UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 107

Docket No. SF-0752-11-0266-I-1

Robert Hoofman,

Appellant,

v.

Department of the Army,

Agency.

September 18, 2012

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.

Carl F. Olson, Esquire, JBER, Alaska, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed its removal action. For the following reasons, we GRANT the agency's petition for review, REVERSE the initial decision, and SUSTAIN the removal action.

BACKGROUND

¶2 The agency removed the appellant from his GS-11 Construction Control Representative position with the U.S. Army Engineer District, Anchorage, Alaska, for misconduct. Initial Appeal File (IAF), Tab 4 at 14-16, 23-24. Specifically, the agency removed the appellant based on the following charges:

(1) driving a government vehicle while under the influence of alcohol; (2) using a government passenger motor vehicle for other than official purposes; (3) loss of his driver's license for 1 year and having to use an ignition interlock device for 1 year after regaining the privilege to drive; and (4) attempting to deceive his supervisor. *Id*. at 23.

¶3 All of the charges stem from events that occurred on October 23, 2010. On that date, the appellant was arrested and charged under Alaska state law with Refusal to Submit to a Chemical Test and Driving Under the Influence. *Id.* at 42-45. The agency, based on the charging officer's affidavit, contended that the appellant's government-owned vehicle was stranded atop a sand pile when the police arrived. *Id.* at 14, 46. The charging officer attested that the first officer who arrived on the scene, Cpl. Messmer, contacted him, requested that he come to the scene, and was present when the charging officer arrived. Cpl. Messmer reported that the appellant was in the driver's seat with the motor running when he arrived and that there were two other individuals in the back seat. One of the individuals in the backseat reported that the appellant had driven the passengers from Tony's Bar. *Id.* at 14, 46. Still citing the charging officer's affidavit, the agency claimed that the appellant had bloodshot and watery eyes, slurred speech, a swaying stance, and a strong odor of consumed alcohol. It also contended that the appellant refused to submit to a chemical breath test. *Id*. at 14, 46. The agency further alleged that the appellant's government vehicle was impounded, which the appellant failed to report when he called his immediate supervisor from jail to request 10 days of leave for "a family emergency."[1] *Id.* at 14. The agency asserted that the appellant was in jail for approximately 2 weeks. *Id.* The agency charged that, pursuant to the subsequent criminal proceeding in which the appellant pled guilty to Refusal of a Breath Test, the court revoked the

[1] Other documents in the record indicate that the appellant's stated reason for requesting leave was actually "personal family reasons." IAF, Tab 11 at 25, 35.

appellant's driver's license for 1 year and required that he use an ignition interlock device for 12 months after he regained his privilege to drive. *Id.* at 14, 47. Based upon this misconduct, the agency removed the appellant. *Id.* at 23-24.

¶4 The appellant filed an appeal. *Id.*, Tab 1. The appellant admitted below, as he did in his response to the proposed removal action, that his government-owned vehicle became stuck on a sand pile. *Id.*, Tab 4 at 21, Tab 12 at 1-2. He claimed that, after the car was stuck, he walked to his nearby apartment and consumed some alcohol. *Id.*, Tab 4 at 21, Tab 12 at 1-2. The appellant asserted that when he was on his way back to his vehicle, he met two individuals who agreed to assist him in moving it. *Id.*, Tab 4 at 21, Tab 12 at 2. In his response to the notice of proposed removal, the appellant stated that the individuals agreed to assist him in exchange for a ride, but the appellant did not specify to where. *Id.*, Tab 4 at 22. Below, the appellant contended that he then tried to "rock the car off the sand by engaging the drive and reverse gears alternatively," but the car did not move. *Id.*, Tab 12 at 2. The appellant further asserted that he would not necessarily lose his license for 1 year and that he did not attempt to deceive his supervisor. *Id.*, Tab 4 at 22, Tab 12 at 3-5.

¶5 The administrative judge ruled that the charging police officer's affidavit was double hearsay evidence and thus had little probative value. Initial Decision (ID) at 6-8. Because charges 1 and 2 were based almost exclusively on the charging officer's affidavit, the administrative judge found that the agency failed to show by preponderant evidence that the appellant committed the acts of driving a government vehicle while under the influence of alcohol or of using a government vehicle for other than official purposes. *Id.* at 8.

¶6 Further, the administrative judge determined that to sustain charge 3, the agency had to prove both that the appellant lost the use of his driver's license for 1 year and that he had to use an ignition interlock device for 1 year after regaining the privilege to drive. *Id.* at 8. In declining to sustain charge 3, the administrative judge found that, although the appellant's license was "revoked"

for 1 year, the appellant did not "lose" his license for 1 year as charged by the agency because the appellant held a valid driver's license, albeit one limited to driving with the interlock system, within approximately 5 months of the incident. *Id.* at 9. Although the administrative judge explained that the appellant was required to use the interlock system on his personal vehicle, she found that he could potentially be permitted to drive a government-owned vehicle without such restrictions under certain circumstances. *Id.* Additionally, the administrative judge concluded that the agency proved by preponderant evidence that the appellant was unable to perform his position's duties without a valid driver's license. *Id.* However, the administrative judge determined that the agency only considered this point with respect to the efficiency of the service and the propriety of the penalty instead of as a factual basis for the charge. *Id.* She further found that the appellant could potentially perform the duties of his position by being assigned duties selectively in the Anchorage area or by being permitted to use his personally-owned vehicle. *Id.* at 10.

¶7 Finally, the administrative judge found that the agency did not prove charge 4, attempting to deceive his supervisor. The administrative judge explained that "deceive" means "to mislead by a false appearance or statement," and the agency failed to prove that the appellant attempted to mislead the agency. Specifically, the administrative judge found that the appellant had a limited ability to talk to others and to explain his situation while he was incarcerated. *Id.* at 12. The administrative judge also found no evidence that the statements the appellant made to Le Jong, his supervisor, were false or that the appellant gained leave or anything else of value by not telling Mr. Jong on October 25 of his arrest, the criminal charges, or the impounded vehicle. *Id.* The administrative judge further found that the appellant sought out Mr. Jong on his first day back at work and told him of the arrest and the impounded vehicle. *Id.* at 12. Thus, the administrative judge concluded that the agency did not establish that the appellant attempted to deceive his supervisor.

ANALYSIS

¶8 On review, the agency argues that the administrative judge erred in finding that it failed to prove by preponderant evidence the factual bases for charges 1, 2, and 4.[2] Petition for Review (PFR) File, Tab 1 at 8-9. Specifically, the agency asserts that the administrative judge improperly discounted relevant evidence and that she incorrectly framed the charges of misuse of a government vehicle and attempting to deceive a supervisor. *Id.* at 7-9.

Charge 1

¶9 Although the administrative judge found the appellant's story that he was sober and alone when he drove his government-owned vehicle onto the sand pile to be far-fetched, she also found that the agency failed to present any credible evidence to contradict the appellant's version of events. ID at 8; Hearing CD. We find, however, that, even accepting the appellant's story as true, he has admitted to facts sufficient to support charge 1. Specifically, the notice of proposed removal makes clear that the appellant was charged with "driving under the influence" within the meaning of Alaska Statute § 28.35.030(a), which provides as follows:

> (a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person *operates* or drives a motor vehicle or operates an aircraft or a watercraft
>
> > (1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance, singly or in combination; or
> >
> > (2) and if, as determined by a chemical test taken within four hours after the alleged operating or driving, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if

[2] Because the agency does not challenge the administrative judge's findings with regard to charge 3, we have not considered it further on review.

> there is 0.08 grams or more of alcohol per 210 liters of the person's breath.

(emphasis added). *See* IAF, Tab 11 at 15. The Alaska courts have defined the term "operates" in the statute as referring to the actual physical control of a vehicle with the motor running, and it does not require that the vehicle be capable of movement. *Lathan v. State*, 707 P.2d 941, 943 (Alaska Ct. App. 1985). Thus, under the Alaska statute that the appellant was charged with violating, a person can be guilty of driving under the influence without "driving" a car in the usual sense; the statute is violated whenever a person under the influence is in actual physical control of a motor vehicle. *Kingsley v. State*, 11 P.3d 1001, 1002 (Alaska Ct. App. 2000). By his own admissions, the appellant was operating the government-owned vehicle within the meaning of the statute. IAF, Tab 11 at 24. The appellant did not dispute that he was in the driver's seat with the engine running when the police arrived, as charged. He also admitted that he attempted to remove the vehicle from the sand pile after he had been drinking by engaging the drive and reverse gears. *Id.*; IAF, Tab 4 at 14, 46; IAF, Tab 12 at 2.

¶10 Furthermore, there is preponderant evidence that the appellant was under the influence of alcohol. The appellant has admitted that he had been drinking, and he declined to take a breathalyzer test. *Id.* at 21, 24-25. In addition, according to the charging police officer's affidavit, the appellant had bloodshot and watery eyes, slurred speech, a swaying stance, and a strong odor of consumed alcohol. *Id.* at 46. We find that this evidence is sufficiently probative to prove by preponderant evidence that the appellant had been driving while under the influence. *See Bradley v. State*, 197 P.3d 209, 216-17 (Alaska Ct. App. 2008) (similar evidence of intoxication was sufficient to uphold a conviction for driving while intoxicated).

Charge 2

¶11 The appellant's admissions are also sufficient to prove charge 2 – use of a government vehicle for other than official purposes. The agency's regulations

provide that a government-owned vehicle may only be used for official purposes, that is: (a) to travel between places of business; (b) to travel between places of temporary lodging when public transportation is unavailable or impractical; and (c) to travel between places (a) or (b) and restaurants, drug stores, barber shops, places of worship, cleaning establishments, and similar places necessary for the sustenance, comfort, and health of the employee. 41 C.F.R. § 301-10.201. The appellant acknowledged that he offered to give a ride to two unidentified individuals in exchange for their assisting him in removing the vehicle from the sand pile, which is sufficient to prove that the appellant used the vehicle for other than official purposes under the regulations. IAF, Tab 11 at 24-25. The fact that he was unable to free the vehicle from the sand pile and complete the unauthorized trip did not disprove the charge.

¶12 Even if the evidence were insufficient to prove that the appellant had the two unauthorized individuals in the vehicle when he got it stuck on the sand pile, it is sufficient to show that the appellant allowed the two individuals into his vehicle as alleged in the notice of proposed removal. *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). Thus, charge 2 is also sustained.

Charge 4

¶13 The administrative judge construed charge 4, attempting to deceive a supervisor, as a falsification charge. We find, however, that charge 4 is more properly construed as a lack of candor charge. While it is true that intent to deceive is a separate element of a falsification charge, "lack of candor [also] necessarily involves an element of deception," *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002), and the inclusion of the phrase "attempting to deceive" in the charging document does not necessarily mean that the appellant was being charged with falsification. Lack of candor is a "broader and more

flexible concept" than falsification, and, as such, it may involve a failure to disclose something that should have been disclosed "to make the given statement accurate and complete." *Id.* The critical difference between falsification and lack of candor in this case is whether the appellant was charged with making an affirmative misrepresentation. *See Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 10 (2012) (to establish falsification, an agency needs to show that the employee made an affirmative misrepresentation).

¶14 Here, the appellant was not charged with making an affirmative misrepresentation. Rather, the specification describes the appellant's successful attempts to deceive his supervisor by covering up his arrest and the impounding of his government-owned vehicle until he returned to work, and the words "false" or "falsification" do not appear in the charge or the narrative specification. For these reasons, the agency was not required to prove an affirmative misrepresentation in order to prove its charge.

¶15 The administrative judge found that the agency did not prove charge 4 by preponderant evidence. ID at 12. Specifically, she determined that the appellant made no false statements and that he did not gain anything of value through his omissions. This rationale, however, would only apply if the agency charged the appellant with falsification, which we conclude the agency did not. The administrative judge further reasoned that the appellant had a limited ability to communicate with his supervisor from jail but that he sought out his supervisor and told him of the incident as soon as he returned to work. *Id.* We disagree with the administrative judge's reasoning. Assuming the cited facts are true, the appellant nevertheless communicated with his supervisor from jail and only requested 10 days of leave for "personal reasons" without informing him of the actual circumstances. IAF, Tab 11 at 25, 35. We find that the appellant should have told his supervisor about his arrest and the impounding of his government-owned vehicle in order to make his stated reason for requesting leave "accurate and complete." *See Ludlum*, 278 F.3d at 1284. Furthermore, the fact

that the appellant eventually told his supervisor of the incident before the supervisor could find out for himself does not change the fact that the appellant had concealed the matter from him for nearly 2 weeks. Based on the foregoing, we sustain charge 4.

Nexus and Penalty

¶16 In addition to the requirement that the agency prove its charges, the agency must also prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for an adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 8 (2010). An agency may show nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Id.*, ¶ 9. We need not determine whether the appellant's conduct is sufficiently egregious to create a rebuttable presumption of nexus because the agency has presented preponderant evidence under the second category of the specific impact of the misconduct on the efficiency of the service. Specifically, the agency proved that the appellant was driving a government-owned vehicle for other than official purposes while under the influence of alcohol. Further, the appellant was less than candid with his supervisor concerning his arrest and the impounding of his government-owned vehicle. Such misconduct would undermine the agency's trust and confidence in the appellant's job performance. Thus, we conclude that the agency established by preponderant evidence a nexus between the proven charges and the efficiency of the service. *See Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 28 (2000) (the appellant's lack of candor strikes at the very heart of the employee-employer

relationship and, thus, directly impacts the efficiency of the service), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002).

¶17 The remaining issue for consideration is whether the penalty of removal is reasonable under the circumstances. When not all of the charges are sustained, the Board will carefully consider whether the sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). Also, when the Board sustains fewer than all of the agency's charges, the Board 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).

¶18 Here, the agency has not stated a desire that a lesser penalty be imposed on fewer charges. Hearing CD. Further, the deciding official testified that he considered the *Douglas* factors and found that the penalty of removal was reasonable because he had lost confidence in the appellant's honesty, truthfulness, and his ability to exercise good judgment. *Id*. The deciding official considered the fact that the appellant's position required frequent travel in remote places and that he was required to work independently. *Id*. The deciding official testified further that he considered the appellant's lack of a disciplinary record, but he found removal warranted based on the seriousness of the misconduct and the fact that it was directly related to the appellant's duties, position, and responsibilities. *Id.* In this case, we have considered the record evidence, including the hearing testimony, and we find that, in light of the seriousness of the proven misconduct and all of the appropriate penalty factors, the removal penalty does not exceed the tolerable limits of reasonableness. We therefore sustain the removal action.

ORDER

¶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 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.