
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JEFFREY F. SAYERS

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

2018-2195

ON PETITION FOR REVIEW OF THE MERIT SYSTEMS PROTECTION
BOARD IN NO. SF-0714-18-0067-I-1

BRIEF OF AMICUS CURIAE
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
IN SUPPORT OF PETITIONER JEFFERY F. SAYERS FOR REVERSAL OF
THE DECISION BELOW

RUSHAB SANGHVI
Legal Rights Attorney
American Federation of Government
Employees
80 F Street, NW, 10th Floor
Washington, D.C. 20001
202-777-3066
Sanghr@afge.org
Counsel For Amicus Curiae AFGE

November 20, 2018

CERTIFICATE OF INTEREST FOR AFGE

(Form 9)

Counsel for the Amicus Curiae AFGE certifies the following:

1. The full name of every party or amicus represented by me is: American Federation of Government Employees, AFL-CIO
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or amicus curiae represented by me are: None.
4. The names of all law firms and partners or associates that appeared for the parties or amicus now represented by me in the trial court or are expected to appear before this court are: The undersigned is a Legal Rights Attorney employed by the American Federation of Government Employees (“AFGE”) and is principal attorney for amicus curiae AFGE.
5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal: None

Date: November 20, 2018

/s/ Rushab Sanghvi
Rushab Sanghvi
Counsel for Amicus Curiae

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 47.5, counsel of Amicus AFGE is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

Counsel notes that *Allyn Mogil v. Department of Veterans Affairs*, Docket No. 2018-1673, currently pending before this Court, may implicate similar issues with respect to analysis of the penalty in actions taken pursuant to 38 U.S.C. § 714. Counsel is unaware of any other cases that may be considered related.

INTEREST OF THE AMICUS¹

The American Federation of Government Employees (“AFGE”) is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government.

AFGE’s representation of these federal employees includes representation before agency decision-makers in internal disciplinary proceedings. It also extends to administrative litigation before numerous Executive agencies, including the United States Merit Systems Protection Board, the United States Equal Employment Opportunity Commission, the United States Federal Labor Relations Authority, and the United States Office of Special Counsel. *See, e.g., Brown v. Dep’t of Defense*, 121 M.S.P.R. 584 (2014), vacated by *Brown v. Dep’t of Defense*, 646 Fed. App’x 989 (Fed. Cir. 2016). AFGE’s representation also includes collective bargaining, and representation in grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C., Chapter 71.

The question of the Merit Systems Protection Board’s scope of review of actions taken under 38 U.S.C. § 714 is of great consequence to AFGE and the federal employees it represents. The question raised is important and likely to have

¹Pursuant to Federal Circuit Rule 29(c), a motion for leave is not required with this brief because all parties have consented to AFGE’s filing of this amicus brief.

a widespread effect on federal employees. Consequently, AFGE has an interest in this case. All parties to this litigation have consented to the filing of this amicus brief.

AUTHORSHIP STATEMENT

AFGE’s counsel authored this brief in its entirety. No party, party’s counsel or person other than AFGE contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The decision of U.S. Merit Systems Protection Board Administrative Judge (“AJ”) Samantha J. Black sustaining the removal of Petitioner, Jefferey S. Sayers, should be reversed because the AJ failed to assess whether the penalty imposed on Petitioner was supported by substantial evidence.

Nothing in the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, codified in pertinent part as 38 U.S.C. § 714 (“Section 714”), affirmatively prohibits either an AJ or the Merit Systems Protection Board (collectively “the Board”) from reviewing the reasonableness of a penalty imposed in an action taken under Section 714 and determining whether the Department of Veterans Affairs (the “VA”) has demonstrated the reasonableness of that penalty by substantial evidence.

Section 714 requires the Board to review a disciplinary decision made by the VA pursuant to Section 714 as a whole, which includes the penalty imposed, and to uphold that decision if it is supported by substantial evidence. 38 U.S.C. § 714(d)(2)(A). If the decision is supported by substantial evidence, the Board may not mitigate the penalty imposed by the Secretary of the VA. 38 U.S.C. § 714(d)(2)(B).

But if any aspect of the decision is not supported by substantial evidence, for example if the penalty imposed amounts to an abuse of discretion, the Board, in the absence of any mitigation authority, must reverse the VA's decision. This is so because, *inter alia*, a contrary interpretation would render Board review essentially meaningless. Without review of the penalty, the Board would, for example, be without authority to assess the removal of a successful 20-year employee who was removed for being five minutes late to work. This is not the result that Congress intended for the Accountability Act nor is it what Congress legislated.

Put another way, a review of the merits of a decision to take disciplinary action must include an assessment of the penalty imposed because a "decision" necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted." *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 297 (1981). Moreover, as the Supreme Court has noted, "[u]nder the Board's settled procedures" an agency must prove "not only that the misconduct actually

occurred, but also that the penalty assessed was reasonable in relation to it." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 5, (2001) (citing *Douglas at 297*). The AJ could not, therefore, have determined whether the VA's decision to remove Petitioner was based on substantial evidence without assessing the penalty imposed. Because the AJ failed to properly determine whether Petitioner's removal was based on substantial evidence, her decision must be reversed.

ARGUMENT

I. Section 714 Does Not Prohibit the Board from Reviewing the Reasonableness of a Penalty

Section 714 does not prohibit the Board from reviewing the reasonableness of a penalty when determining if a disciplinary action is supported by substantial evidence. The AJ's decision sustaining the removal of Petitioner should be reversed because it is based on the erroneous conclusion that the Board lacked authority to review the reasonableness of the penalty imposed on the Petitioner.

The AJ's failure to assess the penalty imposed on the Petitioner is based on a flawed interpretation of Section 714. The AJ incorrectly interpreted the prohibition on penalty mitigation provided in Section 714 as limiting the Board's authority to conduct any review of a penalty's reasonableness. Appx41. Although, the Board is not permitted to mitigate penalties taken under Section 714, it may still review the reasonableness of a penalty selected as part of its determination that the Secretary's decision was based on substantial evidence because a "decision" necessarily

includes selection of the particular penalty as well as the determination that some sanction was warranted.” *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 297 (1981). In other words, dictating that the Board may not mitigate a penalty is simply not the same as saying that the Board may not consider the reasonableness of the penalty when determining whether the agency has met its burden of proof.

Under Section 714 the Secretary of Veterans Affairs “may remove, demote, or suspend [a covered employee] if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension.” 38 U.S.C. § 714(a)(1) (emphasis added). An employee has the right to appeal the Secretary’s decision to a Board administrative law judge pursuant to the provisions of 5 USC § 7701. 38 U.S.C. § 714(a)(1).

Section 714, however, places two significant limitations on the Board’s review of the Secretary’s decision. First, the Board is directed to “uphold the decision ... if the decision is supported by substantial evidence,” as opposed to preponderant evidence as provided in 5 U.S.C. § 7701. 38 U.S.C. § 714(d)(2)(A). Next, the Board is not permitted to “mitigate the penalty prescribed by the Secretary.” 38 U.S.C. § 714 (d)(2)(B). The AJ here erroneously interpreted the prohibition on mitigation as depriving the Board of jurisdiction to conduct any form of penalty assessment. Appx41. Contrary to the AJ’s reasoning, under Section 714, the Board is still obligated to review whether the Secretary’s “decision is supported by

substantial evidence.” 38 U.S.C. § 714(a)(1). Because the Secretary’s selection of a penalty is an essential part of that decision, the Board must still review whether the Secretary’s determination that the selected penalty was warranted, is supported by substantial evidence, even if the Board cannot mitigate the penalty.

The Supreme Court has held that the Board has “wide latitude in fulfilling its obligation to review agency disciplinary actions.” *U.S. Postal Serv. v. Gregory*, 534 U.S. at 7; See also *Kaplan v. Conyers*, 733 F.3d 1148, 1177 (Fed. Cir. 2013)(“deference is due to the Board's interpretation of its authority”)(citations omitted). Although the Board has not had occasion to interpret its authority under Section 714, it has consistently determined that it has the authority to review the reasonableness of penalty imposed as part of a disciplinary action. See *Gregory*, 534 U.S. at 5 (noting that “[u]nder the Board's settled procedures” and agency must prove “not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it.” (citing *Douglas*, at 333-334).

Relevant here, in regulations promulgated to implement 38 U.S.C. § 713, a statute nearly identical to Section 714, the Board found that it may still assess a penalty’s reasonableness even if it lacks mitigation authority. See 5 C.F.R. § 1210.18. Moreover, actions taken under Section 714 are distinct from those where the Board has found it does not have the authority to assess a penalty, such as in

reviewing performance-based actions taken pursuant to 5 U.S.C. 4330. See *Lisiecki v. Merit Sys. Prot. Bd.*, 769 F.2d 1558, 1560 (Fed. Cir. 1985).

The AJ's failure to assess, in any manner, the penalty imposed on the Petitioner was not in accordance with Board precedent and procedure. Consequently, AJ's decision should be reversed.

The Board has yet to issue a precedential decision relating to an action taken under Section 714. However, as noted by AJ David Brooks in *Julie A. McDonald v. Department of Veterans Affairs, DE-0714-17-0409-I-1*, Board regulations permit penalty review even when the mitigation authority is lacking. DE-0714-17-0409-I-1, 2018 WL 494983 (Jan. 16, 2018). Specifically, in regulations promulgated to implement 38 U.S.C. § 713, the Board provides that an "action is reversed" when the appellant establishes that the "the imposed penalty was unreasonable under the circumstances of the case." 5 C.F.R. § 1210.18(d). The language of 38 U.S.C. § 713 and Section 714 are nearly identical. And just as provided under Section 714, the Board concluded that an "administrative judge may not mitigate the Secretary's decision to remove" an appellant, when reviewing an action taken under 38 U.S.C. § 713. 5 C.F.R. § 1210.18(d). Despite an administrative judge's inability to mitigate a penalty, the Board still requires an assessment of the penalty imposed in an action taken under 38 U.S.C. § 713, and provides for the reversal of the action

when “the imposed penalty was unreasonable under the circumstances of the case.”
5 C.F.R. § 1210.18(d).

Until the Board has interpreted its authority under Section 714, the Board’s regulations implementing 38 U.S.C. § 713 provide the most authoritative guidance on how an administrative judge must review an action taken under Section 714. Consequently, the AJ should have assessed the penalty imposed on the Petitioner to determine whether it was “unreasonable under the circumstances” of the case.

This Court’s decision in *Lisiecki* also supports applying the Board’s settled procedure of assessing the reasonableness of a penalty to actions taken under Section 714. In *Lisiecki*, this Court found that the Board lacked authority to consider the reasonableness of a penalty in actions taken under Chapter 43. *Lisiecki* at 1568. A review of *Lisiecki*, however, demonstrates that the factors in Chapter 43 actions that preclude the Board from assessing a penalty are not found in actions taken under Section 714.

In distinguishing the limitations on the Board’s authority to consider the reasonableness of a penalty in actions taken under Chapter 43, *Lisiecki* highlights several factors unique to Chapter 43 actions. First, the Court notes that Chapter 43 contains numerous limitations on an agency’s discretion, including limiting it to “only two penalties, demotion or removal.” *Lisiecki* at 1564. These limitations, the Court found, “mark the boundaries of board review.” *Id.* Next, unlike other actions,

the Court noted that actions under Chapter 43 can only be taken after an employee has been “given an opportunity to improve.” *Lisiecki* at 1566. Chapter 43 actions, moreover, are “remedial,” as opposed to punitive, like those taken for misconduct. *Id.* Finally, the Court noted that Congress explicitly excluded Chapter 43 actions from the procedures required under Chapter 75. *Lisiecki* at 1567; 5 USC § 7512(D).

The factors that limit the Board’s authority to assess a penalty in Chapter 43 cases are not present in Section 714. Unlike an agency acting under Chapter 43, in taking a Section 714 action the Respondent maintains the discretion to impose a wide range of penalties. Namely, there is no limit or restriction on the length of suspensions that may be imposed under Section 714, in addition to removal or demotion. Chapter 43 also contains several additional “procedural and substantive safeguards,” such as the requirement that employees be provided “an opportunity to improve,” that Section 714 does not. *Lisiecki* at 1565. Most important, nothing in Section 714 or Chapter 75, exclude Section 714 from Chapter 75 in its entirety. Indeed, Section 714 is explicit in exempting actions from that the procedures in Chapter 43; yet contains no such exemption from the procedures in Chapter 75. 38 U.S.C. § 714(c)(3). The only limitations on the Board’s authority is the application of a lower standard of proof and the prohibition on mitigation. Thus, Congress has

not removed the Board's ability to assess the reasonableness of a penalty imposed under Section 714.

Board procedures and precedent require an administrative judge to assess the reasonableness of a penalty in reviewing agency disciplinary actions. As with actions taken under Section 713, the Board's lack of mitigation authority in Section 714, does not remove its authority to assess the reasonableness of a penalty. The AJ's decision failed to contain any assessment of the penalty imposed on the Petitioner based on her erroneous belief that that she was prohibited from assessing the reasonableness of the penalty. Therefore, the AJ's decision should be reversed.

II. Meaningful Review Of Section 714 Actions Require the Board to Determine Whether the Reasonableness of the Penalty is Supported by Substantial Evidence.

When reviewing the merits of a disciplinary action taken under Section 714, the Board should assess the reasonableness of the penalty imposed because the selection of a penalty is part and parcel of the decision that must be supported by substantial evidence. The AJ's initial decision below was made in error and should be reversed because the AJ failed to review the reasonableness of the penalty imposed on the Petitioner, and therefore could not have determined that the decision to remove the Petitioner was based on substantial evidence.

The AJ erroneously interpreted Section 714's prohibition on mitigation as depriving the Board of jurisdiction to conduct any form of penalty assessment. Appx41. Contrary to the administrative judge's reasoning, however, Section 714 does not limit the Board's authority to assess the reasonableness of a penalty when determining whether the Secretary's "decision is supported by substantial evidence." 38 U.S.C. § 714(a)(1). Indeed, because the Secretary's selection of a penalty is an essential part of that decision, meaningful review of a Section 714 action requires the Board to determine whether the reasonableness of the penalty is supported by substantial evidence.

An administrative action consists of both a determination on the merits underlying the action, as well as a determination of the sanction to be imposed as part of that action. See *Goodman v. United States*, 518 F.2d 505, 510 (5th Cir. 1975); *Stedman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (the "Commission specifically ought to consider and discuss ... the factors that have been deemed relevant to the [penalty]..."). In the context of a disciplinary action taken pursuant to civil service statutes, courts have held that the penalty chosen should be assessed in reviewing the decision to take the action. *Young v. Hampton*, 568 F.2d 1253, 1264 (7th Cir. 1977). The court in *Young* highlighted the necessity of assessing the penalty selected as part of a review of a disciplinary action by noting how it would be unreasonable to sustain an agency's removal of an employee for merely spilling

a cup of coffee. *Id.* at 1264 n.12. Similarly, this Court, has indicated that it will review the reasonableness of a penalty imposed in a disciplinary action taken against a federal employee, and reverse that penalty if it “is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.” *Zingg v. Dep't of the Treasury*, 388 F.3d 839, 843 (Fed.Cir.2004) (quoting *Brook v. Corrado*, 999 F.2d 523, 528 (Fed.Cir.1993)).

The Board has adopted this view that a disciplinary action is a unitary “decision” that not only includes the decision to take some form of action, but also “necessarily includes selection of the particular penalty.” *Douglas at 297* (1981). As a result, under the Board’s procedures, an agency must prove “not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it.” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 5, (2001) (citing *Douglas at 297*). In other words, the Board’s review of an agency’s decision to take disciplinary action consists of a simultaneous determination of whether any action was warranted, as well as whether the penalty imposed was reasonable. The Board’s authority to mitigate a penalty is distinct from its obligation to review the reasonableness of a penalty imposed as part of a disciplinary action.

While Section 714 may reduce the scope of the Board’s authority to review covered actions, by prohibiting mitigation, Section 714 does not preclude the Board from assessing the reasonableness of a penalty. The Board’s assessment of a

penalty is distinct from its authority to mitigate. In fact, since the determination of a penalty is inextricably linked to the merits of a disciplinary action, the Board must still assess the reasonableness of a penalty as part of its review of whether a disciplinary action taken under Section 714 is supported by substantial evidence. If a penalty is unwarranted, the disciplinary action will not be supported by substantial evidence and must be remanded. In her decision, the AJ explicitly declined to conduct any assessment of the penalty imposed on the Petitioner. The AJ's decision should therefore be reversed.

CONCLUSION

Based on all of the above, and for these reasons, this Court should find that the Board has the authority to assess the reasonableness of a penalty in an appeal of an action taken under Section 714. Consequently, the AJ's decision should be reversed because it failed to assess the reasonableness of the penalty imposed on the Petitioner.

Respectfully submitted,

/s/ Rushab B. Sanghvi
RUSHAB B. SANGHVI
Legal Rights Attorney
AFGE, 80 F Street, NW, 10th Floor
Washington, D.C. 20001
Counsel of Record

**ORAL ARGUMENT NOT SCHEDULED
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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| Jeffery F.Sayers, |) | |
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| Petitioner, |) | |
| v. |) | Case No. 2018-2195 |
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| Department of Veterans Affairs, |) | |
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| Respondent. |) | |
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CERTIFICATE OF SERVICE

I, Rushab Sanghvi, hereby certify and affirm that on this day, November 20, 2018, I caused copies of the Brief of Amicus Curiae American Federation of Government Employees, AFL-CIO to be filed, in PDF format, with the Clerk of the Court via the Court’s electronic filing system (NextGen CM/ECF) and to be served on counsel for respondent and petitioner as follows via CM/ECF:

Hillary A. Stern
Senior Trial Attorney
U.S. Department of Justice
Commercial Litigation Branch,
Civil Division
PO Box 480
Ben Franklin Station
Washington, DC 20044
Hillary.Stern@usdoj.gov

Natalie K. Khawam
Whistleblower Law Firm, P.A.
400 N. Tampa St., Suite 1015
Tampa, FL 33602-4700
Office: (813) 944-7853
nataliek@813whistle.com
Attorney for Petitioner

/s/ Rushab B. Sanghvi
Rushab B. Sanghvi
Counsel for Amicus Curiae AFGE

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/s/ Rushab Sanghvi
Rushab B. Sanghvi
Counsel for Amicus Curiae
AFGE

11/20/2018
Date