

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2008 MSPB 1**

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Docket No. PH-0752-06-0495-I-1

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**Dean J. Balouris,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

January 4, 2008

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Joseph H. Chivers, Esquire, Pittsburgh, Pennsylvania, for the appellant.

Daniel J. Monahan, Esquire, Philadelphia, Pennsylvania, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

Member Sapin issues a decision concurring in part and dissenting in part.

**OPINION AND ORDER**

¶1 The agency has petitioned for review of an initial decision (ID) that mitigated the appellant's removal to a 60-day suspension. For the reasons set forth below, we GRANT the petition for review (PFR), AFFIRM the ID as modified, and SUSTAIN the appellant's removal.

**BACKGROUND**

¶2 The appellant was employed by the agency as a letter carrier. On April 17, 2006, the agency proposed the appellant's removal based on a single charge of "Unacceptable Conduct/Assault." Initial Appeal File, Tab 8, Subtab 4(b). The

charge was based on an alleged physical confrontation involving the appellant and another letter carrier, Terence Sullivan. *Id.* After the appellant had an opportunity to respond to the notice of proposed removal, the agency issued a letter of decision removing him. *Id.*, Subtab 4(a).

¶3 The appellant filed a Board appeal challenging his removal. IAF, Tab 1. He claimed that the agency committed harmful error and that his removal constituted reprisal for his union activity. *Id.* After a hearing, the administrative judge (AJ) issued an ID sustaining the charge, finding that the appellant failed to prove his affirmative defenses, and mitigating the removal to a 60-day suspension. IAF, Tab 28.

¶4 The agency has filed a PFR of the ID. PFR File, Tab 1. On PFR, the agency challenges both the AJ's finding that the appellant did not intentionally strike Sullivan and her mitigation of the penalty. *Id.* The appellant has filed a response in opposition to the agency's PFR. PFR File, Tab 3.

#### ANALYSIS

¶5 The agency argues that the AJ erred in finding that the appellant did not intentionally strike Sullivan. PFR File, Tab 1. We find no error in the AJ's finding in this regard, nor in her finding that, notwithstanding, by the appellant's actions he committed "Unacceptable Conduct/Assault." Therefore, we affirm the ID with respect to the charge.

¶6 The agency also argues that the AJ erred in mitigating the appellant's removal to a 60-day suspension. PFR File, Tab 1. Where the Board sustains the charge and underlying specifications, it will defer to an agency's penalty decision unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or unless the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Batten v. U.S. Postal Service*, 101 M.S.P.R. 222, ¶ 9 (quoting *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987)), *aff'd*, 208 F. App'x 868 (Fed.

Cir. 2006). That is because the agency has primary discretion in maintaining employee discipline and efficiency. The Board will not displace management's responsibility, but will instead ensure that managerial judgment has been properly exercised. *Id.*, ¶ 9. Mitigation is appropriate only where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness. The deciding official need not show that he considered all the mitigating factors. The Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty. *Id.*, ¶ 11.

¶7 We find that the agency's penalty of removal for the sustained charge is reasonable. The record shows that the deciding official weighed the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), in deciding to remove the appellant. IAF, Tab 8, Subtab 4(a); Hearing Tape (HT), Side 1B. Specifically, he considered that the altercation took place while the appellant was not only in uniform and on the clock, but also on the street where the incident could be observed by the public. HT, Side 1B. The deciding official also considered that the appellant's actions affected the confidence and trust his supervisors could place in him and in his ability to carry out his duties, and that the appellant had a past disciplinary record. *Id.* We therefore defer to the agency's penalty determination and SUSTAIN the appellant's removal.

#### ORDER

¶8 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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>. 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.

FOR THE BOARD:

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

CONCURRING AND DISSENTING OPINION OF BARBARA J. SAPIN

in

*Dean J. Balouris v. United States Postal Service*

MSPB Docket No. PH-0752-06-0495-I-1

¶1 My colleagues find, in agreement with the administrative judge, that the appellant did not commit intentional misconduct, but that the agency has proven its charge of “unacceptable conduct/assault” by a preponderance of the evidence. However, contrary to the judge, they find that this single incident of unintentional misconduct was sufficient to warrant the appellant’s removal. After careful review of the record in this case, I concur with my colleagues’ conclusion that the agency has proven its charge. Nevertheless, for the reasons set forth below, I believe that the penalty of removal exceeds the bounds of reasonableness. I would, therefore, affirm the judge’s decision to mitigate the penalty to a 60-day suspension.

BACKGROUND

¶2 At the time the instant proceeding arose, the appellant was employed as a full-time Letter Carrier at a facility in Pittsburgh, Pennsylvania. Initial Appeal File (IAF), Tab 8, Subtab 4b. Having entered on duty in 1991, he had given the agency over 15 years of service. *Id.*, Tab 8, Subtab 4e.

¶3 The incident precipitating the charge of unacceptable conduct occurred on March 27, 2006. *Id.* The agency alleged that on that date, the appellant was involved in an altercation with another letter carrier, Terrance Sullivan, in which heated words were exchanged. The agency further alleged that as a result, the appellant punched Sullivan in the side of the face. *Id.* According to the agency, the appellant stated that he reflexively pushed Sullivan away after Sullivan had spit on him and, in doing so, accidentally hit him in the face. *Id.* As a result of

the subsequent investigation, the agency proposed the appellant's removal, which became effective on June 2, 2006. *Id.*, Subtab 4a.

¶4 Following a hearing, the administrative judge affirmed the agency's action but mitigated the penalty to a 60-day suspension. IAF, Tab 29. The judge found, as relevant here, that the agency proved that the appellant hit Sullivan, who sustained a minor injury. *Id.* However, as noted, the judge additionally found that the agency did not show that the appellant's conduct was intentional. *Id.* In view of the fact that Sullivan was only issued a letter of warning and, after weighing a number of mitigating circumstances, the judge concluded that the penalty of removal could not be sustained. *Id.*

¶5 The agency has filed a petition for review in which it argues that the appellant's removal should be affirmed. Petition for Review File, Tab 1.

#### DISCUSSION

¶6 Where, as here, the agency's charge is sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Jacoby v. U.S. Postal Service*, 85 M.S.P.R. 554 (2000). In making such a determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised. *Id.* The Board will, therefore, modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the bounds of reasonableness. *Id.* In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 12 (2003), *aff'd*, 104 F.App'x 155 (Fed. Cir. 2004).

¶7 Here, after considering the circumstances surrounding the charge, as well as the existence of a number of mitigating factors, I would find, in agreement with the administrative judge, that the agency's penalty is not within the tolerable limits of reasonableness. In arriving at the finding, I initially note that prior to the altercation between the two men, there had been simmering animosity between them. IAF, Tab 29 at 13. Indeed, it was Sullivan who instigated the altercation by calling the appellant an "asshole" during a telephone conversation that was loud enough for the appellant to overhear. The appellant stated that during the course of the ensuing argument, he accidentally struck Sullivan as he pushed him away when Sullivan spit on him. *Id.*

¶8 The fact that the appellant accidentally made contact with Sullivan goes to the nature and seriousness of the offense, which is the most important factor in determining the appropriate penalty. *See Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006). A single incident, consisting of an instantaneous response, although deserving of discipline, is hardly sufficient to warrant the penalty of removal.

¶9 In addition, I note, as did the judge, the great disparity between the discipline imposed on each of the participants involved. Despite the fact that Sullivan instigated the verbal altercation by calling the appellant an asshole, the only discipline Sullivan received was a written letter of warning. IAF, Tab 29. By contrast, the appellant was terminated because he sought to protect himself when Sullivan spit on him. In my view, the penalty mitigated by the administrative judge more accurately reflects the relative culpability of Sullivan and strikes an appropriate balance when the penalties imposed on each of the participants to the altercation are compared. I would, accordingly, affirm the judge's decision to mitigate the penalty to a 60-day suspension. *See Spearman v. U.S. Postal Service*, 44 M.S.P.R.135, 141-42 (1990) (60-day suspension, not removal, was the appropriate penalty for an employee's altercation with a co-



worker considering the employee's ten years of service and the presence of provocation).

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Barbara J. Sapin  
Member