

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

JAMES E. RILEY,
Appellant,

DOCKET NUMBER
SF-0752-09-0066-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: May 8, 2009

Ali M. Sachani, Esquire, Ventura, California, for the appellant.

Janessa Inong, San Diego, California, for the agency.

Thomas R. Avey, Sr., San Diego, California, for the agency.

BEFORE

Glen D. Williams
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 31, 2008, the appellant timely appealed the action of the agency removing him from the position of Maintenance Worker, WG-4749-08, effective October 3, 2008. Initial Appeal File (IAF), Tabs 1 and 4, Subtabs 4a and 4b. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511-7513. The hearing requested by the appellant was held on February 10, 2009, in San Diego, California. Hearing Compact Disc (HCD).

For the reasons discussed below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Background

The appellant, born in 1956 and with a service computation date in 1992, was employed in the competitive service position of Maintenance Worker, WG-4749-08, by the agency's Naval Facilities Engineering Command Southwest at Naval Air Station North Island, Naval Base Coronado (North Island), San Diego, California. IAF, Tab 4, Subtab 4a.

On August 14, 2008, the agency proposed the appellant's removal for unauthorized removal of government property (1 specification). *Id.*, Subtab 4f. The charge letter asserted that on June 18, 2008, at approximately 2:30 p.m., the appellant was seen balancing a spool of bare No. 1 copper wire on a forklift. On that date, a spool of copper wiring was reported missing from a government vehicle. *Id.* The appellant orally replied to the notice on September 11, 2008. *Id.*, Subtab 4d.

On September 24, 2008, Commander Shawn Bergan, Naval Base Coronado Public Works Officer, notified the appellant that he had sustained the charge against him and determined that removal was warranted. *Id.*, Subtab 4b. The removal was effective October 3, 2008. *Id.*, Subtabs 4a and 4b.

The appellant thereafter appealed his removal.

Applicable Law

To sustain an adverse action before the Board, an agency must prove, by a preponderance¹ of the evidence, the factual basis for the misconduct charged and establish that disciplinary action, based on the proven misconduct, promotes the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B). The "efficiency of the service" requirement includes a showing that some disciplinary

¹ A preponderance of the evidence is that amount of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2).

action is warranted (the “nexus” requirement) and that the particular penalty is within the tolerable limits of reasonableness. Thus, three distinct elements must be proven in any adverse action. *See, e.g., Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981).

Charge

The agency’s charge letter labeled the charge as “unauthorized removal of government property.” IAF, Tab 4, Subtab 4f. At the prehearing conference on January 28, 2008, I notified the parties that it was unclear whether the agency was charging the appellant with removing government property from the base, or merely with removing government property from its authorized location on the base to an unauthorized location still on the base. The appellant contended that the charge was removal of government property from the base and the agency contended that the charge was removal of government property from its authorized location on the base to an unauthorized location still on the base. I advised the parties that the proper construction of the charge must be addressed at the hearing.

In determining how charges are to be construed, the Board will examine the structure and language of the proposal notice. *Tom v. Department of the Interior*, 97 M.S.P.R. 395, ¶ 17 (2004). The Board will not technically construe charges, and an agency is not required to “label its charge narrowly with magic words” in order for the Board to sustain the charge. *Id.* Evidence of the parties’ understanding of a charge, including testimony of the proposing and deciding officials, should be considered by the Board in characterizing a charge. *Greenough v. Department of the Army*, 73 M.S.P.R. 648, 652-3 (1997). An adverse action charge usually consists of two parts: (1) a name or label that generally characterizes the misconduct; and (2) a narrative description of the acts that constitute the misconduct. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198,

203 (1997). The agency has the burden of proving the charge it brought against an appellant, even if it could have charged the appellant with other violations. The Board will not sustain an action on the basis of charges that could have been brought, but were not. *See Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

During the hearing the deciding official, Cmdr. Bergan, testified that he believed the charge was removing the copper from the base and selling it for personal gain.² HCD, Bergan. The appellant testified that throughout the removal process, he believed that he was being charged with removing the copper wire from the base. HCD, appellant. Based on the structure and language of the proposal notice, and based on the testimony of the appellant and the deciding official, I construe the charge of “unauthorized removal of government property” to have charged the appellant with removal of government property from the base, and not merely removal of government property from its authorized location.

In order to prove this charge, the agency must show that the appellant removed the government property as charged, and that such use or removal was improper or unauthorized, regardless of whether the misuse was intentional. *See Rogers v. Department of Justice*, 60 M.S.P.R. 377, 389 (1994); *see Sternberg v. Department of Defense*, 52 M.S.P.R. 547, 558 (1992) (agency is not ordinarily required to prove intent to sustain a charge of unauthorized use of government property). This charge can be proven, even without showing that the employee

² Selling the copper wire for personal gain would be an aggravating factor in determining the appropriate penalty. *See Marler v. Department of Veterans Affairs*, 58 M.S.P.R. 116, 123-24 (1993). The agency did not identify this aggravating factor in the charge letter. IAF, Tab 4, Subtab 4f. Because I do not sustain the charge against the appellant, I do not reach the issue of whether the deciding official impermissibly considered an aggravating factor not set forth in the charge letter.

was on notice and had knowledge that what he was doing was improper or unlawful. Lack of knowledge or notice can be considered in setting the penalty. *Id.*

On June 18, 2008, JC Campbell, a High Voltage Electrician, reported the theft of approximately 800 feet of Bare No. 1 copper wire, on a spool, from his “stake” truck. IAF, Tab 4, Subtab 4h at 22-24; HCD, Campbell. The truck had been parked unattended near Building 315, North Island, all day with the spool of Bare No. 1 copper wire unsecured on the bed. At approximately 2:30 p.m., Campbell returned to the truck and drove to Naval Station San Diego to unload the spool of Bare No. 1. Campbell testified that when he and his partner went to offload the spool, they discovered that the spool was missing. Campbell returned to Building 315, North Island, and reported the wire stolen. Campbell stated that a forklift would be required to remove the spool from the truck and that a forklift was stored at Building 343, across the street from Building 315. He reported the theft to a supervisor at Building 343, and Reginaldo Munoz, an Electrical Journeyman, informed him that he had seen the appellant driving a forklift with a spool of copper wire on it that afternoon. *Id.*

Munoz testified that on June 18, 2008, at approximately 2:30 p.m., he helped Max Gomez unload carpet remnants from Gomez’s truck into a dumpster located near Building 315. HCD, Munoz; IAF, Tab 4, Subtab 4h at 26-28. He then walked toward the sheet metal area of Building 315 and saw the appellant trying to balance a spool on a forklift. He testified that he could not see the wire wrapped on the spool, but saw a strand of wire above the spool. The wire he observed was much smaller than Bare No. 1 and was “probably” Bare No. 6. Munoz testified that he said to the appellant, “Hey, that’s trouble man,” to which the appellant responded, “I don’t want it. I’m taking it back to Graybar³.” He then went into the building, but heard the forklift drive away. Later, he was in

³ Graybar Electric is a civilian materials supplier located at North Island.

Building 343 and overheard Campbell reporting the theft of the copper wire to a supervisor. *Id.*

The appellant testified that on June 18, 2008, David Gutierrez, Industrial Equipment Mechanic, requested that the appellant assist him in moving sheet metal from Graybar to the sheet metal shop at Building 315. HCD, appellant; *see* HCD, Gutierrez. The appellant met Gutierrez at Graybar with a “stake” truck and loaded a pallet with a single sheet of sheet metal. *Id.*; IAF, Tab 27, Exhibit E-2. The appellant proceeded to Building 343 and parked the truck. HCD, appellant. The appellant then signed out the forklift and used the forklift to unload the pallet from the truck and drove the forklift to the roll-up door at Building 315. HCD, appellant; IAF, Tab 4, Subtab 4g; *see* HCD, Brooks. The appellant and Gutierrez then transferred the sheet metal sheet from the pallet to a rolling table outside the building at the roll-up door and Gutierrez then rolled the table with the sheet metal into the sheet metal shop. The appellant denied seeing or talking to Munoz at anytime when he was using the forklift on the afternoon of June 18, 2008. HCD, appellant.

The record is devoid of any evidence that the spool of Bare No. 1 copper wire was removed from the base by the appellant or anyone else. Accordingly, I find that the agency failed to prove by preponderant evidence the sole charge against the appellant.

Even if I were to construe the charge as removing government property from its authorized location on the base to an unauthorized location still on the base, I would still find that the agency failed to prove the charge by preponderant evidence. The only evidence linking the appellant to the missing spool of copper wire was the testimony of Munoz. The testimony of Munoz directly conflicts with the testimony of the appellant, presenting a credibility determination. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). As stated in *Hillen*:

Numerous factors ... must be considered in making and explaining a credibility determination. These include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

Id.

Munoz stated that he saw the appellant "trying to balance a spool of wire onto the forklift" right outside the roll-up door in the east parking lot of Building 315. IAF, Tab 4, Subtab 4h at 26. He testified that his observation of the wire was made while he was standing approximately five feet behind the forklift and looking through its cabin and mast and lift carriage. HCD, Munoz; *see* IAF, Tab 11, Subtab 4. He first testified that he did not see the copper spool itself, but than testified that he saw the top of the spool, but not the wire wound on the spool. Munoz was clear that the wire he observed sticking out of the top of the spool was much smaller than copper no. 1. *Id.* The agency did not introduce evidence of the exact location of Campbell's stake truck in the east parking lot, but Munoz stated that he did not see a truck near the appellant from which the appellant may have taken the spool of wire. IAF, Tab 4, Subtab 4h at 27.

The appellant testified the sheet of sheet metal was on a pallet and secured by metal bands. HCD, appellant; *see* HCD, Gutierrez. Although he denied seeing or talking to Munoz at this time, he opined that if Munoz did see him with the forklift, what he saw was the wooden pallet with a metal band on or hanging off the pallet. While the appellant appeared nervous while testifying, he nevertheless was earnest and his responses to questions were direct, unguarded and unequivocal. *Id.*

Applying the *Hillen* factors, I find that Munoz was not in a position to observe what the appellant had on the forklift. I find it inherently improbable that the appellant would have removed the spool of wire from Campbell's truck

and then driven the forklift with the spool on it over to the roll-up door, particularly because Gutierrez was working in the sheet metal shop just inside the roll-up door. *See* HCD, Gutierrez. Based on the foregoing, I do not find Munoz's testimony to be credible. Accordingly, the agency has not established that the appellant moved the spool of copper no. 1 from its authorized location to an unauthorized location still on the base.

Insofar as the agency has failed to prove its charges by preponderant evidence, its action must be reversed. 5 U.S.C. § 7701(c)(1).

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **October 3, 2008**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform 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, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

Glen D. Williams
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 12, 2009**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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. 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.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

