

U.S. Merit Systems Protection Board, Western Regional Office

Gregory A. Lyons , Appellant,
v.
Department of Veterans Affairs, Agency

SF-0752-07-0192-I-1

April 17, 2007

Initial Decision

Introduction

The appellant timely filed an appeal challenging an agency action that removed him from the part-time position of Food Service Worker, WG-02, effective December 11, 2006. See Initial Appeal File (IAF), Tab 1; id., Tab 12 (Agency File), Subtabs 4a, 4b. It is undisputed that he is an employee within the meaning of 5 U.S.C. § 7511(a)(1), and therefore has a right of appeal to the Board. See Agency File, Subtab 1, at 1. The Board has jurisdiction under 5 U.S.C. §§ 7512, 7513(d) and 7701 (a). The petition for appeal included a stay request, which was denied. See *Lyons v. Department of Veterans Affairs*, MSPB Docket No. SF-0752-07-0192-S-1 (Order Denying Stay Request, December 22, 2006). A hearing was held on April 10, 2007.

For reasons explained below, the agency's action is AFFIRMED.

Analysis and Findings

The appellant was employed by the agency's Greater Los Angeles Healthcare System (GLAHS), at its West Los Angeles Healthcare Center in West Los Angeles, California, where he worked as a part-time dishwasher and kitchen helper. He had approximately 5 years of federal service, all with the agency, and no prior discipline of record. Agency File, Subtabs 4a, 4b, 4d; IAF, Tab 1, MSPB Form 185, Page 3, block 9; Official Hearing Recording (HR), testimony of appellant.

Effective July 31, 2005, the agency suspended the appellant for fifteen days based on alleged misconduct. The appellant filed an appeal with the Board, contesting the merits of the action and raising affirmative defenses of reprisal for equal employment opportunity (EEO) activities and whistleblowing (Suspension Appeal). On April 14, 2006, the agency notified the Board that it had canceled the suspension, and moved to dismiss the Suspension Appeal as moot.¹

On May 3, 2006, the agency issued a notice of proposed removal based on Inappropriate Conduct toward a union official, agency management and others in the course of the Suspension Appeal. IAF, Tab 4m. After the appellant had made his reply new allegations arose concerning his continued receipt of a monthly transit benefit while he was on administrative leave pending investigation of charges past and present. Id., Tabs 4g, 4e. On September 5, 2006 the agency issued an amended notice of proposed removal, that restated the allegations of Inappropriate Conduct as charge a. and added two new charges, b. Inappropriate conduct related to the Transit Benefit Program and c. Misuse of Transit Fare Benefit. Id., Subtab 4d. After hearing a further reply Charles M. Dorman, Director of GLAHS, issued a decision on December 5, 2006, that sustained all three charges and carried out the appellant's removal effective December 11, 2006. Id., Subtab 4b.

On appeal the appellant contests the action on its merits and raises affirmative defenses of harmful procedural error and retaliation for whistleblowing, for filing an EEO complaint and for filing his Suspension Appeal with the Board. IAF, Tabs 23, 41; see also id., Tabs 45, 48.2

Charge a. Inappropriate Conduct is sustained

The agency bears the burden of proof by preponderant evidence with respect to the reasons for the action, and its choice of penalty. 5 C.F.R. § 1201.56(a). Preponderant evidence is defined as [t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c).

Originally Charge a. Inappropriate conduct was based on five specifications, arising out of five different incidents, all of which were sustained by the deciding official. Agency File, Subtabs 4b, 4d. On appeal the agency withdrew Specifications 3 and 4, and presented no evidence thereon; thus, those specifications are not sustained. See IAF, Tabs 44, 45.

To prove Charge a. the agency must show that one or more of the remaining incidents took place, and the efficiency of the service suffered as a result. See *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997) (Vice Chair Slavet, dissenting); see *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed.Cir., 1990) (proof of some, but not all instances of misconduct underlying a charge will sustain the charge as a whole).

Specification 1: Union Letter

The agency alleges that on February 27, 2006, the appellant notified agency employee and local union president Ann Perkins that she would be arrested and face criminal prosecution if she did not rescind the letter banning [the appellant] from the union office[,] thereby attempt[ing] to extort a personal advantage by threatening criminal prosecution. Agency File, Subtab 4d, at 1.

This charge arose out of a dispute between the appellant and his union over its handling of the Suspension Appeal, which resulted in a complaint to the Federal Labor Relations Authority (FLRA). See IAF, Tab 23, Appellant's Exhibit F, at F4-F7. In mid-December 2005, the appellant went to the union office to review documents related to that action, and allegedly made a threat to the union vice president Lynda Eaton, who called the agency's on-site police (VA Police). Id., at F5-F6. As a result union president Perkins issued a memorandum dated December 15, 2005, citing the incident and banning the appellant from the union office. Agency File, Subtab 4s.

On February 27, 2007, Ms. Perkins received via facsimile the following letter from the appellant, with copies to agency's Human Resources Director Dennis Scott, and Chief of Police Daryl Blackwell:

Dear President Perkins,

Within 5 working days of the receipt of this letter you are Requested to rescind your letter banning [the appellant] from the AFGE Local 1061 Union Hall, or you will face Arrest and Criminal Prosecution and upon conviction Removal from the Office that you now hold as the elected President of AFGE Local 1061[.] I cite the following Federal Statute to you Title 18, U.S.C. Section 245(1)(C) Which clearly states

Applying for or enjoying employment, or any perquisite thereof, By any private employer or any agency of any State or subdivision thereof, or Joining or using the services or advantages of any labor organization, hiring hall, Or employment agency

As a dues paying member in Good Standing you as the President do not have the Power to Ban me for Life without any due process. The VA Police have had 2 months To investigate the False

Allegations of Lynda Eaton and as such no Criminal Charges have been filed, I expect that within the next 5 working days you will lift The ban and you will issue a written apology to me for violating my rights under Title 18, U.S.C. Section 245(1)(C).

Agency File, Subtab 4p (boldface, underline and capitals as in original). Chief Blackwell responded with a letter to the appellant dated March 2, 2006, which reads in pertinent part:

The language of your letter [to Ms. Perkins] insinuates that you have the ability and authority to arrest and criminally prosecute officials assigned to the AFGE, Local 1061, for violating 18 USC 245 (1)(c). This is a misrepresentation of your position as a Federal employee. You do not have the legal authority to make those statements.

...

This letter is a lawful order advising you to cease and desist correspondence which misrepresents your authority. Additionally, any further attempts to threaten or intimidate the above listed officials or any other VA employees will result in charges of Disorderly Conduct 1.218(b)(11).

IAF, Tab 23 (appellant's prehearing submissions dated February 12, 2007, hereafter APS), Exhibit A.

The appellant argues that the foregoing events constitute a labor dispute between himself and the union, the charged statement was made during a labor dispute and is therefore protected under State and Federal Law. APS, at 1. Cited are provisions of the applicable collective bargaining agreement (CBA), which provide that the agency will not restrain, coerce, discriminate against, or interfere with any Union representative or employee in the exercise of their rights; nor will it [s] ponsor, control, or otherwise assist any labor organizations. Id., Tab 31 (appellant's motion to dismiss this specification), at 3. The appellant also contends that he has already been punished for his alleged misconduct by Chief Blackwell's letter quoted above, and the agency is therefore precluded from taking further disciplinary action based on this specification. APS, at 2.

Where an agency has imposed disciplinary or adverse action because of an employee's misconduct, it is barred from subsequently taking another adverse action for the same reason. *Adamek v. U.S. Postal Service*, 13 M.S.P.R. 224, 226 (1982). Here, however, the letter from Chief Blackwell carried no sanction and conferred no punishment; rather, it constituted an order to stop sending correspondence of the type at issue. The appellant's claim of double discipline therefore lacks merit. Cf. *Furman v. Department of the Treasury*, 21 M.S.P.R. 522, 526 (1984) (fact that supervisor gave employee a counseling memorandum regarding his conduct did not preclude subsequent removal action for the same conduct, where counseling memorandum carried no sanction and conferred no punishment).

With regard to the appellant's claim of protected speech: Had he threatened a type of legal action that he was authorized to take by himself e.g., an unfair labor practice charge, or a civil suit I would find his argument more compelling. Compare *Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 239 (1993) (employee's informing others that he might take legal action that is within his rights cannot be construed as intimidation). However, the appellant was not authorized to initiate criminal proceedings, and by telling Ms. Perkins to rescind the ban or you will face Arrest and Criminal Prosecution, he implied that he could. The offense is aggravated by the fact that, in so doing, he materially misquoted the statute in a way that cannot have been accidental.

Title 18 U.S.C., Section 245 (Federally Protected Activities) reads in pertinent part:

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with --

(1) any person because he is or has been, or in order to intimidate such person or any other person

or any class of persons from --

...

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

...

(2) any person because of his race, color, religion or national origin and because he is or has been -

...

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

Id. (Boldface added.)

In short, subsection (1)(C) criminalizes the use of violence to prevent individuals from applying for or enjoying federal employment or any perquisite thereof; whereas subsection (2)(C) criminalizes violence motivated by the victim's race, religion, or other discriminatory reason, and because of the victim's use of a public facility, including a union hall. By cutting and pasting from both subsections, and omitting any mention of force or threat of force, the appellant created a new, quasi-statute that supposedly criminalizes the union's letter barring him from its office. To include this in a letter to a lay person, as continuous text that is indented from the body of the letter to suggest a direct quotation from the United States Code, was deceptive and smacks of bad faith.

Preponderant evidence therefore shows, and I find, that the appellant attempt[ed] to extort a personal advantage as charged; i.e., he tried [t]o gain by wrongful methods; to obtain in an unlawful manner; to extract wrongfully by threat or intimidation. Black's Law Dictionary, 605 (7th Ed.1999) (extortion defined). This represented very poor judgment on his part, and warrants discipline. See *Coons v. Department of the Navy*, 15 M.S.P.R. 1, 5 (1983) (threat of frivolous legal action represents poor judgment and can support disciplinary action).

With regard to nexus: While the message was apparently sent from a private location while the appellant was off duty, see HR, testimony of appellant, it was directed to an agency employee and union president at an office on agency property; it had a potential to disrupt operations of the union local that represents agency employees; copies were directed to others within the agency, and it resulted in a cease and desist order from the Chief of VA Police. The appellant's actions therefore had a disruptive impact on agency operations sufficient to show that nexus exists, cf. *Bieber v. Department of the Army*, 287 F.3d 1358, 1364 (Fed.Cir., 2002), cert. denied, 537 U.S. 1020 (2002); and the agency's interest in curtailing such behavior outweighs any conceivable right that the appellant might have under the First Amendment, to comment on internal matters of this sort. See *Sigman v. Department of the Air Force*, 37 M.S.P.R. 352, 355-56 (1988), aff'd, 868 F.2d 1278 (Fed.Cir. 1989) (Table).

Charge a., Specification 1 is sustained.

Specification 2: E-Mail to Outside Employer

The agency next alleges that on January 30, 2006, the appellant sent an unsolicited e-mail message to the non-federal employer of attorney Sara Evans, who once worked for the agency, stating incorrectly that Ms. Evans was under investigation for Criminal Misconduct in MSPB case no SF-

0752-05-0929-I-2[,] referring to the Suspension Appeal. Agency File, Subtab 4d, at 1.

While with the agency Ms. Evans did not work as an attorney. Rather, she was an Employee / Labor Relations Specialist who drafted proposal and decision letters relating to the appellant's 15-day suspension, and participated in the agency's defense of his Suspension Appeal. HR, testimony of appellant, Moore. In the course of that matter the appellant made submissions to the Board that charged Ms. Evans with various improprieties and listed her as a proposed witness for hearing. In approximately January 2006 she left the agency and went to work for a large international law firm³ at its office in Seattle, Washington. Thereafter, the appellant began to send e-mail and voice mail messages, and transmit facsimile copies of his Board filings in the Suspension Appeal to Ms. Evans at her new workplace. According to the appellant, a representative of the firm, Connie McEachern, contacted him and asked why I left messages why I was sending e-mails to Ms. Evans, and what was going on with the documents that he had transmitted. In response, the appellant sent the e-mail message in question. HR, testimony of appellant.

The message is entitled, Subject: Sara J. Evans Associate and reads in pertinent part:

Connie,

I thought you should be the first to know that the Attorney that works for you Sara J. Evans in [sic] under investigation for Criminal Misconduct in MSPB case no SF-0752-05-0929-I-2 as you see by two of the documents that I have disclosed to you in this E-Mail.

I think you should check under CCP 338.D and she will soon find herself under investigation by the State Bar of California if you send some one to the Merit System Protection Board Office in Colorado to pull the file.

Agency File, Subtab 4r. Copies of the message were sent to several individuals, including agency employee Joan Liguoro, who in turn forwarded it to the Chief of Employee/Labor Relations (ELR) for GLAHS, Mary Moore. Id.; HR, testimony of Moore.

Prior to hearing the appellant argued that the agency failed to bear its burden of proof, in that the foregoing message is not the original but appears as part of a string of messages that was received by Ms. Moore, and the agency has failed to produce any evidence to show a witness was present that saw the appellant send the original message. IAF, Tab 29 (appellant's motion to dismiss this specification), at 2-3. Be that as it may, the tone and content of the message is very similar to others in the record, which the appellant admittedly wrote, see, e.g., APS, Appellant's Exhibit H; it originated from the same e-mail address as the others, which is also the appellant's e-mail address of record in this appeal, id.; Agency File, Subtab 4r, at 1; moreover, at hearing the appellant agreed that he sent the message in question to Ms. McEachern. HR, testimony of appellant. To the extent that this was ever seriously in dispute, the agency has borne its burden of proof by preponderant evidence. See 5 C.F.R. § 1201.56(c).

The appellant argues further that Ms. Evans is an attorney and is therefore bound by Business & Professional [C]ode 612(a); she represented the agency in the Suspension Appeal, and was aware of facts that suggest that the witnesses in that action made false statements against him, in violation of 18 U.S.C. § 1001; and on January 21, 2005, she engaged in conduct that showed that [she] conspired with these witness to violate the statute. APS, at 2. At hearing the appellant testified that Ms. Evans is under investigation by the California State Bar, evidently at his urging, and that the Board's administrative judge (AJ) Jack Salyer, who once handled the Suspension Appeal, agreed to forward his allegations to the Office of Special Counsel (OSC). HR, testimony of appellant.

All of this is beside the point: The question is not whether Ms. Evans engaged in misconduct, or whether she is under investigation by the State Bar or OSC, but whether she was under investigation for Criminal Misconduct in MSPB case no SF-0752-05-0929-I-2 when the appellant said this in a message to her employer. Agency File, Subtab 4d, at 1. Clearly she was not: For the Board has no authority to conduct an investigation for Criminal Misconduct, nor was it doing so in

the appellant's Suspension Appeal. Even if the Board were to refer allegations to OSC which cannot take place until Board proceedings have concluded,⁴ see 5 U.S.C. § 1221(f)(3) it would be for investigation and possible action under 5 U.S.C. § 1215, which is not a criminal statute.

There was no basis whatever for the statement in question, and to volunteer this to a person's new employer, particularly when that person is an attorney, was guaranteed to cause embarrassment and alarm. Such conduct is highly inappropriate, and I so find. It also had a nexus to service efficiency, in that the statement was communicated to a member of the public, and it impugned the integrity of the agency and its former employee. Cf. *Bonanova v. Department of Education*, 49 M.S.P.R. 294, 300 (1992); *Jackson v. Small Business Administration*, 40 M.S.P.R. 137, 146 (1989). By the same token, the government's interest in service efficiency far outweighs the appellant's interest in free expression when it involves communications of this sort. *Id.* Thus, a nexus exists between this specification and the efficiency of the service. See *Otero*, 73 M.S.P.R. at 202.

Charge a., Specification 2 is sustained.

Specification 5: E-mail to FLRA

The agency next charges that the appellant sent an e-mail message to a representative of the Federal Labor Relations Authority alleging that the GLA Director of Human Resources, Dennis Scott, stated in sum and substance, 'we will fire you if you don t resign.' Your [sic] finished at the VA Hospital. Mr. Scott did not make these statements. Agency File, Subtab 4d, at 1.

The e-mail message in question is dated April 15, 2006, and reads as follows:

Dear Mr Pannozzo,

As you can see even the FLRA can not protect me from Reprisal for contacting your office and making a complaint Dennis Scott says we will fire you if you don t resign, Your finished at the VA Hospital your just part time GREG LYONS

Agency File, Subtab 4n, at 1.

The header of the message shows that it was sent from the appellant's e-mail address of record in this appeal, on Saturday, April 15, 2006, to e-mail addresses including jpannozzo@flra.gov and AJ Elizabeth Milligan, who was then handling the Suspension Appeal. It also shows that an electronic copy of a document was attached. *Id.* As offered in evidence by the agency, the message is accompanied by a document that appears to be the attachment, consisting of a scanned copy of a letter dated April 14, 2006 from Dennis Scott to the appellant, notifying him that he was being placed on administrative leave effective immediately until further notice. *Id.*, at 2.

The appellant made two replies to this allegation at the agency level, both of which were heard by the deciding official, Mr. Dorman. Mr. Dorman testified without contradiction that on neither occasion did the appellant deny sending the message in question. HR, testimony of Dorman. Likewise, in the appellant's written reply to the proposed removal there was no hint that he denied doing so. Agency File, Subtab 4g, at 7-8. In his prehearing submission to the Board the appellant defended the contents of the message as true, but did not deny sending it. APS, at 3. Thereafter he made a motion to dismiss, in which he argued that the agency could not bear its burden of proving that he sent the foregoing message, because the copy submitted by the agency is not the original but passed from agency employee Evan Stein; and the agency has failed to produce any evidence to show a witness was present that saw the appellant send the original. He also alleged that the agency had altered his e-mail messages in the past, but he did not say that the agency altered the one in question, nor did he deny sending it himself. IAF, Tab 29 (appellant's motion to dismiss this specification), at 2-3.

At hearing the appellant testified that he never sent the message in question; that he sent only one

message on April 15, 2006, which was to AJ Milligan and not to the FLRA, and he has computer records that prove this; and the supposed copy of the message is a fraud created by the agency, that was cut and pasted from documents relating to his Suspension Appeal. HR, testimony of appellant. I find this wholly unpersuasive; for if it were true, the appellant would likely have said so in response to his proposed removal, and submitted the exculpatory computer records at that point and at every opportunity thereafter. I therefore discount this testimony as non-credible. See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

The agency has therefore shown that, more likely than not, the appellant sent the message in question. With regard to its substance, the appellant states that he and Mr. Scott got into heated arguments over the fact that the appellant had been detailed to the Housekeeping Department in mid-2005, and he was told by Mr. Scott that if he did not show up for his detail to housekeeping he would be fired. APS, at 3-4. At hearing he testified that the statement at issue, Dennis Scott says we will fire you if you don't resign, Your finished at the VA Hospital your just part time, was not intended as a direct quote, but represented the gist of what Mr. Scott said to him on a number of different occasions beginning in 2005. HR, testimony of appellant.

ELR Chief Mary Moore testified that she spoke with Mr. Scott about the message to the FLRA and he told me the allegation was not true. Likewise, proposing official Deborah Lasker testified that she spoke to Mr. Scott about the message and he said he did not make that comment. HR, testimony of Moore, Lasker. Mr. Scott's out-of-court denials are hearsay, insofar as they are offered to prove the matter asserted; i.e., that Mr. Scott did not make the statements to the appellant that are attributed to him in the message. Hearsay is admissible in Board proceedings, but its probative value depends on the circumstances of each case. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). Various factors affect the weight to be accorded such hearsay, including the availability of persons with firsthand knowledge to testify at the hearing, and the agency's explanation for failing to obtain signed or sworn statements. *Id.*, at 87. Mr. Scott was approved to testify for the agency but did not attend the hearing due to a family emergency. A continuance was offered but the agency chose not to request one and rested its case without calling him as a witness. See HR, colloquy between AJ and agency counsel prior to closing argument. Thus, his out-of-court denials are unsworn, and the agency had an opportunity to cure this but failed to do so, for reasons that were not explained. *Id.* Moreover, the statements attributed to Mr. Scott by others are quite general, and open to interpretation; e.g., the assertion that he did not make that comment leaves open the possibility that he may have said something similar, though not exactly the same. All of this detracts from the probative value of this evidence.

The appellant's poor credibility with regard to Charge a., Specification 2 leads me to doubt his veracity on this issue as well. See *Hawkins v. Smithsonian Institution*, 73 M.S.P.R. 397, 403-04 (1997) (credibility determinations properly made in one matter may be weighed in determining speaker's credibility in another). Nonetheless, he gave specific testimony under oath, which the agency seeks to rebut with unsworn generalities that are hearsay of somewhat diminished weight. Thus, I remain unsure what Mr. Scott said to the appellant, if anything.

In sum, preponderant evidence shows that the appellant sent the message in question, but it is unclear whether, and to what extent it was truthful. Assuming *arguendo* that the agency's Human Resources Director did threaten the appellant's job while he had a complaint pending before the FLRA, it would not necessarily detract from service efficiency to report this to the FLRA as a possible act of reprisal. Again, the evidence on this point is simply unclear.

It was the agency's burden to prove that inappropriate conduct occurred, and on this record I find that it failed to bear this burden. Charge a., Specification 5 is not sustained.

Conclusion

In sum, the agency proved Specifications 1 and 2 under Charge a., it dismissed Specifications 3 and 4, and failed to prove Specification 5. Nonetheless, Charge a. as a whole is sustained. See *Burroughs*, 918 F.2d at 172.

Charge b. Inappropriate conduct related to the Transit Benefit Program and Charge c. Misuse of Transit Fare Benefit are sustained

In support of Charge b. the agency alleges that the appellant received transit benefit program vouchers at a rate of \$78 per month, certifying that they would be used for [his] regular daily commute to and/or from work during certain periods; he failed to report for duty, and therefore was not entitled to transit benefit fare during certain periods for which vouchers were accepted; and he failed to return unused vouchers. The periods in question are all dates from January 4 through 30, 2005 (Specification 1); all dates from June 2 through 30, 2005 (Specification 2); 21 days from July 1, 2005 to July 30, 2005 (Specification 3); at least 15 work days April 1, 2006 through April 30, 2006 (Specification 4); 20 of the possible 22 work days between May 1 and 31, 2006 (Specification 5); and all but one work day from June 1 through 30, 2006 (Specification 6). See Agency File, Subtab 4d, at 2-3. Also in support of this charge the agency alleges that in approximately December 2004 the appellant completed an application to increase [his] monthly disbursement of vouchers for reasons unrelated to the cost of [his] daily commute to and from work. Id., at 3, Specification 7.

In Charge c. Misuse of Transit Fare Benefit the agency alleges further that the appellant used the transit fare benefit for transportation not related to [his] daily commute to and from work. Id., at 3.

Charge c

To prove misuse of the transit benefit, the agency must show that such use occurred and was not authorized; it need not prove wrongful intent. See *Quarters v. Department of Veterans Affairs*, 97 M.S.P.R. 511, 513 (2004). Nevertheless, if intent is shown this may be considered as an aggravating factor with regard to the choice of penalty. *Sternberg v. Department of Defense*, 52 M.S.P.R. 547, 558-59 (1992).

It is undisputed that the appellant received the benefits in question, which were dispensed quarterly in the form of vouchers. Record evidence showed that in order to obtain them he signed multiple applications certifying, e.g., I will be using [the benefit] for my regular daily commute to and/or from work and [t]he monthly transit benefit I am receiving does not exceed my average monthly commuting cost. Prominent on these forms was a warning that making a false, fictitious, or fraudulent certification may render the maker subject to criminal prosecution and/or agency disciplinary actions up to and including dismissal. See Agency File, Subtab 4e, at 6.

The appellant testified that he accepted the vouchers and used them to buy a bus pass each month during the subject periods; and that he continued to use the passes while he was on administrative leave, to travel to medical appointments, his lawyer's office and to law libraries where he did legal research. Although he was not commuting to or from work, he contends that these trips were work-related because they were caused by the agency's acts of reprisal, which forced him to seek medical treatment and file complaints and appeals to the Board, the FLRA and the Equal Employment Opportunity Commission (EEOC). HR, testimony of appellant; see also id., testimony of Rodrigues; Agency File, Subtab 4e, at 1-2.

Based on the certification quoted above, and uncontradicted testimony from two agency witnesses, I find that agency policy allowed employees to use the transit benefit only to pay for their daily commute, at times when they were actually working, HR, testimony of Dorman, Rodrigues; yet the appellant admittedly used it at other times, for other purposes.

Charge c. is sustained

Charge b

With regard to Charge b., Specification 4: Record evidence shows that by letter dated April 14, 2006, the agency notified the appellant that he was placed on administrative leave effective immediately until further notice. Agency File, Subtab 4n, at 2. The appellant testified that prior to that

date he was in regular duty status, and earlier in the month he had purchased a monthly bus pass that was not refundable. HR, testimony of appellant. This testimony is uncontradicted, and it is consistent with the appellant's record of paid leave, which shows that he was granted leave only sporadically between April 1 and 13, 2006; hence, he appears to have been working at least some of the time during that period. See Agency File, Subtab 4e, at 18. Based on these facts, I find that the agency has failed to show that the appellant acted inappropriately when he received the transit benefit for April 2006, and used it to buy a bus pass before he was placed on administrative leave. Charge b., Specification 4 is not sustained.

The appellant's records also show that he was on paid leave for all work days in January 2005, as alleged in Charge b., Specification 1, see Agency File, Subtab 4e, at 9-10; all work days from June 2 through 30, 2005, as alleged in Specification 2, see *id.*, at 12-14; 21 work days between July 1, 2005 and July 30, 2005, as alleged in Specification 3, *id.*, at 15-16; 23 work days between May 1 and 31, 2006, which exceeds the 20 of 22 possible work days alleged in Specification 5, *id.*, at 19-20; and all work days from June 1 through 30, 2006, which exceeds the allegation that he was absent all but one work day during that period, as stated in Specification 6. *Id.*, at 20-22.

Insofar as the appellant was not at work, I find that he had no proper reason to receive vouchers for these months; or if he had taken them previously as part of a quarterly allotment, I find that he had no proper reason to use them to buy monthly bus passes when he was not working. The appellant points to the letter of April 14, 2006, placing him on administrative leave, which states, You are to remain available to report for duty within 24 hours notice in the event the administrative leave is canceled[,] see Agency File, Subtab 4n, at 2, and argues that he needed to buy a bus pass each month even when he was not reporting to duty, so that he would be ready to resume his commute on short notice if leave was canceled. HR, testimony of appellant. Special Agent (SA) Michael Rodrigues of the agency's Office of Inspector General testified without contradiction that the appellant could have accomplished the same thing by buying a few, individual bus tokens at much lower cost, but failed to do so. *Id.* Preponderant evidence therefore shows, and I find, that the appellant acted inappropriately when he used the transit benefit to buy monthly bus passes that were not necessary for his daily commute, as alleged in Charge b., Specifications 1, 2, 3, 5, and 6. Those specifications are sustained.

SA Rodrigues testified further, and without contradiction, that during an investigative interview the appellant stated that he had increased the transit benefit he was requesting in December 2004, to pay for extra bus tokens that he needed in order to travel to law libraries and perform legal research concerning his disputes with the agency. HR, testimony of Rodrigues; see also Agency File, Subtab 4e, at 1-2. For reasons discussed above with regard to Charge c., I find that he had no proper reason to do so; and based on the clear language of the certifications that he had been signing since 2001, I find further that he had no good reason to think that he did. Increasing the amount of his subsidy therefore constituted inappropriate conduct. Charge b., Specification 7 is sustained.

Insofar as I have sustained all but one specification under Charge b., the charge as a whole is sustained. See *Burroughs*, 918 F.2d at 172.

The appellant's retaliation defenses are not sustained

The appellant alleges that his removal took place because of retaliation for disclosures covered under 5 U.S.C. § 2302(b)(8), commonly known as whistleblowing; retaliation for filing an EEO complaint, and retaliation for filing his Suspension Appeal to the Board. See IAF, Tab 1, MSPB Form 185, Page 7, block 30. Specifically, he states that he [f]iled an EEOC claim based on the fact that all the Supervisors were African American, and [he] was fired because he refused to give up[,] *id.*, at 10 (Stay Request, page 2); and that [t]he timing of the removal comes directly after the appellant asserts his statutory rights in a[n] appeal to the [M]erit [S]ystems [P]rotection [B]oard. See Stay Initial Appeal File, Tab 3 (Appellant's Points And Authorities In Support Of Application For A Stay, etc.), at 3.

To prove an affirmative defense of reprisal for whistleblowing, an appellant must show, *inter alia*,

that he or she made, was perceived to have made, or was closely associated with someone who made a disclosure protected under 5 U.S.C. § 2302(b)(8). *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 113 (1998). Disclosures evidencing illegal discrimination or reprisal for EEO activities are not covered under section 2302(b)(8); rather, they are protected under 5 U.S.C. §§ 2302(b)(1) or 2302(b)(9). See *Von Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 509-10 (1993), modified on recons., 59 M.S.P.R. 503 (1993), review dismissed, No. 94-3109 (Fed. Cir. 1994), overruled on other grounds by *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998); *Santillan v. Department of the Air Force*, 53 M.S.P.R. 487, 490-91 (1992). Likewise, filing an appeal with the Board is not a protected disclosure within the meaning of section 2302(b)(8), although it may be covered under section 2302(b)(9). See *Ruffin v. Department of the Army*, 48 M.S.P.R. 74, 78 (1991). Thus, the appellant has failed to show that any disclosure within the scope of this appeal was protected under section 2302(b)(8).⁵ His defense of reprisal for whistleblowing therefore is not sustained.

With regard to the remaining allegations of reprisal: Insofar as the record is complete it is unnecessary to follow a burden-shifting order of analysis such as the one set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973). Rather, the inquiry shifts from whether the appellant has established a prima facie case to whether he has demonstrated by a preponderance of the evidence that the agency's reasons for its action were pretextual, and his removal was in fact motivated by retaliation for filing an EEO complaint or prior Board appeal. See *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005).

It is self-evident that the appellant was removed, in part, for events surrounding his prior Board appeal, and that those events weighed heavily in Mr. Dorman's decision in the matter. HR, testimony of Dorman. It is therefore quite possible that the appellant's misconduct, and the resulting removal, would not have taken place but for his Board appeal. It is also undisputed that the action was proposed shortly after the agency canceled the appellant's prior suspension and moved to dismiss the Suspension Appeal as moot; and it was effected at a point when the Board had denied the motion, and had tentatively scheduled an evidentiary hearing on his affirmative defenses to that action, one of which was reprisal for EEO activities. The appellant argues that these facts prove conclusively that his removal was an act of reprisal. HR, closing argument.

I disagree. Complaints and appeals can proceed without misconduct on the part of the litigants, and section 2302(b)(9) does not shield them from discipline, so long as it is premised on the misconduct itself and not on their decision to exercise a right of complaint or appeal. See, e.g., *Oliver v. Department of Health & Human Services*, 34 M.S.P.R. 465, 473-75 (1987), aff'd, 847 F.2d 842 (Fed.Cir.1988).

The appellant has neither alleged nor proven that disparate treatment took place as a result of his earlier filings; i.e., that any non-complainant or non-appellant committed similar misconduct under circumstances that were otherwise nearly identical to his own, but was not removed. See *Spahn v. Department of Justice*, 93 M.S.P.R. 195, 202 (2003); see also *Harris v. Henderson*, EEOC No. 01982575, 2000 WL 1280680 (Aug. 29, 2000) (To be similarly situated, comparative employees must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to complainant's without differentiating or mitigating circumstances.) Assuming arguendo that Mr. Dorman was aware of the appellant's EEO complaint and appeal to the Board, the record does not show that Mr. Dorman was likely to suffer discipline or any other disadvantage as a result of those actions, that would provide a motive to retaliate. Compare *Arauz v. Department of Justice*, 89 M.S.P.R. 529, 540-41 (2001). Moreover, the case for removal was strong, in that appellant's misconduct was quite serious; much of it was tacitly admitted; as a part-time dishwasher he was not a key employee; and given his relative short service, the agency did not have a great deal invested in him at that point. Viewing the record as a whole, I am not convinced that the real reason for Mr. Dorman's decision was retaliation for filing an EEO complaint or a prior Board appeal. The appellant has therefore failed to show pretext, and these defenses are not sustained. See *Simien*, 99 M.S.P.R. 237, ¶ 28.

The appellant's defense of harmful procedural error is not sustained

Finally, the appellant argues that he was removed due to harmful procedural error; specifically, because the agency's Mary Moore failed to turn over documents relating to Charge a., Specifications 1 through 5, and failed to respond to requests for such documents in violation of the Article 21, Section J of the CBA and VA Handbook 5021 part 1(3)(a)(3). See APS, Affirmative Defenses at 14, item 2; *id.*, at 15, item 9; IAF, Tab 36 (Appellant's Response To Agency's Opposition to Appellant's Motion To Dismiss dated March 24, 2007), Exhibit 1 (document request dated May 11, 2006, regarding first letter of proposed removal).

Alleged violations of agency procedures or the CBA are treated as allegations of harmful procedural error. 5 U.S.C. § 7701(c)(2)(A); see *Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980), *aff'd*, 686 F.2d 844 (10th Cir., 1982) (agency is bound by the provisions of the CBA as it would be by its own regulations). To prove harmful procedural error, the appellant must show by preponderant evidence that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. See 5 C.F.R. § 1201.56(c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to his rights. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

In my prehearing conference summary I wrote, Assuming *arguendo* that the agency erred in its handling of the appellant's document request, the appellant has not set forth facts which, if proven, would show that this violated his substantive rights. Thus, he has failed to fully explain this defense. I therefore ordered the appellant to file a further submission explaining why he believes that the agency would not have removed him, had it responded to the document request in question. IAF, Tab 41, at 6.

In response, the appellant states that had the agency responded to his request, it would have produced some unspecified evidence showing that no decision to remove the appellant from his employment was made until the day after the appellant refused to drop his affirmative defenses to the 15 day suspension case; that the agency had no other reason except for retaliation & reprisal to remove the appellant; and with this evidence, the appellant would have been able to show the Director Charles Dorman that the removal letter of May 3, 2006 [i.e., the first notice of proposed removal] was in fact a pre-text for reprisal and retaliation. *Id.*, Tab 42, brief at 2. However, he has not identified any specific document that would have proven this to Mr. Dorman; rather, he restates his claim of reprisal in conclusory, and asks the Board to assume that evidence to prove them would have been forthcoming had the agency made its response. *Id.*

Harmful error cannot be presumed. *Stephen*, 47 M.S.P.R. at 681. Rather, to show harmful error, the appellant must prove that a procedural error substantially prejudiced his rights by possibly affecting the agency's decision. *Turner v. U.S. Postal Service*, 85 M.S.P.R. 565, ¶15 (2000); *Salter v. Department of the Treasury*, 92 M.S.P.R. 355, 358-9 (2002). The appellant made no such showing, and this defense therefore is not sustained.

Removal does not exceed the maximum reasonable penalty, based on the sustained allegations

The Board will review an agency-imposed penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Where less than all of the agency's charges are sustained, the Board will review the agency-imposed penalty to determine whether it is within the parameters of reasonableness, and may mitigate only to the extent necessary to bring the penalty within those limits; i.e., the Board will apply a maximum reasonable penalty standard. *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999). The same is true where, as here, the Board sustains all of the agency's charges but less than all of the underlying specifications. *Laniewicz v. Department of Veterans Affairs*, 83 M.S.P.R. 477, 483 (1999). In such cases, the Board will look for evidence showing that the agency would have imposed the same penalty for the sustained specifications. *Id.*; *LaChance v. Devall*, 178 F.3d at 1259. Nothing in the record suggests that the agency wishes to impose less than the maximum reasonable penalty, under any circumstances. Thus, I must determine whether removal is within the

bounds of reasonableness for the sustained charges and specifications, and if not, I must impose the maximum reasonable penalty. *Id.*, at 1259-60.

Record evidence shows that deciding official Dorman considered mitigating factors, including the appellant's nearly five years of service, lack of prior discipline and otherwise satisfactory work performance. However, Mr. Dorman found that mitigating factors were outweighed by the seriousness of the appellant's offenses. He placed particular emphasis on the appellant's letter to the union president, which he characterized as threatening and highly disruptive, and the letter to Ms. Evans new employer, which could have done great harm to her employment prospects, and also put the agency in a bad light. According to Mr. Dorman, both letters were highly disruptive and weighed heavily in his decision to remove. Also significant was the fact that misuse of the transit benefit was not a new issue at GLAHS. According to Mr. Dorman, a big investigation concerning the same topic hit the papers a year or two earlier, and to have it come up again was very disturbing. Yet in response to these allegations, the appellant showed no remorse whatever; instead, he was of the opinion he did nothing wrong, that the agency was wrong on every case. Thus, while Mr. Dorman considered a lesser penalty, he concluded that the appellant had poor potential for rehabilitation and therefore carried out the removal. HR, testimony of Dorman.

The sustained charges were serious, intentional and involved willful misstatements of fact. All were motivated by resentment and a desire to punish those he perceived as his enemies. The letter to Ms. Evans employer was a gratuitous, ad hominem attack that could have embarrassed the agency and done real damage to Ms. Evans reputation as an attorney and her prospects for employment at her new firm; yet the appellant continues to insist that he did nothing wrong. Despite persistent, and at times leading questions from his own counsel, who was trying to elicit some word of remorse, the appellant steadfastly refused to acknowledge any fault in the matter. When pressed to admit that his letters contained harsh language, and could have been phrased better, he testified that the language was not harsh because others were committing a criminal act. When his attorney suggested that they were, at the minimum, somewhat rude in tone and asked whether they gave the agency some reason to take action against you, the appellant answered flatly, No. He explained that they were sent from outside the agency's premises as part of the Suspension Appeal, and had the agency not brought the case i.e., the 15-day suspension we'd all be friends, we'd all be here at the clubhouse and I'd be working. As for misusing the transit benefit, he testified that this too was the fault of the agency, because absent reprisal he would be coming to work and therefore entitled to buy bus passes. HR, testimony of appellant. Based on this testimony, I can see little prospect for a change in the appellant's behavior. See *O'Keefe v. U.S. Postal Service*, 88 M.S.P.R. 475, 481-82 (2001) vacated and remanded on other grounds, 318 F.3d 1310 (Fed.Cir., 2002) (appellant's failure to express remorse or take responsibility for his actions supports a finding of poor rehabilitative potential, despite prior acceptable service and a clean disciplinary record).

Accordingly, I conclude that removal does not exceed the maximum reasonable penalty based on the sustained allegations. See, e.g., *Rogosky v. Veterans Administration*, 24 M.S.P.R. 588, 591 (1984); *Sigman*, 37 M.S.P.R. at 355-56; *Krennrich v. United States*, 169 Ct.Cl. 6, 340 F.2d 653, 654 (Ct.Cl. 1965). I therefore affirm the agency's action. *LaChance*, 178 F.3d at 1260.