UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 173

Docket No. PH-0752-09-0126-I-1

Thomas O. Ward,

Appellant,

v.

United States Postal Service,

Agency.

August 31, 2009

Joseph J. Chester, Esquire, Pittsburgh, Pennsylvania, for the appellant.

Daniel J. Monahan, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the appellant's petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still AFFIRMING the appellant's removal.

BACKGROUND

¶2 The appellant was a preference eligible Maintenance Mechanic for the agency. Initial Appeal File (IAF), Tab 4 at 14. On August 29, 2008, the agency proposed the appellant's removal based on one charge of "Improper Conduct." *Id*. at 15-17. The narrative specification stated that the appellant "improperly

acted in a menacing and violent behavior [sic] towards" Supervisor of Maintenance Operations Jeanien Bickerstaff. *Id*. at 15, 17. Specifically, it stated that the appellant met with Ms. Bickerstaff in her office to complete a PS Form 1769 accident report and an associated PS Form 3971 leave request, and that the appellant and Ms. Bickerstaff completed these forms without incident. *Id*. at 15. The appellant then produced two additional PS Forms 3971 and requested that Ms. Bickerstaff sign and date them as well. *Id*. Ms. Bickerstaff, in her capacity as proposing official, related the following version of events:

> I told you that I could not sign these leave slips as they had already been signed and dated by your regular supervisor. You got loud and told me that I would sign them because you could not read the date. I asked you for the document[s] and you refused to give them to me.
>
> I told you again that I could not sign and date them as by changing the documents I would be falsifying them. I also instructed you again to return the documents to me. I told you that I needed them back to send to FMLA. You shouted at me stating that you are not giving them back until I sign those (meaning copies of the documents). I again told you that I needed the original documents back. You yelled that you did not care if I had you taken out of the building and that you were not giving them back.
>
> While you were yelling at me I was in a seated position at a desk. You were across the desk from me, in a standing position, and standing over me in a menacing position. I received your behavior as threatening.
>
> I called Postal Police and asked for assistance. I instructed you to remain in the office, but you stormed out of the office taking the original PS Forms 3971's with you.
>
> Once located, you were promptly escorted out of the building.

Id. at 15-16. The deciding official, Manager of Post Office Operations Daniel O'Hara, issued a final decision removing the appellant. *Id*. at 11-13. Mr. O'Hara stated he reviewed the appellant's Official Personnel File and considered his 23 years of service, but after considering "all of the relevant Douglas Factors," he found that removal was warranted. *Id*. at 11.

¶3 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 2. He argued that the charge against him was false, IAF, Tab 1 at 3, Tab 8 at 4, and he claimed several affirmative defenses, IAF, Tab 1 at 3, 5-8, Tab 8 at 4. After a hearing, the administrative judge issued an initial decision affirming the appellant's removal. IAF, Tab 12 (ID) at 1, 12. She found that the agency proved its charge, ID at 2-5, and the appellant failed to prove his affirmative defenses, ID at 5-9. The administrative judge also found that the agency established a nexus between the appellant's conduct and the efficiency of the service, and she found no basis to disturb the agency's penalty determination. ID at 9-12.

¶4 The appellant filed a petition for review, arguing that the agency failed to prove its charge, Petition for Review File (PFRF), Tab 1 at 2-8, the deciding official considered penalty factors not mentioned in the notice of proposed removal, and the removal penalty was inappropriate, *id*. at 2-3, 8-9. [1] The agency has filed a response, addressing the appellant's arguments and arguing that the petition for review should be denied for failure to meet the review criteria. PFRF, Tab 4 at 4-11.

ANALYSIS

¶5 With respect to the merits of the charge, we agree with the AJ's finding that the agency supported its charge of Improper Conduct by a preponderance of the evidence. ID at 5. We grant the appellant's petition, however, for the purpose of addressing the agency's penalty determination.

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[1] Because the appellant does not argue that the administrative judge erred in finding that he failed to prove his affirmative defenses, we have not addressed those issues on review. *See Dobert v. Department of the Navy*, 74 M.S.P.R. 148, 150 n.1, *review dismissed*, 116 F.3d 1496 (Fed. Cir. 1997) (Table); 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely petition for review or cross-petition for review).

¶6 The appellant argues that, in arriving at the removal penalty, the deciding official, Daniel O'Hara, impermissibly considered alleged past instances of misconduct, PFRF, Tab 1 at 3, 8-9, and that the removal penalty exceeds the bounds of reasonableness, *id*. at 2-3, 8-9. For the reasons set forth below, we agree with the appellant that the deciding official impermissibly considered alleged past instances of misconduct, but we disagree that the removal penalty exceeds the bounds of reasonableness.

¶7 At the hearing, Mr. O'Hara testified regarding the factors that he considered in arriving at the removal penalty. Hearing Tape (HT) 1, Side B. He stated that the factors weighing in the appellant's favor were his 23 years of service and his lack of a disciplinary record. *Id*. He testified, however, that these factors were outweighed by the nature and seriousness of the offense as it related to the appellant's position, the clarity with which the appellant was on notice of the impropriety of his actions, and the appellant's lack of potential for rehabilitation based on his past work record. *Id*. Mr. O'Hara stated that, in speaking with several different managers and supervisors, he became aware that "the same issue kept coming up again, and again, and again," where the appellant engaged in "loud, intimidating behavior" and "unacceptable conduct." He supported his assertion by briefly describing five other alleged incidents in which the appellant engaged in loud, intimidating, threatening, and belligerent behavior. *Id*. Mr. O'Hara testified that he considered imposing a lesser penalty than removal, but in light of the "recurring pattern of behavior," he did not believe that the appellant's conduct could be corrected through any form of lesser discipline. *Id*.

¶8 In her initial decision, the administrative judge discussed the appellant's alleged prior misconduct in the context of the penalty analysis and found that, although the appellant had not been formally disciplined for these incidents, "non-disciplinary counselings and letters of warning may be used as a basis for imposing an enhanced penalty." ID at 11. She found that "these incidents are

precisely the types of non-disciplinary counselings a deciding official may use to enhance a penalty." *Id.* The administrative judge considered that Mr. O'Hara learned of the prior incidents through ex parte communications, but she found that they were not of the type that resulted in undue pressure on Mr. O'Hara to rule in a particular manner. *Id.*; *see generally Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (in deciding whether an ex parte communication has deprived an appellant of due process, the Board should consider the facts and circumstances of each particular case, including whether the communication introduced cumulative information or new information, whether the appellant knew of the communication and had a chance to respond to it, and whether the communication was of the type likely to result in undue pressure on the deciding official to rule in a particular manner).

¶9 In analyzing this issue, the administrative judge erred in two respects. First, she erred in finding that Mr. O'Hara could consider the alleged acts of prior misconduct in his penalty analysis. ID at 11. Because these matters were not mentioned in the notice of proposed removal, but rather were mentioned for the first time during the Board appeal, it was improper for Mr. O'Hara to consider them as aggravating factors weighing in favor of an enhanced penalty. IAF, Tab 4 at 15-17; *see Tryon v. U.S. Postal Service*, 108 M.S.P.R. 148, ¶ 8 (2008); *Westmoreland v. Department of Veterans Affairs*, 83 M.S.P.R. 625, ¶¶ 7-9 (1999), *aff'd*, 19 F. App'x 868 (Fed. Cir. 2001); *see also Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 304 (1981) (aggravating factors on which the agency intends to rely for imposition of an enhanced penalty should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official).

¶10 Second, the administrative judge erred in analyzing the issue as one of improper ex parte communication. ID at 11. Where an ex parte communication does not relate to the charge itself, but relates instead to the penalty, the Board has not considered such error to be denial of due process of law to be analyzed

under the factors set forth in *Stone*; rather, the Board will remedy the error by doing its own analysis of the penalty factors. *Biniak v. Social Security Administration*, 90 M.S.P.R. 682, ¶ 10 (2002); *see, e.g., Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76, ¶ 33 n.4 (2008), *aff'd*, 314 F. App'x 318 (Fed. Cir. 2009); *Groeber v. U.S. Postal Service*, 84 M.S.P.R. 646, ¶¶ 9-11 (2000), *aff'd*, 13 F. App'x 973 (Fed. Cir. 2001). The agency's error, therefore, does not necessarily require mitigation of the penalty; the question is whether removal is within the bounds of reasonableness, considering the pertinent factors other than the appellant's past work record. *Mingledough v. Department of Veterans Affairs*, 88 M.S.P.R. 452, ¶ 10 (2001), *review dismissed*, 35 F. App'x 873 (Fed. Cir. 2002).

¶11 Factors that are generally recognized as relevant in determining the appropriateness of the penalty were set forth by the Board in *Douglas*, 5 M.S.P.R. at 305-06. The facts and circumstances of a given case may warrant consideration of additional factors not numerated in *Douglas*. *See id*. at 305. In addition, not every *Douglas* factor will be pertinent in every case, and "some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances." *Id*. at 306. The key is a "responsible balancing of the relevant factors" in each case. *Id*. In determining the appropriateness of the penalty, the Board is not required to articulate irrelevant factors, but failure to consider a significant mitigating circumstance constitutes an abuse of discretion. *VanFossen v. Department of Housing & Urban Development*, 748 F.2d 1579, 1581 (Fed. Cir. 1984).

¶12 Removal is the most serious penalty available to the agency and the most harmful to the employee. *Sterner v. Department of the Army*, 711 F.2d 1563, 1568 (Fed. Cir. 1983). The factors weighing in favor of a lesser penalty are: (1) The appellant's 23 years of federal service, 19 of which were with the agency, IAF, Tab 4 at 14; *see Lloyd v. Department of the Army*, 99 M.S.P.R. 342, ¶ 14 (2005) (the appellant's 19 years of service was a mitigating factor), *aff'd*,

180 F. App'x 911 (Fed. Cir. 2006); *Kelly v. Department of Health & Human Services*, 46 M.S.P.R. 358, 362 (1990) (the appellant's 23 years of service was a mitigating factor); and (2) the appellant's lack of a prior disciplinary record, *see Ford v. Department of Defense*, 30 M.S.P.R. 43, 45 (1986) (the appellant's lack of prior discipline over his long career was a mitigating factor).[2] The factors weighing in favor of the removal penalty are: (1) The nature and seriousness of the offense, IAF, Tab 4 at 15-16; *see Beaudoin v. Department of Veterans Affairs*, 99 M.S.P.R. 489, ¶ 19 (2005) (disrespectful or insolent conduct towards a supervisor is a serious offense); (2) the nature of the appellant's job, i.e. working substantially unsupervised and unattended throughout a very large building, HT 1, Side A (testimony of Ms. Bickerstaff); HT 1, Side B (testimony of Mr. O'Hara); *see Krbec v. Department of Transportation*, 21 M.S.P.R. 239, 244 (1984) (because the agency lost faith in appellant's integrity, the autonomous nature of his position weighed against mitigation), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table); (3) the clarity with which the appellant was on notice of the impropriety of his behavior, HT 2, Side B; HT 3, Side A (testimony of the appellant); *see Farrelly v. U.S. Postal Service*, 86 M.S.P.R. 230, ¶ 10 (2000) (the appellant's awareness of the agency's zero tolerance policy weighed against mitigation), *aff'd*, 13 F. App'x 910 (Fed. Cir. 2001); *Boscoe v. Department of*

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[2] The appellant disagreed with Ms. Bickerstaff's opinion that her signing and dating the two illegible PS Forms 3971 would constitute falsification. HT 1, Side A (testimony of Ms. Bickerstaff); HT 2, Sides A-B; HT 3, Side A (testimony of the appellant). However, this disagreement did not constitute provocation that would weigh in favor of mitigating the penalty because even if the appellant were correct, and even if Ms. Bickerstaff should have been more accommodating to his request, the appellant was still bound to respect Ms. Bickerstaff's decision at the time she made it. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08 (1995) (an employee may not disregard his supervisor's order even if he reasonably believes that the order is improper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances, such as where obedience would place the employee in a clearly dangerous situation or where complying with the order would cause him irreparable harm), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table).

Agriculture, 54 M.S.P.R. 315, 326-27 (1992) (the appellant's awareness that he was required to comply with his supervisor's instructions weighed against mitigation); (4) the negative effect that the appellant's conduct has had on his supervisors' confidence in his ability to follow instructions and perform his work duties without incident, HT 1, Side B (testimony of Mr. O'Hara); *see Hernandez v. Department of Agriculture*, 83 M.S.P.R. 371, ¶¶ 11, 13 (1999) (the appellant's supervisor's loss of confidence in his ability to perform his duties was a factor weighing against mitigation); and (5) the appellant's lack of remorse for, or even acknowledgment of the impropriety of his behavior, *see White v. U.S. Postal Service*, 62 M.S.P.R. 600, 602 (1994) (the appellant's lack of remorse and failure to acknowledge his misconduct weighed against mitigation).[3]

¶13 In evaluating whether a penalty is reasonable, the Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities. *Vaughn v. U.S. Postal Service*, 109 M.S.P.R. 469, ¶ 15 (2008), *aff'd*, 315 F. App'x 305 (Fed. Cir. 2009). The appellant was aware that he was required to follow Ms. Bickerstaff's instructions even though he disagreed with them, HT 3, Side A (testimony of the appellant), and the appellant admitted that he defied Ms. Bickerstaff's instructions to remain in her office and to give her the PS Forms 3971, *id.*; IAF, Tab 4 at 15-16. Deliberate defiance of a supervisor's direct orders constitutes serious misconduct. *See Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316 (1993) ("An employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that cannot be condoned."); *see also Davis v. Smithsonian Institution*, 14 M.S.P.R. 397, 400 (1983) (the offence of failure to obey an order "goes to the heart of the supervisor-employee relationship"). The appellant was

[3] If there are any other potentially relevant penalty factors in this case, the parties presented no evidence or argument for the Board to consider in that regard. The parties fully litigated the penalty issue below, and the record on the matter is closed. *See Davis v. Department of the Army*, 33 M.S.P.R. 223, 226 (1987).

also aware of the impropriety of his belligerent behavior toward Ms. Bickerstaff, HT 2, Side B (testimony of the appellant), and the agency proved that the appellant spoke to Ms. Bickerstaff in a loud, disrespectful, and menacing manner, ID at 4-5. This element of the appellant's actions also constitutes serious misconduct. *See Lewis v. Department of Veterans Affairs*, 80 M.S.P.R. 472, ¶¶ 6, 10 (1998) (the appellant's actions of yelling at her supervisor and advancing toward her in a menacing manner constituted serious misconduct); *Wilson v. Department of Justice*, 68 M.S.P.R. 303, 310 (1995) (disrespectful conduct as manifested by the use of abusive language is serious); *Redfearn*, 58 M.S.P.R. at 316 (insolent disrespect towards supervisors seriously undermines management's capacity to maintain employee efficiency and discipline). The appellant's misconduct is particularly problematic in light of his duty to work largely unmonitored in a building of nearly 1 million square feet, and his supervisors' loss of trust in his ability to do so without incident. HT 1, Side A (testimony of Ms. Bickerstaff); HT 1, Side B (testimony of Mr. O'Hara); *see Talavera v. Agency for International Development*, 104 M.S.P.R. 445, ¶ 12 (2007) (loss of trust is a significant aggravating factor in a penalty determination). Finally, the appellant's failure to express remorse or to acknowledge the impropriety of his conduct suggests that a lesser penalty may be ineffective to deter such behavior in the future. *See Neuman v. U.S. Postal Service*, 108 M.S.P.R. 200, ¶ 26 (2008) (the appellant's rationalizations and lack of remorse indicated little rehabilitation potential and were aggravating factors). Although the appellant might contend that his lack of remorse is due to the fact that he did not engage in the charged misconduct, PFRF, Tab 1 at 5-6, this argument would constitute mere disagreement with the administrative judge's reasoned and explained findings to the contrary, ID at 4-5; *see Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

¶14 The appellant's many years of service and his lack of prior record discipline are significant mitigating factors, the importance of which should not

be downplayed. *See Tryon*, 108 M.S.P.R. 148, ¶ 9 (considering the nature and seriousness of the proven misconduct, the appellant's 45 years of unblemished federal service warranted mitigation of his removal to a 60-day suspension). Nevertheless, having carefully weighed all the pertinent factors, we find that the removal penalty in this instance does not exceed the tolerable limits of reasonableness. *See Biniak*, 90 M.S.P.R. 682, ¶ 15 (where the agency considered improper factors in arriving at its penalty determination, the question was whether the penalty was still within the bounds of reasonableness upon consideration of the proper factors). Accordingly, we sustain the appellant's removal.

ORDER

¶15 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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:

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