

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 35

Docket No. DA-0752-07-0331-I-1

**Jimmie R. Tryon, Sr,
Appellant,**

v.

**United States Postal Service,
Agency.**

February 20, 2008

Jeanne Chastain, Esquire, Corpus Christi, Texas, for the appellant.

Tammy S. Barrow, Esquire, Dallas, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision sustaining his removal. For the reasons stated below, we GRANT the appellant's petition, AFFIRM the initial decision with regard to the administrative judge's findings on the charge, and MODIFY it with regard to the penalty, MITIGATING the penalty to a 60-day suspension.

BACKGROUND

¶2 The agency removed the appellant from his position of City Letter Carrier effective March 23, 2007, for unacceptable conduct. Initial Appeal File (IAF), Tab 5, subtabs 4A, 4B. In its notice of proposed removal, the agency stated that

it had received a letter dated December 11, 2006, from Velma Garza, the property manager for the Princess Apartments (the Princess), which advised the agency that the appellant had behaved inappropriately towards her when he delivered mail to the tenants at the Princess, i.e., the appellant had hugged her and kissed her on her left cheek. IAF, Tab 5, subtabs 4B, 4F. Ms. Garza had asserted that the appellant's conduct was unprofessional and she denied encouraging his behavior. *Id.*, subtab 4F. Based on Ms. Garza's letter and the agency's subsequent investigation, the agency charged the appellant with engaging in "inappropriate conduct by touching a postal customer in an inappropriate manner and making inappropriate comments – some of which contained sexual innuendos." *Id.*, subtab 4B.

¶3 On appeal to the Board, the administrative judge (AJ) found, based on Ms. Garza's demeanor and the plausibility of her statements, that Ms. Garza lacked credibility when she testified that on October 16, 2006, the appellant hugged and kissed her on the cheek and made remarks to her, both of which were unwelcome. Initial Decision (ID) at 8. The AJ found further that, even though Ms. Garza claimed that a tenant witnessed the appellant's inappropriate comments to her, the record is devoid of any corroborating evidence and, thus, there was insufficient evidence to conclude that the appellant's alleged comments to Ms. Garza were sexual in nature. *Id.* Rather, the AJ found that another individual stated in a written statement that he never saw the appellant behave inappropriately and he did not recall Ms. Garza ever telling him that the appellant had kissed her cheek. ID at 9. The AJ found that, in contrast to Ms. Garza, the appellant testified in a straightforward manner that he did not kiss Ms. Garza and that she had initiated hugs with him on some occasions. The AJ found the appellant credible when he testified that he was friendly with his customers and that he frequently gave them hugs and handshakes, and that the agency failed to prove that he kissed Ms. Garza or made inappropriate remarks to her as alleged in the proposal notice. *Id.* The AJ sustained the charge of unacceptable conduct, however, because the appellant

admitted hugging Ms. Garza, as well as other customers, finding that hugging any customer is inappropriate behavior for a mail carrier. ID at 10. Thus, the AJ sustained the charge, absent the finding of a kiss or sexual comments. In reviewing the agency's penalty determination and in deciding whether the appellant could be rehabilitated, the AJ relied on the fact that the agency had proposed the appellant's removal sometime in the past for similar misconduct, and she concluded that removal is within the bounds of reasonableness. ID at 10-13.

ANALYSIS

¶4 With respect to the merits of the charge, we agree with the AJ's finding that the agency supported its charge of unacceptable conduct by preponderant evidence. We grant the appellant's petition, however, for the purpose of addressing the agency's penalty determination.

¶5 The Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), and exercised management discretion within tolerable limits of reasonableness. When all of the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). An agency's failure to sustain all of its supporting specifications may require, or contribute to, a finding that the agency's penalty is not reasonable. *Id.* at 651.

¶6 Here, the most serious of the allegations were not sustained, namely, kissing a customer and making lewd or inappropriate comments to that same customer. In this instance, there was really only one "charge" with a narrative recitation of what events transpired that constituted misconduct, most of which were not found by preponderant evidence to have occurred. Under these

circumstances, the Board's function is to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Alberto v. Department of Veterans Affairs*, 98 M.S.P.R. 50, ¶ 7 (2004), *aff'd*, No. 05-3090 (Fed. Cir. June 10, 2005) (NP).

¶7 After considering the specific circumstances in this case, we find that the removal penalty is not within the limits of reasonableness. First, the more serious allegations of misconduct were not sustained. Furthermore, we find that it was clear error for the AJ and the deciding official to consider the appellant's alleged prior proposed removal for similar misconduct as a basis for finding the appellant incapable of rehabilitation. In this case, there is no evidence in the record of any prior disciplinary action (reprimand or suspension), and any proposed actions which were either withdrawn or never finalized cannot be relied upon as they do not constitute "prior discipline." Even though the notice of proposed removal does not refer to the prior proposed discipline, the record clearly reflects that, when assessing the *Douglas* factors and determining the penalty, the deciding official improperly relied on the prior proposal to support the conclusion that nothing less than removal was an appropriate penalty. IAF Tab 5, subtab 4A; Hearing Tape (HT) 2A.

¶8 It is improper for an agency to enhance a penalty based on misconduct that was not cited in the notice of proposed removal. *Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 505-06 (1995) (to the extent the deciding official and the AJ relied on prior threatening statements and attendance-related misconduct, which were characterized as "erratic" to enhance the penalty, such reliance was improper), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996) (Table). Here, the prior proposed removal was not cited by the proposing official when she proposed the instant action, even to support the charge (as opposed to a *Douglas* factor). Nevertheless, it is clear from the record that the deciding official and the AJ improperly relied upon the appellant's prior "disciplinary record," IAF, Tab 5,

subtab 4A; ID at 10-13, which does not officially exist and cannot be considered, to support the removal analysis under *Douglas*.

¶9 Therefore, under the specific facts in this case, where the deciding official and the AJ improperly took into consideration a past proposal of discipline to find that the appellant cannot be rehabilitated, and where the AJ only sustained one instance of hugging a customer, removal of an employee with 45 years of unblemished federal service exceeds the bounds of reasonableness. Accordingly, we find that a 60-day suspension constitutes the maximum reasonable penalty for the appellant's sustained misconduct.

ORDER

¶10 We ORDER the agency to cancel the removal action and substitute a 60-day suspension and to restore the appellant effective March 23, 2007. *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.

¶11 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, 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.

¶12 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 to describe 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).

¶13 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 in 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).

¶14 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. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

¶15 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:

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.



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.