UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS B. STEIN, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBERS[1] CH07529110504 CH0752910504C1 DATE: MAY 7 1993

John P. Gamlin, Esquire, John P. DiFalco & Associates, P.C., Fort Collins, Colorado, for the appellant.

Zana Dakroub, Royal Oak, Michigan, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that mitigated his removal to a demotion to the next lower nonsupervisory full-time position. For the reasons set

---

[1] The appellant's petition for review of the compliance initial decision issued on February 4, 1992, and his petition for review of the initial decision issued on September 19, 1991, involve related facts. We find, therefore, that joining the petitions will be more expeditious than separate adjudication of each petition and that such joinder will not adversely affect any party. See 5 C.F.R. § 1201.36(a)(2); *Parker v. United States Postal Service*, 46 M.S.P.R. 214, 214 n.1 (1990).

forth below, the Board GRANTS the petition for review and AFFIRMS the initial decision AS MODIFIED by this Opinion and Order, further mitigating the penalty of removal to a 60-day suspension. The appellant has also petitioned for review of a compliance initial decision that denied his petition for enforcement of an interim relief order. For the reasons set forth below, the Board DISMISSES the appellant's petition for review as moot.

BACKGROUND

The appellant filed a petition for appeal from the agency's action removing him from his position of Superintendent of Postal Operations - Mail Processing at the Farmington, Michigan, Post Office. *See* Initial Appeal File (IAF), Tab 1. The agency alleged that the appellant, on five separate occasions, had manipulated reports of mail volume that were forwarded to the agency's regional office, and that this was done to falsely increase the Farmington Post Office's productivity rate and to improve the appellant's own merit performance rating. *See* IAF, Tab 3, Subtab K. After a hearing, the administrative judge issued an initial decision that sustained one charge of falsification but found that the other four charges were not supported by preponderant evidence. *See* Initial Decision (I.D.) at 4-5. The administrative judge ordered that the removal penalty be mitigated to a demotion to the next lower nonsupervisory full-time position, and he directed the agency to provide interim

relief to the appellant if a petition for review is filed. *See id.* at 5-8.

The appellant has filed a petition for review in which he alleges that the administrative judge erred by: (1) Improperly shifting the burden of proof to the appellant to show that he did not intentionally falsify the volume of mail at the Farmington Post Office with regard to the incident on October 3, 1990;[2] and (2) Misapplying relevant case law when he found that a demotion was a reasonable penalty under the circumstances. *See* Petition for Review File (PFRF), Tab 1, at 3, 17. The appellant also filed a petition for enforcement of the interim relief order. *See* Compliance File (CF), Tab 2. The administrative judge issued a compliance initial decision in which he dismissed the appellant's petition for enforcement, finding that the agency had complied with his interim relief order. *See* Compliance Initial Decision (CID) at 1-6. The appellant has filed a petition for review alleging that the administrative judge erred in his findings on the compliance issue. *See* Petition for Review File 2 (PFRF 2), Tab 1. The agency has responded in opposition to the appellant's petition for review; the appellant has filed a motion to strike that submission, arguing that the response was untimely. *See* PFRF 2, Tabs 3, 4.

---

[2] The appellant claims that the agency did not charge him with intentional falsification of mail volume figures, *see* PFRF, Tab 1 at 21, but examination of the charges made by the agency belies that claim. *See* IAF, Tab 3, Subtab K.

ANALYSIS

The agency's charges

The administrative judge stated in the initial decision that the agency had levelled five separate charges against the appellant. *See* I.D. at 2-3. That statement is incorrect, although it is based on the agency's imprecise use of the word "charge" in its notice of proposed removal. The agency first stated in the proposal letter that the appellant was charged with "failure to maintain the integrity of Postal operations" entrusted to him by manipulating production reports "to falsely increase productivity." *See* IAF, Tab 3, Subtab K. It then listed five separate occasions on which the appellant had allegedly manipulated mail volume reports and described each allegation as a "charge." *See id.*

It is clear from the structure of the proposal letter, however, that the agency's discussion of the "charges" was merely a description of the factual specifications of its overall charge, i.e., that the appellant had failed to maintain the integrity of Postal operations entrusted to him when he falsely increased mail volume and productivity figures. *See, e.g., Diaz v. Department of the Army*, MSPB Docket No. SF07529206881I1 (Feb. 16, 1995), slip op. at 3-8; *Boykin v. United States Postal Service*, 51 M.S.P.R. 56, 58-59 (1991). Proof of only one of the specifications supporting a charge is sufficient to sustain the charge. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). Thus, if the agency established that the appellant had

falsified mail volume on one occasion, then it established its overall charge of failure by the appellant to maintain the integrity of Postal operations entrusted to him. *See id.* *The administrative judge did not err in finding that the agency proved the necessary intent to falsify.*

To sustain a falsification charge, the agency must prove by a preponderance of the evidence that the employee knowingly supplied wrong information with the intent of defrauding the agency. *See Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). It is well settled that the issue of the appellant's intent must be resolved not from demeanor evidence alone, but rather from the totality of the circumstances. *See Delessio v. United States Postal Service*, 33 M.S.P.R. 517, 520 (1987), *aff'd*, 837 F.2d 1096 (Fed. Cir. 1987) (Table); *Filson v. Department of Transportation*, 7 M.S.P.R. 125, 132 (1981), citing *Tucker v. United States*, 624 F.2d 1029, 1033 (Ct. Cl. 1980), citing *Scanland v. U.S. Army Test and Evaluation Command*, 389 F. Supp. 65, 75 (D. Md. 1975) ("[i]ntent being a state of mind, can seldom be proved directly. Circumstantial evidence is generally utilized...to establish intent."). In this regard, an incorrect statement coupled with the lack of any credible explanation or contrary action by an employee has been held to constitute circumstantial evidence of an intention to deceive. *See Randolph v. Department of Education*, 38 M.S.P.R. 99, 102 (1988).

The appellant alleges in his petition for review that the administrative judge improperly penalized him for his inability to remember specifically why he gave an accounting technician a signed, dated order to adjust mail volume for October 3, 1990, upward by 50,000 pieces. *See* PFRF, Tab 1, at 4. He alleges that the administrative judge shifted the burden of proof to him, in violation of 5 C.F.R. § 1201.56(a)(ii), to show that he did not intentionally falsify mail volume. *See id.* That claim misreads what the administrative judge actually found. The administrative judge found incredible the appellant's assertion that he ordered the increase because of a vaguely remembered "major problem" on that day, given the size of the increase, the lapse of two days before the adjustment was made, and the improbability that an error could account for an even 50,000 pieces of mail. *See* I.D. at 5. In this context, it must also be considered that the recorded ratio of sorted mail to carrier delivered mail was higher at the Farmington Post Office than at other offices. *See* IAF, Tab 3, Subtab 1. The administrative judge thus held that it was more likely that the even-numbered increase in mail volume was ordered to enhance the appearance of the efficiency of the appellant's operation than to correct a previously undiscovered error, applying the factors set out in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).[3] The appellant criticizes

[3] Under *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), to resolve credibility issues, an administrative

this holding as finding him guilty based on his inability to remember events that occurred months before the hearing, further alleging that the administrative judge applied only the "inherent improbability" factor in *Hillen* and neglected to consider the other factors. *See* PFRF, Tab 1, at 5-10.[4]

The administrative judge correctly resolved the credibility determinations in accordance with *Hillen*. He first identified the factual questions in dispute, summarized the agency's charges, and then analyzed the evidence that the parties offered with respect to the charges. *See* I.D. at 2-5. The administrative judge then stated that he believed the agency's version, and explained why he found the appellant's version incredible. *See id.* at 5. This decisional process mirrors closely the analytical steps mandated by *Hillen*. 35 M.S.P.R. at 458. Although the administrative judge did not specifically discuss each *Hillen* factor, this omission does

---

judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

[4] The appellant criticizes the administrative judge for his skepticism about the appellant's inability to remember, at the time of the hearing, events that occurred ten months before, *see* PFRF, Tab 1 at 10, but it should be noted that the appellant had notice of an ongoing investigation of his operation three months after the events occurred, and received specific, formal charges five months after the events occurred. *See* IAF, Tab 3, Subtab 2 at 3 of 16, Subtab L, Subtab 52; Subtab K.

not mean that he did not consider the appropriate factors. *See Marques v. Department of Health and Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Here, the administrative judge reviewed the record thoroughly, found the appellant's explanation incredible and outlined his reasons for so holding, and thus held that the record contained circumstantial evidence of the appellant's intent to falsify. *See Filson*, 7 M.S.P.R. at 132. Nothing in the appellant's characterization of the evidence or in the conclusions he draws therefrom compels us to abandon the traditional deference accorded the findings of an administrative judge. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985). Therefore, he did not err in finding that the agency had carried its burden of proof, and in sustaining the charge of falsification.

The administrative judge erred by not sufficiently mitigating the agency's removal action.

The appellant asserts in his petition for review that the penalty of demotion to the next lower non-supervisory full-time position was too harsh for the offense committed, and that the administrative judge erred in his application of the factors listed in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981). *See* PFRF, Tab 1, at 17-24. Specifically, he argues that the administrative judge did not consider all the mitigating factors and unique circumstances involved in the appellant's case, and that the cases cited to

support the administrative judge's choice of penalty are inapposite here. *See id.* at 20-23.

In reviewing the appropriateness of a penalty, the Board may determine whether it is clearly excessive, disproportionate to the charges, arbitrary, capricious, or unreasonable. *See Douglas*, 5 M.S.P.R. at 302 (1981). Further, when not all of the charges brought by the agency are sustained, the penalty imposed by the agency must be evaluated on the basis of only those sustained. *See id.* at 308. The Board has held that relevant factors to be considered in evaluating penalties imposed for falsification include: the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities; the appellant's past disciplinary record; the effect of the offense upon the appellant's ability to perform at a satisfactory level; and the mitigating factors surrounding the offense. *See Rigilano v. United States Postal Service*, 41 M.S.P.R. 513, 519 (1989).

It is true that an employee who knowingly gives false or inaccurate information to his supervisors strikes at the very heart of the employer-employee relationship. *See Hanna v. Department of the Army*, 42 M.S.P.R. 233, 240 (1989). Here, the administrative judge noted that the offense represented an isolated incident (for which the appellant received no direct benefit) set against the background of sixteen years of service by the appellant to the agency, with a good disciplinary record. *See* I.D. at 6. And, the administrative

judge made no finding that the appellant's offense has affected his ability to perform his duties. *See id.* at 5-7. Also, some testimony suggests that the appellant could still work well with his colleagues and subordinates, demonstrating possible rehabilitation potential. *See* Hearing Tapes, Tapes 4B, 5A, 5B (Testimony of Dennis Bzowka); Tapes 6A, 6B (Testimony of David Daane); and Tape 6B (Testimony of Sandra Martin).

The cases that the administrative judge cited to support his choice of demotion as the appropriate penalty are not closely analogous to these facts, since they involve situations where the employees engaged in repeated, widespread misconduct that involved a direct, significant aspect of financial gain; they do not squarely address the appropriate penalty for an isolated incident involving no direct benefit to the appellant. *See Jackson v. United States Postal Service*, 48 M.S.P.R. 472, 474-75 (1991), and *McAllister v. United States Postal Service*, 42 M.S.P.R. 658, 660 (1989). Also, the Board has previously found, depending on the individual circumstances of each case, that a 60-day suspension may be the maximum supportable penalty even for falsification of documents involving some prospective financial gain for the offender. *See Schoeffler v. Department of Agriculture*, 47 M.S.P.R. 80, 91 (1991), *vacated in part on other grounds*, 50 M.S.P.R. 143 (1991).

Given these facts, the conclusion follows that a lesser penalty for the appellant's first offense in his otherwise

satisfactory service record is warranted, and will serve to bring about his rehabilitation. *See, e.g., Schoeffler*, 47 M.S.P.R. at 91. Under the circumstances presented, the maximum reasonable penalty for the appellant's misconduct is a 60-day suspension, which recognizes the seriousness of the offense, and whose stringency will act to deter future misconduct by the appellant. *See id.*

Since final relief in this appeal is more favorable to the appellant than the interim relief ordered in the initial decision, his petition for enforcement of the interim relief order has been rendered moot; therefore, we dismiss as moot his petition for review of the compliance initial decision. We also note that the agency's response to his petition was untimely filed without a showing of good cause for the delay. *See* PFRF 2, Tabs 2, 4. The Board thus would not need to consider it even if the merits of the petition for review were examined, and we therefore grant the appellant's motion to strike the response. *See* PFRF 2, Tab 2; 5 C.F.R. § 1201.114(i).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 60-day suspension without pay, retroactive to the effective date of the removal action, May 4, 1991. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, with interest, and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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:

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 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:

Robert E. Taylor
Clerk of the Board

Washington, D.C.