

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

**2008 MSPB 137**

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Docket No. DA-0752-07-0550-I-1

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**David C. Stoddard,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

June 23, 2008

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Jonathan Bell, Esquire, New York, New York, for the appellant.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the initial decision that affirmed his removal for creating a disturbance and absence without leave (AWOL). For the reasons set forth below, we GRANT the appellant's petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

**BACKGROUND**

¶2 Prior to his removal, the appellant was a Pneudraulic Systems Mechanic, WG-10, with the Corpus Christi Army Depot in Corpus Christi, Texas. Initial Appeal File (IAF), Tab 4, Subtab 4c. By notice dated June 22, 2007, Theodore

Humphrey, Chief, Fuel Control, proposed to remove the appellant based on the following charges:

Charge 1: Creating a disturbance by implying you would inflict bodily harm on your supervisor and co-workers. Specification 1: On 17 April 2007 you told [Charles] Hardeman and [Alan] Sarver that they were number 34 and 35, and when you were done with them, you would go upstairs and “take out” Mr. Humphrey (myself), [Lucius] Thomas and [Lee] Goffigon. This statement was made one day after the shooting deaths at Virginia Tech. As a result of your statement, Mr. Goffigon, Mr. Thomas, and Mr. Hardeman expressed fear of coming to work and were granted leave.

Charge 2: Absence without Approved Leave (AWOL). Specification 1: You were absent without Approved Leave (AWOL) on the twenty-eight and thirtieth of March and the fourth, ninth, tenth, and eleventh of April 2007.

*Id.*, Subtab 4f. The letter further indicated that, as a result of the appellant’s statements, his presence in the workplace created “an atmosphere of unrest, unease, and apprehension.” *Id.* On August 20, 2007, following oral and written responses by the appellant, Joe Herrera, Director, Power Train Production, issued a decision letter sustaining the charges and removing the appellant effective August 24, 2007. *Id.*, Subtab 4c.

¶3 This appeal followed. IAF, Tab 1. The appellant raised affirmative defenses of disparate treatment based on age (53), race (Caucasian), and disability (herniated disc); failure to accommodate; reprisal for equal employment opportunity (EEO) activity; and harmful error and/or violation of due process based on ex parte communications between the proposing and deciding officials. IAF, Tabs 10, 11, 15. Following the hearing, the administrative judge (AJ) found that the agency had met its burden of proof on both charges, that the appellant had failed to establish his affirmative defenses, and that the removal penalty is reasonable and promotes the efficiency of the service. IAF, Tab 15 (Initial Decision, Dec. 13, 2007).

¶4 On petition for review, the appellant reiterates his claims from below and further alleges that Humphrey had a retaliatory motive based on the fact that he

had previously proposed the appellant's removal and Herrera had mitigated the penalty to a 10-day suspension. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's petition. PFRF, Tab 4.<sup>1</sup>

### ANALYSIS

#### The agency failed to establish the charge of AWOL.

¶5 While we agree with the AJ's decision to sustain the agency's first charge, we find that the AWOL charge should not have been sustained. The record reflects that, on January 3, 2007, the agency issued a memorandum advising the appellant that his sick and annual leave balances were zero. *See* IAF, Tab 4, Subtab 4s. Subsequently, on March 22, 2007, Humphrey issued a leave control letter, which provided, in relevant part:

Effective immediately, all leave requested for illness or injury, be it sick leave, leave without pay or annual leave and regardless of duration, must be supported by a medical certificate with the original signature of your physician or licensed practitioner. This certificate must state that you are incapacitated from work. The certificate must specifically state the period of time during which you are incapacitated or undergoing medical treatment. The required certificate or statement must be submitted to me as soon as possible upon your return to duty but no later than 15 calendar days from the date of your absence. Your absence will be carried as Absence without Leave (AWOL) until such time the documentation is furnished.

*Id.* The appellant was absent from work on March 28 and 30 and April 4, 9, 10, and 11, 2007. He provided a timely certificate, signed by a registered nurse (RN), requesting that his absences on those specific dates be excused "due to medical issues." *See* IAF, Tab 4, Subtab 4e at 9.

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<sup>1</sup> The agency's response was untimely filed by 1 day, and its request for an extension of the filing deadline was denied. However, based on the statements in the agency's unopposed request, we find that the agency has shown good cause for the minimal delay. *See* PFRF, Tabs 2, 4, 5.

¶6 The appellant testified that he believed this certificate complied with the requirements of the leave control letter, and that he was not informed otherwise until the proposal notice. HT at 294-95; *see also* IAF, Tab 4, Subtab 4e at 1. Humphrey testified that he considered the certificate unacceptable, as it was not signed by a licensed physician and did not state that the appellant was “incapacitated for work.” HT at 124. In his written response to the notice of proposed removal, the appellant provided a signed certificate from his physician, dated July 9, 2007, explicitly stating that he was incapacitated on the dates in question. IAF, Tab 4, Subtab 4e at 8. However, Mr. Herrera found this certificate unacceptable on the grounds that it was not provided within 15 days of his absence, as required by the leave control letter. *Id.*, Subtab 4c; HT at 211.

¶7 Removal for AWOL is improper if leave policies are ambiguous, if the appellant attempts to comply with them, and if there is no evidence that the absence of the employee impaired the agency’s ability to carry out its mission. *See Young v. Department of the Navy*, 27 M.S.P.R. 274, 276 (1985). Here, the appellant made a good faith effort to comply with instructions that were at best ambiguous. The leave control letter provided that the certificate must include a specific statement that the appellant was incapacitated for work, but it did not indicate that this statement must include any particular combination of words. IAF, Tab 4, Subtab 4s. The appellant testified without contradiction that he was not orally informed of any such requirement. HT at 294. Given the lack of clarity in this matter, the RN’s statement that the appellant’s absences were “due to medical reasons” was arguably sufficient. Moreover, contrary to Humphrey’s testimony, the leave control letter did not state that the certificate must be signed by a physician. IAF, Tab 4, Subtab 4s. Rather, it provided that the certificate must be signed by a “physician or licensed practitioner.” *Id.* Under Texas state law, the practice of nursing requires a license. *See Tex. Occ. Code Ann.*, § 301.002 (2007). Additionally, the appellant testified that he was not advised that a certificate signed by an RN would be deemed not in compliance with the

leave control letter. HT at 214. Finally, the agency has not asserted that the appellant's absences were disruptive. Under these circumstances, the AWOL charge should not have been sustained.<sup>2</sup>

The appellant's new claim of reprisal will not be considered.

¶8 We discern no error in the AJ's finding that the appellant failed to prove the affirmative defenses raised below. On petition for review, the appellant introduces a new reprisal claim, based on the fact that Humphrey had previously proposed his removal, only to have the proposed action mitigated to a 10-day suspension following his response. See IAF, Tab 4, Subtab 4k. However, the Board will not consider an argument raised for the first time on petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). In any event, it is unlikely that the appellant could establish a significant retaliatory motive, as Herrera was the deciding official in both actions.

The removal penalty is within the bounds of reasonableness.

¶9 When, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). 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

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<sup>2</sup> We further note that, while the July 9, 2007 certificate was untimely, it is evident that it otherwise complied with the requirements set forth in the leave control letter. Having received that certificate, the agency was obliged to grant the appellant available sick leave before removing him on AWOL charges. See *Foreman v. U.S. Postal Service*, 89 M.S.P.R. 328, ¶ 8 (2001); *Atchley v. Department of the Army*, 46 M.S.P.R. 297, 301 (1990). By the time of his removal, the appellant had accumulated 28 hours of sick leave, enough to cover more than half of the absences in question. See IAF, Tab 4, Subtab 4b.

that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Here, the agency did not indicate that it would have imposed a lesser penalty based on the sustained misconduct alone. To the contrary, Herrera testified that he would have removed the appellant even if there had been no AWOL charge. HT at 214.

¶10 We further find that the removal penalty is within the bounds of reasonableness, notwithstanding the appellant's 32 years of service and fully successful performance. Even if the appellant intended his remarks as a joke, at a minimum he displayed profoundly bad judgment in making such statements the day after the Virginia Tech shootings, and the effect on the workplace was clearly disruptive to the agency's mission. Herrera also indicated in the decision letter that he had lost trust in the appellant. IAF, Tab 4, Subtab 4c. Additionally, the appellant had recently received a 10-day suspension for refusal to obey orders, defiance of authority, and AWOL.<sup>3</sup> *Id.*, Subtab 4k. While the AWOL charge in this case should not have been sustained, the appellant was nevertheless properly removed, and an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

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<sup>3</sup> The Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). The 10-day suspension meets this standard. However, we agree with the appellant that Herrera improperly considered a counseling the appellant had recently received for engaging in "horseplay." See HT at 233-34. Humphrey did not address the counseling in his notice of proposed removal, see IAF, Tab 4, Subtab 4f, and it is error for an agency to rely on matters affecting the penalty it imposes without including those matters in the proposal notice. *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 20 (2006), *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006). The Board may remedy such an error on appeal by performing its own analysis of the reasonableness of the penalty, as we have done here. *Id.*

ORDER

¶11 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 Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

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. § 2000e5(f); 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 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](http://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.