

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STEPHEN F. FAUCHER,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
BN07528710144

DATE: JUL 26 1989

Stephen F. Faucher, East Hartford, Connecticut, pro se.

Jeffrey F. Perrotta, Hartford, Connecticut, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board upon the October 25, 1988, decision of the United States Court of Appeals for the Federal Circuit vacating the Board's decision in *Faucher v. United States Postal Service*, 36 M.S.P.R. 517 (1988), and remanding the case to the Board for mitigation of the penalty. See *Faucher v. United States Postal Service*, No. 88-3261, slip op. at 5 (Fed. Cir. Oct. 25, 1988). See also *Faucher v. United States Postal Service*, 862 F.2d 322 (Fed. Cir. 1988) (Table). Consistent with the court's order, the

Board MITIGATES the penalty of removal to a 60-day suspension.

BACKGROUND

The agency removed the appellant from his Distribution and Window Clerk position for assaulting Paul Garavel, a co-worker, on March 16, 1987. At the time of his removal, the appellant had been employed for ten years and had no record of disciplinary actions against him. He appealed the action to the Board's Boston Regional Office (Regional Office), and, in an initial decision issued on August 27, 1987, an administrative judge found that the agency had proven its charge by preponderant evidence. The administrative judge also found, inter alia, that mitigation of the penalty was not appropriate because Garavel's injuries were serious and there was no element of provocation present.

The appellant filed a petition for review of the initial decision, alleging various errors by the administrative judge. The Board denied the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115, but reopened the case on its own motion, under 5 C.F.R. § 1201.117, to address the appellant's allegations of error by the administrative judge. Finding that the appellant's allegations were not supported by the record, the Board affirmed the initial decision, as modified by the Opinion and Order. See *Faucher*, 36 M.S.P.R. at 518-21.

The appellant then appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. In

its decision, the court concluded that the administrative judge's findings, i.e., that there was no element of provocation for the appellant's misconduct, and that the victim's injuries were serious, were not supported by the record.

The court found that the altercation between the appellant and Garavel that resulted in the appellant's removal was triggered when Garavel sent a post-con¹ speeding through swinging doors from the loading dock into the building, toward the appellant, who barely escaped being struck by jumping out of the way. When the appellant confronted Garavel on the dock, Garavel taunted him by stating, "What's the matter, Stevie?" See *Faucher*, slip op. at 4. The court noted that Garavel may also have said, "Too fast for you?" A scuffle then ensued. See *id.* slip op. at 4 n.1.

The court made the following findings: (1) Garavel had routinely harassed the appellant prior to the incident on March 16, 1987; (2) the appellant had previously complained to management about similar incidents by Garavel, but to no avail; (3) Garavel admitted that, on several occasions, he had called the appellant "Stevie baby" in a high-pitched, mocking voice; (4) the appellant testified that Garavel would elbow him in the ribs, causing him to drop mail he was sorting; and (5) Garavel harassed the appellant and other

¹ The post-con is a large metal cart filled with mail. See *Faucher v. United States Postal Service*, No. 88-3261, slip op. at 2.

employees who were Vietnam veterans by referring to them in disparaging terms. See *id.* at 2-3.

The court found that the incident on March 16, 1987, "was undoubtedly the final straw which provoked [the appellant] to react," and, therefore, the administrative judge's finding that there was no element of provocation was unsupported. See *id.* at 3. It noted that the administrative judge's findings that the appellant was the aggressor and that he did not act in self-defense did not eliminate the element of provocation. See *id.* at 3-4.

The court also found that the administrative judge's conclusion that Garavel's injuries were serious was unsupported by the record. It noted that the only medical testimony presented demonstrated that Garavel sustained a bloody nose and bruises, when he and the appellant fell to the floor during the scuffle, and that those injuries were not medically severe. See *id.* at 4. The court also noted that, in response to a question as to whether he had been hurt, Garavel testified that he merely had some bruises. *Id.*

The court found that the Board failed to distinguish this case adequately from other cases involving scuffles where penalties less than removal were taken. It noted also that the Board's findings conflicted with the conclusions by an appeals referee, who, in deciding the appellant's state unemployment claim, found that the only record of injury was an alleged nosebleed and that the appellant's misconduct was

not willful because it was a reaction to the co-worker's actions. See *id.* at 5.

ANALYSIS

The Board has found that mitigation of a removal to a 60-day suspension may be appropriate in a charge of physical assault on a co-worker where (1) no serious injury results; (2) no weapons are used; (3) the employee has a history of satisfactory performance; (4) the agency does not rely upon a prior disciplinary record in selecting the penalty; and (5) there is an element of provocation present. See *Wilburn v. United States Postal Service*, 28 M.S.P.R. 524, 527 (1985). See also *Lindsey v. Department of the Navy*, 9 M.S.P.R. 468, 471 (1982), and *Grandison v. Department of the Navy*, 7 M.S.P.R. 301, 304 (1981).

The record shows that the above circumstances were present in this case, and, therefore, a 60 day suspension is the maximum reasonable penalty.

ORDER

The agency is ORDERED to cancel the appellant's removal and to replace it with a 60-day suspension, retroactive to April 20, 1987. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits as required by Postal

Service regulations, no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's


final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board