UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 232

Docket No. AT-0752-10-0038-I-1

Luis Fernando Villada,
Appellant,
v.
United States Postal Service,
Agency.

December 2, 2010

Luis Fernando Villada, Miami, Florida, pro se.

Daniel P. Gimmy, Esquire, Pembroke Pines, Florida, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his removal. For the reasons explained below, we GRANT the petition, AFFIRM the initial decision insofar as it sustained the charge, and REMAND this case for further proceedings on the appropriateness of the penalty, consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed by the agency as a Building Equipment Mechanic at the agency's Miami, Florida, Processing and Distribution Center

(P&DC). Initial Appeal File (IAF), Tab 6, Subtab 4D. The agency removed him from his position, effective September 30, 2009, on a charge of improper conduct, i.e., possessing and consuming an illicit substance (marijuana) while attending a training course at the agency's National Center for Employee Development (NCED) in Norman, Oklahoma. *Id.*, Subtab 4B. The appellant was one of five agency employees who the agency's Office of Inspector General (OIG) found had used marijuana on the evening of July 23, 2009, on the grounds of the hotel at NCED. *Id.*, Subtab 4F at 4. The appellant filed an appeal with the Board and requested a hearing. IAF, Tab 1. The administrative judge held a hearing on January 21, 2010. Hearing Recording (HR).

¶3 The administrative judge issued an initial decision on February 1, 2010, affirming the appellant's removal. IAF, Tab 12 at 1. He sustained the charge of marijuana use, relying on the admissions of several of the employees involved, the evidence regarding the emergency medical treatment received by one employee that night for having used marijuana laced with PCP, and the appellant's initial admissions to the OIG and the proposing official that he had smoked marijuana. IAF, Tab 12, Bench Decision at 8, 12. The administrative judge determined during the prehearing conference that there was a nexus between the charge and the efficiency of the service. IAF, Tab 10 at 4. Finally, he held in the initial decision that the penalty of removal, "while harsh," was not unreasonable. IAF, Tab 12, Bench Decision at 15.

¶4 The appellant has filed a petition for review in which he challenges the penalty as unreasonable under the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Petition for Review File (PFR File), Tab 1. The agency has filed a response to the petition for review. *Id.*, Tab 4.

ANALYSIS

¶5 The appellant has not challenged the administrative judge's findings that the agency proved its charge of improper conduct and that there was a nexus

between the charge and the efficiency of the service. We find that the administrative judge’s determinations that the agency proved the charged misconduct and that there was a nexus to the efficiency of the service are supported by the record. We therefore AFFIRM them. Accordingly, the only issue before the Board is the administrative judge's determination that the penalty of removal was not unreasonable.

¶6 The Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Douglas,* 5 M.S.P.R. at 306. Factors that may be relevant in determining an appropriate penalty include: (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith,

malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Douglas,* 5 M.S.P.R. at 305-06.

¶7 On appeal, the appellant asserted that he had not smoked marijuana before, that he was not a drug user, and that he had no prior discipline. HR. He also asserted that his removal was inconsistent with that of three other individuals who participated in the July 23, 2009 incident at NCED, i.e., Erika Hill, David Neff, and Jason Bronick. *Id.* Hill is a Maintenance Mechanic at the Flint, Michigan, P&DC. IAF, Tab 6, Subtab 4F at 4. Neff is a Maintenance Mechanic in South Hackensack, New Jersey. *Id.* Bronick is a Mechanic at the Cleveland, Ohio, P&DC. *Id.* The appellant testified that Hill received an 8-day suspension, that Neff was not suspended, and that Bronick was allowed to return to work pursuant to a settlement agreement. HR. The official who proposed the appellant's removal, Miami P&DC Maintenance Manager Ricardo Amezquita, testified that he had heard other employees were brought back to work. HR. He also stated that he had ascertained that although Hill returned to work after a suspension, she was "pending termination." HR.

¶8 The administrative judge found that the penalty of removal was not unreasonable, based on Amezquita's testimony that Building Equipment Mechanics travel among facilities and work independently and that he had lost trust in the appellant. IAF, Tab 12, Bench Decision at 13. The administrative judge also cited Amezquita's testimony that the appellant lacked potential for rehabilitation because he did not acknowledge his wrongdoing. *Id.*[*]

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[*] The deciding official, Plant Manager Juan Gonzalez, did not testify. The decision letter stated, without explanation, that in determining the proper penalty, Gonzalez considered the appellant's tenure of service, the seriousness of the charges, the appellant's potential for rehabilitation, any mitigating circumstances, and all other evidence of record. IAF, Tab 6, Subtab 4B.

¶9 The administrative judge found that the other employees cited by the appellant were not valid comparators because they were not employed at the Miami P&DC. IAF, Tab 12, Bench Decision at 14. The administrative judge also stated that there was no evidence that the other employees lacked potential for rehabilitation. *Id.* Therefore, the administrative judge held he was required to review the penalty without reference to the comparators because they were not similarly situated to the appellant. *Id.* In his petition for review, the appellant reiterates his contentions on appeal, including his assertion that other employees involved in the incident at NCED were returned to work. PFR File, Tab 1 at 3.

¶10 To establish disparate penalties, an appellant "must show that the charges and the circumstances surrounding the charged behavior are substantially similar." *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6 (2010) (citing *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983)). If he does so, "the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." *Id.* To trigger the agency's burden,

> [T]here must be a great deal of similarity, not only between the offenses committed by the appellant and a proposed comparator, but as to other factors, such as whether the employees were in the same work unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time.

Id., ¶ 12. In the past, whether an appellant and a comparator were in the same work unit, among other factors, was outcome determinative; if they were not, the Board would not find a disparate penalty. *Id.*

¶11 The Board's reviewing court, however, has held that while the fact that different employees are supervised under different chains of command may sometimes justify different penalties, the factual record must be fully developed with respect to the agency's actions, to show why different chains of command would justify different penalties. *See Williams v. Social Security Administration,*

586 F.3d 1365, 1368-69 (Fed. Cir. 2009). Consistent with the court's holding in *Williams*, the Board recently held as follows:

> [T[here must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but we will not have hard and fast rules regarding the "outcome determinative" nature of these factors.

Lewis, 113 M.S.P.R. 657, ¶ 6.

¶12 In this case, as discussed above, the administrative judge held that the fact that the comparators the appellant cited were not employed at the Miami P&DC, i.e., that they were not in the same work unit, meant that they were not valid comparators for purposes of disparate penalty analysis. IAF, Tab 12, Bench Decision at 14. However, the Board has now held that this factor is not dispositive as to whether an appellant was subjected to a disparate penalty. *Lewis*, 113 M.S.P.R. 657, ¶ 6. Further, there appears to be substantial similarity in the conduct in which the appellant and the comparators participated. However, the record is not fully developed as to the circumstances of the discipline, if any, imposed on the comparators and why different chains of command or other factors would justify different penalties. Because the facts necessary to resolve the question of whether the appellant was subjected to a disparate penalty and whether the agency met its corresponding burden to show a legitimate reason for the difference in treatment are not in the record, it is necessary to remand this appeal. *See Taylor v. U.S. Postal Service*, 69 M.S.P.R. 479, 483 (1996). On remand, the administrative judge shall provide the parties the opportunity to submit supplemental evidence and argument on circumstances and factors relevant to determination of a penalty, including a hearing, if requested, and shall issue a new initial decision addressing the reasonableness of the penalty, consistent with *Williams* and *Lewis*.

¶13 The new initial decision shall include consideration of all the relevant *Douglas* factors, including new contentions raised by the appellant in his petition

for review. In addition to reiterating his prior arguments, the appellant asserts for the first time in his petition several new arguments regarding the reasonableness of the penalty, i.e., that he did not commit a serious crime, is not a supervisor, has limited public contact, and had no warnings regarding misconduct and a satisfactory work record. PFR File, Tab 1 at 3. He asserts that the incident was not notorious, his potential for rehabilitation was not considered and he was not offered counseling, and his judgment on the night in question was impaired by drinking. *Id.* Generally, the Board will not consider evidence or argument submitted for the first time in a petition for review absent a showing there is evidence that was unavailable before the record closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115. However, in this case, the administrative judge's prehearing order identified the only two issues in the appeal as whether the appellant used marijuana as charged and whether there was a nexus between the charge and the efficiency of the service. IAF, Tab 10 at 3-4. The appellant was not put on notice that reasonableness of the penalty was an issue or that the *Douglas* factors were applicable until the issuance of the initial decision. Therefore, the Board may consider the appellant's new arguments regarding penalty on petition for review. *See Miller v. U.S. Postal Service,* 110 M.S.P.R. 550, ¶ 8 (2009); *Rodgers v. U.S. Postal Service,* 105 M.S.P.R. 297, ¶ 10 (2007).

ORDER

¶14 The appeal is REMANDED to the Board's Atlanta office for further proceedings on the penalty consistent with this Opinion and Order.

FOR THE BOARD:

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