

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

**2008 MSPB 178**

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Docket No. AT-0752-07-0971-I-1

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**Lynn M. Vaughn,  
Appellant,  
v.  
United States Postal Service,  
Agency.**

August 1, 2008

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Lorenzo Cobb, Esquire, Sugarhill, Georgia, for the appellant.

Carla M. Ceballos, Esquire, Atlanta, Georgia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The agency has filed a petition for review (PFR) of the March 12, 2008 initial decision (ID) that reversed the appellant's reduction in grade and pay. For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115(d), REVERSE the ID, and SUSTAIN the appellant's reduction in grade and pay.

**BACKGROUND**

¶2 The appellant served as the EAS-20 Manager, Customer Services, at the Glenridge Post Office in Atlanta, Georgia. Initial Appeal File (IAF), Tab 6, subtab 4N. On April 26, 2007, Charles Gracek, Manager, Customer Service Operations, Atlanta, Georgia Post Office, proposed to reduce her in grade and pay

to the EAS-17 position of Supervisor, Customer Services, based on a charge of failure to perform her duties in an effective manner. Gracek specified as follows: The appellant failed to provide information to the union steward or to schedule “Formal A meetings” in the grievance process, which caused the steward to forward the grievances without management documentation and responses. The appellant’s failure to support management’s position at the Formal A step resulted in the “Step B Team” rendering decisions and awards totaling nearly \$28,000 in the union’s favor. The appellant’s error cast doubt on her ability to manage her unit in a satisfactory and effective manner, and her inability to delegate duties to her supervisors and to timely complete tasks resulted in substantial financial liability for her unit. *Id.*, subtab 4E.

¶3 On December 20, 2007, Kevin Helmer, Postmaster, Atlanta, Georgia, issued a revised letter of decision sustaining the proposal and reducing the appellant in grade and pay for failing to perform her duties in a satisfactory manner. He informed her that she would be reassigned to the position of EAS-17 Supervisor, Customer Services, Martech Station, Atlanta, Georgia, effective December 22, 2007.<sup>1</sup> IAF, Tab 11. The appellant filed an appeal with the Board’s Atlanta Regional Office. *Id.*, Tab 1.

¶4 After the appellant withdrew her request for a hearing, IAF, Tab 24, the administrative judge (AJ) reversed the agency’s action based on the written record,<sup>2</sup> ID at 1, 4. The AJ acknowledged that the agency file contained copies of the Step B decisions, signed by agency representative Rich Anastasi and union

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<sup>1</sup> The record indicates that the appellant stopped reporting for duty in April 2007, that she filed a claim with the Office of Workers’ Compensation Programs (OWCP) in August 2007, and that OWCP denied the claim in January 2008. IAF, Tabs 5, 7, 17.

<sup>2</sup> Although the AJ also stated that the “removal action” was reversed, ID at 2, he recognized that the action was a reduction in grade and pay, *id.* at 1, 4.

representative Greg Dixon,<sup>3</sup> which awarded lump sum payments to postal letter carriers for the appellant's violations of "collective bargaining agreement provisions regarding overtime, requests for a special count and inspection, [and] overtime assignments, on the bases that she failed to timely provide information to the union and schedule grievance meetings." *Id.* at 2-3. The AJ found that the "decisions are not sworn or signed under penalty of perjury," that "their findings are conclusory in nature and do not set forth specific factual findings in support thereof," and thus, that they "are insufficient, without more, to support the charge of ineffective performance." *Id.* at 3. He found that, although Dixon and Anastasi had "first-hand knowledge regarding their Step B decisions finding that the appellant failed to provide information to the union and to timely schedule meetings, the agency failed to submit their affidavits or statements signed under penalty of perjury" to support the charge and did not explain why it failed to do so. *Id.* at 3-4. The AJ found that the appellant asserted that she timely scheduled meetings with the union representative, but that he proceeded to the next level of arbitration without her knowledge; that she, thus, did not have an opportunity to reply to the grievance issues; and that she informed Gracek of the situation. The AJ found that the agency did not refute her assertions. *Id.* at 4.

¶5 The AJ concluded: "I have no way of knowing if the Step B decisions correctly found that the appellant had failed to effectively perform her duties in this respect." *ID* at 4. Therefore, he found that the agency failed to sustain the charge by preponderant evidence. *Id.* He ordered the agency to cancel the reduction in grade and pay effective December 22, 2007, and to provide interim relief if a PFR was filed.<sup>4</sup> *ID* at 4-5.

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<sup>3</sup> The AJ mistakenly identified Dixon as the agency representative and Anastasi as the union representative. *ID* at 2-3.

<sup>4</sup> The agency certified that it had provided interim relief and submitted a Postal Service (PS) Form 50 reflecting that it had conditionally restored the appellant to the position of Manager, Customer Services, EAS 20, effective March 1, 2008. PFR File, Tab 1 at 2

¶6 The agency has filed a PFR. PFR File, Tab 1. The appellant has filed a response opposing the PFR. *Id.*, Tab 3.

### ANALYSIS

The AJ erred in finding that the agency failed to prove the charge.

¶7 The agency contends that the AJ erred in analyzing the weight that should be given to the Step B decisions and in finding that the decisions and the other evidence did not suffice to prove the charge. First, it asserts that the Step B decisions are business records, and, as such, are an exception to the hearsay rule. PFR File, Tab 1 at 3-4. Second, it asserts that, under the factors set forth in *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981), the Step B decisions had sufficient probative value to sustain the action, especially since the affidavits provided by the appellant corroborated the material information contained in the Step B decisions. PFR File, Tab 1 at 3-6.

¶8 The agency's assertion that the Step B decisions should be considered under the business records exception to the hearsay rule is unclear. Admittedly, as the AJ implicitly and correctly found, the Step B decisions are hearsay -- non-hearing statements offered to prove the truth of the matter asserted -- because they were offered to prove the charge that the appellant failed to perform her duties in an effective manner. *See, e.g., Scott v. Department of Justice*, 69 M.S.P.R. 211, 228 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table); ID at 3. But evidence need not fall within an exception to the hearsay rule to be admissible in Board proceedings. *See, e.g., Anderson v. Department of Transportation*, 827 F.2d 1564, 1575 (Fed. Cir. 1987); *Borninkhof*, 5 M.S.P.R. at

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and PS Form 50. The appellant has not contested the agency's certification. The agency exceeded the interim relief requirements by retroactively reinstating the appellant prior to the date the ID was issued. *See Luciano v. Department of the Treasury*, 74 M.S.P.R. 441, 450 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table). However, where an agency in good faith has inadvertently exceeded the requirements of an interim relief order, the Board will not dismiss the agency's PFR as moot. *Id.*

83. Thus, whether the Step B decisions fall within an exception to the hearsay rule, a determination that concerns admissibility, is irrelevant. In any event, the AJ did not reject the decisions as inadmissible; rather, he considered them and simply found that they lacked sufficient probative weight to prove the charge. ID at 2-4.

¶9 The agency's assertion that the AJ erred in assigning little probative value to the Step B decisions, however, is persuasive. The Board may find that hearsay evidence is sufficient to sustain a charge. *See, e.g., Office of Hearings & Appeals, Social Security Administration v. Whittlesey*, 59 M.S.P.R. 684, 692 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (Table). The determination of whether hearsay evidence alone is sufficient to sustain a charge depends on its reliability and trustworthiness. *Id.* The probative value of the agency's evidence must be evaluated in terms of the factors set forth in *Borninkhof*, 5 M.S.P.R. at 87. *Whittlesey*, 59 M.S.P.R. at 692-93. The following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for the statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) credibility of declarant when he made the statement attributed to him. *Borninkhof*, 5 M.S.P.R. at 87.

¶10 The agency correctly notes, concerning the first through fourth and eighth *Borninkhof* factors, that there was no hearing; the Step B decisions were signed by Anastasi and Dixon and the appellant never disputed the authenticity of the signatures or the documents, so there was no need to obtain sworn statements; the

agency's agreement to pay a significant amount of money to the union supported the trustworthiness of the documents; and the appellant did not allege that Anastasi or Dixon harbored any animosity towards her. PFR File, Tab 1 at 3-4. In addition, the record indicates that Anastasi and Dixon were disinterested witnesses and that Step B decisions are routinely made. IAF, Tab 6, subtab 4F. Further, we note that the six Step B decisions found that the agency had violated the collective bargaining agreement and specifically identified the appellant, stating that she shall take various actions including "process the necessary salary adjustments to reflect this decision"; "cease and desist not scheduling grievance meetings in accordance with Article 15.2 of the JCAM"; "cease and desist not providing requested information to the union in accordance with Articles 15, 17 and 31 of the JCAM"; and "meet with the union immediately upon receipt of this decision to schedule this route inspection." *Id.* Thus, we find that the Step B decisions are probative evidence supporting the charge that the appellant failed to perform her duties in an effective manner. *See, e.g., Lavette v. U.S. Postal Service*, 96 M.S.P.R. 239, ¶ 9 n.3 (2004) (stating that the AJ noted that the agency supported its charge with a Step B grievance decision); *Rint v. Office of Personnel Management*, 48 M.S.P.R. 69, 72 (stating that normal office records, compiled in the ordinary course of business, are admissible and are entitled to substantial weight), *aff'd*, 950 F.2d 731 (Fed. Cir. 1991) (Table); *cf. Mahnken v. U.S. Postal Service*, 34 M.S.P.R. 1, 5 n.2 (indicating that, although the agency agreed to settle the grievance, the grievance decision did not prove the appellant's contention that he was placed on an emergency suspension because the grievance decision stated that there was no evidence to substantiate the union's allegations), *aff'd*, 835 F.2d 871 (Fed. Cir. 1987) (Table).

¶11 The agency also correctly notes, concerning the fifth through seventh *Borninkhof* factors, that the material fact in dispute is whether the appellant failed to timely schedule grievance meetings with the union steward and provide information to the union regarding grievances; that through her own sworn

statement and that of union Vice President Ben Jackson, she corroborated the Step B decisions that she failed to meet with the union or provide the information to the union regarding the grievances; and that she did not dispute the charge as stated. PFR File, Tab 1 at 5-6. In that regard, we disagree with the AJ's finding that the appellant adequately refuted the agency's evidence. ID at 4. Granted, the appellant stated to Helmer in an unsworn response to Gracek's proposal that she told Gracek that "the grievance had been sent forward not because we did not meet at Step A Formal, but we were supposed to meet again so I could put in my contentions and he sent the grievance up without my contentions," IAF, Tab 6, subtab 4B at 1, and in her representative's unsworn response to the AJ's order that "she did schedule meetings with the designated union representative to discuss the grievances filed by the employees," but that he "proceeded to file the grievances to the next step of the grievance process without [her] knowledge or an opportunity to respond to the issues," *id.*, Tab 16. However, in her sworn declaration, the appellant stated that "I was unable, due to the lack of adequate supervisory staffing, to complete all of my duties as a Manager Customer Services," and that "discipline was unwarranted in that I was understaffed in my position and could not have possibly performed all of the functions I was held responsible for." IAF, Tab 27 at 9-10. Similarly, although Jackson stated that the appellant always timely scheduled meetings, he further stated that she could not dedicate the usual time required to resolve the issues at hand, that disruptions often required the meetings to be held late in the evening or to be rescheduled, and that he was forced to forward grievances to the next level. *Id.* at 11.

¶12 Indeed, the record as a whole shows that the appellant, at most, asserted that she initially met with the union on an unidentified number of grievances, not that she performed her required duties. But, as stated in the notice of proposed reduction in pay and grade, the appellant was charged with "failure to either provide information or failure to schedule Formal A meetings or both." IAF, Tab 6, subtab 4E. The appellant basically did not refute the charge; rather, she

responded that the penalty was unreasonable or that her failures were justified. In her January 23, 2008 prehearing submission, she identified the issue as “[w]hether the penalty of reduction in grade and pay was reasonable,” and stated that “[b]ased on the mitigating circumstances,” it was not. IAF, Tab 16. Similarly, all of the sworn statements the appellant submitted from her staff addressed the “understaffing” or “adverse circumstances” at the Glenridge Post Office, not whether she failed to perform her grievance-related duties in an effective manner. *Id.*, Tab 27 at 12-22. Therefore, we agree with the agency that it presented sufficient evidence to prove the charge by preponderant evidence. *See, e.g., Whittlesey*, 59 M.S.P.R. at 693.

Reduction in grade and salary promotes the efficiency of the service and is a reasonable penalty.

¶13 To sustain its action, the agency must not only prove the charge by preponderant evidence, but establish that its action promotes the efficiency of the service and that the imposed penalty is reasonable. Here, the agency has established nexus by showing a clear and direct relationship between the basis for its action and the appellant’s ability to satisfactorily accomplish her duties. *See 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).

¶14 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 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.*

¶15 The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform her assigned duties, and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The Board places primary importance upon the nature and seriousness of the offense, and its relation to the appellant's duties, position, and responsibilities. *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). All of the factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306.

¶16 Mitigation is appropriate only where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness. *Batten*, 101 M.S.P.R. 222, ¶ 11. 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.*

¶17 Here, we have not deferred to the agency's penalty determination and have independently weighed the relevant factors because it is not clear whether Helmer properly considered the appellant's prior disciplinary record. In the notice of proposed reduction in grade and pay, Gracek stated that the following elements of the appellant's past disciplinary record were considered: A June 20, 2006 Letter of Warning (LOW); a July 24, 2006 LOW in lieu of a 7-day time off suspension; and a September 28, 2006 LOW in lieu of a 14-day time off suspension; all for failure to perform her duties in an effective manner. IAF, Tab 6, subtab 4E. Helmer stated in his declaration that he considered that the appellant "had received three prior disciplines for failure to perform her duties in an effective manner." *Id.*, Tab 26 at 6. The agency's file, however, shows that the "June" 20,

2006 LOW was actually issued on July 20, 2006; and that the July 24, 2006 and the September 28, 2006 documents were proposals, not decisions. *Id.*, Tab 6, subtabs 4H-4J.

¶18 Nonetheless, we find that the agency-imposed penalty of reduction in pay and grade for the sustained charge is reasonable. The Board may remedy the agency's errors by performing its own analysis of the reasonableness of the penalty. *See, e.g., Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 20, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006). In evaluating whether a penalty is reasonable, 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, including whether the offense was intentional or frequently repeated. *Id.*, ¶ 23. Here, the record contains documentation showing that the appellant received the July 20, 2006 LOW and that the agency imposed the LOW in lieu of a 14-day suspension on November 29, 2006.<sup>5</sup> IAF, Tab 6, subtabs 4G, 4J. Thus, it shows that the appellant had received at least two previous disciplinary actions based on the same conduct at issue in this case. Therefore it supports Helmer's statement that the appellant "had been warned of her deficiencies and given the opportunity to correct them." IAF, Tab 26 at 6. Moreover, Helmer stated that the appellant's "continuous failure to perform her duties of Manager Customer Services in an effective manner demonstrates that [she] could not be rehabilitated." *Id.* Helmer further stated that he also considered that, "as a high level manager, [the appellant's] performance of the job was crucial to the needs of the [a]gency," and that "her inability to perform her duties in an efficient manner cost the [a]gency a significant amount of money." *Id.* The agency properly considered these factors in deciding to reduce

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<sup>5</sup> The November 29, 2006 decision refers to the July 24, 2006 proposal, which was actually the proposal for the LOW in lieu of a 7-day suspension. IAF, Tab 6, subtabs 4G, 4I. The LOW in lieu of a 14-day suspension was proposed on September 28, 2006. *Id.*, subtab 4H.

the appellant in grade and pay. *See, e.g., Stack v. U.S. Postal Service*, 101 M.S.P.R. 487, ¶ 9 (2006) (stating that supervisors are held to a higher standard of conduct).

¶19 Given these aggravating factors, we find that the appellant's almost 25 years of service, IAF, Tab 18 at 2, and the alleged understaffing at the Glenridge Post Office are insufficient to warrant mitigating the penalty, *see, e.g., Stack*, 101 M.S.P.R. 487, ¶ 9; *Lavette*, 96 M.S.P.R. 239, ¶¶ 16-24. Accordingly, we sustain the appellant's reduction in grade and pay.

#### ORDER

¶20 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, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). 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.