

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

2006 MSPB 82

Docket No. SF-0752-05-0451-I-1

**Debra Stack,
Appellant,**

v.

**United States Postal Service,
Agency.**

April 12, 2006

Daniel Minahan, Esquire, and Barrie Shapiro, Esquire, Lakewood,
Colorado, for the appellant.

David P. Larson, Esquire, Sandy, Utah, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of the July 13, 2005 initial decision that mitigated the appellant's demotion to Part-time Flexible Clerk, PS-5 to demotion to a full-time vacant nonsupervisory position with the least reduction in grade and pay. The appellant has filed a cross-petition for review. For the reasons set forth below, we GRANT the agency's petition, DENY the appellant's cross-petition, and AFFIRM the initial decision as MODIFIED below. The agency's original penalty selection is AFFIRMED.

BACKGROUND

¶2 Prior to her demotion, the appellant occupied the position of Postmaster, EAS-13, in South Prairie, Washington. Initial Appeal File (IAF), Tab 4, Subtab 4e. In the course of investigating the embezzlement of money orders by another employee at South Prairie, the agency discovered irregularities in the appellant's accounting. *Id.*, Subtab 4d. On January 21, 2004, the agency issued a notice proposing to demote the appellant to the position of Part-time Flexible Clerk, PS-5, based on two charges. The first charge, Improper Reporting of Financial Accountability, was based on the agency's allegation that the appellant had overstated sales of "semi-postal" stamps, apparently in an overzealous attempt to compensate for previously unreported sales.¹ The second charge, Failure to Properly Perform the Duties of Your Position, was based on three specifications: (1) that the appellant kept excessive cash in her drawer; (2) that she kept a continuous running PS Form 17, instead of closing out the form every night; and (3) that she was responsible for a \$1,913.50 shortage, and had admitted to leaving her drawer unsecured. *Id.*, Subtab 4b. On March 4, 2005, the deciding official sustained all charges and specifications and demoted the appellant effective the following day. *Id.*, Subtab 4a.

¶3 This appeal followed. IAF, Tab 1. After a hearing, the administrative judge sustained both charges, but only the last specification of the second charge, and found that the appellant failed to establish her affirmative defenses of sex discrimination and denial of due process. Although he found that the deciding official had considered the relevant *Douglas* factors, and that the appellant had minimal potential for rehabilitation as a supervisor, the administrative judge

¹ A portion of the revenue from the sale of a semi-postal stamp goes to the charitable organization designated on the stamp. According to the proposal notice, the appellant reported sales of 9700 more semi-postal stamps than the South Prairie office received, causing the agency to pay \$776 to charitable organizations based on sales that did not take place. *Id.*, Subtab 4b.

mitigated the action to demotion to a full-time vacant nonsupervisory position with the least reduction in grade and pay. IAF, Tab 25. In addition, the agency was ordered to provide interim relief. *Id.*

¶4 On petition for review, the agency contends that its original penalty selection should have been affirmed, and that demoting the appellant to a full-time regular position would violate its collective bargaining agreement with the American Postal Workers Union. Petition for Review File (PFRF), Tab 1. The agency further contends that no full-time vacant non-supervisory position currently exists in the appellant's commuting area, and that the appellant would now be physically unqualified for such a position based on her request for permanent light duty. *Id.* In its certification of compliance with the interim relief order, the agency states that the appellant, who has been placed in a Part-time Flexible Clerk position, is receiving approximately the same hourly pay she would receive as a salaried full-time employee. However, the agency concedes that she is presently working fewer than 40 hours per week. *Id.* In her cross-petition, the appellant contends that the administrative judge erred in sustaining the charges and rejecting her affirmative defenses. PFRF, Tab 3. The appellant also moves that the agency's petition be dismissed for failure to provide interim relief. *Id.*

ANALYSIS

Interim Relief

¶5 When an initial decision grants the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order. 5 C.F.R. § 1201.115(b)(1). In order to comply with the interim relief order, the agency must either provide the interim relief ordered by the administrative judge, or make a determination that returning the employee to the position designated by the administrative judge would cause undue disruption to the work environment.

See 5 U.S.C. § 7701(b)(2)(A)(ii); *Costin v. Department of Health & Human Services*, 72 M.S.P.R. 525, 533 (1996), *modified on other grounds*, 75 M.S.P.R. 242 (1997). In the latter case, the agency must provide the employee with the pay, compensation, and all other benefits of the designated position. *See* 5 U.S.C. § 7701(b)(2)(B); *Costin*, 72 M.S.P.R. at 533. Here, the agency contends that it is unable to place the appellant in a full-time position because no such positions exist within her commuting area, and furthermore, that doing so would violate the applicable collective bargaining agreement and conflict with appellant's medical restrictions. We find that this litany of justifications is equivalent to an undue disruption determination. *See McDonald v. Department of Veterans Affairs*, 86 M.S.P.R. 539, ¶ 8 (2000) (agency's failure to submit undue disruption determination does not require dismissal where circumstances of the case show that its actions are equivalent to such a determination, the appellant's pay and benefits have been restored, and there is no harm to the appellant). However, the agency has failed to establish that the appellant has received the same pay, compensation, and benefits she would receive if placed in a full-time position, i.e., if the agency had provided the interim relief ordered by the administrative judge. The agency contends that the appellant would receive the appropriate full-time pay, or even slightly more, if she worked 40 hours per week in her part-time flexible position, but we are unable to determine from the record how many hours she has in fact worked or how much compensation she has received. Thus, the agency's certification of compliance is less than adequate.

¶6 Nevertheless, we deny the appellant's motion to dismiss the agency's petition for review. If an agency fails to establish its compliance with the interim relief order, the Board has discretion to dismiss the agency's petition, but need not do so. *See* 5 C.F.R. § 1201.115(b)(4); *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1332-34 (Fed. Cir. 2004). Under the circumstances of this case, we find that the shortcomings in the agency's certification of compliance are not sufficiently serious to warrant the sanction of dismissal.

The appellant's cross-petition for review is denied.

¶7 The appellant's cross-petition does not establish that new and material evidence is available that, despite due diligence, was not available when the record closed below, or that the decision of the administrative judge is based on an erroneous interpretation of statute or regulation. With regard to the charges, the appellant correctly notes that the first charge includes an element of intent. *See* IAF, Tab 15 (summary of prehearing conference).² However, the appellant does not dispute that she deliberately overstated sales of semi-postal stamps. That she may have done so for an innocent motive is not relevant to the question of whether she did so intentionally. Additionally, the appellant does not dispute that she sometimes left her cash drawer unlocked, or that she was responsible for the shortage of \$1,913.50.

¶8 Moreover, we find that the administrative judge correctly found the appellant's affirmative defenses unproven. With regard to her claim of sex discrimination, the appellant contends that the agency failed to meet its burden of articulating a legitimate, non-discriminatory reason for its action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). However, this case has been fully tried, so the three-part burden-shifting framework of *McDonnell Douglas* is no longer relevant.³ The appellant based her discrimination claim on the assertion that a male employee, Lawrence Johnson, committed similar misconduct but was subjected only to a proposed demotion from Postmaster, EAS-21, to Supervisor, Customer Service, EAS-17. However, as the

² The appellant objects that the written summary of the prehearing conference does not appear in her files. However, the record indicates that the appellant's representatives received this document by facsimile on June 3, 2005. *See id.*

³ The administrative judge should therefore have proceeded to the resolve the ultimate issue of discrimination instead of attempting to determine whether the appellant had made out a prima facie case.

administrative judge found, the charges against Johnson did not involve any allegations of intentional misconduct. *See* IAF, Tab 13, Exhibit D. Thus, Johnson does not qualify as a similarly-situated individual, *see Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003), and therefore she has failed to show disparate treatment discrimination. With regard to the appellant's allegation that the agency failed to provide adequate notice of the charges, in violation of her due process rights, we agree with the administrative judge that the notice of proposed removal was sufficient to place the appellant on notice of the charges and specifications against her. *See* IAF, Tab 4, Subtab 4b. In short, we find that the cross-petition fails to meet the criteria for review under 5 C.F.R. § 1201.115, and we therefore deny it.

The penalty of demotion to Part-time Flexible Clerk, PS-5, is affirmed.

¶9 When, as here, all of the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the bounds of reasonableness. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). We note that there are significant mitigating factors in this case, including the appellant's 26 years of service without prior discipline, and the lack of evidence that she gained personally from her misconduct. However, the sustained misconduct is serious, and in the case of the first charge, intentional. Moreover, an agency has the right to expect a higher standard of conduct from a supervisor than a non-supervisory employee. *Caster v. Department of the Army*, 62 M.S.P.R. 436, 441 (1994), *aff'd sub nom. Manning v. Merit Systems Protection Board*, 59 F.3d 180 (Fed. Cir. 1995) (Table). Because we find that the agency's original penalty selection is within the bounds of reasonableness, and therefore should not have been mitigated, we do not reach the issue of whether the penalty ordered by the administrative judge is precluded by the applicable collective bargaining agreement.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, 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 must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar

days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling 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 do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at

our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.