woman through abusive phone calls; and (3) physical assault of a third woman. IAF, Tab 3, Subtab 4c.

The appellant filed a petition for appeal with the Board's San Francisco Regional Office, and the administrative judge reversed the agency's action. IAF, Tab 14. The administrative judge found that the agency removed the appellant based upon three charges of off-duty misconduct. He found only one instance of misconduct, making numerous threatening and abusive phone calls to one of the women, supported by a preponderance of the evidence.

He further concluded that the agency had not established a nexus between the sustained misconduct and the efficiency of the service because it had not established that the misconduct was egregious, adversely affected the agency's mission, adversely affected the work performance of the appellant or his co-workers, or resulted in a loss of trust and confidence in the appellant's ability to perform the duties of his

position. The administrative judge essentially based this conclusion on his determination that the appellant's actions "were the result of a quarrel between old friends who had recently become lovers" and that the appellant and the woman had resumed their friendship to a certain extent. IAF, Tab 14 at 6. In addition, he found that the agency had not shown an adverse affect upon its mission or the work performance of its employees. He discounted the testimony of the prison warden who had testified that he had lost trust and confidence in the ability of the appellant to perform the duties of his position. *Id.* at 11. Consequently, the administrative judge reversed the agency's removal action and ordered the reinstatement of the appellant. *Id.*

The agency petitions for review of this decision, contending that the administrative judge erred in his characterization of its action as one based on three separate charges of misconduct rather than three specifications of one charge of misconduct. Petition for Review (PFR), PFR File, Tab 1.[1] The agency also argues that the administrative judge erred in his determination that nexus had not been established. *Id.* The appellant has responded in opposition to the petition.[2] PFR File, Tab 3.

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[1] The agency has provided evidence of compliance with the administrative judge's order for interim relief upon the filing of a petition for review. PFR File, Tab 1.

[2] Although the appellant titled his submission "APPELLANT'S CROSS PETITION FOR REVIEW," we have considered it as a response to the petition for review because it does not

ANALYSIS

When taking an adverse action against one of its employees, the agency bears the burden of proving its charges by a preponderance of the evidence. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990); *Diaz v. Department of the Army*, 56 M.S.P.R. 415, 417 (1993). If the charge consists of more than a single element, then each of those elements must also be proven by a preponderance of the evidence. *Diaz*, 56 M.S.P.R. at 417. A single charge may not be split into several independent charges representing only a portion of the original. If the agency fails to prove an element of its charge, then the entire charge must fail. Several factual specifications, however, may be set forth in support of a single charge. Proof of one or more, but not all, of the supporting specifications may be sufficient to sustain the charge. *Id.*

In this case, the agency's notice of proposed removal stated that the removal was "based on the following charge and specification:

Charge: Off Duty Misconduct."

IAF, Tab 3, Subtab 4b. This language was followed by three separate paragraphs, each of which described the appellant's threatening and harassing actions toward a different woman. *Id.* The final decision letter ordering the removal of the

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challenge the findings on which the administrative judge based his initial decision. *See Nixon v. Department of the Navy*, 51 M.S.P.R. 624, 626 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table).

appellant found "the charge" sustained and supported by the evidence, referring only to a single charge. IAF, Tab 3, Subtab 4a.

We find that the administrative judge erred in his determination that the agency based its action upon three separate charges. Both the notice of proposed removal and the final decision letter refer only to a single charge. The narrative descriptions of the appellant's alleged misconduct towards the three women relate the factual specifications underlying the charge of off-duty misconduct. The administrative judge found that the agency had proven the specification concerning one of the women. Therefore, we find that the proof of this supporting specification is sufficient to sustain the charge of off-duty misconduct. *See Diaz*, 56 M.S.P.R. at 417-420.

The agency next contends that the administrative judge erred in his determination that nexus had not been shown. We agree. An agency may show a nexus between off-duty misconduct and the efficiency of the service by demonstrating by preponderant evidence that: (1) The circumstances are so egregious as to raise a rebuttable presumption; (2) the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) the misconduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987).

The agency argues that the administrative judge viewed the misconduct as a "violent lovers' quarrel" and, therefore, not particularly serious, especially since the appellant and the woman had resumed a cordial relationship. Furthermore, after noting that *Barnhill v. Department of Justice*, 10 M.S.P.R. 378 (1982), is "[t]he Board case most on point," the administrative judge nevertheless found it inapplicable as precedent because the appellant did not exhibit the aberrant behavior shown in *Barnhill* and because the woman was willing to resume friendly relations with the appellant. IAF, Tab 14 at 11-12. The administrative judge thus found that the appellant's misconduct was not serious and, therefore, discounted the testimony by the prison warden that he had lost trust and confidence in the appellant's abilities. *Id.* The agency contends that *Barnhill* is directly on point. PFR File, Tab 1.

We find that *Barnhill* is applicable to this case. *Barnhill* dealt with an employee whose duties as a border patrol agent included the apprehension of female aliens. 10 M.S.P.R. at 380. The employee had been convicted on a misdemeanor charge of making obscene phone calls and had been charged with making a threat of violence to a female. Despite favorable reports from the employee's psychiatrist and parole officer regarding the employee's progress in his counseling and his potential for rehabilitation, the Board found the required nexus between the misconduct and the efficiency of the service. *Id.* at 380-381. The Board found persuasive the

testimony by an agency official stating that the misconduct had resulted in a loss of trust and confidence in the employee's ability to perform his duties. The official noted that the duties of the position required dealing with female aliens and that claims of abuse by agency employees sometimes arose. Given the nature of the misconduct and the nature of the appellant's position, both with respect to his particular duties dealing with female aliens and his general status as a law enforcement officer held to a higher standard of conduct, the Board found that the required nexus had been established. *Id.*

In this case, the sustained misconduct involved several threatening and abusive phone calls. In those phone calls, the appellant at times threatened to kill the woman and her house guests. Although the administrative judge found that the appellant did not exhibit the aberrant behavior shown in *Barnhill*, we do not discern a substantial difference between these actions. The administrative judge placed much emphasis on the relationship between the appellant and the woman. Although the relationship is a factor to be considered, the appellant's repeated threats to the woman must also be considered.

The employee's duties required him to maintain the safety, custody and control of female inmates. Hearing Transcript (H.T.) at 143-44, 208. The prison warden testified that problems had occurred in the past involving sexual relations between staff members and inmates. H.T. at 144-45.

He further testified that he had irretrievably lost his belief in the appellant's integrity and could no longer trust the appellant to properly perform the duties of his position. H.T. at 141. We find that the agency has established by preponderant evidence that the appellant's misconduct adversely affected its trust and confidence in the appellant's ability to perform his duties. *See Beasley v. Department of Defense*, 52 M.S.P.R. 272, 275 (1992).

Furthermore, nexus may be proven by showing that the employee's off-duty misconduct is antithetical to the agency's mission. *Kruger*, 32 M.S.P.R. at 75 n.2. The agency is not required to demonstrate a specific impact on the appellant's job performance or the efficiency of the service before taking action. *Id.* at 75. Based on the above, we find that *Barnhill* is applicable and that the agency has established the required nexus between the appellant's misconduct and the efficiency of the service.[3] *Id.*

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[3] The agency also alleged that the administrative judge was biased in favor of the appellant and that he exhibited this bias in certain rulings and statements in the proceedings. First, allegations of bias must be raised as soon as practicable after a party has reasonable cause to believe bias exists. *Cotton v. Department of Justice*, 53 M.S.P.R. 397, 403-04, *aff'd*, 985 F.2d 584 (Fed. Cir. 1992) (Table). The agency raises this allegation for the first time on petition for review without a showing that it lacked knowledge of the matter prior to the issuance of the administrative judge's initial decision. Therefore, the allegations are untimely. *Id.*

Second, a party alleging bias must make a substantial showing of personal bias to overcome the presumption of honesty and integrity accorded to an administrative judge. *Ali v. Department of the Army*, 50 M.S.P.R. 563, 568 (1991). The party must show that the bias constitutes extrajudicial

We further find that the penalty of removal is reasonable and warranted based upon our determination that the agency's charge is sustained and nexus established. The appellant's actions, threatening and abusive phone calls to a woman, reflect serious misconduct. Moreover, given the nature of the appellant's position as a correctional officer in a women's prison, the misconduct directly reflects upon his abilities to perform his duties. *Kruger*, 32 M.S.P.R. at 75. In addition, the appellant, as a law-enforcement officer, is held to a higher standard. *Barnhill*, 10 M.S.P.R. at 380-81. Finally, the appellant has a prior record of discipline, a fourteen-day suspension for counterfeiting government identification, inattention to duty, solicitation of a favor from an inmate, giving unauthorized articles to an inmate, and smoking in an unauthorized area. IAF, Tab 3, Subtab 4c. Consequently, we find that the penalty of removal is within the bounds of

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conduct rather than conduct arising in the administrative proceedings before him. *Id.* The fact that an administrative judge ruled against a party is not sufficient evidence to show bias. *Rolon v. Department of Veterans Affairs*, 53 M.S.P.R. 362, 366-67 (1992). Similarly, the pursuit of the line of questioning concerning the relationship between the appellant and the woman in question does not exhibit bias, arising as it did from proceedings before him. *Cf. Ali*, 50 M.S.P.R. at 568-69.

Finally, the agency objects to a statement in the initial decision noting that the appellant might not remember everything that he said in the threatening phone calls. PFR File, Tab 1 at 6. This statement, while vague, does not in itself establish bias, especially as the comment was made in the context of making a credibility determination in favor of the agency's witness. IAF, Tab 14 at 6. *See Lifschitz v. Defense Logistics Agency*, 48 M.S.P.R. 487, 491-92, *aff'd*, 950 F.2d 721 (Fed. Cir. 1991) (Table).

reasonableness to sustain the agency's action.[4] *See Barnhill*, 381.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 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:

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[4] In his response to the agency's petition for review, the appellant makes a claim of disparate treatment in the penalty selection. PFR File, Tab 3. We note first that this claim was not raised in the proceedings below. The appellant has not shown that this claim is based on new and material evidence unavailable in the proceedings below. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

Moreover, even if considered, the appellant has not shown disparate treatment. He claims that the agency gave another employee "time off" rather than removing him, following an off-duty altercation with his girlfriend. PFR File, Tab 3. This employee was allegedly a probation officer, not a correctional officer, and did not have a prior disciplinary record. *Id.* Given the differences in circumstances, the appellant has failed to show disparate treatment by the agency. *Mills v. Department of the Navy*, 30 M.S.P.R. 403, 407 (1986) (an employee claiming disparate treatment must show that the comparison employee worked in the same organizational unit); *Butler v. Department of the Navy*, 23 M.S.P.R. 99, 100 (1984) (aggravating factors may justify a difference in treatment); *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983) (to establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar).

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
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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:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.