UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 19

Docket No. DA-0752-11-0131-I-1

Tyrone Hamilton,

Appellant,

v.

Department of Homeland Security,

Agency.

February 17, 2012

Major Adams, Houston, Texas, for the appellant.

John Farrell, Esquire, Houston, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a petition for review questioning the administrative judge's initial decision that mitigated the agency's removal action to a 15-day suspension. For the reasons explained below, we GRANT the agency's petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The agency's removal penalty is SUSTAINED.

BACKGROUND

¶2 The appellant was stationed at the Vancouver International Airport in Canada, where he worked in the position of Agriculture Specialist with the

agency's U.S. Customs and Border Protection (CBP), questioning U.S.-bound passengers as to whether they were bringing agricultural products into the country. *See* Initial Appeal File (IAF), Tab 7, Subtab 9 at 2, Subtab 11b at 18-20; Heading Compact Disc (HCD) (testimony of the appellant). The agency removed the appellant from his position based on charges of improper conduct and failure to cooperate in an agency investigation.

¶3 The agency's improper conduct charge was supported by 3 specifications, all of which concerned the appellant's relationship with a Canadian female who had been denied entry into the United States. The agency alleged that she had stayed at the appellant's house from January 21 until about January 26, 2008, and that the appellant assisted her during that period in attempting to enter the United States again, when he knew she had been denied entry just days before.

¶4 The agency's charge of failure to cooperate in an agency investigation was supported by two specifications. IAF, Tab 7, Subtab 12 at 1-2. The first specification of this charge concerned the appellant's interview with its Office of Internal Affairs (OIA) related to the Canadian female. *Id.* at 1. Specifically, the agency alleged as follows: In response to questioning concerning the allegation that he had sexually assaulted the Canadian female,[1] the appellant stated that, over the weekend of January 24-26, 2008, he had traveled to Houston, Texas and back. *Id.* An agency query revealed no evidence that the appellant had crossed the border between the United States and Canada during that time period. *Id.*

---

[1] On March 4, 2008, the Joint Intake Center in Washington, D.C., received information regarding an alleged attempted sexual assault by the appellant. IAF, Tab 7, Subtab 13 at 2. The Royal Canadian Mounted Police forwarded a copy of their case file regarding the allegations concerning the appellant to CBP in early October 2008. *Id.* at 4. On October 31, 2008, the United States Attorney's Office for the Western District of Washington declined to prosecute the appellant on any criminal charges. *Id.* On November 13, 2008, OIA interviewed the appellant after notifying him, inter alia, that the investigation was administrative and not related to any possible criminal misconduct. IAF, Tab 7, Subtab 13l at 8-9.

OIA requested that the appellant provide documentation of his trip to Houston, but he failed to provide that information. *Id.*

¶5 The second specification underlying the failure to cooperate charge pertained to the appellant's response to OIA's written request directing him to provide documentation of the alleged Houston trip. *Id.* at 2. The agency alleged that, by memorandum dated December 1, 2008, Resident Agent in Charge Roy Hoffman directed the appellant to provide any and all documentation of his alleged January 2008 trip to Houston. *Id.* The agency's memorandum also advised the appellant that refusal to provide the documentation could result in disciplinary action up to and including termination. IAF, Tab 7, Subtab 13q at 3. The appellant provided no documentation of his alleged Houston trip in response to the December 2008 memorandum. At the oral reply to the agency's notice of proposed removal, however, the appellant supplied a boarding pass dated January 26. The agency's efforts to authenticate this boarding pass showed that it was for a flight taken on January 26, 2009, rather than on January 26, 2008. IAF, Tab 7, Subtab 1 at 4, Subtab 8, Subtab 9 at 3-4, Subtab 10 at 11-12.

¶6 The appellant timely appealed his removal. IAF, Tab 1, Tab 7, Subtab 5. After conducting the appellant's requested hearing, the administrative judge determined that the agency failed to prove any of the specifications underlying the improper conduct charge and that the conduct alleged in that charge had no connection to the efficiency of the service. IAF, Tab 13, Initial Decision (ID) at 3-9. The administrative judge, however, sustained the second charge, finding that the agency proved both of the underlying specifications. ID at 9-10. Specifically, the administrative judge found the appellant engaged in the charged conduct, that OIA had notified the appellant that it was requesting the documentation pursuant to an administrative investigation, and that it also notified him that he could be disciplined for failing to cooperate with the investigation. *Id.*

¶7 In considering the appropriateness of the penalty for the sustained charge, the administrative judge reviewed other CBP disciplinary actions in which employees were charged with failure to cooperate in an agency administrative investigation after being informed that refusal to cooperate could result in removal. She noted that the agency had removed the employee in two of the three cases she cited and mitigated the penalty to a 15-day suspension in the third. *Id.* at 10-11. Concluding that the agency does not always remove employees for the offense, the administrative judge mitigated the penalty to a 15-day suspension. ID at 11-13.

¶8 The agency has timely filed a petition for review, challenging only the penalty decision.[2] The agency argues on review that the administrative judge improperly interpreted the applicable law and substituted her judgment for that of the agency when she mitigated the appellant's removal. Petition for Review (PFR) File, Tab 1 at 8-14. We agree.

ANALYSIS

¶9 When, as here, the Board sustains fewer than all of the agency's charges, it may mitigate the agency's penalty to the maximum reasonable penalty, so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 7 (2010). We agree with the administrative judge that the deciding official's assessment of the relevant *Douglas* factors was flawed. However, her decision to mitigate the penalty to a 15-day suspension in this case is not justified because the agency's chosen penalty, removal, is the maximum reasonable penalty for the sustained misconduct under the

[2] The appellant did not respond to the agency's petition for review, although the Board notified him and his representative of the opportunity to do so. Petition for Review File, Tab 2. Neither did he file a cross petition appealing the initial decision.

circumstances of this case. *See Simmons v. Department of the Air Force*, 99 M.S.P.R. 28, ¶ 37 (2005) (the Board may impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing the mitigating factors), *aff'd sub nom. Gebhardt v. Department of the Air Force*, 186 F. App'x 996 (Fed. Cir. 2006); *see also Lachance*, 178 F.3d at 1260.

¶10 The administrative judge found that, although the agency regarded failure to cooperate in an agency investigation a serious offense, mitigation was appropriate because: (1) the agency did not allege or show that the appellant's offense had any notoriety, or explain how his offense would impair his ability to perform his job in the satisfactory manner; (2) there was no reason to believe the appellant would in the future refuse to cooperate in an agency investigation; (3) the appellant was acting on the misguided advice of his attorney in deciding to end his cooperation with the internal affairs investigators; (4) although the investigators assured him that their investigation was administrative rather than criminal in nature, the appellant had recently been interviewed by law enforcement agencies and he may well have been confused about the possibility of incriminating himself; and (5) the agency does not always remove employees for the offense. ID at 11-12.

¶11 The nature and seriousness of the appellant's offense, however, is the most significant factor in a penalty determination. *Edwards*, 116 M.S.P.R.173, ¶ 14; *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007). In this regard, the charge is a serious one, and both the courts and the Board have held that removal from employment is an appropriate penalty for failure to cooperate with an investigation. *See, e.g., Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 950-51 (Fed. Cir. 1983) (declining to mitigate a removal for refusing to cooperate in an investigation); *Negron v. Department of Justice*, 95 M.S.P.R. 561, ¶ 34 (2004) (even where not all charges were sustained, removal was the appropriate penalty

for the single sustained charge of failure to cooperate during an official investigation in light of the seriousness of the offense and the impact the appellant's misconduct had on the agency's trust and confidence in him, and where the appellant had only 8 years of service); *see also Sher v. Department of Veterans Affairs*, 488 F.3d 489, 509 (1st Cir. 2007) ("Courts have repeatedly held that removal from employment is justified for failure to cooperate with an investigation.").

¶12 In light of the seriousness of the charge, consideration of the other relevant *Douglas* factors does not render removal outside the bounds of reasonableness under the circumstances of this case. As stated above, the administrative judge concluded that there was no reason to believe the appellant would refuse to cooperate in an agency investigation in the future. ID at 12. However, the basis for this conclusion is significantly undermined by the agency's evidence that the appellant eventually supplied misleading information in response to the agency's request for documentation concerning the appellant's alleged trip to Houston in 2008. *See* IAF, Tab 7, Subtabs 6-7.

¶13 Moreover, even assuming that the appellant may have been acting on the misguided advice of his attorney or may have confused the agency's internal investigation with an earlier criminal investigation, an appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Thus, in *Weston*, the court declined to mitigate a removal on the grounds that the appellant had relied on the erroneous advice of her counsel in refusing to cooperate in an investigation. 724 F.2d at 950-51. Further, the appellant here received clear notice that the investigation was administrative in nature and not related to any criminal misconduct. IAF, Tab 7, Subtab 13l at 8.

¶14 The agency concedes on review that it has not always removed employees for this offense. PFR File, Tab 1 at 11. To establish disparate penalties, though, the appellant must show that the charges and the circumstances surrounding the

charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). Establishing that the charges and circumstances surrounding the charged behavior are substantially similar may include proof that the proffered comparison employee was in the same work unit, was with the same supervisor, was subjected to the same standards governing discipline, and faced discipline close in time to the appellant. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶¶ 6, 12 (2010). Other relevant considerations in a disparate penalty analysis may include whether the difference in treatment was knowing and intentional, whether an agency began levying a more severe penalty for a certain offense without giving notice of a change in policy, and whether an imposed penalty is appropriate for the sustained charges. *Id.*, ¶ 15 n.4 (citing *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009)). When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 20 (2010).

¶15 Here, the administrative judge noted that in one case, the agency had mitigated a supervisory agricultural specialist's penalty for a single charge of failing to cooperate in an agency investigation to a 15-day suspension based on his 36 years of service with no prior discipline. ID at 11; *see* IAF, Tab 7, Subtab 11a at 54-60. Similarly, the comparator employee indicated he would not answer any questions without his attorney present. IAF, Tab 7, Subtab 11a at 58-59, Tab 10 at 9-10. According to the letter of decision in that case, however, the deciding official considered the employee's claim that, as a former employee of the Department of Agriculture, he may not have been fully acquainted with different agency procedures covering employees who are under investigation. IAF, Tab 7, Subtab 11a at 59. Once that employee understood the procedures, he offered to fully cooperate in the investigation, which the deciding official reasonably

regarded as evidence of the employee's ability to rehabilitate himself even though the offer came after the investigation had closed. *Id*. The present appellant, however, never claimed to be unaware of his obligation to cooperate with the agency's investigation, and there is nothing in the record indicating that he later offered to cooperate. Indeed, unlike the former Agriculture Department employee-comparator, the appellant here provided only misleading information. The agency therefore established legitimate reasons for the difference in treatment of the appellant under the circumstances of this case. *See Woebcke*, 114 M.S.P.R. 100, ¶ 20.

¶16 Furthermore, this case bears many similarities to the other two instances in which the agency removed employees for similar misconduct. IAF, Tab 7, Subtab 11a at 35-37. Although both of the employees who were removed were law enforcement officers and had significantly fewer years of service, distinctions from the case now before the Board, this evidence nonetheless shows the agency has removed employees in cases with similar factual backgrounds. IAF, Tab 7, Subtab 11a at 36, 65. In sum, the agency's imposition of a 15-day suspension in one case provides some basis for the imposition of a penalty less than removal. However, given the distinctions between that one case and the current appeal, without more, the record does not support the administrative judge's conclusion that a 15-day suspension is the maximum reasonable penalty. Accordingly, we conclude that the agency's chosen penalty, removal, is the maximum reasonable penalty under the circumstances of this case. The agency's removal action is SUSTAINED.

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 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:

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