UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 103

Docket No. DE-0752-10-0404-I-1

Carlos A. Rodriguez,

Appellant,

v.

Department of Homeland Security,

Agency.

December 23, 2011

Enrique Lopez, Esquire, El Paso, Texas, for the appellant.

Robert P. Erbe, Esquire, Tucson, Arizona, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review of an initial decision that mitigated the appellant's removal to a 5-day suspension. For the following reasons, the Board DENIES the agency's petition for review, and AFFIRMS the initial decision AS MODIFIED by this Order.

BACKGROUND

¶2 The appellant began his employment with the agency on March 18, 2007, when he was appointed as an Immigration Enforcement Agent with the agency in Albuquerque, New Mexico. Initial Appeal File (IAF), Tab 4, Subtab 4i at 39. On

December 4, 2009, the agency proposed his removal based on two charges: (1) unauthorized use of a government owned vehicle with two specifications; and (2) failure to report an accident involving a government vehicle. *Id.* at 1-4.

¶3 The charges arose after the appellant served a six-month detail in Otero, New Mexico, between June 2008 and January 2009. *See* IAF, Tab 4, Subtab 4i at 16; Hearing Transcript (HT) at 122. During this time, he was authorized to use a government owned vehicle (GOV), including for the commute between his temporary residence in El Paso, Texas, and Otero. *Id.*, Subtab 4i at 1; HT at 11-12. After his detail ended, the appellant should have immediately returned the GOV, but instead he retained the vehicle and used it for a few days, including a weekend and a work day during which he was on annual leave. *See* HT at 13-14, 122-23, 126-30; IAF, Tab 4, Subtab 4i at 35-36, 38. The appellant returned the GOV to Albuquerque after the agency so directed. *See* HT at 14-15, 126-28; IAF, Tab 4, Subtab 4i at 35, 38. As a result of his failure to return the vehicle immediately after his detail ended, the agency charged the appellant with two specifications of unauthorized use of a government owned vehicle. IAF, Tab 4, Subtab 4i at 1. The second charge, failure to report an accident involving a government vehicle, arose when the agency discovered that the GOV appeared to have undergone major body repairs while in the appellant's possession. HT at 15-16; IAF, Tab 4, Subtab 4i at 2, 11. Supervisory Immigration Enforcement Agent Gabriel Narvaez inspected the GOV and documented the damage. IAF, Tab 4, Subtab 4i at 11; *see id.* at 19-28; *see also* HT at 16. After ascertaining that the agency had no record of body work for the vehicle, IAF, Tab 4, Subtab 4i at 11, Narvaez asked the appellant about the body work, HT at 19.

¶4 The appellant initially denied any knowledge of the body work. *Id.* At the request of his supervisor, the appellant submitted a memorandum dated February 10, 2009, regarding the body work. IAF, Tab 4, Subtab 4i at 12; HT at 146-47. In the memorandum, the appellant stated that he had noticed damage to the passenger-side door and scratches on the rear door panel and fenders while still

on detail, when he walked from his residence to the GOV, which was parked on the street. IAF, Tab 4, Subtab 4i at 12. He stated that he did not know whether the damage occurred at his residence or at Otero, but he paid $650 to have the GOV repaired because he "felt that [he] was in full care of the unit during the course of [his] detail." *Id.*; *see* HT at 166-67. Based on the foregoing, the agency brought the second charge. IAF, Tab 4, Subtab 4i at 2.

¶5 The deciding official, Alfredo Campos, sustained one specification of the first charge and the second charge. *Id.*, Subtab 4b at 2. On appeal, the administrative judge sustained the first charge, but did not sustain the second charge. IAF, Tab 15, Initial Decision (ID) at 6, 10. The administrative judge construed the second charge as requiring proof of three elements: (1) the appellant was *in* an accident with the GOV, (2) he had a duty to report the accident, and (3) he failed to report the accident. ID at 7. The administrative judge credited the appellant's testimony that he first discovered the damage when the GOV was parked in front of his residence as "not inherently improbable." ID at 9. The administrative judge found this testimony to be consistent with the appellant's February 10, 2009 memorandum, as well as with his description of the unrepaired damage, and not contradicted by other evidence. ID at 8-9. The administrative judge concluded that the circumstantial evidence of damage to the GOV was insufficient to support a conclusion that the appellant had been in an accident, and he thus declined to sustain the second charge. ID at 10.

¶6 The administrative judge found nexus between the one sustained charge and the efficiency of the service. ID at 11. The administrative judge mitigated the penalty of removal to a five-day suspension. ID at 13. The administrative judge specifically noted that the decision letter stated that the sustained charge alone would have warranted a five-day suspension. ID at 11; *see* IAF, Tab 4, Subtab 4b at 3. The administrative judge found that Campos had considered the relevant factors and that a five-day suspension was within the bounds of reasonableness. ID at 12-13.

¶7 The agency filed a petition for review, and the appellant responded. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶8 On review, the agency has challenged only the administrative judge's findings regarding the second charge, failure to report an accident involving a GOV. In particular, the agency argues that by requiring it to prove that the appellant was *in* an automobile accident while operating the GOV, the administrative judge misconstrued the charge. PFR File, Tab 1 at 25, 26-32; *see* ID at 6-7. The agency also asserts that the administrative judge focused only on the label of the charge and ignored the structure and language of the proposal notice. PFR File, Tab 1 at 26-27.

The Board's pleading requirements as they pertain to notice of a proposed disciplinary action arise from the requirements of due process and fundamental fairness. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997). An agency is required to state the reasons for the proposed adverse action in sufficient detail to allow the affected employee to make an informed reply. *Id.* An agency need not label its charge narrowly with "magic words" for the Board to sustain it, and instead, the charge must be viewed in light of the accompanying specification and circumstances, and should not be technically construed. *Id.* at 202-03. Nevertheless, "what the agency calls the conduct makes a great deal of difference in proceedings before the Board." *Nazelrod v. Department of Justice*, 54 M.S.P.R. 461, 466 (1992), *aff'd sub nom.*, 43 F.3d 663 (Fed. Cir. 1994). When a charge *is* labeled, the label, and not something else, must be proven. *Id.* at 464-66. The Board will not sustain an agency action on the basis of charges that could have been brought but were not. *Id.* at 466; *Mojica-Otero v. Department of the Treasury*, 30 M.S.P.R. 46, 50 (1986).

¶9 Here, the charge is labeled "Failure to Report an Accident Involving a Government Owned Vehicle." IAF, Tab 4, Subtab 4i at 2. The specification states:

> **Specification**: On February 6, 2009, Immigration Enforcement Agents Lopez and Diaz were tasked to wash GOV M-83522. After the vehicle was washed and towel dried, the IEAs noticed that the paint of the vehicle was off color and dull. The IEAs reported the matter to SIEA Narvaez who, upon examining the vehicle, noticed that the vehicle appeared to have major body work repair on the right passenger's side. When asked to provide a statement regarding this finding, you admitted that the vehicle was in some kind of accident while the GOV was assigned to you. You also admitted to making arrangements for repair of the vehicle at your own expense.

Id. Based on the labeling of the charge, the administrative judge required the agency to prove that the appellant was in an accident with the GOV. ID at 7.

¶10 The agency correctly points out that the specification does not state that the appellant was *in* an accident with the GOV. PFR File, Tab 1 at 27-28. We agree with the agency that the charge did not require it to prove that the appellant was in the vehicle when an accident occurred. The charge label, however, still required that the vehicle have been involved in an accident, regardless of whether the appellant was in the vehicle at the time. As the administrative judge explained, the term "accident" is not merely descriptive of the information that the appellant should have reported, but is a necessary element of the charge. ID at 6-7.

¶11 This interpretation is supported by the testimony of Campos, who distinguished a charge of failure to report damage to a vehicle from a charge of failure to report an accident. ID at 9-10. Campos testified that both charges appear in the agency's interim Table of Offenses and Penalties, and that the failure to report an accident is the more serious of the two charges. HT at 104-05. Campos characterized an accident as a collision that occurs when an agency employee is operating a motor vehicle, but that he would characterize other mishaps, such as parking lot "fender benders," or an employee's discovery

of damage to his parked and unattended vehicle, as "damage to a vehicle." HT at 105-06. Campos also testified that he did not know why the proposing official charged the appellant with failure to report an accident, rather than failure to report damage to the vehicle. HT at 105. When asked whether he himself would have charged the appellant with failure to report damage to a vehicle or with failure to report an accident, Campos testified that it was "a little hard to tell," because the cause of the damage was unknown:

> Who knows what could have happened. He could have been driving and sideswiped a pole in a business parking lot, for all I know. Or he could have sideswiped another car in a parking lot, for all I know, as opposed to the latter—that happening when the car was stationary or not.

HT at 106.

¶12 The agency is now asking the Board to redraft a defective charge. As Campos' testimony shows, agency officials might have issued the lesser charge of failure to report damage to a vehicle, and instead, they selected the more serious of the two charges set forth in the interim Table of Offenses and Penalties. *See* HT at 104-06. The word "accident" is not a criminal charge requiring proof of specific elements, *cf. King v. Nazelrod*, 43 F.3d 663, 664-66 (Fed. Cir. 1994); however, the fact that the agency in its interim Table of Offenses and Penalties envisioned a different charge for less serious vehicular incidents, such as parking lot "fender benders," ascribes a specific meaning to the word "accident" as it was used here. Furthermore, as Campos' testimony shows, the agency does not possess the evidence needed to prove that such an "accident" took place.

¶13 In light of the agency's limited knowledge about the cause of the damage to the GOV, the specification language might support a different charge or charges related to failure to report damage to a GOV or lack of candor. The Board, however, will not sustain an agency action on the basis of charges that could have been brought but were not. *Mojica-Otero*, 30 M.S.P.R. at 50; *see, e.g.*, *Green v. Department of the Army*, 25 M.S.P.R. 342, 345 (1984) (the Board

would not sustain an action where the agency might have based its action on charges of conflict of interest, but instead, charged the appellant with falsification, which it failed to prove), *aff'd*, 785 F.2d 326 (Fed. Cir. 1985) (Table). Accordingly, we affirm the initial decision as modified by this decision.

ORDER

¶14 We ORDER the agency to cancel the removal and substitute in its place a five-day suspension without pay. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶16 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶17 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶18 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶19 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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, 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:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

DISSENTING OPINION OF MARY M. ROSE

in

Carlos A. Rodriguez v. Department of Homeland Security

MSPB Docket No. DE-0752-10-0404-I-1

¶1 There is no dispute that the appellant failed to report an event involving damage to the GOV assigned to him. The dispute in this appeal is whether the event that the appellant failed to report was an "accident" as stated in the agency's charge. The administrative judge found that, after the appellant turned in the GOV, the agency discovered that the GOV "had major body repair to the right passenger side, front, and back," and that there was evidence of "misaligned door jams, scratched paint, paint overspray, and rotor circular marks from buffing the paint." Initial Decision at 7. The appellant initially denied that he knew that anything had happened to the GOV, but later admitted that the GOV sustained damage from a cause unknown to him, and he had $650 in repairs performed at his own expense. *Id*. at 8. The appellant did not report the event.

¶2 The majority here finds that the agency was required to prove that the GOV was in an accident, which it defines as "a collision that occurs when an agency employee is operating a motor vehicle." Because the agency has not proven the cause of the damage (i.e., it has no proof that the GOV was involved in a collision), and because the agency's table of penalties identifies a charge that the majority deems is a better fit for the agency's evidence, the majority affirms the administrative judge's finding that the agency did not show that the GOV was in an "accident."

¶3 In common usage, "accident" means an unexpected and undesirable event or something that occurs unexpectedly or unintentionally. Webster's II New

Riverside University Dictionary 71 (1984).[*] Whatever may have happened to the GOV to cause enough damage to lead the appellant to repair the vehicle at his own expense and then attempt to conceal the repairs by omitting any mention that the repairs had taken place, that event must necessarily have been an "accident" consistent with the dictionary definition of the term. The appellant, certainly, felt responsible for what happened to the GOV, as it is inconceivable that he would repair it at his own expense and take steps to conceal the damage if he did not consider himself to be at fault. The majority, however, asserts that the term "accident" is imbued with a special meaning beyond its common definition because otherwise, there would be no reason for the agency to identify separate charges of failure to report an accident and failure to report damage.

¶4 This view is supported exclusively by the testimony of the deciding official. For example, when the appellant's attorney stated "[the term] accident normally implies that other third parties might have been involved, someone might have been hurt, police might have been called, things of that nature?" the deciding official responded "Could be. Yes sir." Hearing Transcript at 97. The deciding official testified that, had he been the proposing official, he *might* have charged failure to report damage, but he qualified his opinion by stating "But given the extent of the damage, I'm not sure. Because like I said, it's the whole [passenger] side" of the vehicle. *Id.* at 106.

¶5 There is no evidence that the deciding official had any particular expertise in interpreting charges or penalties. There is nothing in the record to suggest that the *agency* intended the word "accident" to be a term of art implying a collision, only the deciding official's highly equivocal responses to leading questions. If this case turns on what the deciding official thought the word "accident" means,

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[*] Webster's Third New International Dictionary of the English Language Unabridged 11 (1993) provides a more expansive definition that includes, as relevant to this case, "**1a:** an event or condition occurring by chance or arising from unknown or remote causes. . . ."

then I feel compelled to point out that the deciding official found that the appellant failed to report an accident when he sustained the charge. In other words, the appellant's conduct fit within the deciding official's definition of "accident," on which the majority so heavily relies.

¶6 The majority also relies heavily on the agency's table of penalties, which lists failure to report an accident and failure to report damage as separate offenses. A table of penalties is meant to provide guidance to agency managers by providing a suggested range of penalties for some offenses. Even considered with respect to the purpose for which a table of penalties was created, the Board has never found the suggestions contained therein to be binding. Instead, a table of penalties has always been understood to be guidance only, and a penalty's consistency with an agency table of penalties is merely one of twelve factors to be considered in assessing the reasonableness of a penalty.

¶7 Further, a table of penalties is not like a criminal code. It is not meant to be an exclusive list of workplace offenses with proscribed penalties for each identified offense. The Board has never found that an agency may take an adverse action based only on a charge that it previously identified in its table of penalties. The Board has consistently held that it must review an agency's decision solely on the grounds invoked by the agency; it may not substitute what it considers to be a more adequate or proper basis. *See Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). Here, however, the majority relies on the fact that the agency could have brought (and in its opinion, presumably should have brought) a lesser charge as a reason to find that the agency has not proven the charge it brought. This reasoning has no support in existing precedent.

¶8 The agency's table of penalties is not in the record. However, it certainly seems from the deciding official's testimony that the charge of failure to report damage to a GOV would have been an appropriate charge for the agency to bring in this case. Again, we do not know what else may be in the table of penalties,

but it is likely that it contains other potential charges that the agency might have brought such as conduct unbecoming a federal employee, providing misleading information, lack of candor, or perhaps even procuring repairs to a GOV without authorization. The agency is not legally obligated to choose - limited by the table of penalties - from a list of charges the one charge that is the best possible fit. If that were true, the Board could never sustain a conduct unbecoming charge if the agency's table of penalties contains a specific charge that might apply to the misconduct. It is the agency's job to decide which charge it wants to bring, and the Board's job to see if that charge is proven, not to look to see if there is perhaps a better charge that the agency arguably could have brought. That, however, is precisely what the majority does here. Because this approach is contrary to a long line of precedent that has been endorsed by our reviewing court, I dissent.

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Mary M. Rose
Member