
Carlson, Michael R. v. General Accounting Office

Docket No. 04-101-09-81

Date of Decision: July 17, 1981

Cite as: Carlson v. GAO

Before: Levan, Presiding Member

Discipline – Determination of Penalty

Discipline - Falsification

Discipline - Progressive Discipline

Discipline - Table of Penalties, Determination of Penalty

Efficiency of Service, Promotion of - Discipline

Nexus - Determination of Penalty

Background

This case came before the Board on a Petition for Review timely filed by the Petitioner.¹ By letter dated May 5, 1981, the Respondent filed a response to the Petition for Review. By a writing dated June 2, 1981, petitioner replied to the respondent's response. On June 22, 1981, the Board notified the parties to this case of their right to file motions, including motions for a hearing. Neither party filed a timely motion in response to the Board's Notice of June 22, 1981. Therefore, this Decision is based upon the written submissions of the parties.

Findings of Fact

The Petitioner is a GS-11, writer/editor with the Los Angeles Regional Office of the respondent. While so employed, on or about August 27, 1979, petitioner prepared a letter on official GAO stationery, falsely stating that a Management Auditor in the Los Angeles Regional Office, Jennifer L. Freund, was to be transferred to "our regional office in Albuquerque, N.M." Implicit in the letter was the assumption that petitioner supervised Ms. Freund. Apparently, Ms. Freund used this letter to obtain a loan from the New Mexico Mortgage Finance Authority for a condominium she was

¹ The petition was received by the Personnel Appeals Board on April 14, 1981.

purchasing in the State of New Mexico. However, according to the State Attorney General, such loans are available only to New Mexico residents who are owner-occupants of the mortgaged property, conditions which Ms. Freund did not satisfy. When the letter dated August 27, 1979, was discovered during a management audit and concurrent criminal investigation by the Office of New Mexico Attorney General, James T. Hall, Jr., Regional Manager of the Los Angeles Region, was queried by the State of New Mexico as to the petitioner's letter of August 27, 1979. Then, by letter dated January 26, 1981, the State of New Mexico officially contacted the petitioner.

As a result of these events, Regional Manager Hall proposed a 20-calendar day suspension of the petitioner for deliberate misstatements which led to the involvement of the petitioner and respondent in the New Mexico criminal investigation. The petitioner appealed the proposed 20-day suspension. The suspension was carried out between March 22, 1981 and April 10, 1981.

Contentions of the Parties

The Petitioner asserts four arguments in support of his request that the suspension be reduced to a letter of reprimand: "(1) mitigating circumstances, (2) the principle of progressive discipline, (3) the inconsistency and unfairness of the penalty, and (4) unclarity as to how this penalty will promote the efficiency of the service."²

The Respondent, in its letter of May 6, 1981, by counsel, addresses each of the Petitioner's contentions, concluding that the decision to suspend Petitioner was proper, citing the general authority of management to take such an action; and relying principally on the rationales expressed in the February 20, 1981, decision to suspend.

Although the Petitioner, in a writing dated June 2, 1981 attempted to refute the Respondent's arguments, the Petitioner essentially relied on his earlier arguments.

Analysis

Petitioner contends that the penalty imposed does not relate to the promotion of the efficiency of the service, suggesting that the concept "efficiency of the service" is too vague and indefinite to be enforceable.

² Quoted from page (1) of Petitioner's Petition.

In any event, the petitioner would suggest that GAO has failed to demonstrate how the penalty imposed would relate to the promotion of the efficiency of the service. We do not agree.

The term “such cause will promote the efficiency of the service” has been interpreted in countless administrative and judicial decisions.³ The Supreme Court of the United States concluded in Arnett v. Kennedy that the term is not constitutionally vague nor otherwise violative of an employee’s constitutional right to due process of law.⁴ The essential requirement is that before an agency imposes punishment against an employee it demonstrate that the conduct or offense involved has a nexus to the resulting harm to the agency, agency personnel, or the public. The touchstone of this requirement is the reasonableness of the agency action under all the circumstances.⁵ The standard articulated by the Merit System Protection Board in Douglas, et al v. Veterans Administration, et al,⁶ is applicable here:

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the Overton Park criteria for measuring arbitrariness or capriciousness have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency’s primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board’s function is not to displace management’s responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Based upon a review of the record, we are persuaded that

- (1) The petitioner deliberately committed the offense he was charged with;
- (2) There is a nexus between petitioner’s misconduct and injury to respondent’s credibility as to the watchdog of the Federal Government by

³ See, Penalzoza v. Department of HHS, 80 FMSR 5208 (MSPB, December 1, 1980).

⁴ 416 U.S. 134 (1974).

⁵ York v. U.S. Postal Service, 80 FMSR 5349 (MSPB, May 28, 1981).

⁶ 5 MSPR 280, 302 (1981).

virtue of the untoward involvement of GAO and two of its employees in a criminal investigation conducted by a State authority, and

(3) Based upon respondent's determinations in similar cases, suspension of petitioner would promote the efficiency of the service.

Having made the determination that the respondent was authorized to affix a penalty to the offense committed by the petitioner, the question becomes whether or not that penalty was reasonable under all of the circumstances.

Petitioner contends that the principal of progressive discipline calls for progressively more severe discipline for repetition of the same offense. Respondent agrees with this theory, but argues that the punishment here "is within the range of possible disciplinary actions available to the General Accounting Office for the offense in question." (Exhibit R-1) While the charge against petitioner might arguably have justified a more severe penalty than invoked here, the difficulty with respondent's position is the absence of any ascertainable standards or criteria by which to evaluate the relative seriousness of the offense involved. Clearly one prerogative of the exercise of management discretion is the determination of appropriate punishment for offenses committed by GAO personnel. In the absence, however, of specific guides or criteria for the assessment of such penalties within GAO, supervisors and employees are left to ponder the appropriate penalty for a punishable offense. In this regard the precedent of like or similar cases becomes significant. Absent criteria or applicable precedents management action against employees who commit punishable offenses is highly susceptible to attack as being arbitrary, capricious, an abuse of discretion or unreasonable.

While the evidence submitted establishes that a penalty is appropriate in the interest of promoting the efficiency of the service, respondent's evidence, after a careful review of the notice of proposed suspension and the decision to suspend, fails to disclose any rational basis between the offense and the appropriateness of a 20-day suspension. The only precedents even remotely relevant to this case generally set the suspension for the first offense at five days. (Exhibit P-1(p), May 11, 1981, letter and enclosure from Stephen M. Schmal to petitioner). While respondent gives lip service to the concepts of flexible management and progressive discipline, it fails to articulate the standards applicable in this case.

We would conclude, based upon GAO precedents, that a five-day suspension would have been reasonable and appropriate here. In arriving at this conclusion, we do not endorse the petitioner's reliance on the Department of Agriculture's Table of Disciplinary Penalties as in any way supporting the decision we make. Nor do we purport to usurp the managerial function of establishing the criteria for the imposition of penalties in any way. We do suggest, where management deems it appropriate to impose an extraordinary penalty for the offense, the basis for the imposition of the penalty must be set forth.

We would reject all of the other contentions of the petitioner as being either irrelevant or immaterial. Petitioner's emotional entanglement, his contention that his offense was a "one-time thing," his assertion that he received no personal gain, pecuniary or otherwise, and the fact that he did not fully appreciate the consequences of his action, are all irrelevant to the issue before us. Petitioner admitted commission of the offense with which he is charged; he admits the propriety of the imposition of a penalty for the offense. He suggest only that the penalty is too severe. The circumstances cited by the Petitioner do not support his position.

In addition, we reject as unsubstantiated by any evidence of the petitioner's assertions as to the commission by GAO employees of more serious offenses without suffering punishment, petitioner's good work record, and the vagueness of the charge description, "deliberate misuse of GAO official stationery".

Decision

Petitioner's request that his 20-calendar day suspension be changed to a letter of reprimand is denied. The respondent is directed to reduce petitioner's suspension of 20-calendar days to five calendar days and to provide petitioner with back pay for the period in excess of calendar days and to restore to petitioner all rights of employment attendant upon the excessive suspensive suspension.⁷ Agency records should be corrected consistent with this decision.

⁷ This decision is not based upon the possible criminality of the petitioner's conduct as may be determined by the New Mexico authorities nor does it purport to prejudice any further management action as a result thereof.