UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARK A. PERRODIN, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER DA07529202951I1 DATE: OCT 29 1992

Daniel E. Broussard, Esquire, Alexandria, Louisiana, for the appellant.

Connie Darne, Fort Worth, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on June 16, 1992, which sustained the appellant's removal. After full consideration, we DENY the petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the removal.

BACKGROUND

The appellant was removed from his position as Materials Handler Foreman at the Federal Correctional Institution in Oakdale, Louisiana, for accepting money from an inmate. Initial Appeal File (IAF), tab 4, subtabs 3 & 4. On appeal, the administrative judge held, following a hearing, that the agency had proved the charge by a preponderance of the evidence and that the penalty was not unreasonable. IAF, tab 16. She rejected the appellant's defense that he did not intend to keep the money and that he had received the money while acting under the instructions of a superior to assist in an investigation into the source of drugs coming into the prison. *Id.* (at 5).

The appellant argues in his petition for review, as amended, that the administrative judge erred in sustaining the charge and the penalty of removal. Petition for Review File (PRF), tab 1. In support of his position, the appellant contends: (i) he did not intend to keep the money; (ii) the administrative judge should have drawn an adverse inference from the agency's failure to offer the testimony of the inmate from whom the money was received; (iii) the money was received outside of the prison compound; (iv) the administrative judge improperly expanded the charge; (v) the appellant's explanation that he was attempting to ascertain the source of the drugs is unrebutted; (vi) an agency witness gave false testimony at the hearing; (vii) in assessing the appellant's credibility, the administrative judge relied too heavily on an

inconsistency between the appellant's response to the charge and his testimony at the hearing; (viii) the appellant was intimidated and confused by the presence of Correctional Officer Bland at the time that he was questioned about receiving the money; and (ix) the administrative judge did not fully consider the appellant's defense of entrapment. *Id.*[1]

ANALYSIS

The administrative judge properly sustained the charge.

The appellant admitted to receiving a $100 bill from an inmate. Transcript (Tr.) 147-48. He testified that he did not intend to keep the money, and that he believed that he was assisting in an investigation into the source of drugs coming into the prison. Tr. 182. As we discuss below, the administrative judge properly rejected this explanation. Except where indicated otherwise, what follows is the appellant's own version of the facts.

On December 31, 1991, the appellant told Captain Hines of the agency's Special Investigation Service (SIS) that he

[1] The agency's response to the amended petition for review was filed more than 25 days from the date of service of the amended petition for review, and thus is untimely. 5 C.F.R. § 1201.114(d). The agency's representative avers in an affidavit that she was unable to timely file the response to the amended petition for review due to previously scheduled annual leave and unspecified "travel commitments." PRF, tab 4. This explanation does not establish good cause for waiving the filing deadline, and we therefore have not considered the response to the amended petition for review. *See Duncan v. Department of the Navy*, 43 M.S.P.R. 423 (1990) (the late filing of a corrected petition for review was not excused by the fact that the appellant's representative was on leave during the filing period, where he had not requested an extension of time and where there was no explanation why someone else in his office could not have made the filing).

believed that drugs were being smuggled into the prison. Tr. 141-42. Captain Hines told the appellant to get all the information he could. Tr. 142, 152.[2] At approximately 12:05 p.m. on Friday, January 3, 1992, inmate Pettit told the appellant that inmates involved in drug smuggling had paid him $100 for his cooperation. Tr. 147-48, 180. The appellant "confiscated" a $100 bill from inmate Pettit because inmates were not supposed to have money. Tr. 147-48. When the appellant's shift ended at 3:30 p.m. that day, he entered the prison compound by the rear gate (he had been working in a warehouse behind the compound), passed by the SIS office, and left the prison by the front entry building. Tr. 182. The appellant was detained by SIS Lieutenant Wakulsky and brought to the SIS office. *Id.* After being asked to empty his pockets and to take all of the currency out of his wallet, the appellant placed approximately $45 on a desk. Tr. 161-62. The appellant answered "yes" when asked if that was all the money he had. Tr. 162. The appellant's hands were then exposed to a black light, which revealed traces of a theft-detection powder; at that point, the appellant admitted that the $100 bill he had received from inmate Pettit was in a compartment of his wallet. Tr. 162.

In light of this testimony, the administrative judge properly rejected as not credible the appellant's explanation

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[2] Captain Hines denied instructing the appellant to gather information, but admitted asking the appellant to report anything he might learn. Tr. 7.

that he did not intend to keep the money and that he thought he was assisting in the drug investigation. As found by the administrative judge, the appellant admitted to possessing the money for over three hours without reporting it and to leaving the prison at the end of his shift without turning the money in; the appellant also conceded that he did not admit that he had the money, even after being questioned, until his hands were exposed to the black light.

The appellant maintains that the administrative judge's reliance on these facts amounted to an impermissible expansion of the charge into one of receiving money from an inmate without reporting it. We disagree. Even though the appellant's actions after receiving the money were not part of the charge, they are relevant to assessing the appellant's intent. Simply put, the appellant's actions after receiving the money negate his explanation that he believed that he was assisting Captain Hines in the drug investigation. *See Kumferman v. Department of the Navy*, 785 F.2d 286, 290 (Fed. Cir. 1986) (intent may be inferred from circumstantial evidence). Thus, the preponderance of the evidence before the administrative judge established that the appellant had received a gift or favor from, or had become financially involved with, an inmate, as specified in the charge. IAF, tab 4, subtab 6.

The appellant's remaining allegations of error by the administrative judge are without merit. First, regardless of whether the appellant's testimony at the hearing was or was

not consistent with his prior statement responding to the charge, the appellant's contention that he intended to turn the money in is incompatible with the appellant's own version of his actions. Further, there was no "adverse inference" to be drawn from the agency's failure to produce either inmate Pettit or his affidavit. According to the appellant, Pettit had asked the appellant to keep the money until the following Monday, at which time Pettit would give the appellant a letter to be mailed to Pettit's lawyer with the $100. Tr. 147-48. Even if Pettit had corroborated this account of what transpired when the appellant received the money, Pettit was in no position to rebut the inference, based on subsequent events, that the appellant did not believe that he was assisting in an investigation.[3]

The appellant's contention that Lieutenant Wakulsky's testimony should be rejected as tainted by falsehood is without merit. When the appellant's representative asked Lieutenant Wakulsky if the appellant had a disciplinary record, Wakulsky stated that he believed that the appellant had such a record because he had received counseling. Tr. 62-63. In fact, the appellant received counseling following his having been taken hostage during a prison riot, and the counseling was unrelated to any disciplinary matter. Tr. 100. Wakulsky's misapprehension concerning the reason for the

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[3] We note that the appellant did not request Pettit as a witness. *See* IAF, tab 8 (appellant's prehearing submission).

counseling, however, does not render his testimony regarding other matters unworthy of belief.

In addition, whether the money was received outside of the prison compound is immaterial; the charge is not limited to receiving money from an inmate within the compound. Finally, as the administrative judge noted, the appellant was free to ask to speak privately with Captain Hines or Lieutenant Wakulsky if he was intimidated or confused by the presence of Correctional Officer Bland in the SIS office. Thus, his explanation of why he did not admit that he had $100 in his wallet, even after being asked if the $45 he had placed on the desk was all the money he had, is unpersuasive.

The administrative judge properly sustained the penalty of removal.

The Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Merchant v. U.S. Postal Service*, 52 M.S.P.R. 330, 333 (1992). *See also Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (listing factors to be considered in assessing the appropriateness of a penalty).

The most significant factors in the present appeal are the type of employment involved and the fact that the appellant's conduct made the warden lose confidence in the appellant's ability to perform his duties. *See Douglas*, 5 M.S.P.R. at 306 (not all of the *Douglas* factors will be pertinent, and some will be of greater significance than

others). As an employee of the Bureau of Prisons who had regular contact with inmates, tr. 128, the appellant occupied a position of great trust and responsibility and could be held to a heightened standard of conduct. *Cf. Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990). As the warden explained, the appellant's actions showed a susceptibility to manipulation by inmates, thus posing a threat to the security of the institution. Tr. 98-99.

In assessing the appropriateness of a penalty, the Board may also consider the clarity with which an employee was on notice of rules which were violated in committing the offense. *Douglas*, 5 M.S.P.R. at 305. In the present appeal, the agency's Standards of Employee Responsibility and Conduct, which the appellant received when he began work with the agency in 1987, IAF, tab 4, subtab 8, explicitly prohibit the acceptance of a gift or favor from, or any financial involvement with, an inmate. *See* IAF, tab 4, subtab 9.

The appellant contends that the agency's conduct constituted "entrapment," and that the penalty of removal is therefore too harsh. While entrapment cannot be asserted as an affirmative defense to a charge of misconduct, "evidence of a similar nature can be introduced as a mitigating circumstance in connection with the Board's review of the reasonableness of the penalty." *Callan v. U.S. Postal Service*, 48 M.S.P.R. 602, 606 (1991) (citation omitted). The issue is whether and to what extent the agency's actions mitigate the seriousness of the offense. *Id.*

Lieutenant Wakulsky testified that the appellant was suspected of being involved in drug smuggling and that inmate Pettit had told a correctional officer that the appellant was asking him for money. Tr. 49. It is undisputed that the $100 bill found in the appellant's wallet was dusted with theft-detection powder and was given to inmate Pettit by the agency. IAF, tab 4, subtab 6. The fact that the appellant received the $100 bill under circumstances orchestrated by the agency, however, does not take away from the seriousness of the appellant's conduct. Indeed, it was entirely proper for the agency to conduct an investigation into the source of drugs coming into the prison, and to test the integrity of employees who were suspected of being involved. This appeal is a far cry from one in which an employee is removed after repeatedly being enticed into wrongdoing. *See, e.g., Schaffer v. U.S. Postal Service*, 39 M.S.P.R. 153, 157-59 (1988) (in mitigating penalty of removal for employee's having conspired to distribute marijuana, smoked marijuana during lunch break, and left his place of work during duty hours, the Board considered, *inter alia*, the fact that the employee's friend, a confidential informant, had repeatedly asked the appellant to help him obtain drugs; the Board also noted that the employee was not in a special position of trust). In sum, the agency's involvement in giving the $100 bill to inmate Pettit is not sufficient to mitigate the removal, in light of the broad discretion that the Department of Justice must have in "controlling the work-related conduct of those employees

charged with maintaining the integrity of our prison system." *Crawford*, 45 M.S.P.R. at 237 (citation omitted).

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 the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(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, N.W.
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 of the Board

Washington, D.C.