UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 33

Docket No. AT-0752-10-1075-I-2

Randall Scheffler,

Appellant,

v.

Department of the Army,

Agency.

March 8, 2012

John Michael Brown, Augusta, Georgia, for the appellant.

Jacqueline L. Edgerton, Fort Gordon, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that sustained the agency's removal action. For the reasons set forth below, we DENY the appellant's petition and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant was a GS-14 Director of Plans, Training, and Security for the United States Army Garrison at Fort McPherson. Effective September 4, 2010, the agency removed him based on two related charges. First, the agency charged that he committed conduct unbecoming a federal employee when he falsely informed coworkers, subordinates, and civic leaders in the Atlanta metropolitan

area that he was a recipient of the Silver Star medal. Second, the agency alleged that he intentionally made a false statement to his supervisor, David Ellis, by providing him what he knew to be a falsified copy of a military General Order showing that he had been awarded the Silver Star. *See* Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, and 4c.

¶3 After holding a hearing at the appellant's request, the administrative judge issued an initial decision affirming the appellant's removal. The administrative judge found that the agency proved both of the charges by a preponderance of the evidence; that the agency met its burden of proof as to nexus; and that the penalty of removal was reasonable. Refiled Appeal File (RAF), Tab 7. On petition for review, the appellant maintains that the administrative judge's findings were erroneous. *See* Petition for Review File, Tab 1.

ANALYSIS

The administrative judge correctly sustained both charges.

¶4 To prove a charge of conduct unbecoming a federal employee, an agency is required to demonstrate that the appellant engaged in the underlying conduct alleged in support of the broad label. *See Raco v. Social Security Administration*, 117 M.S.P.R. 1, ¶ 7 (2011). To establish a falsification charge, an agency must prove that the appellant knowingly supplied incorrect information with the intention of defrauding, deceiving, or misleading the agency. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 6 (2010). Intent is a state of mind and is generally proven by circumstantial evidence. *Id.* Therefore, the Board may consider plausible explanations for an appellant's having provided incorrect information. *Id.* Likewise, the absence of a credible explanation for the incorrect information can constitute circumstantial evidence of intent to deceive. *Id.* Intent may also be inferred when an appellant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Id.* In short, the Board examines the totality of the circumstances to

determine whether the agency has proven intent to defraud, deceive, or mislead. *Id.* In the instant case, both charges contained allegations of fraud. *See* IAF, Tab 6, Subtab 4c. Therefore, the administrative judge correctly concluded that both charges required proof of intent to defraud, deceive, or mislead.

¶5 Because the Silver Star is given only for gallantry in combat, a crucial issue was whether the appellant was in combat at the time in question (February 13, 1991). The administrative judge noted that the appellant's military performance evaluation for the period from July 1, 1990, through April 7, 1991, did not indicate that he had been in combat. RAF, Tab 7 at 10. The administrative judge also noted that the appellant's hearing testimony did not indicate that he had been in combat. *Id.*

¶6 The official Army General Order 14 in the record showed that the Silver Star recipients were Private First Class Peter Griffin and Master Sergeant John Hamm—not the appellant. IAF, Tab 6, Subtab 4j. Additionally, as the administrative judge noted, the National Personnel Records Center stated that no record was found authorizing a Silver Star for the appellant. RAF, Tab 7 at 11; *see* IAF, Tab 6, Subtab 4f.

¶7 We agree with the administrative judge that the appellant's explanation of his receipt of the Silver Star in the mail was not credible. *See* RAF, Tab 7 at 11-13. The appellant could not give a reasonable estimate as to when he received the award packet. He could not produce the certificate or the medal. He had no idea as to the identity of the individual who recommended him for the award or the identity of the individual who approved the award. Moreover, his claim that he did not see a need to have his DD Form 214 updated to reflect his receipt of the award lacks credibility.

¶8 When confronted with a copy of the official General Order 14, the appellant acknowledged that it conflicted with the document that he submitted to Mr. Ellis. The appellant then claimed that he did not know who would have sent him an award packet to which he was not entitled. IAF, Tab 6, Subtab 4d. The

administrative judge considered the possibility that the appellant erroneously, but honestly, relied on the altered copy of General Order 14. However, after reviewing the record, the administrative judge found that the appellant's false statements concerning his receipt of a Silver Star were knowing and intentional, rather than the result of an honest mistake. RAF, Tab 7 at 12-13. We agree. The evidence supports the administrative judge's finding that the appellant held himself out to be the recipient of a Silver Star even though he knew he was not, and that he submitted an altered copy of General Order 14 to Mr. Ellis in an attempt to bring the agency's inquiry to an end.

The administrative judge correctly found that the agency established nexus.

¶9 In addition to proving the charge against the appellant, the agency must show that the action taken promoted the efficiency of the service. 5 U.S.C. § 7513(a). The first issue under this standard is whether there is a nexus between the charge and the efficiency of the service. The nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified by Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987).

¶10 Our reviewing court has held that there is sufficient nexus between an employee's conduct and the efficiency of the service where, as here, conduct occurred in part at work. *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987). However, as the administrative judge noted, the agency's first charge also involved off-duty conduct. An agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that 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) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Kruger*, 32 M.S.P.R. at 71.

¶11 In finding that the agency had met its burden on nexus, the administrative judge cited the "unique culture and environment" of the garrison:

> While a civilian employee wearing a false military valor medal in the workplace might not merit much notice or concern within some federal agencies, the record establishes that this conduct was a grave breach of the Army's culture and values. The Silver Star is awarded based on heroic action in military combat, and is thus highly regarded by military veterans. The appellant, as well as most of his co-workers, superiors and subordinates within the garrison, all served within the active duty military.

RAF, Tab 7 at 15. As a result of his conduct, the administrative judge found, the appellant was viewed with "great disdain" within the workplace. *Id*. In this connection, he cited the testimony of one of the appellant's subordinates, Howard Mullin, who explained that he had a friend who lost his arm earning the Silver Star, and that another member of his former military unit was awarded the Medal of Honor posthumously. Mr. Mullin testified that since learning that the appellant had been falsely claiming to have earned the Silver Star, he had lost all respect for him and could hardly stand to be in the same room with him. *Id*.; *see* Hearing Record, Track 1 (Mullin). The administrative judge also noted the testimony of the Deputy Garrison Commander, who explained that soldiers die earning valor awards, and that wearing such an award without earning it goes against the "heart and core" of everything the military has stood for since 1776. RAF, Tab 7 at 15; *see* Hearing Record, Track 1 (Butler).

¶12 To the extent the administrative judge found that the agency established nexus under the third prong of *Kruger*, we disagree with his analysis. Absent a finding that the appellant's conduct was directly opposed to the agency's mission, the fact that his conduct was contrary to the "culture and values" of the agency, or that it was viewed with more disdain than would have been the case in another agency, does not warrant a finding of nexus. *See Doe v. Department of Justice*,

113 M.S.P.R. 128, ¶ 21 (2010) (appellant's off-duty conduct was not directly opposed to the agency's mission; agency did not show that its mission included preventing the surreptitious, non-criminal videotaping of consensual encounters); *cf. Brown v. Department of the Navy*, 229 F.3d 1356, 1358-61 (Fed. Cir. 2000) (finding nexus where area program manager for a Marine Corps Morale, Welfare, and Recreation Department engaged in an adulterous relationship with the wife of a Marine assigned to a unit supported by the manager while the Marine was deployed overseas); *Allred v. Department of Health & Human Service*, 786 F.2d 1128, 1131-32 (Fed. Cir. 1986) (finding nexus based on an accountant's off-duty child molestation, given that the mission of the agency was to administer health and social services for children, among others); *Wild v. Department of Health & Human Services*, 692 F.2d 1129, 1131-34 (7th Cir. 1982) (finding nexus based on a Department of Housing & Urban Development appraiser's off-duty actions as manager of deteriorated rental properties).

¶13 Nonetheless, to the extent that the administrative judge found that the agency established nexus under the second prong of *Kruger* by showing that the appellant's conduct adversely affected management's trust and confidence in his job performance, we agree. Colonel Deborah Grays, Garrison Commander and deciding official, testified that the appellant was one of her key staff members because of his role in working with plans for emergencies and mobilizations, and that his position was one of great trust and responsibility within her immediate staff. Hearing Record, Track 2 (Grays). Colonel Grays further testified that the appellant's pattern of false conduct about his military background shattered her trust in him and eliminated her faith in his judgment. *Id.* We find that her unrebutted testimony establishes the requisite nexus between the appellant's misconduct and the efficiency of the service. *See, e.g., Adams v. Defense Logistics Agency*, 63 M.S.P.R. 551, 555-56 (1994) (deciding official's unchallenged testimony that the appellant's off-duty possession of marijuana

adversely affected the agency's trust and confidence in his job performance was sufficient to establish nexus).

The administrative judge correctly found that the penalty of removal was reasonable.

¶14 Where, as here, both of the agency's charges are sustained, the Board reviews the penalty only to determine whether the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *See Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010). The Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency. *Id.* The Board will mitigate a penalty only where the Board finds that the agency did not weigh the relevant factors or that the penalty clearly exceeds the bounds of reasonableness. *Id.*

¶15 Here, the administrative judge correctly found that Colonel Grays conscientiously considered the *Douglas* factors in making her decision regarding the penalty. Colonel Grays testified that she considered the appellant's strong work history and lack of a disciplinary record, but found that those factors were outweighed by the seriousness of his offenses. Hearing Record, Track 2 (Grays). In particular, Colonel Grays considered the fact that the appellant's misconduct was not an isolated incident, but involved a pattern of deception over a prolonged period of time. *Id.* Colonel Grays also explained that the appellant's misconduct brought notoriety and caused embarrassment to the agency. *Id.*

¶16 We further agree that the penalty of removal is within the bounds of reasonableness. The Board has long recognized that removal for falsification and dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the appellant's reliability, trustworthiness, and continued fitness for employment. *Whelan v. U.S. Postal Service*, 103 M.S.P.R. 474, ¶ 13 (2006). This is especially so considering that the appellant was a superior. *See Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21

(2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006). Accordingly, we sustain the agency's decision.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.