UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 96

Docket No. AT-0752-08-0747-I-1

Joe Lewis, Jr.,

Appellant,

v.

Department of Veterans Affairs,

Agency.

June 5, 2009

Sarah Suszczyk, Alexandria, Virginia, for the appellant.

Alan E. Foster, Esquire, Nashville, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant files a petition for review (PFR) of a January 26, 2009 initial decision that affirmed his removal. For the reasons set forth below, the Board GRANTS the PFR, VACATES the initial decision in part, and remands this appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Effective July 11, 2008, the appellant was removed from his GS-6 Health Technician position based on a single charge of violating Nursing Service Policy 118-7-2, entitled "Suicide and Homicide Observation." Initial Appeal File (IAF), Tab 3, subtabs 4a (the removal SF-50), 4b (the agency's decision letter), 4f (the

Notice of Proposed Removal), 4p (the agency's policy which, among other things, requires employees to provide one-to-one monitoring for potentially suicidal patients). The appellant filed this appeal and requested a hearing, IAF, Tab 1, which was held on January 13, 2009, *see* Hearing CD (HCD). The administrative judge issued an initial decision, sustaining the agency's charge and affirming the removal penalty. IAF, Tab 17. The appellant filed a timely PFR, claiming that he obtained new evidence, and the agency filed a response. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

¶3 On PFR, the appellant only appears to challenge the penalty determination. *See* PFRF, Tab 1 at 4 ("In consideration of all circumstances, including new evidence concerning disparate penalty not previously available to the Appellant, the penalty of removal in this instance exceeds all bounds of reasonableness."). Therefore, as we discern no error with the administrative judge's decisions to sustain the charge, and to find a nexus between the charge and the efficiency of the service, *see* IAF, Tab 17 at 2-5, we affirm those conclusions.

¶4 The appellant explains that, in his discovery requests to the agency, he asked the agency to identify

> each [and] every person in the [agency's medical center at the Memphis location] who has been disciplined by the Agency from 2003 to the present for a first offense or greater numbered offense of Violation of Nursing Service Policy 118-7-2 (or similar policy should Nursing Service Policy not have been in effect at that time)

and to provide additional information for each offense. PFRF, Tab 1 at 5; *see id*., Exhibit 1 (the appellant's discovery requests). We note that, in its discovery responses, the agency answered "[n]o one" to the first request and it responded "not applicable" to the appellant's requests for additional information. *See id*., Exhibit 1. Therefore, the parties and the administrative judge had no need to address the issue of whether the removal penalty was consistent with penalties imposed on other similarly situated employees.

¶5 After the close of the record in this matter, the appellant's representative received discovery responses from the agency in an unrelated matter, which indicated that the agency disciplined a Nursing Service employee in April 2004, based on allegations that the employee was "[c]areless and [n]egligent in duties when [he] failed to follow established one to one observation guidelines which endangered the safety of 2 patients," and that this employee was allegedly reprimanded. *Id.* at 6-7 and Exhibit 3 (the agency's discovery responses in the unrelated matter). The appellant's representative also alleges that he learned of another Health Technician, Ricky Walker, who received a proposed removal notice for leaving a patient he was assigned to monitor under the one-to-one policy, but the agency decided instead to issue him a written counseling memorandum. *Id.* at 7; *see id.*, Exhibit 4 (a February 23, 2009 letter on National Association of Government Employees letterhead, indicating that the agency's action against Mr. Walker was proposed on December 17, 2008, *before the hearing in this appeal*, a meeting was held between the Medical Center Director and Human Resources to respond to the proposed removal on January 16, 2009, and the agency issued its counseling memorandum on January 23, 2009, *after the record closed, below*).

¶6 Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the PFR absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Here, however, the appellant exercised due diligence to obtain discovery from the agency and the agency failed to produce the requested information.

¶7 In *Berkey v. U.S. Postal Service*, 38 M.S.P.R. 55, 56, 58 (1988), the administrative judge sustained the appellant's removal for several instances of misconduct. Mr. Berkey identified other employees whom he alleged were treated more leniently for similar misconduct; however, the administrative judge apparently did not compare the case of one of the identified employees "because

that employee had only admitted his misconduct the day before the hearing, and the agency had not yet had the opportunity to determine whether any action against that employee was appropriate." *Id*. at 58. On review, the appellant claimed, in an affidavit, that he "just learned" that the agency suspended that employee for 2 weeks and it refused to explain to him why it gave that employee a lesser penalty. *Id.* The Board concluded that such evidence was new evidence, but noted that it was unable to determine "whether this evidence affects the result reached in this case" and it remanded the appeal to adjudicate this issue. *Id.*

¶8 Similarly, we find that the appellant's proffered evidence is new, and we also conclude that it is of sufficient weight that it *may* warrant an outcome different from that of the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). Indeed, in a chapter 75 action, the consistency of the penalty with those imposed on other employees for the same or similar offenses is only one factor to be considered in determining the reasonableness of an agency-imposed penalty. *Yeager v. General Services Administration*, 39 M.S.P.R. 147, 151 (1988); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). Where an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *Woody v. General Services Administration*, 6 M.S.P.R. 486, 488 (1981). In its response to the appellant's PFR, the agency's representative tries to distinguish the appellant's case from these two instances of seemingly similar misconduct. *See* PFRF, Tab 3 at 8. However, the statements of the agency's representative in its response to the PFR do not constitute evidence, *see Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995), and we do not consider such statements on review.

¶9 Given that the new evidence includes two fairly recent instances of the agency imposing lesser penalties on other employees for seemingly similar misconduct, and the similarity of the circumstances presented in this appeal and

in *Berkey*, we believe that it is appropriate to follow the action taken in that case. Therefore, we remand this appeal, so that the administrative judge may take evidence and argument with respect to these two employees and the circumstances surrounding the agency's actions against them, and make a new penalty determination.

ORDER

¶10 For the above reasons, we GRANT the PFR, VACATE the initial decision only with respect to the penalty determination, and REMAND this appeal to the regional office for a determination as to whether the appellant's removal is within the bounds of reasonableness for the sustained offense. On remand, the administrative judge shall allow the parties to present additional evidence and argument regarding the two employees in question. The administrative judge shall then determine whether the appellant and these employees were similarly situated, and, if so, whether their different treatment warrants a different penalty in the present case.

FOR THE BOARD:

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