

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

JEFFREY N. LEWIS,
Appellant,

DOCKET NUMBER
SF-0752-09-0139-I-1

v.

DEPARTMENT OF
TRANSPORTATION,
Agency.

DATE: February 27, 2009

SUMMARY OF TELEPHONIC PREHEARING CONFERENCE

A telephonic prehearing conference was held in this appeal on February 24, 2009, and a brief follow-up conference was held on February 27, 2009. Ariel Solomon, Esquire, represented the appellant, and Naomi Tsuda, Esquire, and Don Bobertz, Esquire, represented the agency.¹

The Merits

The agency has the burden to prove each of the three charges by preponderant evidence.² Proof of one or more specification supporting a charge is sufficient to sustain the charge. *See Greenough v. Department of the Army*, 73 M.S.P.R. 648, 657 (1997), *review dismissed*, 119 F.3d 14.

¹ Because the Board's computer network is currently not functional, I am transmitting this Summary to Ms. Solomon and Ms. Tsuda by fax, and expect that they will supply it to the appellant and Mr. Bobertz, respectively.

² *Preponderance of the evidence* is defined as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2).

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(TAB 12)

In the first charge, "Inappropriate behavior in the workplace" (6 specifications), the agency must show that the conduct occurred as described in each specification and that the conduct was improper, unsuitable, or detracted from the appellant's reputation. *See Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 201-205 (1997) (charge must be construed in light of accompanying specifications); *Miles v. Department of the Army*, 55 M.S.P.R. 633, 637 (1992) (discussing elements of a charge of conduct unbecoming a federal employee). The first five specifications are clearly charged, but we discussed the sixth specification and agency counsel asserted that the charge is that the behavior the appellant allegedly admitted-that he mimicked the individuals named-was inappropriate.

To prove the second charge, "Insubordination or refusal to carry out orders," the agency must prove that the conduct described constituted either insubordination or refusal to carry out orders.

To establish the third charge, "Providing misleading information during an official investigation" (9 specifications), the agency must prove that the appellant provided the information as charged, and that he had the intent to defraud, deceive, or mislead it. *See Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, 318 (1998). The requisite intent may be established by direct or circumstantial evidence. *See Deskin v. U.S. Postal Service*, 76 M.S.P.R. 505, 510 (1997). That the employee supplied incorrect information cannot itself control the question of intent, and plausible explanations are to be considered in determining whether the misrepresentation was intentional. *See Forma v. Department of Justice*, 57 M.S.P.R. 97, 103 (1993). The lack of any credible explanation for the misrepresentation can constitute circumstantial evidence of an intent to deceive. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 226 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). In addition, such intent may be inferred when the misrepresentation is made with reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Hernandez v. Department of*

Education, 42 M.S.P.R. 61, 69 (1989). The issue of intent must be resolved based on the totality of the circumstances. *Deskin*, 76 M.S.P.R. at 511.

The agency must also show a nexus between each sustained charge and the efficiency of the service, and must also prove the reasonableness of the penalty, and that the deciding official considered the relevant mitigating factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

Affirmative Defenses

The appellant has the burden to prove his affirmative defenses by preponderant evidence.

The appellant's allegation that the agency's action was taken in retaliation for his union activity falls under 5 U.S.C. § 2302(b)(9)(B). To prevail on a claim of retaliation for union activity, an appellant has the burden of showing that: (1) He engaged in such activity; (2) the accused official knew of such activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) after carefully balancing the intensity of the motive to retaliate against the gravity of the misconduct, there was a genuine nexus between the alleged retaliation and the adverse action. See *Haack v. U.S. Postal Service*, 68 M.S.P.R. 275, 282 (1995).

His claim that the agency violated Article 10, Section 12 of the collective bargaining agreement by failing to provide documents is a claim of harmful procedural error. To prove harmful procedural error, the appellant must prove that the agency committed an error in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. See 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, *i.e.*, that it caused substantial prejudice to his rights. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991) (harmful error cannot be presumed; an agency

error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error).

As to the appellant's claim that the agency's charges are "stale," the appellant must show that a charge (or the action) should be dismissed because the agency's delay in proposing the action was unreasonable and was prejudicial to him. *See Messersmith v. General Services Administration*, 9 M.S.P.R. 150, 155-56 (1981).

Witnesses

I APPROVED Richards, DePlasco, Ralph, Hardy, Austin, Crabtree, Swanson, Marshall, and Marks (verbally requested by agency) for both parties.³

The appellant submitted a witness list requesting that 55 individuals testify at hearing. After discussing the scope of the hearing, and clarifying that subjects such as the medical disqualification and the appellant's allegation that he was constructively suspended⁴ will not be adjudicated and are not otherwise relevant in this appeal, we discussed only 4 additional witnesses on appellant's list; Breaux, Davis, Ferrera, and Goodman. I agreed to hold in abeyance a ruling on Breaux and Davis until the parties determine whether they can render their testimony unnecessary by provision of documentary evidence. I DISAPPROVED Ferrera and Goodman, as well as all of the other witnesses on the appellant's list,

³ Although the appellant did not specify in his prehearing submission that he plans to testify, he is, of course, approved to testify on his own behalf.

⁴ Appellant's counsel agreed that the dates the appellant is alleging he was constructively suspended-April 17-July, 2008-were included in his grievance raising the same allegations. Agency File, Subtab 4O. Accordingly, under 5 U.S.C. § 7121(e), he has made a binding election of forum and cannot also appeal the action to the Board.

Exhibits

Any exhibits not already part of the agency file must be entered into the record through witness testimony at hearing, subject to objection by the other party. Such exhibits are the only exhibits that will be accepted for consideration in my decision.

The above-referenced issues and defenses are the only issues and defenses that will be adjudicated in this appeal. If any party objects to any of the rulings herein, they must object on the record prior to the swearing of the first witness, or any such objections will be deemed waived.

FOR THE BOARD:



Craig A. Berg
Administrative Judge

 *** ACTIVITY REPORT ***

TIME	DESTINATION NUMBER	DESTINATION ID	NO.	MODE	PGS.	RESULT
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*12/04 00:24	18668175023		0038	TRANSMIT ECM	2	OK 00'57
*12/16 19:48	18666432245		0039	TRANSMIT ECM	5	OK 00'57
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*12/16 19:56	18666432245		0042	TRANSMIT ECM	5	OK 00'57
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*01/12 21:40	18666432245		0045	TRANSMIT ECM	6	OK 00'49
01/30 10:49	18609750845		0046	TRANSMIT ECM	1	OK 00'23
02/17 16:34	9040580		0047	TRANSMIT ECM	4	OK 00'31
02/17 16:38	9040580		0048	TRANSMIT ECM	6	OK 00'43
02/24 01:22	18666432245		0049	TRANSMIT ECM	4	OK 00'50
02/24 01:26	18666432245		0050	TRANSMIT ECM	3	OK 00'46
02/24 01:34	18666432245		0051	TRANSMIT ECM	4	OK 00'49
02/24 01:37	18666432245		0052	TRANSMIT ECM	4	OK 00'47
02/24 01:41	18666432245		0053	TRANSMIT ECM	4	OK 00'49
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02/27 14:24	13107256816		0055	TRANSMIT G3	6	OK 02'32

TO: Ariel Solomon

From: Administrative Judge Craig Berg

To: Naomi Tsuda

From: Administrative Judge Craig Berg