UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 282

Docket No. CH-0752-04-0620-B-1

John Doe,

Appellant,

v.

Department of Justice,

Agency.

December 4, 2007

Richard L. Swick, Esquire, Washington, D.C., for the appellant.

Jeffrey B. Killeen, Esquire, Pittsburgh, Pennsylvania, 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 filed a petition for review, and the appellant has filed a cross petition for review, of a remand initial decision mitigating the agency's removal action to a 120-day suspension and a directed reassignment at the agency's option. For the reasons set forth below, we GRANT the agency's petition, DENY the appellant's cross petition, and AFFIRM the remand initial decision AS MODIFIED by this Opinion and Order, sustaining the agency's removal action.

BACKGROUND

¶2 Until his removal, the appellant was employed as a Special Agent, GS-13, by the Federal Bureau of Investigation (FBI). Second Initial Appeal File (IAF-2), Tab 3, Subtab 4a. In October 2002 and January 2003, the agency received reports from an Employee Assistance Program representative and an employee in the appellant's division that prompted it to recommend that its Office of Professional Responsibility (OPR) conduct an inquiry. *Id.*, Subtabs 4aa-bb. The reports indicated that the appellant had videotaped his sexual activities with women, including two women in his division, and that he might have done so without their consent. *See id.* OPR conducted an investigation, and the agency subsequently removed the appellant for "Unprofessional Conduct – Videotaping Sexual Encounters With Women Without Their Consent." *See id.*, Subtabs 4a-bb. The charge was based on evidence that the appellant had videotaped his sexual activities with the two FBI employees mentioned above, as well as with another woman who was not employed by the FBI; that, although one of the FBI employees had consented to videotaping of her sexual activities with the appellant on other occasions, the appellant had videotaped her on one occasion when she had not consented to and was not aware of the taping; and that the other two women, each of whom was videotaped once, had not consented to and were not aware of those tapings. *Id.*, Subtab 4b at 1-3, 5.

¶3 The appellant subsequently filed a Board appeal, and after holding a hearing, the administrative judge issued an initial decision finding that the action could not be sustained because the agency failed to establish a connection between the appellant's conduct and either the efficiency of the agency's operations or the performance of the appellant's duties. IAF-2, Tab 21 at 18. The agency petitioned for review of the initial decision, to which the appellant responded in opposition. Petition for Review (PFR) File, Tabs 1, 4. Finding that the agency had "established, by a preponderance of the evidence, a nexus between disciplinary action against the appellant and the efficiency of the

service," the Board reversed the administrative judge's initial decision and remanded the appeal to the regional office for further adjudication. *Doe v. Department of Justice*, 103 M.S.P.R. 135, ¶ 13 (2006).

¶4 On remand, the agency filed a motion requesting that the record be reopened to allow for the submission of evidence and a supplemental hearing on the issue of whether "the Board's finding that the appellant's conduct was 'clearly dishonest' impairs the appellant's ability to testify or act as an affiant in criminal cases for the foreseeable future" under the agency's "Giglio Policy," promulgated pursuant to *Giglio v. United States*, 405 U.S. 150 (1972).[*] Remand Appeal File (RAF), Tab 2 at 2. Although the appellant agreed with the agency that the convening of a supplemental hearing would be appropriate to address the penalty issue, RAF, Tab 4, the administrative judge denied the agency's motion, RAF, Tab 7. Nonetheless, the administrative judge granted the parties' request that they each be permitted to submit a memorandum of law regarding "the significance of the Board's remand decision to the application of the agency's 'Giglio Policy,' should the appellant be restored as a special agent." *Id.* at 2. The agency and the appellant each filed memoranda pursuant to the administrative judge's order. RAF, Tabs 10, 12.

¶5 The administrative judge issued a remand initial decision, in which he mitigated the agency's removal action to a 120-day (time served) suspension and a directed reassignment at the agency's option, finding that, despite the appellant's status as a law enforcement officer and his failure to maintain the

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[*] Under *Giglio*, investigative agencies must turn over to prosecutors, as early as possible in a case, potential impeachment evidence with respect to the agents involved in the case, after which the prosecutor exercises his discretion as to whether the impeachment evidence must be turned over to the defense. *Cameron v. Department of Justice*, 100 M.S.P.R. 477, ¶ 10 n.1 (2005), *review dismissed*, 165 F. App'x 856 (Fed. Cir. 2006). Such potential impeachment evidence may render a *Giglio*-impaired agent's testimony to be of marginal value, placing at risk any case that relies on such an impaired witness. *Id.*

high standards expected of him in that position, the penalty of removal was beyond the tolerable limits of reasonableness due to such mitigating factors as: (1) the appellant's length of service with positive performance evaluations and no prior disciplinary record; (2) the appellant's candor in promptly admitting to his off-duty actions when interviewed by agency investigators and his decision to seek counseling, thereby showing his capacity for rehabilitation; (3) the agency's failure to establish that the appellant's misconduct violated state criminal statutes or the agency's internal policy regarding personal relationships, coupled with the fact that the loss of confidence in the appellant by his superiors was based, in part, on their "unsubstantiated belief" that he had violated a criminal statute; (4) the agency's failure to show what impact the disclosure of the existence of the pornographic videotapes had on the female coworkers recorded on the videotapes; (5) any disruption of office functions resulting from the existence of the pornographic videotapes was caused more by the office discussions initiated by one of the subject females and the agency's own conduct and delay in investigating the matter, than by the actions of the appellant; (6) the severity of the penalty imposed on the appellant was greater than the severity of the penalties meted out against other employees in purportedly similar situations; and (7) the appellant's admitted misconduct would have a minimal impact on his ability to function in his position, notwithstanding the agency's "Giglio Policy." Remand Initial Decision (Remand ID) at 4-15. The administrative judge ordered the agency to provide interim relief. *Id.* at 16-17.

¶6 The agency has filed a petition for review of the remand initial decision, in which it argues that the administrative judge erred in weighing the relevant *Douglas* factors and exceeded his authority by substituting his own choice of an appropriate penalty in place of the agency's, and that the penalty of removal was within the tolerable bounds of reasonableness. Remand PFR at 15-28, 31-34, Remand PFR File, Tab 1. The agency also argues that the administrative judge erred by refusing to reopen the record on remand and by failing to grant the

agency's motion for certification of an interlocutory appeal on that issue. *Id.* at 28-31. The appellant has filed a cross petition for review, in which he requests that the Board reconsider its previous finding on the issue of nexus, and has responded in opposition to the agency's petition. Remand PFR File, Tab 5. The agency has responded in opposition to the appellant's cross petition. Remand PFR File, Tab 7.

ANALYSIS

The appellant's cross petition for review.

¶7 In his cross petition for review, the appellant requests that the Board reconsider its finding that the agency proved the requisite nexus between disciplinary action against him and the efficiency of the service. Remand Cross PFR at 21-26, Remand PFR File, Tab 5; *see Doe*, 103 M.S.P.R. 135, ¶ 13. In response, the agency argues that the law of the case doctrine precludes the appellant from re-litigating the issue of nexus, and that the appellant's so-called cross petition for review is actually a motion for reconsideration of the Board's earlier decision, which the Board lacks the authority to consider. Remand PFR File, Tab 7.

¶8 We find that the law of the case doctrine does preclude us from reconsidering the appellant's arguments concerning whether the agency established a nexus between disciplinary action against him and the efficiency of the service. The law of the case doctrine was developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit; it thus regulates judicial affairs before final judgment, not preclusion by final judgment. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). Under the law of the case doctrine, a tribunal will not reconsider issues that have already been decided in an appeal. *Dow v. Office of Personnel Management*, 95 M.S.P.R. 355, ¶ 10 (2003). Nonetheless, there are three recognized exceptions to the law of the case doctrine: (1) the availability of new

and substantially different evidence; (2) a contrary decision of law by controlling authority that is applicable to the question at issue; and (3) a showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 553 (1993). In his cross petition for review, the appellant has produced no new and substantially different evidence bearing on the issue of nexus, and he has cited no contrary decision of law by controlling authority that is applicable to the issue. Further, the appellant has not shown that the Board's prior decision in this case was clearly erroneous and would work a manifest injustice, which requires a showing of "exceptional circumstances," *i.e.*, "clear error" that convinces the adjudicating tribunal that the prior decision was in error. *Dow*, 95 M.S.P.R. 355, ¶ 10. Because the appellant has established no basis for re-litigating the issue of nexus, his cross petition for review is denied.

The agency's petition for review.

¶9 As a preliminary matter, we note that the agency contests in its petition for review the administrative judge's failure to certify its motion for an interlocutory appeal regarding his refusal to reopen the record on remand. The record reflects that the agency filed a motion for certification before the administrative judge, RAF, Tab 8, which the appellant opposed, RAF, Tab 9. The record does not indicate that the administrative judge expressly ruled on the agency's motion for certification; however, the Board's regulations provide for certification of rulings for interlocutory appeal only when the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. 5 C.F.R. § 1201.91. Under 5 C.F.R. § 1201.92, an administrative judge will certify a ruling for interlocutory appeal only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, that an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public. *Special Counsel v. Perkins*, 104 M.S.P.R.

148, ¶ 11 (2006). Because the agency was able to challenge the administrative judge's ruling on petition for review, and has subsequently done so, and because the agency has not established the criteria for certification set forth under 5 C.F.R. § 1201.92, the agency has not shown that the administrative judge's implicit denial of its motion for certification constituted an abuse of discretion. *See Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418 (1991).

¶10 As to the penalty issue, the agency argues that the administrative judge erred by finding that removal was beyond the tolerable bounds of reasonableness and by mitigating the penalty to a 120-day (time served) suspension and a directed reassignment at the agency's option. Where the Board sustains the charge and underlying specifications, it will defer to an agency's penalty decision unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Jones v. U.S. Postal Service*, 103 M.S.P.R. 561, ¶ 20 (2006), *aff'd*, No. 2007-3054, 2007 WL 1725497 (Fed. Cir. June 11, 2007) (NP); *Batten v. U.S. Postal Service*, 101 M.S.P.R. 222, ¶ 9, *aff'd*, 208 F. App'x 868 (Fed. Cir. 2006); *see Zingg v. Department of the Treasury*, 388 F.3d 839, 843 (Fed. Cir. 2004). Because the agency has primary discretion in maintaining employee discipline and efficiency, the Board will not displace management's responsibility, but will instead ensure that managerial judgment has been properly exercised. *Jones*, 103 M.S.P.R. 561, ¶ 20; *see Modrowski v. Department of Veterans Affairs*, 252 F.3d 1344, 1353 (Fed. Cir. 2001) (noting that an agency is tasked with determining the appropriate penalty in a given case, whereas the Board's role is merely to ascertain the reasonableness of the agency's chosen penalty); *Adam v. U.S. Postal Service*, 96 M.S.P.R. 492, ¶ 7 (2004) (noting that the Board's role is not to decide what penalty it would impose, but rather, whether the penalty selected by the agency exceeds the maximum reasonable penalty), *aff'd*, 137 F. App'x 352 (Fed. Cir. 2005). Mitigation is appropriate only where the agency failed to weigh the relevant

factors or the agency's judgment clearly exceeded the limits of reasonableness. *Jones*, 103 M.S.P.R. 561, ¶ 20. The deciding official need not show that he considered all of the mitigating factors, and the Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty. *Id.* In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. *Leatherbury v. Department of the Army*, 105 M.S.P.R. 405, ¶ 23 (2007).

¶11 The record shows that OPR investigated the allegations made against the appellant, and upon determining that the appellant had committed actionable misconduct, OPR weighed the relevant *Douglas* factors in deciding the appropriate discipline that it should recommend. IAF-2, Tab 3, Subtab 4f at 10-14; Subtab 4g. OPR found that mitigating factors such as the appellant's length of service, with positive performance evaluations and no prior disciplinary record, and potential for rehabilitation were outweighed by the seriousness of the misconduct, which "eroded his Division's confidence in his ability to perform" in his position. IAF-2, Tab 3, Subtab 4f at 11. OPR ultimately determined that the appellant's "honesty, integrity, trustworthiness, character, and credibility have been called into question." *Id.*, Subtab 4f at 13-14. Finding that the appellant's "actions [could not] be tolerated, . . . OPR believe[d] that taking any action less severe than dismissal would, in effect, be condoning such behavior and would be unfair to other employees who have been disciplined according to policy and precedent." *Id.*

¶12 The appellant has not alleged, and the record does not suggest, that the agency failed to weigh any relevant factors; thus, mitigation is appropriate only if the agency's judgment clearly exceeded the limits of reasonableness. *See Jones*, 103 M.S.P.R. 561, ¶ 20. Based on our review of the record, we find that the

agency-imposed penalty of removal is within the tolerable bounds of reasonableness and is not "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion" by the agency. *See id.* The intentional, egregious and "clearly dishonest" nature of the appellant's misconduct—the surreptitious videotaping of sexual encounters with various female acquaintances, two of whom were agency employees assigned to the same division as the appellant—is clear from the record. *Cf.* 5 C.F.R. § 735.203 (noting that "[a]n employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government"); *Stephens v. Department of the Air Force*, 58 M.S.P.R. 502, 506 (1993) (finding that even a single instance of indecent and disgraceful conduct toward a coworker can support a penalty of removal), *dismissed*, 842 F.Supp. 1457 (MD Ga. 1994), *aff'd*, 48 F.3d 537 (11th Cir. 1995) (Table). Such misconduct stands at odds with the high standards of conduct expected of the appellant in his position as an FBI Special Agent. *See, e.g., Bordelon v. Department of Health & Human Services*, 54 M.S.P.R. 400, 405 (1992) (removal was a reasonable penalty where the employee occupied a position of considerable responsibility, and the agency was entitled to require that the incumbent of such a position possess the highest standard of integrity).

¶13 In the initial decision, the administrative judge found, *inter alia*, that any disruption of office functions resulting from the existence of the pornographic videotapes was caused more by the office discussions initiated by one of the women surreptitiously videotaped by the appellant and by the agency's own conduct and delay in investigating the matter, than by the actions of the appellant. Remand ID at 7, 9-12. Such intervening acts, however, do not absolve the appellant of culpability for his clearly dishonest actions in the matter. The appellant argues further that the agency's established policy regarding personal relationships precluded the agency from seeking disciplinary action against him. Cross PFR at 6-7, 10-14, 16, Remand PFR File, Tab 5. The appellant's argument

is misplaced because the agency's removal decision was based not on his relationships, but rather, on his clearly dishonest actions through which he exploited his relationships with female acquaintances, two of whom were coworkers, to satiate his prurient "compulsions." IAF-2, Tab 3, Subtab 4c at 2. Although, at the time of his removal, the appellant had served with the agency for 7 years, with no disciplinary record and a history of positive performance, we find those factors insufficient to warrant mitigation in this case. *Cf. Cisneros v. Department of Defense*, 83 M.S.P.R. 390, ¶ 20 (1999) (finding, in the context of a sexual harassment case, that "notwithstanding the favorable penalty factors upon which the administrative judge relied, removal is a reasonable penalty in view of the seriousness of the appellant's sexual misconduct, particularly its continual, unrelenting nature, its pervasiveness, its perpetration on several female employees, and his position as a supervisor"), *aff'd*, 243 F.3d 562 (Fed. Cir. 2000) (Table).

¶14 We find that the agency gave appropriate consideration to the mitigating factors presented in this case, and in light of the nature of the misconduct and the agency's rationale regarding the appropriateness of the penalty, we find that the agency's decision to remove the appellant was not so harsh and unconscionably disproportionate to his misconduct that it amounts to an abuse of discretion. *See Leatherbury*, 105 M.S.P.R. 405, ¶ 24. Accordingly, we sustain the appellant's removal.

ORDER

¶15 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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:

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William D. Spencer
Clerk of the Board
Washington, D.C.