UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 2

Docket No. CH-0752-11-0786-I-1

Shannon L. Brough,

Appellant,

v.

Department of Commerce,

Agency.

January 9, 2013

Shannon L. Brough, Jeffersonville, Indiana, pro se.

Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that mitigated the appellant's removal to a 14-day suspension. The agency files a cross-petition for review in which it argues that the administrative judge erred in failing to sustain certain specifications and in mitigating the penalty. For the following reasons, we DENY the appellant's petition for review, GRANT the agency's cross-petition for review, and SUSTAIN the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from his WG-05 position as a Materials Handler with the U.S. Census Bureau for 3 reasons: (1) Inappropriate Conduct (6 specifications); (2) Absence without Official Leave (AWOL) (3 specifications); and (3) Failure to Follow Proper Call In Procedures (2 specifications). Initial Appeal File (IAF), Tab 4 at 76-80. The appellant appealed, and the administrative judge merged Reasons 2 and 3 because they concerned the same dates and did not involve different misconduct or elements of proof. IAF, Tab 15, Initial Decision (ID) at 2. After holding a hearing, the administrative judge sustained 3 of the 6 specifications listed under the first reason, as well as all the specifications listed under merged Reasons 2 and 3, and mitigated the penalty based on her determination that the maximum reasonable penalty for the sustained misconduct was a 14-day suspension. ID at 2-11, 14. The administrative judge also found that the appellant failed to prove his disability discrimination claim. ID at 11-13.

¶3 The appellant has filed a timely petition for review in which he cites the administrative judge's alleged delay in issuing the initial decision and argues that a 14-day suspension is excessive because the agency failed to use progressive discipline. Petition for Review (PFR) File, Tab 1. He does not address his affirmative defenses. The agency has filed a cross-petition for review in which it argues that the administrative judge erred in mitigating the penalty. PFR File, Tab 3. In his response to the agency's cross-petition for review, the appellant indicates that he is no longer concerned with the amount of time that the administrative judge took to issue the initial decision. PFR File, Tab 5 at 3.

ANALYSIS

The appellant's petition fails to meet the Board's criteria for review.

¶4 The Board may grant a petition for review only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an

erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).[1] The appellant provides numerous documents with his petition for review, all of which are dated before the close of the record below. PFR File, Tab 1 at 3-34; *see* 5 C.F.R. § 1201.58. Some of these documents are included in the record below. *Compare*, *e.g.*, PFR File, Tab 1 at 16-20, 25-28, *with* IAF, Tab 4 at 76-80, 86-88. Evidence that is already a part of the record is not new. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). To the extent that the documents that the appellant submits with his petition for review are not already part of the record, under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant makes no such showing.

¶5 The appellant has failed to prove his sole remaining claim on review, that the agency failed to employ progressive discipline. The record reflects that less than 7 months after his appointment, the appellant served a 7-day suspension for inappropriate conduct. IAF, Tab 4 at 86-99. The agency subsequently proposed a 14-day suspension based on 3 specifications of inappropriate conduct, 3 specifications of absence without leave, and 2 specifications of failure to follow

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

proper call-in procedures. *Id.* at 81-85. Before it issued a decision on that proposal, the agency withdrew the proposed 14-day suspension and proposed the removal action at issue in this appeal, adding 3 further specifications of inappropriate conduct to the misconduct specified in the proposed 14-day suspension. *Id.* at 76-80. We find that the agency's actions under the circumstances are entirely consistent with the concept of progressive discipline.

The agency proved 2 additional specifications of Inappropriate Conduct.

¶6 In its cross-petition for review, the agency challenges the administrative judge's findings on Specifications 3 and 5 of Reason 1, claiming that the administrative judge mischaracterized relevant testimony that she found to be credible in deciding not to sustain those specifications. PFR File, Tab 3 at 4 n.2, 10-13. The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Sufficiently sound reasons to overturn an administrative judge's demeanor-based credibility determinations include circumstances when the judge's findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). For the reasons set forth below, we find that the record here provides sound reasons to overturn the administrative judge's findings regarding Specifications 3 and 5 of Reason 1.

¶7 Under Specification 3, the agency alleged that Lyndon Alexander, the appellant's second-line supervisor, directed the appellant to return to his work area and that he refused to do so. IAF, Tab 4 at 77; *see* Hearing Transcript, September 26, 2011 (HT) at 28. The administrative judge found, based on the credible testimony of the appellant and Mr. Alexander, that the agency failed to prove the specified misconduct because the appellant returned to his work area as

directed. ID at 4. However, the hearing testimony indicates otherwise. Although Mr. Alexander testified that the appellant "did later on return to his work area," he unequivocally asserted that the appellant did not return to his work area when instructed to do so. HT at 33. Section Chief Marilyn Ede, the appellant's third-line supervisor, also testified that the appellant refused Mr. Alexander's direction to return to his work area and that the appellant returned to his work area only after she intervened at Mr. Alexander's request. HT at 48, 50, 60. Thus, both Mr. Alexander and Ms. Ede, whom the administrative judge found testified in a straightforward and consistent manner, ID at 4, testified that the appellant refused to comply with Mr. Alexander's direction to return to his work area. Accordingly, we REVERSE the administrative judge's finding on Specification 3 and instead SUSTAIN the specification.

¶8 Under Specification 5, the agency alleged that the appellant told Mr. Alexander that he "would no longer deal with [his] supervisor, Lesley Land, and she needed to stay 1,000 feet away from [him], or 'she was going to get it' or words to that effect." IAF, Tab 4 at 77. Based on what she described as the consistent testimony of the appellant and Mr. Alexander, the administrative judge found that the agency failed to prove the "essence" of the specification, i.e., "that the appellant stated that 'she was going to get it' or words to that effect." ID at 5-6. The appellant admitted telling Mr. Alexander that Ms. Land needed to stay 1,000 feet away from him, but he denied using the words "she was going to get it." HT at 160-61. The administrative judge found that, when asked whether he recalled the appellant using the words "she was going to get it," or words to that effect, Mr. Anderson testified "not something to that effect . . . ." ID at 5. However, the hearing transcript reflects a small but significant difference between Mr. Alexander's actual testimony and the testimony as cited by the administrative judge. The hearing transcript shows the following exchange:

> Q. During that conversation, do you recall him using the words "she was going to get it" or words to that effect?

> A. Not – something to that effect. I mean, it may not have been exactly that.

HT at 34. The audio recording of the hearing also reflects a pause between the words "not" and "something" in Mr. Alexander's testimony. Hearing Compact Disc (HCD) 1. Based on that pause, we find that "Not – something to that effect" was not a single statement, as the administrative judge found. Rather, we find that Mr. Alexander started his answer by saying "Not," then he stopped and began his answer anew with "something to that effect." That interpretation of Mr. Alexander's testimony is consistent with his statement that "it may not have been exactly that." HT at 34. It is also consistent with Mr. Alexander's subsequent testimony in response to questioning by the administrative judge, wherein he stated, "I don't remember the exact wording. It was something to that effect." HT at 114. Because we find that Mr. Alexander credibly testified that the appellant said that Ms. Land "was going to get it," or words to that effect, we REVERSE the administrative judge's finding on Specification 5, and we SUSTAIN that specification.

Removal does not exceed the bounds of reasonableness for the sustained misconduct.

¶9 When the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Notwithstanding that authority, the Board has long held that in a case like this, when all of the charges are sustained, even when some of the specifications are not, the agency's penalty determination is entitled to deference and should be reviewed only to determine if the agency considered all of the relevant factors and exercised its discretion within the tolerable limits of reasonableness. *E.g.*, *Penland v. Department of the Interior*, 115 M.S.P.R. 474, ¶¶ 7, 12 (2010); *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). In doing so, "the Board must give due weight to the agency's primary discretion in

maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised." *Penland*, 115 M.S.P.R. 474, ¶ 7.

¶10 As noted above, the administrative judge mitigated the appellant's removal, finding that the maximum reasonable penalty for the sustained misconduct was a 14-day suspension. ID at 11. She did so in large part because the specifications that she sustained in her initial decision were, with minor exception, identical to the specifications set forth in the proposed 14-day suspension that the agency rescinded before proposing the appellant's removal. ID at 10-11; *see* IAF, Tab 4 at 81-82. Of the 3 specifications the agency added when it replaced the proposed suspension with the proposed removal, the administrative judge only sustained Specification 4 and, as the administrative judge noted in her penalty analysis, the deciding official testified that Specification 4 was not sufficient to support removal. ID at 4-8, 10; HT at 95; *see* IAF, Tab 4 at 76-77, 81-82. Thus, mitigation may have been appropriate based on the specifications sustained by the administrative judge. However, because we reverse the administrative judge's findings on 2 of the specifications that she did not sustain, we must revisit the issue of the reasonableness of the penalty, affording the agency's penalty determination the deference to which it is entitled. *See, e.g.*, *Penland*, 115 M.S.P.R. 474, ¶¶ 7, 12; *Payne*, 72 M.S.P.R. at 650.

¶11 In the decision letter, the deciding official discussed the relevant *Douglas* factors that he considered, including the appellant's over 1 year of service with the agency. IAF, Tab 4 at 58-59. The deciding official indicated that the appellant's length of service was outweighed by the nature and seriousness of his "repeated acts of disrespectful and troubling misconduct," as well as his repeated absences and failure to follow call-in procedures. *Id.* at 58. The deciding official also wrote that the appellant's "actions have had a detrimental effect on the workplace by creating an atmosphere of intimidation and fear that has hampered

the ability of the Bureau to accomplish its mission and meet workplace demands." *Id.* at 59. The Board has consistently held that the nature and seriousness of the offense and its relationship to the employee's duties and responsibilities is the most important factor in determining the appropriate penalty. *E.g.*, *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007); *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

¶12 The deciding official also testified that the appellant failed to improve his behavior following his first suspension and wrote in his decision letter that, rather than show any subsequent potential for rehabilitation, the appellant's prior discipline for similar misconduct "resulted in an escalation of [the appellant's] misconduct to the point of talking about harming [his] co-workers and [his] supervisor."[2] HT at 96-97; IAF, Tab 4 at 58. The deciding official similarly acknowledged in his testimony that the appellant's misconduct had not only impaired his relationship with his supervisors but with his co-workers as well. HT at 97. Moreover, the deciding official testified that, due to the appellant's failure to improve his behavior following the first suspension, as well as his failure to recognize any behavioral issues on his own part, management had essentially lost confidence in the appellant and was concerned about his ability to perform his job. HT at 96-97. Also important to our penalty analysis is the deciding official's testimony that Specification 5 was, in and of itself, sufficient to support the appellant's removal. HT at 96; *see* ID at 10. The deciding official unambiguously testified that he would have stood with his decision to remove the

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[2] Because the agency charged the appellant with inappropriate conduct, rather than with making a threat, the agency was not required to prove that the appellant intentionally made a threat under the test set forth in *Metz v. Department of the Treasury*, 780 F.2d 1001, 1002-03 (Fed. Cir. 1986), and may instead consider the threatening nature of the appellant's comments in determining the penalty. *E.g.*, *Gray v. Government Printing Office*, 111 M.S.P.R. 184, ¶ 11 (2009); *McCarty v. Department of the Navy*, 67 M.S.P.R. 177, 182-83 (1995).

appellant based on Specification 5 alone because it involved "a much more threatening tone" than the other sustained misconduct. HT at 96; IAF, Tab 4 at 76-77.

¶13 Accordingly, we find that the penalty of removal was within the tolerable limits of reasonableness for the sustained misconduct and SUSTAIN the appellant's removal.

ORDER

¶14 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other

issues in your appeal. 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 the date of this order. 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.