

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,)
)
Complainant,)
) Docket No. HQ12068410010
v.)
) Date: JUN 18 1995
JOHN H. DEFORD and)
RITCHIE R. JULIAN,1/)
)
Respondents.)
_____)

Before

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

FINAL DECISION

The Board has under consideration the Recommended Decision of Administrative Law Judge Edward J. Reidy and related pleadings^{2/} in an action initiated against respondent DeFord, who at the time of hearing was a member of the Senior Executive Service and Director of Administrative Services at the Environmental Protection Agency, Research Triangle Park, North Carolina (EPA/RTP).^{3/} In his Recommended Decision Judge Reidy concluded that, as charged in the complaint, DeFord had violated

1/ The proceeding as to respondent Julian was severed prior to hearing. Julian was the primary witness for the Special Counsel in the hearing on charges against respondent DeFord.

2/ Respondent DeFord has excepted to the Recommended Decision and the Special Counsel has responded.

3/ According to a letter Judge Reidy received from DeFord's counsel, DeFord planned to retire on November 23, 1984.

5 U.S.C. § 2302(b)(6).^{4/} Judge Reidy recommended a penalty of a \$750 forfeiture.

Section 2302(b)(6) prohibits the grant of any unauthorized preference or advantage to an employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person. The prohibition applies to any employee who has the authority to take, direct others to take, recommend, or approve any personnel action. 5 U.S.C. § 2302(b). A promotion is a personnel action. 5 U.S.C. § 2302(a)(2)(A)(ii).

Judge Reidy found DeFord had violated section 2302(b)(6) by ordering Ritchie Julian, the Personnel Officer at EPA/RTP and DeFord's subordinate, to promote one Sarah Francis Woodard, a Program Analyst on DeFord's immediate staff, retroactively. The promotion, effected at DeFord's order, was improper because the

^{4/} The Administrative Law Judge did not, in assessing this penalty, consider two counts which, on the same set of facts, alleged regulatory and rule violations. In fact, he dismissed these counts as¹ multiplicative. We do not need to address the issue of whether his ruling was erroneous because it is decisionally insignificant in this case. Given the close relationship between the statutory and non-statutory violations alleged herein, the allegations of the non-statutory violations merely offer alternate theories for why the single action taken was not in accordance with law. We make this determination fully aware that, in a different case, multiple violations of law committed in the course of taking a single action may justify the imposition of a more serious penalty than a single violation of law. Cf. Special Counsel v. Harvey, MSPB Docket No. HQ12068310021 (Dec. 6, 1984).

position had not been classified at the effective date of the promotion. DeFord believed the retroactive promotion would protect Ms. Woodard from downgrading should a reduction in force (RIF) be announced. The record fully supports Judge Reidy's conclusion and we adopt his summaries of the evidence and subsidiary findings as substantially correct.^{5/}

DeFord excepts to the Recommended Decision on the grounds that (1) the record does not support the conclusion that DeFord ordered Julian to promote Ms. Woodard; (2) DeFord is not responsible because Julian did not advise him the promotion was improper; (3) the promotion did not give Ms. Woodard a preference or advantage; and (4) if there was a violation of section 2302(b)(6), no penalty should attach under the circumstances. Upon a review of the record, the Board finds these exceptions meritless. The record fully supports Judge Reidy's conclusions that DeFord precipitously ordered Ms. Woodard's retroactive promotion to give her an advantage in a potential RIF.

I

THE EVIDENCE SUPPORTS THE FINDING THAT
DEFORD ORDERED JULIAN TO PROMOTE
MS. WOODARD

DeFord's challenge of the finding that he ordered Ms. Woodard's promotion is two-pronged. He contends first that

^{5/} Judge Reidy summarized the testimony at Appendix B to his Recommended Decision. The reference to one "Moody" in the summary of the testimony of Ms. Westmoreland is incorrect. The error is not decisionally significant. The transcript makes clear that the reference was to "Julian."

Julian's testimony that DeFord ordered him to promote Ms. Woodard is inherently implausible, and second that the evidence of record refutes Julian's claim. We find nothing inherently implausible in Julian's testimony and we find that the preponderance of the evidence supports Judge Reidy's finding.

A. Julian's Testimony

Judge Reidy found credible Julian's testimony that at a meeting on August 31 DeFord ordered him to promote Ms. Woodard. Judge Reidy stated that his analysis of the events surrounding the promotion was based on his observation of the witnesses. We depend heavily on a presiding official's assessment of credibility and give due deference to Judge Reidy's reliance on Julian's credibility. Weaver v. Department of Navy, 2 MSPB 297 (1980).

DeFord offers no persuasive reasons to overturn Judge Reidy's credibility finding. DeFord argues that Judge Reidy should have rejected Julian's testimony if he thought some of the testimony was false. DeFord cites Kennedy v. Aro, Inc., 447 F.Supp. 1083 (E.D. Tenn. 1977), citing Norfolk & W.Ry. Co. v. McKenzie, 116 F.2d 632 (6th Cir. 1941), for the "rule of law" that if a witness is found to have made a statement under oath that is afterward found to have been false, the trier of fact has every right to distrust the witness. Both of those cases state clearly that the "rule of law" is flexible and permissive, not mandatory. Judge Reidy recognized discrepancies in Julian's testimony, but determined nevertheless that Julian's account of the August 31 meeting with DeFord was credible.

Nor do we find Judge Reidy's reliance on other evidence and documentation to support his finding of Julian's credibility erroneous. Julian's colleague, Edwin R. Strickland, Supervisory Personnel Management Specialist EPA/RTP, testified that the morning of August 31 when he complained to Julian about a promotion without documentation, Julian told him that he was acting under orders from DeFord. Diane Westmoreland, Personnel Staffing Specialist EPA/RTP, also testified that when on August 31 she challenged Julian about the promotion, Julian said he acted on orders from DeFord. Thus, two employees in the Personnel Office testified as to what Julian told them after his meeting with DeFord. The Request for Promotion (SF-52) bearing a date of August 31 was the first documentation in the Personnel Office. The SF-52 came from DeFord the afternoon of August 31 and had an effective date of August 23.

DeFord next challenges Judge Reidy's reliance on an absence of motive in judging Julian credible.^{6/} DeFord's effort to show that Julian was motivated to testify falsely against him is unpersuasive. DeFord relies on "institutional animosity" and DeFord's admonitions to Julian concerning his office decorum and his performance. The testimony on "institutional animosity" is too insubstantial to attribute ill will to Julian. The admonitions by DeFord occurred in 1982 and 1983. Although Julian might have had reason to accuse DeFord falsely, Julian's hearing

^{6/} Judge Reidy relied on the proposed settlement between Julian and the Special Counsel in which Julian agreed to serve a 90-day suspension.

his testimony as to the August 31 meeting with DeFord is consistent with what he told Strickland and Ms. Westmoreland on August 31, 1981, prior to any admonitions from DeFord.

B. The Other Evidence Concerning the Promotion

After challenging Judge Reidy's judgment in appraising Julian's testimony that DeFord ordered him to promote Ms. Woodard, DeFord attempts to show that Julian's testimony was "overwhelmingly" refuted by other evidence of record. DeFord has combed the record for testimony contradicting Julian's testimony that DeFord ordered him to promote Ms. Woodard.

The recited evidence does not overcome Judge Reidy's finding that Julian's testimony is credible. Two witnesses (Frances Bradow and Houston Blair) testified as to Julian's statements during an EPA/RTP meeting on a discrimination complaint by Blair against DeFord and Julian arising from Ms. Woodard's promotion. They testified that Julian assumed responsibility for the promotion and said it had been done properly. Julian explained in effect that he was protecting DeFord in an internal EEO matter where all the participants were subordinate to DeFord.^{7/} The explanation is plausible and we accept it. Moreover, countering the statements made at the EEO meeting were Julian's statements made earlier to his colleagues in the Personnel Office on August 31.

^{7/} Blair also testified that Julian said he would not let any of his staff be responsible for the promotion. This is consistent with Ms. Westmoreland's testimony that Julian told her he had signed the SF-52 so that no one on his staff would have to be responsible.

We are also unpersuaded by DeFord's argument that Julian's testimony that he acted out of fear of DeFord is unbelievable and thus casts doubt on Judge Reidy's finding Julian's testimony credible. Whether Julian acted out of fear or as a "good soldier" is irrelevant to whether DeFord ordered him to promote Ms. Woodard.

Also irrelevant to the question of whether DeFord ordered Julian on August 31 to promote Ms. Woodard is the evidence of DeFord's informal approaches to Julian in the spring of 1981. Contrary to DeFord's contention that the promotion was well underway and routine, these informal discussions came to nothing.^{8/} DeFord had never made even an oral request for Ms. Woodard's promotion. The Personnel Office had no documentation of any kind on a promotion for Ms. Woodard until August 31. The position was not classified before August 31.

In contrast, the events on August 28 and August 31 directly relate the effort to promote Ms. Woodard to DeFord's knowledge that she would be downgraded if the simulated RIF were effected. He asserted on August 28 that she had already been promoted. He sent the SF-52 on August 31 after his meeting with Julian.

^{8/} After talking with DeFord and Ms. Woodard about her duties, Julian had concluded, based on twenty years experience, that her duties did not warrant a promotion. He doubted that her current duties warranted a GS-12. For several years her grade 12 had been under question, a fact that DeFord knew.

DeFord contends that Judge Reidy's finding on the order to promote fails because there was no motive for DeFord to promote Ms. Woodard. To violate section 2302(b)(6), DeFord must have given the order "for the purpose" of advantaging Ms. Woodard.

We think the record shows plainly the reason for DeFord's precipitous actions. He considered Ms. Woodard a valuable employee. In the spring she had asked him for a promotion to a grade 13. She had not been promoted. When he saw the simulated RIF, he anticipated that she would be "bumped" and reduced in grade to a GS-11. He wanted to protect her from the grade reduction.

In addition, the simulated RIF was based on the abolition of a GS-12 position in the office of Dr. Thomas Houser, the senior research and development official at EPA/RTP, whose office DeFord served. The incumbent of that position would have "bumped" Ms. Woodard from her GS-12 position. DeFord could have wanted Ms. Woodard's promotion to be in effect as long as possible prior to any announcement of a RIF in Dr. Houser's office in order to disassociate her promotion from the RIF and to avoid the appearance that he had protected one of his staff at the expense of one of Dr. Houser's staff.

II

DEFORD IS RESPONSIBLE FOR THE PROMOTION.

DeFord tries to absolve himself of responsibility for the execution of his order on the ground that Julian failed to tell him the promotion was improper. The sequence of events and

DeFord's meeting with Julian show that DeFord was interested in effecting the promotion retroactively.

DeFord told Strickland on Friday August 28 that the promotion had already been accomplished and was in effect, a statement that was not true. At the meeting with Julian on Monday August 31, DeFord told him that he (DeFord) had decided the job was a 13 and he ordered Julian to promote Ms. Woodard. DeFord's manner brooked no opposition. DeFord had the authority to promote Ms. Woodard. He sent Julian an SF-52 showing the promotion was to be retroactive. Not only did DeFord's manner inhibit opposition, but also it is highly improbable under all the circumstances that DeFord would have listened to or heeded advice that the promotion was improper.^{9/}

Under his delegated authority to prevent prohibited personnel practices (5 U.S.C. § 2302(c)), DeFord had an obligation to ascertain the requirements of law before he told Strickland on August 28 that Ms. Woodard had been promoted effective August 23 and before he ordered Julian on August 31 to promote her retroactively.

^{9/} Ms. Woodard's promotion violated 5 C.F.R. § 511.701(a)(1)(ii), (2), and (4) and Federal Personnel Manual, Subchap 7, 7-1. Retroactive position classification is prohibited. The personnel action promoting her must occur within a reasonable time after the classification. The classification of Ms. Woodard's position was made retroactive to August 21 to accommodate the retroactive promotion. The testimony of DeFord's expert witness was consistent with these regulations. He testified that there is no prohibition on a retroactive career promotion for a position that is already established and classified. The Special Counsel proved the promotion as it was effected was unauthorized.

III

THE PURPOSE OF THE PROMOTION WAS TO
ADVANTAGE MS. WOODARD.

DeFord argues that Ms. Woodard received no preference or advantage and therefore no violation occurred. Section 2302(b)(6) does not require that the unauthorized promotion result in an advantage, but only that the purpose be to give an advantage.

DeFord granted Ms. Woodard a retroactive promotion for the purpose of advantaging her. The fact that the wrongful promotion may not have advantaged her as DeFord had anticipated because the RIF never occurred does not make his grant of the promotion any less a violation of section 2302(b)(6). DeFord ordered Ms. Woodard's unauthorized retroactive promotion; DeFord's purpose was to protect her from a downgrade; therefore, DeFord violated section 2302(b)(6).

IV

THE RECOMMENDED PENALTY IS APPROPRIATE.

Before recommending a penalty, Judge Reidy carefully reviewed the circumstances of record, including information and belief that DeFord had retired from federal service on November 23, 1984. He concluded that the most practical penalty would be a forfeiture. Judge Reidy used the teachings of Douglas v. Veterans Administration, 5 MSPB 313 (1981), as a guideline in recommending the amount of the forfeiture. Among other factors,

Judge Reidy considered that DeFord's past disciplinary record was spotless and his performance and dependability unassailable. Judge Reidy recommended a \$750 penalty. We adopt the recommendation.

V

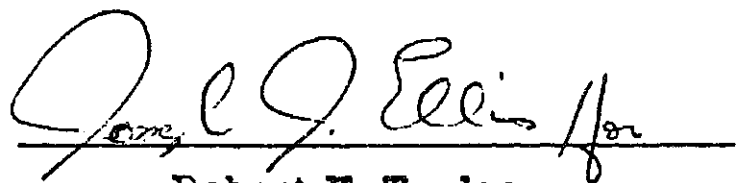
CONCLUSION

We adopt and incorporate the recommended decision except as modified or supplemented herein. Accordingly, we find that John H. DeFord violated 5 U.S.C. § 2302(b)(6) by ordering the retroactive promotion of Sarah Woodard to protect her from a potential downgrade in a reduction in force and we impose a forfeiture in the amount of \$750. Within 30 days of issuance of this final decision, DeFord shall remit a check or similar instrument in the amount of \$750 made payable to the U.S. Merit Systems Protection Board, and addressed to the U.S. Merit Systems Protection Board, Office of the Comptroller, 1120 Vermont Avenue, N.W., Washington, D.C. 20419.

This is the final order of the Merit Systems Protection Board. Respondent DeFord is hereby notified of the right to seek judicial review of the Board's action as provided in 5 U.S.C. § 1207(c).

FOR THE BOARD:

Washington, D.C.



Robert E. Taylor
Clerk of the Board