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

**2009 MSPB 216**

Docket No. AT-0752-09-0118-I-1

**Antwon R. Walker,**

**Appellant,**

**v.**

**United States Postal Service,**

**Agency.**

October 28, 2009

Janet D. Howard, Esquire, Tampa, Florida, for the appellant.

Susan Breymaier, Esquire, Memphis, Tennessee, for the agency.

**BEFORE**

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

## OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the June 5, 2009 initial decision (ID) that dismissed his constructive suspension appeal for lack of jurisdiction and sustained his removal. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge (AJ) made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

¶2 After fully considering the filings in this appeal concerning the appellant's alleged constructive suspension, we conclude that there is no new, previously unavailable, evidence and that the AJ made no error in law or regulation that affects the outcome. Therefore, we DENY the appellant's PFR in that regard. For the reasons discussed below, we GRANT the appellant's PFR concerning his removal and AFFIRM the ID as MODIFIED, still sustaining the removal.

## BACKGROUND

¶3 The appellant, a disabled preference eligible, was a Part-Time Flexible City Carrier at the Sulphur Springs Station in Tampa, Florida. Initial Appeal File (IAF), Tab 1 at 1, Tab 3, subtab 1 at 1. Supervisor of Customer Services Virgil Elkins had been informally accommodating his physical limitations. Hearing CD. On October 16, 2007, the appellant presented his supervisors with new documentation concerning his limitations. IAF, Tab 19, subtab A at 1, subtab B at 1; Hearing CD. The documentation included his October 15, 2007 letter, in which he described his conditions as "Plantar Fasciitis of the feet and Chondromalacia of both knees, both of which are indefinite conditions," and stated that he is "limited to walking up to 30 minutes, sitting up to 1 hour, and standing for 20-30 minutes." He further stated that, according to his doctor, his condition was worsening because of his job. IAF, Tab 19, Ex. A at 1. He left work on October 16, 2007, and did not return thereafter. Hearing CD.

¶4 On July 24, 2008, Elkins proposed to remove the appellant for "Unsatisfactory Attendance – Absent without Leave (AWOL) – Failure to Follow Instructions." Elkins specified, inter alia, as follows: The appellant had failed to follow Manager of Customer Services David Jordan's instructions in Jordan's May 5, 2008 letter to provide medical documentation for his absences by May 12, 2008, or to report to work on that date, and to call the Employee Resource Management System (eRMS) to report any absences. Although the appellant sent Jordan a May 12, 2008 letter, Jordan again instructed him in a May 16, 2008

letter to submit proper documentation and advised him that his failure to call eRMS had resulted in a charge of AWOL for May 12 through 16, 2008. He was instructed by a July 3, 2008 letter to report for a July 10, 2008 investigative interview. He failed to report for the interview or to contact management concerning his inability to attend. He was advised that he was still in an AWOL status because of his failure to report for work or to contact eRMS to notify the agency of his inability to report for work. He did not submit the required medical documentation to substantiate his inability to work. He remained in an AWOL status as of the date of the notice of proposed removal. IAF, Tab 3, subtab 4E.

¶5 In a September 15, 2008 decision, Manager of Customer Service Operations Timothy Dose sustained the charges and removed the appellant effective September 19, 2008. IAF, Tab 3, subtab 4B. The appellant filed an appeal of the removal. He also alleged that the agency constructively suspended him beginning October 16, 2007, and discriminated against him by denying him reasonable accommodation for his disability. IAF, Tabs 1 at 2-3, 6 at 1.

¶6 In his ID, the AJ described the events leading to the appellant's alleged constructive suspension and removal. ID at 2-3. The AJ then found as follows: Elkins testified that the appellant could not work as a City Carrier with the restrictions he identified, and therefore, Elkins informed Jordan of the situation. Jordan testified that he told the appellant that the station had no work available within those restrictions and that the appellant would have to apply to the Postmaster for light duty. Jordan further testified that he told the appellant how to apply to the Postmaster, that the appellant could take leave for the rest of the day, and that he could decide which type of leave he wanted to use. Jordan also testified that the appellant did not tell him that he could work, still wanted to work, or did not want to take leave. *Id.* at 3.

¶7 Concerning the constructive suspension appeal, the AJ found that the appellant failed to prove that he was placed on enforced leave, concluding that he initiated his absence on October 16, 2007, and did not show that the agency

should have allowed him to return to work later. Thus, the AJ dismissed the constructive suspension appeal for lack of jurisdiction. ID at 4-6. Concerning the removal appeal, the AJ found that the agency charged the appellant with failure to follow instructions and AWOL and that the agency proved the charges. IAF, Tab 18 at 5; ID at 2, 6-8. He found that the appellant failed to prove disability discrimination. ID at 9-10. He concluded that removal promoted the efficiency of the service and was a reasonable penalty. *Id.* at 8-9. Thus, he affirmed the agency's removal action. *Id.* at 2, 10.

¶8 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

## ANALYSIS

The appellant has failed to show that the AJ's alleged error in various rulings and findings provides a basis for Board review.

¶9 The appellant asserts that the AJ erred in denying certain witnesses, making credibility determinations, declining to address some issues, accepting certain evidence and argument, disallowing some testimony, sustaining the failure to follow instructions charge, and rejecting as unproven his disability discrimination affirmative defense. PFR File, Tab 1. After examining the appellant's assertions, we find that he has either failed to preserve objections for Board review or merely disagreed with the AJ's explained factual findings and credibility determinations without showing error in those findings and determinations. Therefore, we find that his assertions do not provide a basis for Board review under 5 C.F.R. § 1201.115(d).

Although the AJ erred in defining the period at issue in the AWOL charge, he did not err in finding that the agency proved the charge.

¶10 In sustaining the AWOL charge, the AJ found as follows:

> It is undisputed that the appellant was not at work during the period from May 12, 2008, through July 24, 2008, the date of the agency's letter proposing his removal. Mr. Jordan's May 5, 2008 letter

> instructed the appellant to either update his medical restrictions or to report to work on May 12, 2008. Agency File, Tab 4(p). It also instructed him to request any absences on a daily basis through eRMS. As has been discussed above, the appellant did not update his medical restrictions, nor did he request leave through eRMS. Accordingly, I find that the appellant was AWOL since he was absent from work and he had failed to request leave. The charge is SUSTAINED.

ID at 8.

¶11 The appellant asserts, inter alia, that the AJ erred in finding that he was AWOL for a longer period after the AJ stated during the hearing that he was charged with AWOL for only May 12 to 16, 2008, and told his counsel that she did not have to worry about any dates after that week. The appellant also asserts that the agency never produced any evidence showing that he was ever scheduled to work any particular routes during the alleged AWOL period, contending that he was unscheduled during that period. PFR at 11.

¶12 We agree with the appellant that the AJ erred in identifying the AWOL period. During the hearing, the AJ went off the record to examine the July 24, 2008 notice of proposed removal. When he returned, he stated that an issue had arisen concerning whether the agency had charged the appellant with AWOL for only the period from May 12 through 16, 2008, or for a longer period. He further stated that, in any event, the agency contended that it was seeking to prove AWOL only for the period from May 12 through 16, 2008, and, therefore, that he would limit his consideration of the evidence to that time frame. He thus told the appellant's attorney that she did not need to concern herself with whether the appellant was AWOL after May 16, 2008. Hearing CD. Given the agency's representation that it would confine the AWOL charge to that period and his limitation of the testimony, the AJ should have considered the AWOL charge to be based only on May 12 through 16, 2008, in deciding the charge.

¶13 Nonetheless, we find that the appellant has failed to establish that the AJ's error in identifying the AWOL period shows that the agency failed to prove the

AWOL charge. In that regard, the appellant has shown no error in the AJ's finding that Jordan's May 5, 2008 letter instructed the appellant to either update his medical restrictions or to report to work on May 12, 2008; that it also instructed him to request any absences on a daily basis through eRMS; and that he failed to do so. ID at 8; IAF, Tab 3, subtab 4P. Given Jordan's instructions, the appellant's undisputed absence from May 12 through 16, 2008, was unauthorized. Further, we find that proof that the appellant was AWOL for part of the period is analogous to proof of a specification under a charge. *See, e.g.*, *Young v. Department of Veterans Affairs*, 83 M.S.P.R. 187, ¶ 19 (1999). Thus, despite the AJ's error in misstating the AWOL period agreed upon at the hearing, we find that the agency presented preponderant evidence to sustain the AWOL charge. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

Although the AJ erred in analyzing the penalty, he did not err in finding that removal was within the tolerable limits of reasonableness.

¶14 In sustaining the removal penalty, the AJ found, inter alia, that "the appellant was AWOL for more than two months, a lengthy period of time." ID at 9. As set forth above, in determining the reasonableness of the penalty, the AJ similarly should not have considered the AWOL period to extend longer than the May 12 through 16, 2008 period to which the parties agreed at the hearing.

¶15 Nonetheless, we find that the appellant has failed to show that the AJ's error affected the ultimate determination that removal was an appropriate penalty. When 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 parameters of reasonableness. The Board's function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of

reasonableness. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *See, e.g., Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶¶ 8-9 (2009).

¶16 Here, Dose found, inter alia, that the appellant's offense was very serious; that he was clearly aware of the proper procedures, yet failed to report to work as scheduled; that management had lost all confidence in him; that he had worked for the agency for only a year and a half; that the discipline was consistent with that imposed on employees who engage in similar conduct; that he was not a candidate for rehabilitation; and that no other sanction would serve to deter such conduct. IAF, Tab 3, subtab 4B at 1-2. Similarly, the AJ found that the appellant's failure to update his medical restrictions and call in to eRMS was deliberate and willful, that the appellant was AWOL for a lengthy period, that he had less than 2 years of service with the agency, and that he had shown no remorse or rehabilitation potential. ID at 9. Even considering the AWOL period to be only May 12 through 16, 2008, the appellant has offered no mitigating factors sufficient to overcome the aggravating factors. Thus, we find that the appellant's removal is within the tolerable bounds of reasonableness. *See, e.g., Jones v. U.S. Postal Service*, 110 M.S.P.R. 674, ¶ 8 (2009).

## ORDER

¶17 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 Code, 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 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, www.cafc.uscourts.gov. 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:

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