

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

71 M.S.P.R. 326

Docket Number DC-0752-95-0623-I-1

**ELLSWORTH J. TODD, Appellant,**

**v.**

**DEPARTMENT OF JUSTICE, Agency.**

Date: AUG 21, 1996

Arthur J. Horne, Jr., Esquire, Largo, Maryland, for the appellant.

Paul D. Jessup, Washington, D.C., for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Antonio C. Amador, Member

**OPINION AND ORDER**

The agency has petitioned for review of an initial decision that mitigated the appellant's removal to a thirty-day suspension. For the reasons set forth below, we DENY the agency's petition for review for failure to meet the criteria for review under 5 C.F.R. § 1201.115 but REOPEN the appeal on our own motion under 5 C.F.R. § 1201.117; we REVERSE the initial decision and SUSTAIN the appellant's removal.

**BACKGROUND**

The appellant petitioned for appeal from the agency's action removing him from the position of Correctional Counselor, GS-9, with the agency's Bureau of Prisons (BOP) at the Federal Correctional Institution (FCI) in Cumberland, Maryland. See Initial Appeal File (IAF), Tab 1; Tab 4, Subtab 4a. The agency based its action on charges of acquiring inmate status, misconduct off the job, failure to report an arrest in a timely manner, and improper use of a BOP identification card. See *id.*, Tab 4, Subtab 4c.

The first charge alleged that the appellant had been convicted in the Allegany District Court of Maryland on March 14, 1995, of driving while intoxicated (DWI) and failure to drive right of center; it also contended that he had been convicted in that court on April 18, 1995, of DWI. As a result of these convictions, the appellant was fined, served sentences in jail, and was placed on probation; the agency asserted that the appellant thus was considered an "inmate" under its standards of conduct because of

these penalties. See IAF, Tab 4, Subtab 4c. The second charge alleged that the misconduct underlying the appellant's two convictions violated its standards of conduct. See *id.* The third charge cited the appellant's three arrests in January, February, and March of 1995 for DWI, negligent driving, failure to drive right of center, and operating an unregistered motor vehicle; it contended that the appellant had violated the agency's standards of conduct by failing to report these arrests to the agency immediately. See *id.* The final charge maintained that the appellant had violated the agency's standards of conduct on the occasion of his January 1995 arrest by showing his BOP identification card to the arresting officer and requesting "professional courtesy." See *id.* The appellant did not specifically dispute these charges but did raise the affirmative defense of disability discrimination based on his alleged alcoholism. See *id.*, Tabs 1, 7.

After a hearing, the administrative judge mitigated the appellant's removal to a thirty-day suspension. See Initial Decision (I.D.) at 1-8. The agency has petitioned for review of the initial decision, and the appellant has responded in opposition to the petition for review. See Petition for Review File (PFRF), Tabs 1, 3. The appellant also filed a submission after the record on petition for review had closed. See *id.*, Tab 6. The Board will not consider this submission because it is not based on previously unavailable evidence which would affect the result. See *Nixon v. Department of the Navy*, 51 M.S.P.R. 624, 626 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table).

## ANALYSIS

In mitigating the agency's removal action, the administrative judge found that it had established all of its charges but that the appellant had also proven his affirmative defense of disability discrimination. See I.D. at 2-7. Regarding the latter issue, he concluded that the appellant had shown that he suffered from the disabling condition of alcoholism and that this condition was responsible for all of the charged misconduct except his failure to report his three arrests immediately (charge 3). The administrative judge further determined that the agency had failed to accommodate the appellant's condition by offering him a "firm choice" between treatment and removal for his alcohol-related misconduct prior to the incidents at issue in the appeal; he therefore found that the three alcohol-related charges could not be sustained. See *id.* at 4-7. With respect to the only remaining charge, the administrative judge determined that the removal penalty was too severe and mitigated it to a thirty-day suspension. See *id.* at 7-8.

On petition for review, the agency challenges the administrative judge's determination that the appellant suffers from disabling alcoholism and also argues that the administrative judge erred in finding a nexus between that condition and one of the charges; it further contends that the appellant's misconduct was so egregious that it was not required to accommodate his condition. See PFRF, Tab 1 at 2-4. Our own review of the record, however, has disclosed an independent basis for reversing the initial decision, and it is therefore unnecessary to address the agency's arguments. For that reason, we have denied its petition for review and have reopened the appeal on our own motion in order to discuss this basis for reversal.

As the administrative judge correctly noted, see I.D. at 6, prior Board precedent has held that an agency, before removing an employee disabled by alcoholism, had to offer him a "firm choice" between treatment and removal for his alcohol-related misconduct. See *Tate v. Department of Defense*, 57 M.S.P.R. 180, 189 (1993); *Calton v. Department of the Army*, 44 M.S.P.R. 477, 478-79 (1990). In order to satisfy this requirement, the agency had to inform the employee that removal action would be initiated under certain enumerated circumstances. The agency's failure to give such notice to the employee would require the Board to find that the agency had not reasonably accommodated the employee's disability and that he had established his affirmative defense of disability discrimination with respect to alcohol-related charges of misconduct. See *Tate*, 57 M.S.P.R. at 189; *Yancy v. General Services Administration*, 57 M.S.P.R. 192, 198-99 (1993). The administrative judge relied on this precedent in finding that the three alcohol-related charges of misconduct could not be sustained here because the agency had not accommodated the appellant's disabling alcoholism by affording him a firm choice between treatment and removal. See I.D. at 6-7.

Even if the appellant suffered from disabling alcoholism and this condition caused three of the charged instances of misconduct, however, we find that the agency was not required to offer him a firm choice. After the initial decision was issued, the Equal Employment Opportunity Commission (EEOC) issued a decision holding that federal employers no longer had to provide the reasonable accommodation of firm choice. The EEOC concluded that such accommodation was inconsistent with employment standards of the Americans with Disabilities Act of 1990, which were incorporated into the Rehabilitation Act of 1973 by amendments enacted by Congress in 1992. See *Johnson v. Babbitt*, EEOC Petition No. 03940100, slip op. at 5-7 (Mar. 28, 1996). As a result of the amendments, the EEOC held, "employers do not have to excuse the violation of uniformly-applied conduct or job performance standards as a form of reasonable accommodation" by offering alcoholic employees a firm choice. See *id.* at 7-8. It therefore found in that case that the agency had properly removed the employee for absence without leave and giving false information to a management official, and it concluded that discrimination had not been established simply because he had not been given a firm choice. See *id.* at 8. The Board has adopted the EEOC's holding in *Johnson* and overruled its prior cases imposing a firm choice rule. See *Martin v. Department of Defense*, MSPB Docket No. PH075295043611, slip op. at 6 (Jun. 12, 1996); *Kimble v. Department of the Navy*, MSPB Docket No. SF075295040411, slip op. at 5-9 (Jun. 11, 1996).

As noted above, the agency here established its four charges and therefore proved that the appellant had violated its standards of conduct. The recent EEOC and Board case law discussed above means that the agency did not have to excuse these violations by offering the appellant a firm choice as a form of reasonable accommodation before effecting his removal based on those violations. The agency's failure to offer him a firm choice thus does not establish that it discriminated against him and does not provide a basis for reversing its removal action. See *Kimble*, slip op. at 8-9; *Johnson*, slip op. at 7-8. We reverse the initial decision on that basis.

The only remaining question, then, is whether the four sustained charges support the appellant's removal, and we find that they do. The Board will review an

agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In examining this issue, we note that correctional or law enforcement officers are held to a higher standard of conduct with respect to the seriousness of their offenses and that the Department of Justice is permitted wide discretion in controlling the work-related conduct of those employees charged with maintaining the integrity of our prison system. See *McManus v. Department of Justice*, 66 M.S.P.R. 564, 569 (1995).

It is an extremely serious offense when a correctional officer violates federal or state laws against drunken driving because it flatly compromises the integrity of personnel in the federal prison system. See *Thompson v. Department of Justice*, 51 M.S.P.R. 43, 50 (1991). Similarly, it is also quite serious for a law enforcement officer to fail to report his own arrest. See *Lawton v. Department of Veterans Affairs*, 53 M.S.P.R. 153, 158 (1992). The appellant's use of his BOP identification card in a bid for "professional courtesy" on the occasion of his January 1995 arrest likewise constituted an improper attempt to escape the processes of law by virtue of his status as a law enforcement officer. See I.D. at 3-4; *Anderson v. Department of Justice*, 62 M.S.P.R. 611, 612, 614-15 (1994). Given this background, we find that the agency's removal penalty is reasonable and promotes the efficiency of the service.

### **ORDER**

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 further review of the Board's final decision in your appeal.

#### *Discrimination Claims: Administrative Review*

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

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

You should submit your request to the EEOC 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. § 7702(b)(1).

#### *Discrimination and Other Claims: Judicial Action*

If you do not request review of this order on your discrimination claims by the EEOC, 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 should file your civil action with the district court 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)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping 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 choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(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,  
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  
Washington, D.C.