

WALTER E. SHEPHERD
v.
U.S. POSTAL SERVICE

Docket No.
DC075209234

OPINION AND ORDER

Appellant was removed from his position of Special Delivery Messenger effective March 7, 1980, for "Unsatisfactory Performance of Assigned Duties in Delay of Mail." Appellant did not defend the charge before the agency but he filed a petition for appeal.

After affording appellant a hearing, the presiding official issued his initial decision finding that a preponderance of the evidence supported the charge and that appellant's prior disciplinary record was properly considered by the agency in assessing its penalty. The presiding official also found that appellant's allegation of prohibited racial discrimination did not constitute a factor in his removal, and that the removal action was taken for such cause as will promote the efficiency of the service.

Appellant filed a timely petition for review asserting, for the first time, that his poor work record and ultimate removal were due to his long history of alleged alcoholism. Appellant states "that at no time" did he "disclose to his superiors at the Postal Service or during the hearing" before the presiding official his record of alcohol abuse. Appellant contends that his alcoholism constitutes new and material evidence for purposes of granting a petition for review under 5 C.F.R. 1201.115(a). Appellant further asserts that the "due diligence" criterion of the regulation should be waived in this case because he was unable to articulate his alcoholism problem before the agency or the presiding official due to fear and ignorance.

The agency's response asserts that the agency was unaware of appellant's alleged alcoholism and that appellant's petition does not meet the criteria for review under 5 C.F.R. 1201.115(a).

We are unpersuaded by appellant's argument. Appellant's alleged alcoholism does not constitute new and material evidence that, despite due diligence, was not available when the record was closed. 5 C.F.R. 1201.115(a). Therefore, appellant's petition does not meet the regulatory criteria for review. Nor do we find that appellant has satisfactorily explained his failure to bring his proffered evidence before the presiding official for his consideration. We decline to now reopen and reconsider these factual allegations under authority of 5 C.F.R. 1201.117. *See Moses v. U.S. Postal Service*, 2 MSPB 193 (1980).

The Board, having fully considered appellant's petition for review of the initial decision issued on July 24, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also 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 the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

WASHINGTON, D.C., *January 15, 1981*