

Merit Systems Protection Board - Initial Decisions

TAL HAREL
VS
DOI

No. SF-0752-07-0810-I-1

January 08, 2008

Before: ANDERSON, LUNELL C., ALJ

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|           CAUTION!           |
| MSPB INITIAL DECISIONS ARE NOT PRECEDENTIAL |
| AND CANNOT BE CITED AS SUCH IN SUBMISSIONS |
| TO THE BOARD OR THE FEDERAL COURTS.         |
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

_____)	
)	
TAL HAREL,)	DOCKET NUMBER
APPELLANT)	SF-0752-07-0810-I-1
)	
V.)	
)	
DEPARTMENT OF THE INTERIOR,)	DATE: JANUARY 8, 2008
AGENCY.)	
)	
_____)	

Richard Segerblom, Esquire, Las Vegas, Nevada, for the appellant.

Karen D. Glasgow, Esquire, Oakland, California, for the agency.

BEFORE

LuNell C. Anderson

Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the agency action that removed him from his position of Plumber, BB-4206-00, effective August 23, 2007. See Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over such matters pursuant to the provisions of 5 U.S.C. §§ 7511, 7512 and 7701(a). A hearing was held on December 12, 2007 and the record in this matter closed at the conclusion of the hearing.

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

ANALYSIS AND FINDINGS

Background

The appellant was employed as a Plumber at the Lake Mead National Recreation Area with the National Park Service, Department of the Interior. He served in this position beginning December 10, 2006. Prior to this, the appellant worked for the Bureau of Reclamation where he received a career conditional appointment on November 18, 2002. See IAF, Tab 3, Agency File, Tab 4B, page 6.

On June 29, 2007, the agency notified the appellant that it had proposed his removal for conduct unbecoming a Federal employee based upon two specifications: (1) On February 16, 2007, a neatly folded paper towel was left by you in the middle of the employee restroom at Callville Bay water treatment plant. The paper towel contained fecal matter; and (2) On May 2, 2007, fecal matter was found smeared by you in the toilet paper holder in the employee restroom at Echo Bay treatment plant. See Agency File, Tab 4F. After providing the appellant notice and an opportunity to reply, the agency issued a final decision sustaining both specifications and removed the appellant from his position effective August 23, 2007. See Agency File, Tab 4A. The appellant subsequently filed an appeal with the Board, disputing the merits of the charge. See IAF, Tab 1.

Burden of Proof

Pursuant to 5 C.F.R. § 1201.56, the agency has the burden of proving its charges against the appellant by a preponderance of the evidence. It is the agency's burden to present sufficient evidence to convince the trier of fact that the substance of the charge is more likely true than not. *Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 474 (1991). The appellant did not raise any affirmative defenses.

The agency has sustained its specifications by a preponderance of the evidence.

In support of its charge of unacceptable conduct and the two specifications, the agency proffered the testimonies of Carolyn Steward, Pam Mott, Samuel Smith, and Jesse Hinojosa.

Carolyn Steward, a Water and Waste Water Worker at Lake Mead, testified that she was working alone on February 16, 2007, at the Callville Bay water treatment plant

when the appellant came by to look at the strainers they had just installed because he was asked to install the same strainers at the Echo Bay treatment plant. The appellant questioned her as to why the Echo Bay operators could not put in their own strainers as she had done at Callville and she told him because he was asked to put them in. While there, the appellant used the restroom and Ms. Steward recalls that he stayed in the restroom for an extended time period. She waited for him to come out of the restroom and since it was taking him so long, she locked the plant door so it would lock when the appellant left and told him she was leaving to go to the lagoons. She returned 15-20 minutes later and the appellant was gone.

Ms. Steward stated that the bathroom is located inside the treatment plant that is kept locked and only a limited number of employees have keys to the plant. She also stated that whenever there is work to be done at the plant, prior arrangements are made with the operator.

Ms. Steward testified that when she walked pass the bathroom door, she saw a brown paper towel neatly folded on the floor. She went in and picked it up and put it into the trash wondering to herself if the appellant did this at home. She was curious about what was in the neatly folded paper towel so she retrieved the paper towel from the trash and put it a Ziploc bag. She spoke to Pam Mott about the paper towel and Ms. Mott told her to open it. When she did, she found what looked and smelled like feces smeared inside. Ms. Steward stated that where she found the paper towel was not near the trashcan or where the clean paper towels are kept by the sink but near the shower. Ms. Steward also testified that she and the appellant were the only two people present and she knows that the paper towel was not there before the appellant came to the plant.

Ms. Steward stated that she told Chuck Henry, the senior operator and Scott Bell, the rover operator, about what she found but did not inform her supervisor or the appellant. It was not until the next incident that her supervisor, Steve Spearman was informed of the February 16, 2007 incident. She was later asked to provide a statement by Lizette Richardson, the Chief of Maintenance. Agency File, Tab 4M.

Pam Mott, a Waste and Water Treatment Plant Operator at Echo Bay and Overton Beach, confirmed that she spoke with Ms. Steward on February 16, 2007, who told her about finding a folded paper towel in the bathroom after the appellant had used it and that she had an odd feeling about it so she encouraged Ms. Steward to look inside. The next day, Ms. Steward informed her that she found fecal matter. They discussed it and Ms. Steward decided to give the appellant the benefit of the doubt and did not report the incident to her supervisor.

Samuel Smith, Lead Operator at Overton Beach and Echo Bay Water and Waste Water Facilities, testified that on May 2, 2007, plumbers Dave Bannister and the appellant stopped by the Echo Bay treatment plant to inform him that they had set the pumps at Overton Beach. Mr. Smith recalled that he discussed the pumps and lift stations with Mr. Bannister for about fifteen minutes while the appellant was in the restroom. After they left, Mr. Smith stated that he went into the restroom to see if anything was left but did not see anything. Mr. Smith also testified that he was the only person in the Echo Bay treatment plant on May 3 and 4, that no one came to visit, there was no scheduled maintenance or supervisory inspection and that he did not use the restroom other than to urinate. Mr. Smith explained that

he always begins his day at Overton Beach and on Ms. Mott's scheduled days off at Echo Bay, he goes there around 7:30 a.m. to check out any problems and leaves around 12:30 p.m. to return to Overton Beach.

Mr. Smith stated that he received a call on May 5, 2007, from Ms. Mott informing him that she had found fecal matter smeared on the toilet paper dispenser and on the empty toilet paper holder. He instructed Ms. Mott to take pictures. On Monday when he returned, he inspected the bathroom and found what Ms. Mott had reported so he put the toilet paper holder with the fecal matter in a baggie. Mr. Smith also noted that Chris Reynolds the Ranger was present to see the fecal matter found in the restroom. Mr. Smith stated that you could not see the fecal matter until you sat down on the toilet at eye level with the dispenser which is why he missed seeing it when he first looked on May 2, 2007. He reported the incident the next day to his supervisor, Mr. Spearman. See also Agency File, Tab 4I.

Ms. Mott testified that when she returned to work on May 5, 2007, and used the bathroom, she saw the fecal matter smeared on the toilet paper dispenser and on the empty toilet paper holder. She was repulsed by the sight and was upset. When Larry Steadman the team leader came by, she asked him to take a look in the restroom to see what he thought. He had the same impression that someone smeared feces with their hand on the dispenser and there was feces on the toilet paper holder. Ms. Mott also confirmed that she took photos. Agency File, Tab 4J.

Jesse Hinojosa, Deputy Chief of Maintenance and the proposing official, stated that he got a call from the appellant while away at training and a call from Ms. Richardson when he returned to work about the meeting that had occurred with the appellant. He then conducted an investigation into the matter by reviewing the statements provided and putting together a timeline based on the timesheets to see who else could have been present other than the appellant. His investigation revealed that the appellant was the only employee at both locations on the dates the incidents occurred and, based on the statements provided, had used the restroom at both treatment plant locations. Mr. Hinojosa stated that he spoke to the appellant who he said he did not do it and maintained his innocence throughout the process.

Mr. Hinojosa testified that he had no problems with the appellant's work and in fact he hired him and thought he was a terrific worker. However, Mr. Hinojosa testified that he concluded that the appellant was responsible for leaving the fecal matter in the restrooms based on his review of the time sheets and that he was the only employee present at both restrooms on the dates the incidents occurred and because of unsolicited statements he made. Mr. Hinojosa also testified that based on his conduct, he lost trust in the appellant and his ability to work independently in the water treatment plants.

Mr. Hinojosa recalled that the appellant asked to speak to him about the incident but he told him he was not available. Later when the appellant came to his office to turn in his time sheet, he again asked to speak about the matter but Mr. Hinojosa stated that he advised him that he could not talk about it as he was in the process of investigating the matter. The appellant then stated, 'I guess some people are upset that I couldn't hit the trash can or wash my hands good enough for them.' Agency File, Tab 4G. Mr. Hinojosa testified that he found these

unsolicited statements odd and was surprised by the appellant's cavalier attitude. Finally, Mr. Hinojosa stated that the only comment the appellant made to him after he issued the notice of proposed removal was, 'I can't believe you are going to fire me over this.'

The appellant admitted that he was at the Callville Bay plant on the date at issue and that he went to the restroom to urinate but denied that he left fecal matter folded in a paper towel on the floor. The appellant also acknowledged that he was at the Overton Beach plant but testified that he did not use the restroom at this facility and that Mr. Bannister was with him the whole time. The appellant also denied that he made the statements attributed to him by Mr. Hinojosa. The appellant testified that he merely asked Mr. Hinojosa, 'Are people pissed off at me? Did I not throw something away? Did I miss the trash can? Did I leave something?'

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

After reviewing all of the evidence presented in this matter, I find that the testimonies of Carolyn Steward, Pam Mott, and Samuel Smith more credible than the appellant's with regard to the specific allegations of conduct where they were recipient witnesses. I also find the testimony of Jesse Hinojosa credible. In reaching this decision, I find that their testimonies were candid, straightforward, unbiased, persuasive, consistent with one another, consistent with their prior statements, and internally consistent with the documentary evidence of record. I also find the demeanor, i.e., deportment, behavior and manner of each of these witnesses, served to enhance their overall credibility.

I find no merit in the appellant's insinuation that Ms. Steward and Ms. Mott engaged in a conspiracy to stage the incidents because he was 'creepy' or took some brushes. Any such conspiracy would have had to involve Mr. Smith who testified that the appellant used the restroom at Echo Bay and Mr. Hinojosa who testified about his unsolicited statements, and then all would have to give statements and testimony adverse to him. Finally, I find no merit in the appellant's argument that because Ms. Steward failed to complain and report his conduct when it occurred, it decreases its seriousness. Ms. Steward testified as to why she did not mention the appellant's behavior to management or file a complaint regarding her disgusting discovery and she only reported the appellant's behavior when she learned it had occurred again. I find no plausible reason or motive for these witnesses to fabricate their testimony about the appellant. In fact, the appellant agreed that he had no indication there were any problems with either Ms. Steward or Ms. Mott.

By contract, I find the appellant's testimony inconsistent and on the whole, unworthy of belief. For example, the appellant denied going to the bathroom at Echo Bay while Mr. Smith is certain that not only did he go into the restroom, he remained there for approximately fifteen minutes while he waited and talked with Mr. Bannister. The appellant testified that there were two other workers at Echo Bay at the same time but offered no evidence to support his claim.

Moreover, a review of the statement from Ms. Richardson and Tony Reyes who first spoke to the appellant about the incidents and the appellant's hearing testimony about what was said during the meeting shows that he was advised that there was information he used the bathroom facilities at two water treatment plants and afterwards visible signs of feces were found. Agency File, Tab 4H. Information about the nature of what was specifically found in the restrooms was not provided to the appellant until after the investigation. Thus, the appellant's unsolicited statements made to Mr. Hinojosa on May 11, 2007, clearly point towards the fact that the appellant knew something more about the specifics of the fecal matter left in the restrooms.

After considering the testimonies of the percipient witnesses and the record evidence, I find that the agency has supported its charge of conduct unbecoming a Federal employee and its two specifications by a preponderance of the evidence. I also find that the appellant's actions were not accidental or inadvertent, but deliberate, i.e., the paper towel was found by the shower and not near the area where the trashcan was located.

Efficiency of the Service and Penalty Determination

The nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a direct relationship between the articulated grounds for the adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), modified, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). Here, there is clearly a direct relationship between the appellant's position as a Plumber at the Lake Mead National Recreation Area with responsibilities where he must often work independently in and about the water treatment plants where the health and safety of co-workers and the public could be impacted by the failure to maintain basic sanitary habits. The deciding official noted that the appellant's conduct contributed to a lack of trust by his supervisor and co-workers. Thus, nexus has been established.

It is well settled that the Board will review an agency-imposed penalty only to determine if 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). The Board will not infringe upon an agency's exclusive domain as workforce manager. *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999).

The deciding official, Gary Warshefski, testified that he considered all of the evidence of record including the statements from the investigation, the appellant's oral and written reply and he concluded that the appellant had acted

inappropriately as charged. Agency File, Tabs 4A. Mr. Warshefski stated that he reviewed both specifications and considered their seriousness with regards to the appellant's position and the public trust that is critical in all aspects of his position. He found that the appellant's misconduct tarnished that image and the expectation that he maintain sanitary conditions in all facets of his job. Mr. Warshefski also found that the appellant's lack of candor during his interview into the incidents was unacceptable.

In addition, Mr. Warshefski stated that the appellant took no responsibility for his conduct and was untruthful so he can no longer trust the appellant. Mr. Warshefski also stated that he considered the appellant's years of service, his past work record, his potential for rehabilitation and mitigation and/or another position. However, based on his review of the specifications and the agency table of penalties, he concluded removal was the only appropriate penalty.

I find that Mr. Warshefski conscientiously considered the relevant *Douglas* factors in assessing the proper penalty. Based upon the nature and seriousness of the appellant's sustained misconduct, its relationship to his duties and responsibilities and the appellant's unwillingness to acknowledge any responsibility for his actions, I find that the penalty of removal is well within the tolerable bounds of reasonableness. The appellant provided no enlightenment that could explain his actions or show that there was a possibility for him to salvage the trust of his supervisor and co-workers. Moreover, with no explanation for his actions and no expression of remorse and assurance that the behavior would never be repeated, I find that the agency's duty to provide health and safety for its employees and the public far outweighs any argument put forth by the appellant to remain in his job. Finally, the agency's articulated loss of trust in the appellant's ability to work independently without oversight was a significant aggravating factor.

In view of all the circumstances in this case, I find no mitigating factors, including the appellant's years of federal service and his good performance, sufficient to disturb the agency's decision to remove him from Federal Service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD

LuNell C. Anderson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on February 12, 2008, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial

decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar

days after the date this initial decision becomes final.

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, [http:// fedcir.gov/contents.html](http://fedcir.gov/contents.html). 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.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

2008 WL 352061 (PERSONNET)
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