UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALPHONZA WHITMORE, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER PH07528610712 DATE: JUN 16 1987

David E. Schultz, Esquire, Virginia Beach, Virginia, for the appellant.

Marilyn Spence, Norfolk, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board upon appellant's petition for review of the initial decision issued on January 12, 1987. For the reasons stated below, the Board GRANTS the petition for review and AFFIRMS the initial decision as MODIFIED by this Opinion and Order. *See* C.F.R. § 1201.115.

BACKGROUND

The agency removed appellant from his position as Heat Treater and Temper for leaving his assigned duty during working hours without permission. In the notice of proposed removal, the agency stated that it was considering appellant's past disciplinary record, which included a fourteen-day suspension on September 12, 1984, for a similar infraction (third offense) and a five-day suspension on April 15, 1984, for transacting labor and attendance for another employee (first offense).

Appellant appealed to the Board's Philadelphia Regional Office, alleging, inter alia, harmful procedural error by the agency and challenging the penalty of removal as unduly severe. The administrative judge, based on her credibility determinations, found the charge supported by preponderant evidence. She found that the agency properly considered the two disciplinary actions stated in the proposal notice. She credited the deciding official's testimony that he considered the following relevant mitigating factors set forth under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981): (1) The nature and seriousness of the conduct; (2) the employee's job level and type of employment; (3 the employee's past disciplinary record, including leng h of service; (5) the consistency of the penalty; (6) the clarity with which the employee was on notice of any rules that he violated; (7) the potential for the employee's rehabilitation; and (8) any mitigating circumstances. The

administrative judge considered the deciding official's testimony that he did not consider the time lost (approximately ten minutes) to be a mitigating factor. She specifically found that the deciding official "seem[ed] to have relied heavily on the fact that the appellant ha[d] a significant past record, and that most of the disciplinary actions involved being away from assigned duty." Initial Decision at 4-5. Finding the penalty appropriate, she sustained the removal action.

In his petition for review, appellant alleges error in the administrative judge's credibility determinations and her finding that the agency action promoted the efficiency of the service. Appellant also reasserts his allegation of harmful procedural error which, he contends, was not considered by the administrative judge.

ANALYSIS

Appellant challenges the administrative judge's credibility assessment of testimony relating to appellant's exact location during his absence from the worksite, testimony as to whether appellant was accompanied by another employee, and testimony that appellant's supervisors were unable to locate him at the worksite.

Appellant has not shown error in the administrative judge's credibility determinations. Those determinations are consistent with the evidence of record, including appellant's own admission that he was away from his worksite without permission but that he believed that it was his

lunch time. Appellant's mere disagreement with the administrative judge's credibility findings does not warrant full review of those determinations by the Board. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982). Thus, the administrative judge properly sustained the charge.

Appellant contends that the agency violated its own regulations in considering past disciplinary offenses which were more than three years old. Appellant refers to the applicable regulation at OPNAVINST 12000.14 CH-29, ¶ 7-I 752-B, Appendix B, pp. 20-21 (1982). See Agency File, Tab 3-K. That regulation is a part of the agency's penalty guidelines. Paragraph 5 of the regulation states that certain "limitations *must* be observed" when past offenses are considered in determining a remedy (emphasis added).

One of the limitations stated in subsection c. of paragraph 5 above provides as follows: "A suspension or reduction in grade or pay (if effected for disciplinary reasons) may be counted as a prior offense provided the effective date of the suspension or reduction in grade or pay is not more than three years before the date of the proposed adverse action in which it is cited."

We therefore find that, in determining the reasonableness of the penalty, the agency improperly considered appellant's past disciplinary offenses that were more than three years' old. As previously stated, the proposal notice referred to appellant's past disciplinary

infraction of leaving his assigned duty without permission as his "third offense." It is undisputed that the two prior offenses to which the agency alluded occurred more than three years before the issuance of the notice of proposed removal in the present case. Also, the administrative judge noted that the deciding official apparently gave substantial weight to appellant's "significant" prior record. This assessment by the administrative judge, who was present to hear and observe the demeanor of the witness, is entitled to due deference. *See Weaver v. Department of the Navy*, 2 M.S.P.R. at 133.*

Because we find that the agency improperly relied on prior offenses which were more than three years old in imposing appellant's removal, we will consider the reasonableness of the penalty in light of the two properly considered prior offenses. We find that, even in light of the two properly considered offenses, the following factors warrant mitigation: (1) The agency's recommended penalty of a suspension of five to ten days for a second offense of leaving a job to which assigned without permission; (2) the agency's policy against the use of prior offenses over

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While the agency states in its response to the petition for review that "only the two suspensions within the three-year period were relied upon in imposing the removal," it admits that "the others were considered under the Douglas [sic] factors regarding whether a lesser penalty would suffice." *See* Agency's Response at 3. The agency's regulation, however, prohibits the consideration of prior disciplinary offenses more than three years old in regard to all *Douglas* mitigating factors.

three years old to enhance the penalty; (3) the agency's admission that those offenses were considered in rejecting mitigation; (4) the relatively short period of time involved (approximately ten minutes); and (5) appellant's apparently satisfactory government service of approximately sixteen years. *Cf. Hyatt v. Department of the Army*, 30 M.S.P.R. 256, 260 (1986) (although a prior reprimand was improperly considered because it was more than three years old, other relevant factors were sufficient to sustain the removal). We thus conclude that a sixty-day suspension is the maximum reasonable penalty under these circumstances and that the agency's imposition of the removal penalty clearly exceeded the bounds of reasonableness.

ORDER

The agency is ORDERED to cancel the appellant's removal and to substitute therefor a sixty-day suspension effective September 5, 1986. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to award back pay and benefits in accordance with 5 C.F.R. § 550.805. *See Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984); *Robinson v. Department of the Army*, 21 M.S.P.R. 270 (1984).

The agency is ORDERED to complete all computations and issue a check to the appellant for the appropriate amount of

back pay within sixty days of the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay due.

If there is a dispute as to the amount of back pay due, the agency shall issue a check to the appellant for the amount not in dispute within the above time frame. The appellant may then file a petition for enforcement concerning the disputed amount.

The agency is ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. See 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

If, after being informed by the agency that it has complied with the Board's order, the appellant believes that there has not been full compliance, he may file a petition for enforcement with the Philadelphia Regional Office within thirty days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.