

## OPINION AND ORDER

Appellant is a former regional Equal Employment Opportunity Officer who was reduced in grade from GS-14 to GS-12 and reassigned from the Kansas City to the New York Regional Office.<sup>1</sup> The agency took this action based on charges that appellant engaged in unprofessional and inappropriate conduct exceeding his authority, including (1) using on-duty time to pursue a non-agency matter, (2) being rude and intimidating to employees of another federal agency, (3) misrepresenting his authority, (4) demonstrating performance and judgment short of what is to be expected of a person of his grade and position, (5) compromising his agency's ability to work with another federal agency, and (6) undermining the trust which should exist between him and the agency's principal regional officer. These alleged offenses arose out of a series of telephone conversations between appellant and employees and officials of the Internal Revenue Service (IRS), wherein appellant attempted to make a job inquiry concerning an IRS applicant for employment not employed by appellant's agency.

An appeal was filed with the Board's St. Louis Field Office, and the presiding official affirmed the agency decision.

Appellant in his petition for review contends that (1) new and material evidence is available that warrants reconsideration of the presiding official's decision; (2) the demotion and reassignment were the result of prohibited personnel practices in violation of 5 U.S.C. §§§ 2302(b)(2), 2301(b)(8)(A), and 2302(b)(11); and (3) the penalty of demotion and reassignment was unduly harsh and far in excess of what is authorized by 5 U.S.C. § 7503(a).

As new and material evidence, appellant submits a series of newspaper articles appearing in the Kansas City Times on and after November 19, 1979. These articles were the result of the reporting of a newspaper staffer who obtained employment with the agency's Kansas City Regional Office from July 9 through October 17, 1979.

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<sup>1</sup>The agency originally proposed to remove appellant. After consideration of his oral and written replies, the deciding official concluded that while the charges were found sustained, a demotion and transfer constituted a more appropriate penalty in that "... It is my hope that this decision will enable you to start afresh and to contribute to the Department's EEO mission."

They tend to suggest occurrences of mismanagement and waste in the office. Their validity is highly disputed by agency officials. Nowhere in the articles is appellant's disciplinary action mentioned in any context.

The Board has held that in order to satisfy the "new and material evidence" criterion for granting a petition for review, the new evidentiary submission must be of sufficient weight to warrant an outcome different from that ordered by the presiding official. *Russo v. Veterans Administration*, 3 MSPB 427 (1980). See *Redding v. Department of Interior*, 4 MSPB 489 (1980). The newspaper articles must be examined in light of this requirement.

The appellant offers his new evidentiary submission to show that Mr. Higgins' motive for proposing his (appellant's) removal was personal favoritism toward others, and that since Mr. Higgins had no other basis for his proposal, Mr. Higgins acted arbitrarily. The Board finds that the new evidence would be useful at all only in that if its contents were established as fact they might tend inferentially to impeach the testimony of Mr. Higgins. However, Higgins' testimony at the hearing conducted by the field office was corroborated by other witnesses, most particularly by IRS employees who had no interest in the matter. Accordingly we do not conclude this evidence meets the materiality requirement for granting a petition for review. See *Russo v. Veterans Administration*, *supra*.

Next, we turn to appellant's allegation of prohibited personnel practices. Appellant has the burden of proving these allegations by a preponderance of the evidence. *Ramos v. Federal Aviation Administration*, 4 MSPB 446 (1980). See *In the Matter of Frazier* (U. S. Marshal's Service), 1 MSPB 159 (1979). Appellant's claim under 5 U.S.C. §§ 2302(b)(11) and 2301(b)(8)(a) appears to be an allegation of favoritism by Higgins and/or other agency officials toward employees other than appellant and of arbitrary treatment generally. In this regard, the record as a whole shows appellant to have engaged in the conduct for which he was removed and supports the conclusion that appellant failed to establish favoritism toward others or some other arbitrary reason as the motive for his demotion and reassignment. See *In the Matter of Frazier*, *supra*. Consequently, even assuming that appellant properly alleged a prohibited personnel practice, the Board concludes that appellant has not met his burden of proving the factual foundation necessary for establishing his contention. See *Dinkins v. U.S. Postal Service*, 5 MSPB 179 (1981); *Ramos v. Federal Aviation Administration*, *supra*.<sup>2</sup>

<sup>2</sup>We need not decide whether, as a matter of law, appellant has alleged a violation of "law, rule or regulation implementing, or directly concerning, the merit system principles contained in . . . (5 U.S.C. § 2301)," by his claim that his demotion and reassignment were taken for some arbitrary reason. See 5 U.S.C. § 2302(b)(11). Rather, we dispose of this claim on evidentiary grounds.

Appellant also contends that the demotion and reassignment are unlawful under 5 U.S.C. § 2302(b)(2), because the proposing official did not have personal knowledge of the actions on which they were based. This contention is a variation of a defense that appellant raised before the presiding official: that the demotion and reassignment were unlawful because the presiding official relied on statements which were not founded on the personal knowledge of those who made them. See First Amended Petition of Appeal to The Merit Systems Protection Board, p. 3; Initial Decision, p. 3. The presiding official found that the contention was not supported by the record. See Initial Decision, p. 4.

The Board is of the view that the appellant's argument in his petition for review, that under 5 U.S.C. § 2302(b)(2) the proposing official must have personal knowledge of the actions on which the proposal is based, is a *misconstruction* of law. In *Williamson v. Department of Health and Human Services*, 3 MSPB 142 (1980), we rejected the contention that 5 U.S.C. 2302(b)(2) prohibits an agency official from taking action against an employee unless the official has personal knowledge of the adverse action charges. As we pointed out in *Williamson*, the sparse legislative history of the statutory provision indicates that the section was intended to prevent the use of improper influence to obtain a position or promotion. *Id.* at 144.

While we do not decide the full extent and meaning of the statutory provision, we do conclude that it is inapplicable in this case.

Finally, appellant contends that the penalty of demotion and reassignment was too harsh. Indeed he suggests it may be in and of itself illegal. For support appellant cites 5 U.S.C. § 7503(a), which provides:

- (a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

The offenses for which appellant was demoted and reassigned are different and more serious than the offense described in 5 U.S.C. § 7503(a). As has been previously noted, in addition to being discourteous to employees of another federal agency, the presiding official sustained charges that appellant's conversations with IRS employees constituted misuse of official duty time on non-agency matters and misrepresentation of authority; that they demonstrated lack of judgment expected of an employee of appellant's grade and position; and that they prejudiced the employing agency's ability to work with another agency and served to undermine the trust which should exist between appellant and the agency's principal regional

official. We cannot conclude that the agency, or the presiding official, erred as matter of law in concluding that the sustained charges warranted discipline in excess of a 14 day suspension as described in § 7503(a).<sup>3</sup>

The Board's conclusion concerning the direct applicability of 5 U.S.C. § 7503(a) does not, however, foreclose all inquiry into the harshness of the penalty selected by the agency. The Board has recently held that an appellant is entitled to obtain review of an agency penalty under the "efficiency of the service" standard set forth in 5 U.S.C. § 7513. *See Douglas v. Veterans Administration*, 5 MSPB 313, 329-30 and n. 58 (1981). Accordingly, we must evaluate appellant's claim that the agency's penalty was too harsh under the standards set out in *Douglas v. Veterans Administration*, *supra*.

After noting that a penalty should be selected only after the relevant factors have been weighed, the Board in *Douglas* held that

<sup>3</sup>There is additional support in the legislative history of § 7503(a) for reaching this conclusion. The statements of its sponsor, Congressman Levitas, in debate on the floor of the House September 11, 1978 make it clear that the provisions § 7503(a) are not intended to set maximum standards of discipline for other breaches of the employer-employee relationship of a more serious nature. 96th Cong. 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 892-93 (1979). More significantly, the amendment which was adopted on the House floor provided that an agency could take action against an employee for such cause as would promote the efficiency of the service *including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct*. The language appeared in both Subchapter I and II of Chapter 75 of 5 U.S.C., and was clearly intended to apply in both cases.

When action on the Civil Service Reform Act was completed by the House-Senate Conference Committee the discourteous conduct language had disappeared from Subchapter II, ostensibly because of efforts to eliminate superfluous language. Congressman Levitas became concerned that the statute would be interpreted in such a way that discourteous conduct would not be viewed as cause for action under Subchapter II (5 U.S.C. § 7513). This led to a floor colloquy during House consideration of the Conference Report between Levitas and Congressman Udall, floor manager of the bill. That colloquy, in part, was as follows:

Levitas: "I would like to receive assurance from the chairman that, nevertheless, discourtesy on the part of a Federal employee under certain circumstances can constitute grounds for the application of the provisions of both subchapter 1 and under subchapter 2 as well."

Udall: "Absolutely. I want to assure the gentleman that the thrust and purpose of the amendment he offered on the House floor has been maintained . . . [T]he heart and substance of what the gentleman was trying to do is in here. It is stated in slightly different words. I can assure the gentleman that discourtesy can be the basis for removal action . . ."

124 *Congressional Record* H 11823 (daily ed. October 6, 1978). Thus while we need not reach the matter in the instant case, the legislative history clearly indicates that "discourteous conduct", standing alone, may in some circumstances warrant a penalty more severe than those contemplated in Subchapter I of Chapter 75. Of course in such circumstances the employee would be entitled to the greater panoply of procedural rights provided for in Subchapter II.

the purpose of its review is to ensure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a reasonable balance within the limits of reasonableness. The most relevant factors in this case are: (1) the relationship of appellant's offenses to his duties, position, and responsibilities; (2) appellant's job level and type of employment, including contacts with the public and the prominence of the position; (3) his past disciplinary record; (4) his past work record, including length of service and performance on the job; (5) the effect of appellant's offenses upon his supervisors' confidence in his ability to perform assigned duties; and (6) the impact of the offenses on the reputation of his agency.

In analyzing the agency's reasonableness in selecting a penalty, we believe the following considerations relevant. Appellant's offenses have a substantial relationship to appellant's duties, position, and responsibilities. As the Chief Equal Employment Opportunity Official of one of his agency's regions, appellant had to communicate regularly with other federal employees. In the region where appellant worked, he occupied a position which had a high job level, was prominent, and involved numerous and on-going contacts with the public and other agencies. The appellant's supervisor stated that the incident caused him to lose confidence in appellant's ability to perform his assigned tasks. Appellant's offenses had at least some adverse impact on the regional reputation of his agency, as demonstrated by the complaints and subsequent testimony of IRS officials.

On the other hand, appellant had no past disciplinary record, had a generally satisfactory performance record, and had twelve years of government service, nine with his agency. The weight of these factors is somewhat reduced, however, by the nature of the penalty; for although the agency originally proposed removing appellant for his offenses, it opted in its final decision for a penalty that both gives appellant a second chance and allows continued use of appellant's EEO skills. We think this act of reconsidering the penalty is in and of itself some evidence that agency officials "conscientiously considered the relevant factors" and attempted to "strike a responsible balance within the limits of reasonableness." *Douglas, supra*, at 333.

The Board will modify an agency-imposed penalty only when it finds that the agency clearly exceeded the limits of reasonableness. *Douglas, supra*, at 333. In light of the nature of appellant's offenses and position, and the apparent effect of those offenses on both his continued effectiveness in the region and on the agency's reputation, the Board finds that the penalty of demotion and reassignment in his case was not unreasonable.

The petition for review is **DENIED**.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

WASHINGTON, D.C., *October 6, 1981*