

CHARLES D. WATSON
v.
U.S. POSTAL SERVICE

DOCKET No.
SF07528010425

OPINION AND ORDER

Appellant was removed from his position as a distribution clerk by the U.S. Postal Service (agency) based on his (1) alleged absence without leave (AWOL) status for three days and (2) tardiness on 14 separate occasions.

In the initial decision, the presiding official found that the agency failed to prove the first charge by a preponderance of evidence. In this regard, the presiding official held that the agency's refusal to grant appellant sick leave for the days in question, because of his failure to submit medical documentation to support his absence, was improper. However, the presiding official concluded that the agency had sustained its charge of repeated tardiness, and that in view of appellant's disciplinary record involving numerous attendance infractions, appellant's removal was for such cause as would promote the efficiency of the service.

In the petition for review, appellant argues that the presiding official erred in sustaining the tardiness charge, in that the agency did not place him on AWOL status for any of the cited incidents but instead approved his use of annual leave for the occasions when he was late for work. Moreover, appellant contends that the agency excused his tardiness by failing to charge him as AWOL and that it cannot take a disciplinary action on the basis of approved leave.

For the reasons set out below, we hereby GRANT appellant's petition for review of the initial decision.

While we concur with the presiding official's determination that the agency failed to sustain its first charge, we find that the agency's approval of appellant's use of leave for the incidents of tardiness preclude it from taking an adverse action against him on the basis of his tardiness.

A review of the record reveals that on each of the 14 occasions of tardiness, the agency completed a PS Form 3971, "Request For, Or Notification of, Absence," and that in the space designated "Official Action on Application" it checked the "approved" box and added the remark: "Leave entry only." At the hearing, the agency contended that under its procedures an employee's tardiness may be charged to leave if he has any available, but if the tardiness is not excused, it may be grounds for appropriate disciplinary action. Appellant's pay-location supervisor further explained that the only incidents of

tardiness that may be excused are those approved in advance. (Tr. at 29-31). The testimony indicates that none of appellant's tardiness was approved in advance.¹ (Tr. at 31). Therefore, the presiding official concluded that the agency properly charged appellant with tardiness, even though for time and attendance purposes the absences were charged to leave.

However, this Board has held that a removal action based on unsatisfactory attendance, where all of the absences are under approved leave, cannot constitute a valid cause of action. See *Webb v. U.S. Postal Service*, 9 MSPB 749 (1982). Therefore, the agency's contention that it never excused appellant's tardiness is inconsistent with the fact that it approved leave for these occasions. Accordingly, we conclude that the presiding official erred in finding that the agency could properly charge appellant with tardiness even though it permitted him to use annual leave. In order to discipline appellant for his tardiness, the agency was required to disapprove appellant's requests for annual leave when he was late for work and place him in AWOL status. However, the agency exercised its discretion to the contrary and is now precluded from disciplining appellant for those specific alleged infractions.² If the agency considered appellant's explanations concerning his tardiness to be sufficient for granting his request to use annual leave to cover the incidents, it cannot use these incidents as a basis for a removal action. Accordingly, we find that the agency failed to sustain the tardiness charge and the initial decision affirming the removal is hereby REVERSED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The agency is hereby ORDERED to cancel the removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the San Francisco Regional Office in accordance with 5 C.F.R. § 1201.181(a).

Appellant is hereby 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.

¹On the other hand, appellant's pay-location supervisor acknowledged that appellant must have provided his relief supervisor with sufficient justification for using his leave rather than being charged as AWOL (Tr. at 63).

²This is not to suggest that appellant's time and attendance cannot be considered in evaluating his performance or in selecting a penalty for a given actionable offense.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 12, 1982*