UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 155

Docket No. AT-0752-09-0193-I-1

Ryan C. Spencer,
Appellant,
v.
United States Postal Service,
Agency.

August 7, 2009

Roy L. Palmer, Conley, Georgia, for the appellant.

Randle Smith, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's petition for review (PFR) of an initial decision that sustained several misconduct charges against him, but changed the agency's reduction in grade/pay to a 30-day suspension. For the reasons set forth below, we GRANT the appellant's PFR under 5 C.F.R. § 1201.115(d), VACATE the initial decision with respect to the penalty determination, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, an EAS-20 Manager, Distribution Operations, was demoted to an EAS-17 Supervisor, Distribution Operations, effective November 22, 2008, based on five allegations of misconduct. Initial Appeal File (IAF), Tab 5, subtabs 4A (Letter of Decision), 4D (Notice of Proposed Reduction in Grade/Pay). The appellant filed this appeal.[1] IAF, Tab 1.

¶3 In the Notice of Proposed Reduction in Grade/Pay, the agency explained that it was proposing the action for the following reasons:

> **CHARGE 1: YOU ARE CHARGED WITH UNSATISFACTORY WORK PERFORMANCE, FAILURE TO PERFORM ASSIGNED DUTIES IN AN EFFECTIVE MANNER; FAILURE TO ENSURE TIMELY PROCESSING OF COMMITTED MAIL VOLUMES; FAILURE TO ACCURATELY REPORT DELAYED MAIL ON DAILY CONDITION REPORT (DMCR); AND FAILURE TO FOLLOW INSTRUCTIONS.**

IAF, Tab 5, subtab 4D at 1 (capitalization, bolding and underlining in original). The agency then provided a narrative of the events that appear to summarize the factual bases for the charged misconduct. *Id.* at 1-3.

¶4 During the Prehearing Conference, the administrative judge, *sua sponte*, announced that he would be "interpreting the charge as five separate charges," *i.e.*, 1) unsatisfactory work performance; 2) failure to perform assigned duties in an effective manner; 3) failure to ensure timely processing of committed mail volumes; 4) failure to accurately report delayed mail on the DMCR; and 5) failure to follow instructions. IAF, Tab 11 at 2. Although the appellant objected to this ruling below and argued instead that the agency intended one charge with

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[1] Although the appellant originally claimed that he was asserting harmful error as an affirmative defense, *see* IAF, Tab 1 at 5, during the Prehearing Conference, he indicated that he was not asserting any affirmative defenses. IAF, Tab 11 at 2.

multiple subparts, IAF, Tab 13, the agency did not so object.[2] Neither party has contested the administrative judge's construction of the charges on PFR.

¶5 A hearing was held on February 10, 2009. Hearing CD (HCD). On March 3, 2009, the administrative judge issued an initial decision, sustaining all of the charges, except the failure to accurately report delayed mail on the DMCR charge, and changing the penalty to a 30-day suspension without pay. IAF, Tab 16. The appellant filed a PFR and the agency filed a response. Petition for Review File (PFRF), Tabs 1, 3. The agency did not file a cross-PFR.

ANALYSIS

¶6 On PFR, the appellant challenges the sustained charges, but those arguments do not warrant granting his PFR. *See* 5 C.F.R. § 1201.115(d). The appellant also challenges the penalty. We are granting his PFR to address a problem with the penalty determination.

¶7 Generally, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v.*

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[2] We discern no error that prejudiced either party's substantive rights with the administrative judge's decision to construe the agency's charge as separate acts of misconduct, and thus, as separate charges. *See Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 12 (2006) ("When a single stated charge contains two [or more] separate acts of misconduct that are not dependent upon each other and that do not comprise a single, inseparable event, each act constitutes a separate charge.") (internal citations omitted), *aff'd*, No. CIV 06-0807 JB/ACT, 2009 WL 1563868 (D.N.M. May 4, 2009); *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

However, based on our review of the record, we believe that the unsatisfactory work performance charge merges into the remaining sustained charges. *See Mann v. Department of Health & Human Services*, 78 M.S.P.R. 1, 6 (1998) (noting that the Board has merged a general charge, such as conduct unbecoming a federal employee, into a more specific charge, such as falsification, and that "[s]uch merger has been held appropriate when the agency 'did not accuse the appellant of any specific misconduct under the unacceptable conduct charge in addition to its . . . allegations' of misconduct underlying the more specific charge") (internal citation omitted).

Veterans Administration, 5 M.S.P.R. 280, 306 (1981). The factors to be considered in determining the propriety of a penalty include the nature and seriousness of the offense, the employee's past disciplinary and work records, the supervisor's confidence in the employee's ability to perform his assigned duties, the clarity with which the employee was on notice of any rules violated, and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Douglas*, 5 M.S.P.R. at 305-06. The Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities. *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). All of the factors will not be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306.

¶8 But, when the Board sustains fewer than all of the agency's charges, as here, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). In doing so, the Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining its employees. *Id.* at 1258.

¶9 The administrative judge noted that the deciding official, Metro Plant Manager Marilyn S. Spells, did not testify because she was unavailable for the foreseeable future due to a medical condition, and that the agency introduced the testimony of the deciding official's replacement, Gwen Green, regarding what penalty she would have imposed. The administrative judge found that neither Spells's decision letter, nor Green's testimony, addressed what the agency would have done if all of the charges were not sustained. Initial Decision (ID) at 9 n.1. Similarly, Spells's decision letter did not reflect any meaningful discussion of the

pertinent *Douglas* factors that she considered and Green's testimony regarding her analysis of those factors was irrelevant. IAF, Tab 5, subtab 4A; HCD, Track 1013.

¶10 Absent relevant evidence from the agency, the administrative judge properly conducted his own penalty analysis. He considered mitigating and aggravating factors, found that the agency-imposed demotion exceeded the bounds of reasonableness, and concluded that a 30-day suspension was the maximum reasonable penalty. ID at 10-11. In doing so, the administrative judge believed that he was mitigating the penalty. *Id.* at 1, 11.

¶11 We find, though, that the 30-day suspension imposed by the AJ may not be the maximum reasonable penalty under the circumstances of this case. On PFR, the appellant argues that the suspension is not reasonable because, in effect, it constitutes a harsher penalty than the demotion. In that regard, he asserts that the demotion would result in a pay reduction of only $1,100 a year, whereas the 30-day suspension would result in an immediate pay reduction of $6,500 (even if for only 1 year). PFRF, Tab 1 at 4. Although there are different ways to evaluate whether a particular penalty is more or less severe than another, the appellant's argument that the administrative judge actually increased the penalty warrants consideration. The Board has never concluded that it has the authority to increase an agency-imposed penalty. *See Douglas*, 5 M.S.P.R. at 284 (concluding that the Board has the authority to *mitigate* a penalty when the Board determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable) (emphasis added).

¶12 The appellant could not have presented his argument that the 30-day suspension is unreasonable to the administrative judge because he did not know that the administrative judge would ultimately change the agency-imposed demotion. Therefore, we direct the administrative judge to reevaluate the penalty considering the appellant's argument.

ORDER

¶13 For the above reasons, we VACATE the initial decision only with respect to the penalty determination. We REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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