UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 69

Docket Nos. SF-0752-09-0460-I-1
SF-0752-09-0466-I-1

Travis Canada,

Matilde Torres,

Appellants,

v.

Department of Homeland Security,

Agency.

April 20, 2010

Michael P. Baranic, Esquire, San Diego, California, for the appellants.

Carlos O. Cantu, Esquire, Chula Vista, California, for the agency.

Sofia Flood, Chula Vista, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellants have filed petitions for review of the initial decisions that sustained the agency's actions reducing them in grade and pay from their positions as Supervisory Border Patrol Agents to Border Patrol Agents for Conduct Unbecoming a Supervisory Border Patrol Agent. For the reasons set forth below, we GRANT the petitions for review, AFFIRM as MODIFIED those parts of the initial decisions finding the charge sustained, a nexus between the

sustained charge and the efficiency of the service, and the appellants' affirmative defenses based on retaliation unsubstantiated, VACATE the remainder of the initial decisions, and REMAND the appeals for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellants worked as GS-12 Supervisory Border Patrol Agents (BPA) for the agency. Canada Initial Appeal File (IAF), Tab 4, Subtab 4b at 1; *id.*, Subtab 4e at 16; Torres Initial Appeal File (IAF), Tab 4, Subtab 4b at 1; *id.*, Tab 6, Ex. 1. On October 24, 2008, the agency proposed to reduce the appellants in grade and pay and suspend them for 30 days based on the charge of Conduct Unbecoming a Supervisory BPA. Canada IAF, Tab 4, Subtab 4d at 1; Torres IAF, Tab 4, Subtab 4d at 1. The charge included one specification alleging that during Thanksgiving or Christmas 2006 the appellants, as passengers in an unmarked Border Patrol vehicle, participated in purchasing alcohol from a local liquor store and consuming alcohol in the vehicle while on official duty. Canada IAF, Tab 4, Subtab 4d at 1; Torres IAF, Tab 4, Subtab 4d at 1. The agency charged Mr. Canada with continuing to consume alcohol at a local business, Canada IAF, Tab 4, Subtab 4d at 1, while it charged Mr. Torres simply with going to the local business, Torres IAF, Tab 4, Subtab 4d at 1. It charged both with then returning to their official duties at the station. Canada IAF, Tab 4, Subtab 4d at 1; Torres IAF, Tab 4, Subtab 4d at 1. Mr. Canada submitted a written response to the charge, taking "full responsibility for [his] actions in this episode" but requesting that the punishment be mitigated. Canada, IAF, Tab 4, Subtab 4c. Mr. Torres presented an oral reply, admitting that he "made a poor judgment" and asserting that the punishment was excessive. Torres IAF, Tab 4, Subtab 4c at 2. On March 18, 2009, the deciding official sustained the charge against both appellants but mitigated the penalty to a reduction in grade to the highest nonsupervisory position, a GS-1896-11, step 10, BPA. Canada IAF, Tab

4, Subtab 4b at 1; Torres IAF, Tab 4, Subtab 4b at 1. The appellants filed separate appeals with the Board. *See* Canada IAF, Tab 1; Torres IAF, Tab 1.

¶3 Following hearings in both appeals, the administrative judge issued separate initial decisions finding that the agency supported its charge by a preponderance of the evidence. Canada IAF, Tab 15, Initial Decision (ID) at 5; Torres IAF, Tab 11, Initial Decision (ID) at 8. In the Canada initial decision, the administrative judge noted that Mr. Canada testified that he could not recall if he was on duty on the day in question, but that his third-line supervisor asked him to get into the vehicle with three others, including his immediate supervisor, and that he could not recall who purchased the alcohol, whether he got out of the vehicle, or who mixed the drinks in the car. Canada ID at 3; *see* Canada IAF, Tab 9, Exhibit (Ex.) 4 at 1; Canada Hearing Transcript (HT) at 19. She noted that Mr. Canada also testified that he consumed the alcohol while being driven to a local business and that the vehicle occupants shared the alcohol with the employees of the business and then returned to the station but that he could not recall if he returned to work or went home. Canada ID at 4. She found that Mr. Canada's testimony that he could not recall whether he was on duty was not credible, given that he stated in earlier affidavits that he was on duty, that he took full responsibility for his actions, and that he knew consuming alcohol in a government vehicle was in violation of agency policy. Canada ID at 5; *see id.* at 4. The administrative judge found that Mr. Canada's statements in his affidavits alone were sufficient to sustain the charge and that his claim that he had no notice that the alleged conduct was in violation of agency policy was "disingenuous at best and unworthy of belief." *Id.* at 5-6.

¶4 Considering the assertion as an affirmative defense, the administrative judge found that Mr. Canada failed to prove his assertion that his supervisors authorized him to consume alcohol because he failed to present evidence establishing that his supervisors could authorize such activities and because his assertion contradicted his affidavit in which he acknowledged that he knew his

alleged actions were against agency policy. *Id.* at 6. She also found unsubstantiated his assertion that his reduction in grade and pay was motivated by testimony he provided that was favorable to his third-line supervisor in the latter's Board appeal because the record in that case did not show that the appellant provided testimony. Canada ID at 6. Lastly, she found that the agency established a nexus between the charge and the efficiency of the service and that the penalty of reduction in grade and pay to a nonsupervisory position was reasonable. *Id.* at 7-9.

¶5 The administrative judge made similar findings in the Torres initial decision, noting that Mr. Torres testified that his third-line supervisor would have been disappointed and upset if he had not accepted the drink and that he believed it was permissible to consume alcohol in a government vehicle because it was done in the past at the authorization of a higher-ranking official. Torres ID at 5-6. She found not credible Mr. Torres's attempt to question whether he was on duty at the time of the incident and further found that he acknowledged in prior statements under oath and in his oral response that he was on duty and that he took full responsibility for his actions. *Id.* at 8. She also found that he acknowledged in his June 4, 2008 affidavit that agency policy prohibited employees from consuming or transporting alcohol in a government vehicle. *Id.* at 5. The administrative judge found no merit in Mr. Torres's claim that he was authorized to consume alcohol by his supervisor because his supervisor had no authority to authorize the consumption of alcohol under the circumstances. *Id.* at 8.

¶6 Considering Mr. Torres's affirmative defenses, the administrative judge found that he failed to present any evidence that either of his supervisors could authorize his consumption of alcohol in a government vehicle while traveling on city streets. *Id.* at 9. She further found that his defense contradicted his affidavit in which he admitted that agency policy prohibits the transportation of alcohol in a government vehicle. *Id.* She also found that Mr. Torres failed to show that

favorable testimony he provided in his third-line supervisor's Board appeal motivated his reduction in grade and pay. *Id.* at 10. Lastly, she found that the agency established a nexus between the charge and the efficiency of the service and that the penalty of reduction in grade and pay to a nonsupervisory position was reasonable. *Id.* at 10, 14.

¶7 The appellants have filed separate timely petitions for review, Canada Petition for Review File (PFR File), Tab 1; Torres Petition for Review File (PFR File), Tab 3, and the agency has filed responses in opposition, Canada PFR File, Tab 5; Torres PFR File, Tab 4. These appeals present identical issues arising from a single incident involving both appellants. We therefore consolidate them upon finding that such consolidation will expedite processing of the appeals and will not adversely affect the interests of the parties. *See* 5 C.F.R. § 1201.36.

ANALYSIS

¶8 As noted above, the agency charged the appellants with Conduct Unbecoming a Supervisory BPA based on an incident in which the appellants consumed alcohol while on duty in a government vehicle. The brief paragraph in support of the charge stated that the appellants, as passengers in an unmarked Border Patrol vehicle, participated in purchasing alcohol from a local liquor store and consuming it in the vehicle while on duty; that Mr. Canada continued to consume alcohol at a local business, that Mr. Torres went along to the local business, and that both appellants then returned to their official duties at the station. *See* Canada IAF, Tab 4, Subtab 4d at 1; Torres IAF, Tab 4, Subtab 4d at 1.

¶9 A charge of "conduct unbecoming," much like a charge of "improper conduct," has no specific elements of proof; it is established by proving that the employee committed the acts alleged in support of the broad label. *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 22 (2006), *aff'd*, 626 F. Supp.2d 1140 (D.N.M. 2009); *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997).

Nothing in law or regulation requires an agency to affix a label to a charge of misconduct, and an agency may simply describe actions that constitute misbehavior in narrative form and have its discipline sustained if the efficiency of the service suffers because of the misconduct. *Otero*, 73 M.S.P.R. at 202. In sustaining the charge against the appellants, the administrative judge made specific findings that each was aware that Customs and Border Patrol policy prohibits employees from consuming alcohol in a government vehicle. Canada ID at 5-6; Torres ID at 5. However, the violation of any such policy was not a part of the agency's charge, Canada IAF, Tab 4, Subtab 4d at 1; Torres IAF, Tab 4, Subtab 4d at 1, and, to the extent the administrative judge considered it to be, she erred. Her error was not prejudicial, though, because she found, and we agree, that the agency proved that the appellants committed the acts in support of the "conduct unbecoming" charge. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

¶10 In addition to the requirement that the agency prove the charge it has brought against the appellants, the agency must also prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for the adverse action and either the appellants' ability to accomplish their duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified by*, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). The administrative judge found an "obvious" nexus in these cases, reasoning that the appellants are supervisors and must be prepared to lead by example and exercise good judgment in order to have credibility and be trustworthy. Canada ID at 7; Torres ID at 10. Given the nature of the facts cited in support of the charges in these cases, we deem it appropriate to more fully address this issue.

¶11 An agency may establish nexus by showing that the employee's conduct (1) affected his or his coworkers' job performance; (2) affected management's

trust and confidence in the employee's job performance; or (3) interfered with or adversely affected the agency's mission. *Johnson v. Department of Health & Human Services*, 86 M.S.P.R. 501, ¶ 1 (2000),[1] *aff'd*, 18 F. App'x 837 (Fed. Cir. 2001), *and aff'd sub nom. Delong v. Department of Health & Human Services*, 264 F.3d 1334 (Fed. Cir. 2001). The deciding official testified in both cases that the incident at issue had caused him to lose confidence in the appellants. Canada HT at 41; Torres HT at 98. He also testified that the mission of the agency is national security, Canada HT at 41; Torres HT at 98, and that it is important for supervisors to make sound decisions that are based on policies, directives, and law. Torres HT at 41. In addition, he noted that the appellants, as first-line supervisors, oversee a young and impressionable workforce, and that such junior employees look to their supervisors for guidance and direction. Canada HT at 41; Torres HT at 102. Finally, the deciding official testified that drinking alcohol in a government vehicle is dangerous, considering the nature of law enforcement work, not only from a liability standpoint, but also from an officer safety standpoint. Canada HT at 42. The deciding official's testimony establishes that the appellants' conduct affected management's trust and confidence in their job performance and adversely affected the agency's mission. Therefore, under the particular circumstances of these cases, nexus is established.

¶12 Both appellants assert that the administrative judge erred in finding that their reductions in grade and pay were not motivated by retaliation based on the affidavits and testimony they provided in their third-line supervisor's Board appeal. Canada PFR File, Tab 1 at 4; Torres PFR File, Tab 3 at 4; *see* Canada ID at 6; Torres ID at 10. Mr. Canada asserts that the administrative judge erred in basing her rejection of his affirmative defense on her finding that he did not provide testimony in that case. Canada PFR File, Tab 1 at 4. He asserts that he

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[1] There are two paragraphs in the *Johnson* decision that are numbered "1." The paragraph to which we refer here is the second such paragraph.

testified under oath before agency investigators during the course of the underlying investigation, not during the formal hearing, and that his affidavit was included as an exhibit in the appeal. Canada PFR File, Tab 1 at 4; Canada IAF, Tab 11 at 2. He explains that he and Mr. Torres provided testimony that was favorable to their third-line supervisor and that the agency reduced both of them in grade and pay, but did not take such action against their immediate supervisor, who provided testimony that was favorable to the agency. Canada PFR File, Tab 1 at 4-5. Rather, Mr. Canada asserts that the agency has held in abeyance the immediate supervisor's matter. *Id.* at 5. Mr. Torres makes similar assertions in his petition for review, again emphasizing that the agency reduced him and Mr. Canada in grade and pay after providing "testimony favorable to" their third-line supervisor, but has not taken such action against their immediate supervisor, who provided testimony favorable to the agency. Torres PFR File, Tab 3 at 4.

¶13 We agree that the administrative judge apparently misconstrued Mr. Canada's affirmative defense based on retaliation and rejected it by finding that he did not actually testify in his third-line supervisor's Board hearing. *See* Canada ID at 6. The record reveals that Mr. Canada submitted an affidavit in connection with the agency's investigation of various allegations against the third-line supervisor, including the incident at issue in the instant appeal. Canada IAF, Tab 4, Subtab 4e at 4-12. Mr. Canada asserts that his affidavit was submitted as an exhibit in that Board appeal, *see* Canada PFR File, Tab 1 at 4; Canada IAF, Tab 4, Subtab 4e at 4, and the agency did not and does not contest this assertion. Lawfully assisting an individual in the exercise of such an appeal right is protected activity under 5 U.S.C. § 2302(b)(9)(B). Mr. Torres asserts that he also provided an affidavit that was favorable to the third-line supervisor during the underlying investigation and testified on his behalf at his Board hearing. Torres PFR File, Tab 3 at 4; *see* Torres IAF, Tab 4, Subtab 4e at 4-12; *id.*, Tab 8 at 2.

¶14 Because the administrative judge misconstrued the nature of Mr. Canada's claim of retaliation based on 5 U.S.C. § 2302(b)(9), she did not analyze it. Canada ID at 6. She also summarily rejected Mr. Torres's similar claim. Torres ID at 10. Since the record in these cases is complete, we may and do undertake an analysis of these claims now.

¶15 Where, as here, a case has gone to hearing and the record is complete, the only question left before the Board is whether, upon weighing all of the evidence, the appellant proved retaliation under 5 U.S.C. § 2302(b)(9). *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005). The appellants suggest that the fact that the agency reduced them in grade and pay, while holding in abeyance their immediate supervisor's proposed reduction in grade and pay and suspension arising out of the same incident, is evidence of retaliation based on the content of the statements the appellants and their immediate supervisor made during the agency's investigation of the third-line supervisor. Canada PFR File, Tab 1 at 4-5; Torres PFR File, Tab 3 at 4-5. During both hearings, the deciding official testified that the decision on the appellants' immediate supervisor's proposed reduction in grade and pay and suspension had not yet been made and that the action had been held in abeyance. Canada HT at 44; Torres HT at 133. During the Torres hearing, when the agency representative objected to Mr. Torres's question as to why that matter was held in abeyance, the administrative judge noted that, during the prehearing conference, the parties had discussed the fact that the immediate supervisor was in a rehabilitation treatment program for alcoholism. Torres HT at 133-34. Under these circumstances, the mere fact that the action against their immediate supervisor was held in abeyance does not establish that the agency retaliated against the appellants for providing affidavits or testimony that were supposedly favorable to their third-line supervisor. That is true even if the statements in the immediate supervisor's affidavit and in hearing testimony in the third-line supervisor's appeal were more favorable to the agency than to him.

¶16 Additionally, Mr. Canada's statements in his affidavit were not consistently and directly favorable to his third-line supervisor. Mr. Canada admitted that his third-line supervisor brought his children to the station in his official government vehicle, Canada IAF, Tab 4, Subtab 4e at 7, and with respect to the 2006 incident at issue in the instant appeal and various other allegations against the third-line supervisor, Mr. Canada mostly asserted that he could not recall specific details, *see id.* at 8-11. Mr. Torres's affidavit could be characterized as more directly favorable to the third-line supervisor, and he stated in his affidavit that he was concerned about retaliation on the part of an Assistant Patrol Agent in Charge for his participation in the agency investigation. *See* Torres IAF, Tab 4, Subtab 4e at 4-11. However, Mr. Torres failed to claim that the Assistant Patrol Agent in Charge was responsible for the proposed discipline or submit any evidence that she was involved in the proposal of disciplinary action or in the decision to sustain the proposed disciplinary action.

¶17 Moreover, the evidence indicates that the appellants' discipline was proposed by the agency's Discipline Review Board rather than any specific agency official. *See* Canada IAF, Tab 4, Subtab 4d at 1-2; Torres IAF, Tab 4, Subtab 4d at 1-2; Canada HT at 35; Torres HT at 95. The deciding official testified during the Canada hearing that the Discipline Review Board is composed of "senior employees within the organization that review . . . reports either from Internal Affairs or other investigative bodies" to determine if a disciplinary action should be issued. *See* Canada HT at 35; *see also* Torres HT at 95. He further testified that the Discipline Review Board meets in Washington, D.C., that he has no contact with and provides no input to the Discipline Review Board when it is investigating and deliberating a particular case, and that he did not participate in the Discipline Review Board's investigation. Canada HT at 35-36. The appellants failed to provide any evidence indicating a connection between the Discipline Review Board, which initially proposed the actions that the deciding official eventually mitigated, and the appellants' sworn statements and testimony

provided in the agency's investigation of the third-line supervisor and the subsequent Board appeal. *See* Canada IAF, Tab 4, Subtab 4d at 1; *id.*, Subtab 4b at 1; Torres IAF, Tab 4, Subtab 4d at 1; *id.*, Subtab 4b at 1. Accordingly, we find that the administrative judge properly concluded that the appellants failed to establish that the agency reduced them in grade and pay as a result of their participation in the investigation of their third-line supervisor and their subsequent participation in his appeal before the Board.

¶18 In reviewing the penalty in these cases, the administrative judge found that the deciding official had considered all the relevant factors, and she concluded that his selection of a reduction in grade and pay for the appellants was a proper exercise of management judgment and did not exceed the limits of reasonableness. Canada ID at 7-9; Torres ID at 11-14. However, the administrative judge did not fully consider in her penalty analysis the appellants' claim that their supervisors authorized or condoned their consumption of alcohol on the day in question.[2] On review, as below, the appellants assert that their supervisors authorized them to consume alcohol on the day in question and that, although the agency's Standards of Conduct generally prohibit employees from consuming alcoholic beverages while on duty, they permit that activity when "specifically authorized . . . ." Canada PFR File, Tab 1 at 1-2; Torres PFR File, Tab 3 at 1-3; *see* Canada IAF, Tab 11 at 2; Torres IAF, Tab 8 at 2. They explain that their third-line supervisor[3] drove the vehicle and did not object or otherwise advise any of his subordinates that they could not drink the alcoholic beverages, and that their first-line supervisor handed them the drinks. Canada PFR File, Tab

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[2] The administrative judge did consider this claim but found that it demonstrated poor potential for rehabilitation because the appellants attempted to shift the blame to their supervisors. *See* Canada ID at 6; Torres ID at 8-9, 13.

[3] The third-line supervisor testified that he lacked the authority to authorize the consumption of alcohol in a government vehicle. *See* Torres HT at 190-91.

1 at 2; Torres PFR File, Tab 3 at 2-3. The appellants also assert that, even if their supervisors did not explicitly authorize their consumption of alcohol, it was reasonable for them to assume that their supervisors authorized them to drink the alcohol on the occasion in question. *See* Canada PFR File, Tab 1 at 2-3; Canada HT at 75; Torres PFR File, Tab 3 at 3.

¶19 These claims are relevant as a possible mitigating factor as to the penalty. *See, e.g., Barrett v. Department of the Interior*, 65 M.S.P.R. 186, 202 (1994) (evidence that the employees acted with the knowledge and approval of their supervisors supported mitigation); *Davis v. Department of the Army*, 33 M.S.P.R. 223, 229 (1987); *Tallis v. Department of the Navy*, 20 M.S.P.R. 108, 111-12 (1984); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (a relevant factor is the clarity with which the employee was on notice of any rules that were violated in committing the offense).

¶20 Inasmuch as the proper analysis of the reasonableness of the penalty in these cases depends upon the resolution of disputed factual matters, such as whether the appellants were authorized to consume alcohol on the day in question, or whether they reasonably believed they were, these consolidated appeals must be remanded so that the administrative judge who conducted the hearings in which these matters were addressed can consider these claims in the penalty context. *See Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 109 (1994). Moreover, since credibility is at issue, and since deciding issues of credibility is normally the province of the trier of fact, *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), remand to the administrative judge is the appropriate disposition.

¶21 Accordingly, on remand the administrative judge should reconsider the penalty of reduction in grade and pay after considering whether the appellants' supervisors authorized or condoned the appellants' consumption of alcohol on the day in question, including whether the supervisors could have authorized the

consumption, and whether the appellants reasonably believed that their actions were authorized.

ORDER

¶22 For the reasons stated above, we REMAND these appeals to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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