UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 33

Docket No. DA-0752-12-0001-I-1

Cesar H. Figueroa,

Appellant,

v.

Department of Homeland Security,

Agency.

April 26, 2013

Thomas E. Tierney, Esquire, Norwalk, California, for the appellant.

John B. Barkley, Esquire, Phoenix, Arizona, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal and found that he failed to prove his claim of disparate penalties. For the reasons set forth below, we GRANT the petition for review, AFFIRM the administrative judge's findings with respect to the sustained charge and nexus, VACATE the administrative judge's findings with respect to the reasonableness of the penalty, including the appellant's claim of disparate penalties, and

REMAND the appeal for further adjudication consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The agency employed the appellant as a GL-1801-09 Immigration and Enforcement Agent with Immigration and Customs Enforcement. Initial Appeal File (IAF), Tab 5 at 19, Tab 30 at 2. Effective September 30, 2011, the agency removed the appellant from federal service based on the sole charge of falsification. IAF, Tab 5 at 19, 179. The agency based the charge of falsification on the following undisputed facts. On May 25, 2009, the appellant submitted a completed Questionnaire for National Security Positions, Standard Form 86 (SF-86). IAF, Tab 30 at 2 (Stipulation 5). In response to a question that asked the appellant to list each of his relatives, the appellant failed to list three of his brothers. *Id.* at 2-3 (Stipulations 6-8). The appellant certified that the information on the SF-86 was true, correct, complete, and made in good faith to the best of his knowledge and belief. *Id.* at 3 (Stipulation 9). He also certified that he understood that intentionally withholding, misrepresenting, or falsifying information may result in his removal from federal service. *Id.* During an investigation into allegations that the appellant withheld information on the SF-86, the appellant admitted that he failed to list two of his brothers because they had been deported and "he did not want their criminal history and immigration status to affect his chances for the [Immigration and Enforcement Agent] position." *Id.* at 4 (Stipulation 11). The appellant claimed that he did not list the third brother because he was adopted. *Id.* at 6 (Stipulation 21).

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

¶3 The appellant filed a Board appeal of his removal, seeking mitigation of the penalty. IAF, Tab 1 at 3. The appellant argued that he received a harsher penalty than other agency employees who had engaged in more serious misconduct. *Id.* at 5. In accordance with the procedures set forth in the administrative judge's acknowledgment order, IAF, Tab 2 at 2-3, the appellant timely initiated discovery, IAF, Tab 6 at 8-11. His discovery requests included the following request for the production of documents:

> All proposal notices, decision notices, settlement agreements, arbitration awards, last chance agreements or firm choice agreements relating to disciplinary and/or adverse action cases within the Agency nationwide for the past five years relating to any allegation of "Falsification" and/or similar allegations as those in this issue in this appeal for any Agency employee, including supervisors. Please include all settlement agreements. The documents may be provided in sanitized format.

Id. at 10-11. The agency objected, claiming the request was, among other things, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. *Id.* at 16. Notwithstanding the objections, the agency agreed to produce a copy of the proposal and decision letters pertaining to one of the alleged comparators referenced in the deciding official's written evaluation of the penalty determination factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). *Id.*; *see* IAF, Tab 5 at 186.

¶4 The appellant subsequently filed a motion to compel discovery with respect to the document request. IAF, Tab 6 at 4-6. The appellant argued, among other things, that he was entitled to the documentation he sought because the Board found in *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), that comparator employees no longer needed to be in the same work unit, have the same supervisor, or have the same deciding official. IAF, Tab 6 at 5. The agency filed a response to the motion to compel arguing, in relevant part, that supervisors are not valid comparators to the appellant under *Lewis*, 113 M.S.P.R. 657, ¶ 6, because "their circumstances are not substantially similar." IAF, Tab 13 at 9-10.

The administrative judge granted in part and denied in part the appellant's motion to compel. IAF, Tab 17 at 2. Specifically, the administrative judge found that the appellant was entitled to receive information regarding discipline administered to employees who were in circumstances substantially similar to those of the appellant. *Id.* The administrative judge therefore ordered the agency to produce the disciplinary records of Immigration Enforcement Agents, GL-1801-09, who were charged with the same or similar offenses within the same geographic region within the 3-year period preceding the appellant's removal. *Id.* at 3.

¶5 The appellant filed a request for reconsideration of the administrative judge's ruling, seeking the production of documents relating to Immigration Enforcement Agents nationwide, as opposed to within the same geographic region. IAF, Tab 18 at 4-5. After reviewing the appellant's request for reconsideration, the administrative judge granted the request and ordered the agency to produce the disciplinary records of Immigration Enforcement Agents, GL-1801-09, who were charged with the same or similar misconduct nationwide during the 3-year period preceding the appellant's removal. IAF, Tabs 20, 24.

¶6 The appellant filed a second request for reconsideration of the administrative judge's ruling, seeking the production of documents relating to all Immigration Enforcement Agents and Deportation Officers, including supervisors.[2] IAF, Tab 25 at 4-5. During a telephonic prehearing conference, the administrative judge ruled that the appellant was not entitled to discovery with respect to materials relating to supervisory employees because such information did not appear reasonably calculated to lead to the discovery of admissible evidence. IAF, Tab 28 at 1-2. The appellant filed an objection to the

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[2] The agency included documentation relating to Deportation Officers in addition to Immigration Enforcement Agents in its response to the appellant's document request. IAF, Tab 27 at 5 of 66, 4-44 of 45.

administrative judge's ruling, thus preserving it for review by the Board. IAF, Tab 29 at 4-5.

¶7 After holding the requested hearing, the administrative judge affirmed the removal, finding in relevant part that the agency proved its falsification charge by preponderant evidence and that the appellant did not show that the agency imposed a disparate penalty. IAF, Tab 32 (Initial Decision). On review, the appellant challenges the administrative judge's findings with respect to the sustained charge. Petition for Review (PFR) File, Tab 1. He also challenges the administrative judge's findings with respect to the reasonableness of the penalty, and he asserts that the case should be remanded to permit further discovery relating to potential comparator employees who are supervisors. *Id.* The agency has responded in opposition to the appellant's petition for review. PFR File, Tab 3.

ANALYSIS

The administrative judge properly found that the agency proved the charge of falsification by preponderant evidence.

¶8 The appellant argues on review that he did not engage in falsification because his failure to list all of his brothers' names was not an affirmative act of presenting false information. PFR File, Tab 1 at 6. The administrative judge, however, addressed this allegation below and properly found that the appellant's omission of his brothers' names on his SF-86 constituted falsification. Initial Decision at 6. Although the appellant argues that he should have been charged with the lesser charge of lack of candor, PFR File, Tab 1 at 6, the administrative judge properly found that the agency established that the appellant acted with intent to deceive, an element required to establish falsification that is not required to establish lack of candor, Initial Decision at 6; *see Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 164 (1997) (sustaining a falsification charge based upon an omission of required information on an SF-86 without any plausible

explanation for the omission). Accordingly, the appellant has presented no basis to disturb the administrative judge's finding in this regard.

The administrative judge abused his discretion in denying the appellant's motion to compel discovery.

¶9 Discovery is the process by which a party may obtain relevant information from another party to an appeal. 5 C.F.R. § 1201.72(a). "Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request. *Ryan v. Department of the Air Force*, 113 M.S.P.R. 27, ¶ 15 (2009). "The scope of discovery is broad: '[d]iscovery covers any nonprivileged matter that is relevant to the issues involved in the appeal . . . .'" *Baird v. Department of the Army*, 517 F.3d 1345, 1351 (Fed. Cir. 2008) (quoting 5 C.F.R. § 1201.72(b)). The Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table).

¶10 Here, the administrative judge denied the appellant's request for documentation relating to disciplinary actions imposed on supervisory employees for the same or similar misconduct as the appellant because he found it did not appear reasonably calculated to lead to the discovery of admissible evidence. IAF, Tab 28 at 1-2. We find that such a result is contrary to our instructions in recent cases that have held that a flexible approach is warranted when considering the consistency of the penalty with those imposed on comparator employees. *Lewis*, 113 M.S.P.R. 657, ¶¶ 13-15; *see Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 (2012). Specifically, the Board has held that, to establish disparate penalties, the appellant must show that there is enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees

differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Boucher*, 118 M.S.P.R. 640, ¶ 20; *Lewis*, 113 M.S.P.R. 657, ¶ 15. If an appellant does so, the agency must then prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Boucher*, 118 M.S.P.R. 640, ¶ 20.

¶11 We find that the appellant's document request relating to potential comparator supervisory employees was reasonably calculated to lead to the discovery of admissible evidence. Specifically, if the appellant could show that supervisory employees – who are held to a higher standard[3] – were treated less harshly by the agency than the agency treated the appellant for similar misconduct, the appellant would have met his disparate penalty burden and triggered the agency's burden to explain the difference in treatment. *See Boucher*, 118 M.S.P.R. 640, ¶ 20; *Lewis*, 113 M.S.P.R. 657, ¶¶ 15-16. Indeed, in *Hamilton v. Department of Homeland Security*, 117 M.S.P.R. 384, ¶ 15 (2012), the Board held that a supervisory agricultural specialist was not similarly situated for disparate penalty purposes to the non-supervisory agricultural specialist appellant, *not* because the alleged comparator was a supervisor, but because the alleged comparator was unaware of his obligation to cooperate in an investigation, and fully cooperated once he became so aware. Therefore, we find that the administrative judge abused his discretion in denying the appellant's motion to compel on the grounds that materials relating to supervisory employees did not appear reasonably calculated to lead to the discovery of admissible evidence. IAF, Tab 28 at 1-2; *see, e.g.*, *Deas v. Department of Transportation*, 108 M.S.P.R. 637, ¶ 20 (2008); *McGrath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 9 (1999).

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[3] Agencies are entitled to hold supervisors to a higher standard than non-supervisors because they occupy positions of trust and responsibility. *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010).

¶12 On remand, the administrative judge shall permit further discovery by the appellant regarding disciplinary actions imposed on supervisory employees for engaging in the same or similar misconduct as the appellant. After the completion of discovery, the administrative judge shall provide the parties the opportunity to submit supplemental evidence and argument with respect to the appellant's disparate penalty claim, including the reconvening of the hearing, if requested, and shall issue a new initial decision addressing the reasonableness of the penalty, consistent with this Opinion and Order. *See, e.g.*, *McGrath*, 83 M.S.P.R. 48, ¶ 20.

ORDER

¶13 Accordingly, we vacate the administrative judge's findings with respect to the reasonableness of the penalty and remand this appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

Cesar H. Figueroa v. Department of Homeland Security

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¶1 I concur with the disposition of this case. The precedents cited are controlling and I believe they are being applied correctly. I write separately, however, because this case once again illustrates my concerns with the Board's decisions in *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268 (2010) and *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), which in my opinion relaxed the long-established, well-understood and easily managed test for impermissible disparity in penalties.

¶2 As I said in my dissenting opinion in *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012), the Civil Service Reform Act's scheme for employee discipline should tolerate localized or organizational differences in penalties, so long as the penalty in any particular case is reasonable and consistent under the balancing of all appropriate *Douglas* factors.

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Mark A. Robbins
Member