

LEROY WRIGHT, JR.

v.

SOCIAL SECURITY ADMINISTRATION

DOCKET No.

PH07528090140

OPINION AND ORDER

This case comes before the Board on appellant's petition for review of the Philadelphia Regional Office's remand decision affirming his removal from a GS-3 control clerk position on charges of (1) falsely indicating to his supervisor that he had completed work assigned to him which he had not completed; and (2) improperly placing folders that should have been retained into the "destroy" bag.

In his petition for review, appellant contends that the Board's decision remanding the case was "illegal", that the presiding official in the remand decision "exceeded her authority as specified in the remand order"; that this presiding official erred when she "did not consider [the first presiding official's] initial decision in arriving at her decision"; and that "[t]he agency never demonstrated that removal would promote the efficiency of the service to remove [appellant]."

The Board clearly acted legally to remand this case after it determined that the first presiding official had failed to "resolve the question of credibility raised by . . . contradictory testimony" and that therefore the "determination that the agency failed to meet its burden of proof [had] no reasoned basis." *Wright v. Department of Health and Human Services* 5 MSPB 232, 232 (1981); 5 C.F.R. § 1201.111(b)(1); See *Knuckles v. U.S. Postal Service* 654 F.2d 25, (8th Cir. 1981).

In the initial decision on remand, the presiding official states she allowed "testimony from other witnesses on the issue of whether or not appellant's removal based solely on charge 2 would promote the efficiency of the service." Initial Decision at 2. She clarifies this conclusion by stating, "where the appropriateness of the penalty has been challenged, the agency is required to come forward with additional evidence to rebut that challenge." *Fox v. Department of the Navy*, 6 MSPB 292 (1981). Initial Decision at 5. She gives further insight into her reasoning on the record when she states:

I explained before, Mr. Spivak, that it would be impossible for me to write a decision in light of the Board's order in Douglas without hearing some testimony regarding efficiency of the service, and Mr. Jernigan never reached that issue in his opinion because he dismissed both charges. Since he made no findings, there are no findings for me to rely on and, once again,

credibility would play a great part in my determination. You know, is this a manufactured reason of efficiency of the service? Is this a credible reason? Is the witness credible? Is his reasoning credible? It's not something that one can determine from paper and since we're all assembled here, I will hear testimony on that issue.

You are also allowed to introduce testimony on that issue. Remand TR at 8.

The Board concludes that the presiding official opened the record to address the question of mitigation.

The Board has held that the establishment of a relationship between an employee's conduct and the efficiency of the service is required by 5 U.S.C. § 7513(a), but such a showing is insufficient to meet the statutory requirement that removal for cause promotes the efficiency of the service. The appropriateness of a particular penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is a distinct determination. *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In this case the presiding official was bound by the record developed before remand on the general relationship of appellant's conduct and the efficiency of the service, but free to develop the record further with respect to the appropriateness of the particular penalty for the sustained charge, i.e., the question of mitigation in light of the dismissal of one charge.

In its remand decision the Board instructed the regional office to retake "testimony on the second charge"<sup>1</sup> with the presiding official then to resolve the case on the basis of the prior findings on charge one and his own findings on charge two.<sup>2</sup> *Wright, supra*, at 233. Since appellant had defeated charge one, resolution of charge two included a consideration of mitigation by the presiding official. *Douglas, supra*. The Board finds it was in the interest of justice and within the scope of the remand decision for the presiding official to request additional evidence on the question of mitigation, allowing both the agency and the appellant to supplement the record on this point. Nor do we find that the presiding official improperly "did not consider" the first initial decision in reaching her conclusion, inasmuch as the first presiding official did not decide the issue which was remanded for decision.

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<sup>1</sup>Because the presiding official who originally heard the testimony died prior to remand, it was not possible to remand for a finding on the issue of credibility on the basis of the existing record.

<sup>2</sup>The Board denied the agency's petition for review with respect to the first charge, finding, as had the presiding official, that the agency failed to prove this charge by a preponderance of the evidence.

Finally, the Board finds that the penalty of removal, based on charge 2 alone, in light of appellant's prior disciplinary record, reflects "managerial judgment...properly exercised within tolerate limits of reasonableness," *id.*, and thus promotes the efficiency of the service.

The petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. The second initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the right to seek judicial review of the Board's final decision in this appeal. The current provisions of 5 U.S.C. § 7703(b)(1) permit the appellant to petition the appropriate United States Circuit Court of Appeals, or the United States Court of Claims, for review of the Board's final decision. As of October 1, 1982, however, section 127 of the Federal Court Improvement Act of 1982 to be codified at 28 U.S.C. § 1295(a)(9), mandates that such a petition be filed with the newly constituted United States Court of Appeals for the Federal Circuit, which will thereafter have exclusive jurisdiction for judicial review of final Board orders or decisions. Both statutory provisions require that a petition for such judicial review be filed with the proper Court no later than thirty (30) days after the appellant's receipt of the Board's final order or decision.

For the Board:

ROBERT E. TAYLOR,

*Secretary.*

WASHINGTON, D.C., *September 27, 1982*