UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

60 M.S.P.R. 365

Docket Number DE-0752-93-0211-I-1

RONNIE D. PITTMAN, Appellant,

v.

DEPARTMENT OF THE INTERIOR, Agency.

Date: January 7, 1994

Ronnie D. Pittman, Albuquerque, New Mexico, pro se.

Grant L. Vaughn, Esquire, Santa Fe, New Mexico, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member
Member Amador issues an opinion dissenting in part.

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued June 10, 1993, that affirmed his 45-day suspension without pay. For the reasons set forth below, we GRANT the appellant's petition, AFFIRM the initial decision insofar as it sustained the agency's charge of failure to follow proper procedures for receipt of government property, and REVERSE the initial decision insofar as it sustained three other agency charges. The agency's 45-day suspension is MITIGATED to a five-day suspension.

BACKGROUND

The appellant is a Property Management Specialist with the agency's Bureau of Land Management (BLM). On October 19, 1992, the appellant and another employee, James Wolf, removed 12 items of computer equipment from agency premises and took them to Wolf's residence. On October 23, the appellant initiated a Receipt for Property, Form DI-105, showing disposition of these items from himself to Wolf. *See* Initial Appeal File (IAF), Tab 5, Subtab 4x. Wolf did not sign the DI-105 until October 29, but dated the form October 23. *See Id.*; IAF, Tab 5, Subtab 4w. On October 26, the appellant and

Wolf took a personal computer and monitor to Wolf's residence.[1] On October 27, the appellant completed a Certificate of Unserviceable Property, Form DI-103A, recommending the disposition by scrap or destruction of 19 items of equipment, which he submitted to his supervisor, Teresa Barry, for further action. IAF, Tab 5, Subtab 4y. The DI-103A included the 12 items of computer equipment taken to Wolf's residence on October 19. Jim Salas, Chief of the PC Support Group, had declared some of these items as unserviceable on Form DI-105 on October 20 and 21, but he stated that five of the items were never in his possession or turned into the warehouse by him. *See* IAF, Tab 5, Subtab 4r.

Based on the above actions, the agency suspended the appellant without pay for 45 days on the following charges: (1) Failure to follow proper procedures for receipt of government property in violation of BLM Manual 1522; (2) failure to follow proper procedures for personal property disposition in violation of BLM Manual 1527; (3) falsification, misrepresentation, or concealment of material fact in connection with an official government document in violation of 43 C.F.R. § 20.735; and (4) removal of government property without proper authorization in violation of 43 C.F.R. § 20.735-15. IAF, Tab 4, Subtabs 4c, 4h. The appellant filed a timely appeal with the Board's Denver Regional Office. Based on the written record,[2] the administrative judge sustained all four charges and found the agency imposed penalty to be reasonable.[3]

In his petition for review, the appellant challenges the administrative judge's findings of fact and conclusions of law with respect to each of the four agency charges. He also asks the Board to consider new evidence that he says was not previously available.

ANALYSIS

Claim of New Evidence

The appellant's petition for review contains two evidentiary attachments that he says were previously unavailable. One is a statement by Gery Behr, the appellant's second-level supervisor, dated June 25, 1993. The second is a group of agency documents that the appellant offers to show that processing paperwork after the fact is a common practice. The Board will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant says the information in Behr's statement was not produced in the regional office proceeding because Kathy Eaton,

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[1] A DI-105 was completed on October 26, showing a transfer of this equipment from Peggy Dabb to Wolf. IAF, Tab 5, Subtab 4x.

[2] The appellant waived his right to a hearing.

[3] The administrative judge also found that the appellant failed to prove his assertion that he had been discriminated against because of his status as a disabled veteran. The appellant has not petitioned for review of this finding.

Deputy State Director, Administration, told Behr and other employees not to provide the appellant with any information or statements that would aid him in his appeal to the Board. The appellant's unsworn statements in his petition for review cannot prove the truth of this assertion, *see Valverde v. Department of the Army*, 40 M.S.P.R. 380, 386 n.8 (1989), which is not confirmed by Mr. Behr's statement. Even if we were to accept the appellant's assertions as true, we note that he made no allegation below that he was prevented from adducing relevant evidence, and he did not request a hearing at which he could have questioned Mr. Behr under oath. Under these circumstances, we conclude that the appellant has not demonstrated that the evidence in Mr. Behr's statement was previously unavailable despite due diligence.

Regarding the documents alleged to show that it is common agency practice to complete paperwork after the fact, the appellant gave no explanation with his petition for review of why he could not have adduced these or similar documents in the regional office proceeding. In a pleading filed one day after the record on review had closed,[4] the appellant argued that these documents were not previously available because he had been denied access to property management files and other materials. Petition for Review (PFR) File, Tab 4. This allegation is itself not properly before the Board because the appellant has made no showing that he could not have made it before the record on review closed. *See* 5 C.F.R. § 1201.114(i). Even if we were to consider the appellant's explanation of why the documents were previously unavailable, it would not establish that he exercised due diligence in the regionAl office proceeding. A review of the initial appeal file does not indicate that the appellant availed himself of the Board's discovery procedures to obtain the documents in question, or that he complained to the administrative judge about being prevented from adducing relevant evidence. *Cf. Wagner v. Environmental Protection Agency,* 54 M.S.P.R. 447, 453 (1992) (an appellant cannot wait until after adjudication is complete to object for the first time to an administrative judge's hearing-related rulings), *aff'd*,. 996 F.2d 1236 (Fed. Cir. 1993) (Table).

Charge of failure to follow proper procedures for the receipt, of government property

Although he makes a number of objections to the administrative judge's findings regarding this charge, the appellant concedes in his petition for review that "Receipts for Property should be accomplished as an item changes hands," and that Receipts for Property were not completed prior to the removal of computer equipment from agency

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[4] The record on review closes on expiration of the period for filing the response to the petition for review, which is 25 days after the date of service of the petition for review. 5 C.F.R. § 1201.114(d), (i). When the date that would ordinarily be the last day for filing falls on a weekend or Federal holiday, the filing period will include the first workday after that date. 5 C.F.R. § 1201.23. The date of service of the appellant's petition for review was July 6, 1992. *See* PFR File, Tab I. The twenty-fifth day thereafter was Saturday, July 31. The record on review therefore closed on Monday, August 2. The appellant filed his additional submission on August 3. See PFR File, Tab 4.

premises on October 19, 1992. See PFR File, Tab 1, at 3-4. The administrative judge therefore did not err in sustaining this charge.[5]

Charge of use of improper procedures for disposition of, property in violation of BLM Manual 1527

The appellant listed 19 items on the DI-103A, Certificate of Unserviceable Property, that he initiated on October 27, 1992. IAF, Tab 5, Subtab 4y. Jim Salas had transferred a number of these items to an employee of the Property Management Department on October 20 and 21, using Form DI-105. *See Id.*, Subtab 4r. Salas stated that this was his method of declaring the items to be unserviceable. *Id.* He stated that five of the items listed on the appellant's DI-103A were never in his possession or turned into the warehouse by him. *Id.* The agency charged the appellant with violating section 1527 of the BLM Manual by including these five items on the DI-103A. *See* IAF, Tab 4, Subtab 4h.

The administrative judge found that each of the various methods for disposing of replaced or unneeded property under section 1527 of the BLM Manual requires certificates of unserviceable property or reports of survey from the Accountable Office. Initial Decision at 5. She further found that the appellant was not authorized to declare computer equipment unserviceable, and that he violated section 1527 when he listed five items which had not been declared unserviceable by Jim Salas. *Id.* at 6.

In his petition for review, the appellant contends that the administrative judge erred in finding that he had declared the items on DI-103A to be unserviceable. He points out that the form requires four separate signatures, including the Accountable Officer, to be approved. *See* IAF, Tab 5, Subtab 4y. He says that all he did was to recommend that the items on the list be disposed of as unserviceable. He also says that Salas advised him orally that the five items in question were unserviceable. He contends that he acted properly under section 1527 when he initiated a Certificate of Unserviceable Property based in part on oral statements from Jim Salas.

We concur with the appellant that the agency did not establish a violation of section 1527 of the BLM Manual. An examination of that section discloses that it contains no discussion whatever of the proper procedure for declaring property to be unserviceable, nor even a reference to Form DI-103A, Certificate of Unserviceable Property. *See* IAF, Tab 5, Subtab 4n. We therefore find that the administrative judge erred in sustaining this charge.

Charge of removing government property without authorization in violation of 43 C.F.R. § 20.735-15

The administrative judge agreed with the appellant that transporting and storing government property is within his position description, but was not persuaded that he

[5] Whether completing paperwork such as a Receipt for Property after the fact was commonplace, as the appellant contends, would be relevant to the seriousness of the offense. This matter is therefore considered below in our discussion of the reasonableness of the penalty.

was entitled to transport and store government property off agency premises. Initial Decision at 6. Citing the statement of the appellant's second level supervisor that the appellant was not authorized to remove government property without accounting for the property with a DI-105, and the undisputed evidence that the appellant removed equipment from agency premises without prior authorization, the administrative judge found that the agency had proved its charge. *Id.* at 6-7.

When an agency charge contains two separate elements, the Board may sustain the charge only when the agency proves both elements. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). The agency's notice of proposed suspension charged the appellant with "removal of Government property without proper authorization in violation of 43 CFR 20.735-15." IAF, Tab 4, Subtab 4h. The agency therefore had to prove not only that the appellant removed government property from agency premises without proper authorization, but that such action violated 43 C.F.R. § 20.735-15. Section 20.735-15 provides in pertinent part as follows:

> (a) General responsibility. Employees shall be held accountable for Government property and moneys entrusted to them in connection with their official duties. It is each employee's responsibility to protect and conserve Government property and to use it economically and for official purposes only.
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> (c) Embezzlement of Government property. Employees shall not convert, even temporarily on loan, for personal use any Government property, or equipment
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The appellant has consistently maintained that the reason he removed the equipment in question from agency premises was to protect it from illegal cannibalization by employees of the PC Support Group. *See, e.g.*, IAF, Tab 4, Subtabs 4e-4f; Tab 5, Subtab 4v. There is no evidence in the record to support a conclusion that the appellant acted for any other reason.[6] There is similarly no evidence that the appellant's actions were not intended to protect and conserve government property, that he used government property uneconomically or for other than official purposes, or that he converted government property for personal use. Accordingly, we find that the agency failed to show a violation of 43 C.F.R. § 20.735-15, and that the administrative judge erred in sustaining this charge.

<u>Charge of falsification, misrepresentation, or concealment of material fact in connection with an official Government document in violation of 43 C.F.R. § 20.735</u>

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[6] The appellant submitted evidence that he sent an electronic message expressing these concerns to Teresa Barry, his immediate supervisor, on October 16, 1992, three days before he and Wolf removed the first group of items from agency premises. See IAF, Tab 4, Subtab 4e, attch. 17. Although the message did not inform Ms. Barry that he planned to remove equipment from agency premises, it did advise her that, because of his concerns about cannibalization, NI am removing the items from the area.... If you have 'a better solution please let me know." *Id.*

The DI-105

The agency charged the appellant with falsification in connection with the DI-105 dated October 23, 1992. It alleged in this regard that the appellant allowed Wolf to date the form October 23, 1992, the same date as the appellant's signature, even though Wolf did not sign the form until October 29, 1992. IAF, Tab 4, Subtab 4h. Citing agency investigators' report of interview with Wolf, the administrative judge found that Wolf did not sign the DI-105 until October 29, 1992, that the appellant was aware that Wolf erroneously dated the DI-105, and that the appellant intended the documents to reflect that he reassigned the property to Wolf prior to October 29, 1992. Initial Decision at 8.

A review of the agency investigators' report of the interview with Wolf does not support the administrative judge's finding that Wolf told them the appellant was aware that Wolf dated the form October 29, instead of October 23. *See* IAF, Tab 5, Subtab 4w. Although Wolf's hand-written statement says that the appellant "said that it was perfectly legal to do it this way," *Id.*, it is unclear whether this refers to the backdating of the form or to the storage arrangement itself. In the absence of any evidence that the appellant was even aware that Wolf had used an incorrect date on the form, the falsification charge obviously cannot be sustained.

B. The statement to investigators

The administrative judge found that the agency had charged the appellant with a second specification of falsification -- falsely telling agency investigators that all 19 items on the October 23 DI-103A had been declared as unserviceable by Jim Salas.[7] The administrative judge sustained this specification, finding that the appellant told the investigators that all the items listed on the DI-103A had been turned in and declared unserviceable by Salas's office, but that five of these items were never in Salas's possession nor turned in by him to, the warehouse. Initial Decision at 8-9.

The appellant contends in his petition for review that he did not tell investigators that the five items in question had been in Salas's possession, that Salas had turned all of them in to the Property Management Office, or that he told investigators that Salas had declared them to be unserviceable on a Form DI-105. An examination of the investigators' report of interview with the appellant confirms these contentions. According to that report, the appellant said he came into possession of the 12 items of equipment listed on the October 23 DI-105 in early October, as they were brought to him by some of the users and by Jim Salas, and that Salas "told him the subject items were unserviceable." .IAF, Tab 5, Subtab 4v. These statements are not necessarily inconsistent with Salas's statement that the five items in question "were-never in my possession nor were they turned in by me to the warehouse." IAF, Tab 5, Subtab 4r. As the appellant explained in his response to the notice of proposed suspension, "[e]ven though some of the statements reflect that [Salas] never had possession of, nor turned

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[7] It is not completely clear from a review of the notice of proposed suspension that the agency in fact charged the appellant with falsification in this regard. *See* IAF, Tab 4, Subtab 4h. We need not resolve this issue, however, given our finding that the agency did not establish that the appellant lied to agency investigators.

all of the computer equipment in, he did check it all and provide me information upon which I based my decision to place the equipment on the Certificate of Unserviceable Property instead of on Available Property Reports." IAF, Tab 4, Subtab 4e, attch. 13.

To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). We find the evidence to be insufficient to support an inference that the appellant intentionally lied to agency investigators.

Reasonableness of the penalty

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. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981). When not all of the charges are sustained, however, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Id.* at 308.

Of the four charges brought by the agency, only one --failing to timely complete a DI-105 for the equipment removed from the premises on October 19 -- has been sustained. An important factor affecting the seriousness of that offense is the appellant's contention that it is common practice to prepare paperwork after the transaction in question has already occurred. Although we have not considered the evidence that the appellant submitted with his petition for review on this issue, the evidence of record supports his contention with respect to seven of the twelve items of computer equipment listed on the DI-105 dated October 23, 1992. According to Jim Salas's statement, he completed DI-105's for seven of the twelve items on October 20 and 21, 1992. *See* IAF, Tab 5, Subtab 4r. Although the DI-105's show each of these seven items as being transferred by Salas to Vincent Duquette of the Property Management Division on these dates, *see Id.*, these items of equipment could not actually have been transferred on October 20-21, because it is undisputed that all 12 items had been taken to James Wolf's residence on October 19, 1992, where they remained until at least November 2, 1992, when investigators questioned Wolf and the appellant, *see* IAF, Tab 4, Subtab 4h; Tab 5, Subtabs 4v-4w.

Given this factor, we find that the maximum reasonable penalty is a five-day suspension, despite the appellant's past disciplinary record.[8] *See Davis v. Department of. the Treasury*, 8 M.S.P.R. 317, 320-21 (1981) (when the Board finds a penalty excessive, the penalty specified by the Board is not necessarily the one that, in the Board's view, is "best," or most reasonable," but rather the maximum penalty the Board would find to be within the parameters of reasonableness).

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[8] The appellant's prior disciplinary record includes two official reprimands, one for contributing to a physical altercation between himself and another employee, and one for making demeaning statements in the presence of co-workers. IAF Tab 5, Subtabs 4cc, 4dd.

ORDER

We ORDER the agency to cancel the appellant's 45-day suspension, and to replace it with a five-day suspension effective January 25, 1993. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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,
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.

OPINION OF MEMBER AMADOR DISSENTING IN PART

I concur with the majority's decision not to sustain two of the charges: Failure to follow proper procedures for personal property disposition; and falsification, misrepresentation, or concealment of material fact in connection with an official government document. For the following reasons, however, I dissent from the majority-4s decision to reverse the initial decision with respect to the charge of removing government property without proper authorization in violation of 43 C.F.R. § 20.735-15, and its decision to mitigate the penalty to a five-day suspension.

Subsection 20.735-15(a) provides that "[i]t is each employee's responsibility to protect and conserve Government property and to use it ... for official purposes only." Although there is no evidence that the appellant or the co-worker used the property for personal use, taking government property off of the facility's premises, without authorization, and without even timely noting the transfer of property to the co-worker's possession, is not proper "protection," nor use for "official purposes."

The majority sustains the charge of failing to follow proper procedures for the receipt of government property, but only as to the removal of property from agency premises on October 19, 1992. The appellant was charged with two specifications of such misconduct, however, for removal of property on October 26 as well as on October 19. The administrative judge properly sustained both specifications, finding that the appellant failed to follow proper procedures for the receipt of government property "prior to removing and/or transferring the equipment from the agency premises on October 19 and 26, 1992.4v Initial Decision at 4 (emphasis added).

The appellant, without authorization, twice removed government property from government premises, in a personal vehicle, to a co-worker's home. The agency manual guidelines referenced in the proposal notice with regard to the agency's first charge (BLM Manual 1522) state that "[e]ach employee is responsible for the proper care, safeguard, maintenance and use of all property in his/her custody." Not only did the appellant fail, on two occasions, to timely complete a "Receipts for Property form, he also failed to properly maintain the property by storing it in a co-worker's house.

A finding that the appellant did remove government property from the facility's premises, when combined with a finding that he abused the responsibility for property management with which he was entrusted, justifies a suspension longer than five days under the circumstances. A suspension of 20 days would have been a reasonable penalty. Although concurring with the majority opinion insofar as it fails to sustain two of the agency's charges, I therefore respectfully dissent with respect to the decision to fail to sustain the charge of removal of government property without prior authorization, and with respect to the majority-Ps decision to mitigate the charge to a five-day suspension.

Antonio C. Amador Member