

100 FMSR 5352

**Allen Davis v. Department of Justice
U.S. Merit Systems Protection Board**

DA-0752-99-0008-I-1(07/05/00)

July 5, 2000

Judge / Administrative Officer

**Before: Slavet, Acting Chairman; Marshall,
Member**

Related Index Numbers

37.003 Discipline, Determination of Penalty

**37.0034 Discipline, Determination of Penalty,
Mitigating Circumstances**

37.0101 Discipline, Types of Discipline, Removal

112.051 Termination of Employment, Falsification

**1022.085 Special Employment Categories,
Supervisors and Managers**

Case Summary

Because the two Board members could not agree on the disposition of the petitions for review, the initial decision became the Board's final decision. The Acting Chairman would have reversed that portion of the initial decision mitigating the penalty. The Member would have affirmed the AJ's mitigation of the removal to a demotion out of supervision.

Because the two Board members could not agree on the disposition of the petitions for review, the initial decision became the Board's final decision. Both Board members issued separate opinions. Acting Chairman Slavet would have reversed that portion of the initial decision mitigating the penalty. She would have found that for the admitted misconduct involving sexual relations with a subordinate employee on agency property and for making false statements concerning that misconduct, the agency's choice of removal was the maximum reasonable penalty. Member Marshall would have affirmed the AJ's mitigation of the removal to a demotion out of supervision.

Full Text

APPEARANCES

John-Michael Lawrence, Esquire, New Orleans, Louisiana, for the appellant.

Amy J. Brown, Esquire, Alexandria, Virginia, for the agency.

Final Order

The agency has filed a petition for review asking us to reconsider the August 30, 1999 initial decision issued by the administrative judge, as amended by the Erratum Order dated September 24, 1999. The appellant has filed a cross petition for review as well. The two Board members cannot agree on the disposition of the petitions for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

We ORDER the agency to cancel the appellant's removal and to substitute in its place a reduction in grade below the GS-13 level to the highest-graded, nonsupervisory, permanent full-time position in the New Orleans, Louisiana, commuting area for which he is qualified and in which his normal duties do not require him to testify. This action is to be effective September 18, 1998. *See Kerr v. National Endowment for the Arts* [84 FMSR 7001] 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).

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. § 1201.202. 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 Dallas Field Office.

Notice to the Appellant Regarding Your Further Review Rights

You have the right to request further review of this final decision. **Discrimination Claims:**

Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 20000(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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* [91 FMSR 7013] 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 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

**Separate Opinion of Acting Chairman Beth S.
Slavet**

in

Allen Davis v. Department of Justice

MSPB Docket No. DA-0752-99-0008-I-1

¶1 The two charges below, correctly sustained by the administrative judge, alleged misconduct unbecoming a Drug Enforcement Agency (DEA) employee and making false statements to the DEA's Office of Professional Responsibility Inspectors. Among other arguments in its petition for review, the agency contends that the administrative judge erroneously mitigated the removal penalty to a demotion from GS-13 Criminal Investigator (Special Agent) to the next highest graded, non-supervisory permanent position in the local commuting area, for which he is qualified and for which his duties would not require him to testify.

¶2 On this record, I cannot find that the agency's

choice of penalty was unreasonable under the circumstances. I would find that, for the admitted misconduct involving sexual relations with a subordinate employee on agency property and for making false statements concerning that misconduct, the agency's choice of removal is the maximum reasonable penalty. See *White v. U.S. Postal Service* [94 FMSR 5287] (removal was not beyond the maximum reasonable penalty for sustained charges of engaging in sex with a subordinate employee on agency premises while on duty and making false statements by denying the misconduct); *Dolezal v. Department of the Army* [93 FMSR 5193] *aff'd* 22 F.3d 1104 (Fed. Cir. Mar 16, 1994) (Table) (sexual relations with a subordinate and use of agency property to communicate with that subordinate concerning the relationship sufficient to support removal). I would therefore reverse that portion of the initial decision mitigating the penalty, and affirm the removal.

**Separate Opinion of Susanne T. Marshall,
Member**

in

Allen Davis v. Department of Justice

MSPB Docket No. DA-0752-99-0008-I-1

¶1 I would have affirmed the administrative judge's mitigation of the removal to a demotion out of supervision. Although I agree that Mr. Davis initially provided false testimony during an investigation into his sexual conduct, during that same interview he corrected his earlier statement and truthfully admitted to engaging in consensual sexual relations with a subordinate. The administrative judge found that Mr. Davis misunderstood some of the investigator's questions, and fully cooperated with the agency's investigation. I would conclude that little harm came from his initial false statement, and that truthfulness within the same interview reduces the significance of the misconduct.

¶2 After considering all the circumstances of this case, I would agree with the administrative judge that removal is unreasonable for this act of misconduct.

Mr. Davis has expressed deep regret for his actions, and the administrative judge concluded that he is sincere in his remorse. In addition, Mr. Davis has had over 10 years of exceptional service with the agency with no history of prior misconduct. He received "Outstanding" performance ratings both before and after the incidents here. In consideration of these factors, I would agree that a demotion out of supervision is the maximum reasonable penalty.

¶3 My conclusion as to this matter is not swayed by the case law authority relied upon in the separate opinion of the Acting Board Chairman. In *White v. U.S. Postal Service* [94 FMSR 5287] the underlying merits of the agency's charge of engaging in sexual relations with a subordinate were not being litigated by the Board. Rather, the *White* decision was the appeal of a denial of an attorney fee motion filed in a case in which the agency mitigated its original removal to a demotion out of supervision. The Board's conclusion in *White* was simply that the agency "could reasonably have expected to prevail in its selection of the [removal] penalty," a conclusion involving speculation necessary to our adjudicating an attorney fee motion. We cannot say with certainty just what the Board would have done with the penalty in *White* because that issue was never fully adjudicated, and because appellant *White* lacked remorse and refused to acknowledge his misconduct. These last two factors were specifically found not to be aggravating factors in Mr. Davis' situation.

¶4 In *Dolezal v. Department of the Army* [93 FMSR 5193] the Board affirmed the removal of appellant *Dolezal* based on charges that involved a year-long "adulterous relationship with a subordinate female employee." However, there were other very significant charges sustained against that appellant, including using the agency's email system in the course of the relationship to disparage the subordinate employee's supervisor with offensive and demeaning comments. Factors relied on by the Board to find the penalty of removal warranted in that case included the appellant's SES status, his position as one of a handful of the highest-ranking personnel officer policy makers

in the entire agency, and his steadfast refusal to admit that his actions were wrong. None of these aggravating factors are involved in the present appeal.

¶5 Mr. Davis's conduct is not to be condoned, but also it does not warrant termination. I would find the administrative judge's well-reasoned determination regarding mitigation of the penalty to be correct.