

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

2007 MSPB 27

Docket No. DA-0752-06-0043-I-1

**Susan J. Bullock,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

January 31, 2007

Gail M. Dickenson, Esquire, Dallas, Texas, for the appellant.

Joey L. Caccarozzo, Esquire, Edinburg, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a dissenting opinion.

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

We ORDER the agency to cancel the removal and substitute in its place a demotion to a non-supervisory position with the least reduction in grade and pay. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

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. The agency is ORDERED 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>.

NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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:

/s/

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Susan J. Bullock v. Department of Homeland Security

MSPB Docket No. DA-0752-06-0043-I-1

¶1 For the reasons given below, I do not agree with my colleagues' decision to deny the agency's petition for review. I would grant the petition and uphold the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from her GS-12 Supervisory Border Patrol Agent position for misuse of a government charge card. It is undisputed that during a 7-month detail from Texas to Washington, D.C., the appellant made dozens of unauthorized charges for items such as clothing, shoes, makeup, a rental car, and a massage, totaling over \$4000. Initial Appeal File (IAF), Tab 4, Subtabs 4D, 4F. On appeal, the appellant admitted that she committed the charged misconduct. IAF, Tab 13. After a hearing, the administrative judge sustained the charge but mitigated the removal to a demotion to a non-supervisory position, based on the following factors: The appellant had 17 years of otherwise discipline-free service at the time of her removal; the agency's Table of Penalties, which recommends up to a 14-day suspension for a first offense of unauthorized use of a government charge card, applies to law enforcement officers, thus undercutting the agency's argument that it made an upward departure from the Table because the appellant is a law enforcement officer; the appellant paid off her charge card and never sought reimbursement for the unauthorized charges; and there was no loss to the government. IAF, Tab 19.

DISCUSSION

¶3 The agency argues that removal is appropriate because the appellant's misuse of the government charge card was repeated and knowing. The evidence supports the agency's argument. As noted above, the appellant never sought reimbursement for the unauthorized charges. The administrative judge appears to have found that this was a reason for leniency, but in fact the appellant's failure to seek reimbursement for the unauthorized charges strongly suggests that she knew all along that her actions were wrong. If the appellant believed that she was permitted to charge non-reimbursable personal expenses to the government card then it is reasonable to expect her to have testified forthrightly that that was her belief. The appellant did not so testify, however, but instead claimed that she thought that her ATM withdrawals and purchases on the government card were within her per diem entitlement. Hearing Transcript 65. The administrative judge found that the appellant stopped making unauthorized charges once she "became aware" that her interpretation of the rules governing use of the card was incorrect, IAF, Tab 19 at 9-10, but the appellant's testimony that she thought she was staying within the per diem was not a claim of ignorance of the rules.

¶4 Indeed, the appellant's charges to her government card systematically exceeded her per diem reimbursement by more than 70% for 7 months running. IAF, Tab 4, Subtab 4C. It is hard to believe that the appellant, who was paid at the GS-12 level, would not complain about the fact that the per diem was leaving her so far short for months on end. The per diem reimbursement was grossly insufficient under the appellant's supposed view of the situation, and it is highly implausible that she either never noticed or did not care.

¶5 An individual's state of mind can seldom be proven by direct evidence, but it may be proven by circumstantial evidence or inferred from surrounding circumstances. *See Harmon v. General Services Administration*, 61 M.S.P.R. 327, 330 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). Here, it is undisputed that the appellant never sought reimbursement for the dozens of

unauthorized charges she made on her government card, and that her total charges exceeded her total reimbursement by over 70% for months on end. These facts give rise to the inference that the appellant knew all along -- as she acknowledged in the cardholder agreement she signed prior to travel, IAF, Tab 4, Subtab 4G at 56 -- that she was not permitted to charge personal items to her government card. I would find that the appellant knowingly and repeatedly made dozens of unauthorized charges to her government card totaling over \$4000. As a supervisory law enforcement officer, the appellant may be held to a very high standard of conduct. *Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996); *Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990). The agency's upward departure from the guidance given in its of Table of Penalties was justified, and I would not mitigate the appellant's removal.

/s/
Neil A. G. McPhie
Chairman