UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 7

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

Julius I. England,

Appellant,

v.

United States Postal Service,

Agency.

January 27, 2012

Julius I. England, Jacksonville, Florida, pro se.

Margaret L. Baskette, Tampa, 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 sustained his removal. For the reasons discussed below, we GRANT IN PART and DENY IN PART the appellant's petition for review. We AFFIRM the administrative judge's findings concerning the charge and nexus, VACATE the administrative judge's finding concerning the penalty, and REMAND the case to the regional office for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant was a mail handler at the Jacksonville, Florida Processing and Distribution Center. Initial Appeal File (IAF), Tab 5 at 19. After a customer complained that a priority mail package containing two $25 gift cards for Walgreens and the Olive Garden had not been delivered to its final destination, the agency contacted Walgreens and obtained video of the appellant using the Walgreens gift card. *Id*. at 30-31, 35-38. The Olive Garden confirmed that its gift card was also used, but that it could not identify the individual who used the card. *Id*. at 31, 39. The agency questioned the appellant about the gift cards after informing him of his right to remain silent and to leave the interview at any time. *Id*. at 42. The agency then put the appellant on "emergency placement" for 14 days or less, followed by administrative leave. IAF, Tab 1 at 14, 26.

¶3 By letter dated January 27, 2010, and delivered on February 2, 1010, the agency instructed the appellant to attend a fact-finding interview on February 3, 2010. IAF, Tab 15 at 26-27. The appellant, however, stated that he never received the letter. *Id.*, Tab 6 at 2. According to the agency, on March 17, 2010, the appellant received a notice of proposed removal by certified mail, and another copy of the notice was sent by regular, first-class mail. *Id.*, Tab 5 at 16-18. Again, the appellant asserted that he never received either copy of the notice of proposed removal. *Id.*, Tab 6 at 1.

¶4 By letter dated May 6, 2010, the agency notified the appellant of his removal for "improper conduct." IAF, Tab 5 at 13-15, 17-18. The agency specified that the appellant was seen on video using the Walgreens card and that someone also used the Olive Garden card. *Id.*, Tab 5 at 13, 17-18. The letter stated that the appellant had not responded to the notice of proposed action, and that, absent such a response, the decision was based "on the evidence of record." *Id.* at 13. The appellant filed a timely appeal in which he declined a hearing. IAF, Tab 1. In his initial decision, the administrative judge found that the agency proved the charge by proving the specification with respect to the Walgreens gift

card, that nexus existed, and that the penalty of removal was reasonable. *Id.*, Tab 18.

¶5 The appellant has filed a timely petition for review in which he asserts, inter alia, the following: (1) the agency actually charged him with theft; (2) he never claimed, as the agency asserted, that he had paid cash at Walgreens; (3) he never received the invitation to the fact-finding interview or the notice of proposed removal; and (4) he was harmed by a lack of union representation during questioning. Petition for Review (PFR) File, Tab 1 at 8-15. The agency has filed a timely response opposing the petition for review. *Id.*, Tab 3.

ANALYSIS

The appellant has not shown that the administrative judge erred in sustaining the charge or in finding nexus.

¶6 The appellant asserts that the agency charged him with theft and failed to prove that charge by preponderant evidence. When an agency specifically charges an employee with theft, it must prove by preponderant evidence the elements of that crime, namely, the taking and possession of another's property in a manner inconsistent with the owner's rights and benefits with an intent to permanently deprive the owner of the possession or use of his property. *Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 460 (1991), *aff'd*, 43 F.3d 663 (Fed. Cir. 1994). The agency specifically labeled its charge "improper conduct," not theft. IAF, Tab 5 at 17. We note, however, that in its narrative specification, the agency referred to both the Olive Garden and Walgreens gift cards as stolen. *Id.* at 17-18.

¶7 Even if we assume arguendo both that the agency charged the appellant with theft and that he timely raised the issue, we find that the administrative judge properly sustained the charge. The agency provided uncontroverted, persuasive evidence that the appellant had the Walgreens gift card that was originally mailed to a different individual and that he used the card. IAF, Tab 5

at 30-32, 35-38, Tab 12 at 8. On appeal below, the appellant did not dispute using the Walgreens gift card, but asserted that he "found the gift card on the ground" at a gas station "and pick[ed] it up." *Id.*, Tab 16 at 7. The administrative judge determined that the appellant's account was not credible, Initial Decision at 3, and we agree that the appellant's explanation is implausible, *see Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002); *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Therefore, we find that the administrative judge did not err in sustaining the specification, and, thus, the charge. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge). We also find no error in the administrative judge's nexus determination. *See, e.g., Ruiz v. U.S. Postal Service*, 59 M.S.P.R. 76, 80 (1993) (finding that a letter carrier's opening mail and removing its contents for his personal use strikes at the heart of the agency's mission and breaches the trust placed in the appellant by reason of his position).

The appeal must be remanded for adjudication of the appellant's affirmative defenses.

¶8 The Board has consistently required administrative judges to apprise appellants of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence required to meet those burdens. *See, e.g.*, *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 13 (2010); *Erkins v. U.S. Postal Service*, 108 M.S.P.R. 367, ¶ 8 (2008). Additionally, the Board has held that, when an appellant raises affirmative defenses, the administrative judge must address those defenses in any close of record order or prehearing conference summary and order. *Wynn*, 115 M.S.P.R. 146, ¶ 10. If an administrative judge disposes of an affirmative defense in a close of record conference, the administrative judge must identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to the

withdrawal of the affirmative defense. *See id.*; *Viana v. Department of the Treasury*, 114 M.S.P.R. 659, ¶ 7 (2010); *Guzman v. Department of Veterans Affairs*, 114 M.S.P.R. 566, ¶ 17 (2010).

¶9 We find that the appellant raised affirmative defenses below, and that the administrative judge's orders did not apprise him of his burdens of proof on those affirmative defenses.[*] In his appeal the appellant asserted harmful procedural errors, including that he was denied union representation during questioning and that the agency "intentionally did not provide" him with a copy of the notice of proposed removal. IAF, Tab 1 at 7. The acknowledgement order, however, does not discuss affirmative defenses, *id.*, Tab 2, and the administrative judge did not issue any affirmative defenses order. During discovery, the issue of whether the appellant received the notice of proposed action was discussed, and the administrative judge issued an order compelling the appellant to provide discovery. *Id.*, Tab 11. In response, the appellant again asserted that he did not receive the notice of proposed action. *Id.*, Tab 12 at 1.

¶10 We further find that the administrative judge's close-of-record summary did not sufficiently address the appellant's affirmative defenses or provide him with an opportunity to object to the administrative judge's rulings. The administrative judge held a close-of-record conference on January 6, 2010, and issued a summary of the conference on March 3, 2010. IAF, Tab 17. He stated, inter alia, as follows:

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[*] We note that, although the agency's closing submission discussed the law with respect to the presumption of the delivery of mail, the appellant's right to union representation, and harmful error, it did not discuss the appellant's burden of proving his affirmative defenses and it was not submitted until the day before the record closed. IAF, Tab 15. Thus, even if we consider the notice provided by the agency's submission, we find it insufficient to timely apprise the appellant of his burden of proving his affirmative defenses.

> Though the appellant stated he was raising affirmative defenses of discrimination and harmful procedural error, he described the crux of these defenses as "they didn't like me, they accused me of theft." After inquiry and absent more information and explanation from the appellant, I ruled that there were no affirmative defenses presented in the appeal.

Id. at 2.

¶11 This summary did not specify the appellant's affirmative defenses, was issued nearly 2 months after the close-of-record conference took place, and did not inform the parties that they could object to the contents of the summary. IAF, Tab 17. According to the appellant's sworn declaration, the administrative judge asked him about discrimination during the close-of-record telephone call, but did not ask him about his other affirmative defenses. PFR File, Tab 1 at 16. As previously discussed, the record shows that the appellant raised allegations of due process violations and harmful error below. We thus conclude that the administrative judge erred by holding that all affirmative defenses consisted only of an accusation that the agency did not like the appellant and accused him of theft. Given these factors, we find that the appellant was not given a reasonable opportunity to object to the administrative judge's decision to not consider his due process and harmful procedural error defenses.

¶12 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Because the administrative judge did not inform the appellant of his burden of proof and the means by which the appellant could prove his affirmative defenses, we cannot resolve this case without remanding the case.

The administrative judge must redetermine whether a penalty is warranted in this case.

¶13 The Board will not sustain an adverse action if an appellant shows that the agency violated his due process rights or committed harmful error. *See, e.g.*, *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280-83 (Fed. Cir. 2011); 5 C.F.R. § 1201.56(b)(1). Therefore, it would be premature for the Board to consider whether the agency-imposed penalty is reasonable. If, on remand, the administrative judge finds that the appellant has failed to prove his affirmative defenses, he may incorporate his findings concerning the penalty into a new initial decision.

ORDER

¶14 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order. On remand, the administrative judge must inform the appellant of his burdens of proof regarding his affirmative defenses and adjudicate those affirmative defenses. He must then issue a new initial decision. If the administrative judge finds that the appellant has failed to prove his affirmative defenses, the administrative judge may incorporate his previous findings concerning the penalty.

FOR THE BOARD:

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