UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

ERIC D. BALL,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
AT-0752-07-0962-I-1

DATE: December 20, 2007

Eric D. Ball, Viera, Florida, pro se.

Steven J. Lewengrub, Esquire, Atlanta, Georgia, for the agency.

BEFORE
Lynn P. Yovino
Administrative Judge

INITIAL DECISION

INTRODUCTION

On August 30, 2007, the appellant filed an appeal of the agency's action suspending him indefinitely from the position of Federal Air Marshal (FAM), Transportation Security Administration (TSA), effective August 12, 2007. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal under the agency's modification to its personnel system in Management Directive No. 1100.75-3, Addressing Performance and Conduct Problems. Agency Response (AR), Tab 4L; 49 U.S.C. § 40122(g)(2). Because the appellant did not request a hearing, the appeal was decided based on the parties' written submissions. For the reasons below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

On January 12, 2003, the appellant was appointed by TSA as a FAM in the Orlando Regional Office of the Federal Air Marshal Service. On June 26, 2007, while on government travel on a layover in Washington, D.C. between missions, he was arrested by United States Park Police Officers who, through the monitoring of the downtown surveillance cameras, observed the appellant photographing what they believed to be the genital areas of female visitors on the steps of the Lincoln Memorial. AR, Tabs 4J and 4K. According to the statement of one of the Park Police Officers who was on the scene, a possible victim was questioned, consent to search the appellant's camera was obtained, and the photo of a woman's genital areas was found by the officer on the appellant's camera. AR, Tabs 4J and 4K. The woman subsequently told the police she did not consent to having her picture taken. AR, Tabs 4J and 4K. The Park Police arrested him and charged him with the crime of Video Voyeurism. AR, Tabs 4J and 4K.

On July 10, 2007, the Assistant Attorney General for the District of Columbia, filed a criminal information against the appellant, charging him with the crime of "Voyeurism--Recording." AR, Tab 4J. Six days later, on July 16, 2007, the Assistant Special Agent in Charge (ASAC) proposed the appellant's indefinite suspension. AR, Tab 4I. On August 9, 2007, the Special Agent in Charge (SAC) William Reese issued the decision to suspend the appellant effective August 12, 2007. AR, Tab 4C. This appeal followed.

In 1996, Congress gave the Federal Aviation Administration (FAA) the authority to create its own personnel management system without regard to the provisions of title 5. In the statute creating TSA in 2001, Congress required TSA to apply the FAA personnel system to its non-screener employees, but gave the Under Secretary of the Department of Transportation the authority to modify the FAA system for TSA. Under the FAA personnel system, the provisions of title 5

do not apply except in specifically enumerated instances, and Chapter 75 is not one of them. 49 U.S.C. § 40122(g)(2).

Thus, this appeal is not governed by the provisions of chapter 75 of title 5 of the U.S. Code, but rather by the provisions of the TSA's personnel management system concerning the indefinite suspension of an employee. As permitted by Congress, TSA modified the FAA system with regard to indefinite suspensions. TSA Management Directive No. 1100.75-3 (Agency Response (AR), Tab 4L at 11) authorizes indefinite suspensions only when an employee has been: (1) indicted (or there is an equivalent process) for a crime for which a term of imprisonment may be imposed; (2) arrested pursuant to a warrant for a crime for which a term of imprisonment may be imposed; or, (3) when TSA is conducting an investigation of conduct that it reasonably believes was committed by the employee and is so serious that if true the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace.[1] AR, Tab 4l at 11.

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[1] As explained *infra,* I find the agency satisfied subparagraphs (1) and (3) of Management Directive No. 1100.75-3. For that reason, I need not resolve the agency's argument that it need not show that its investigation into the allegations against the appellant meets the reasonable cause standard in TSA Management Directive No. 1100.75-3. Specifically, the agency argues that an April 20, 2004 TSA Memorandum entitled "Use of Indefinite Suspensions" "clarified" that Directive and allows an indefinite suspension when TSA has obtained "apparently reliable information that, if true, the employee's continued presence at work would threaten ... effective operations." AR, Tabs 4L and 4M. However, I note that TSA Management Directive No. 1100.75-3 became effective September 17, 2004, and states that it "rescinds MD 1100.75-1," which was issued March 4, 2004. The April 20, 2004 Memorandum was issued before MD 1100.75-3 went into effect, and explicitly cites the section addressing indefinite suspensions in MD 1100.75-1 as the section it purported to "clarify." Accordingly, the April 20, 2004 Memorandum cannot be said to "clarify" the provision in MD 1100.75-3 that was in effect when the appellant was indefinitely suspended. Moreover, the agency offered no evidence that Richard A. Whitford, Assistant Administrator for Human Resources, was authorized to substantively amend the Management Directive at issue.

1. *Reasonable cause to believe*

To sustain an indefinite suspension action, the agency must meet its burden of proving, by preponderant evidence, that: (1) it had reasonable cause to believe the appellant committed a crime for which a sentence of imprisonment may be imposed; (2) the suspension had an ascertainable end; (3) there was a nexus between the criminal conduct and the efficiency of the service; and, (4) the penalty was reasonable under the *Douglas* factors.

It is undisputed that there is no indictment or arrest pursuant to a warrant in this case. However, the Attorney General for the District of Columbia issued a criminal information in the appellant's case in the Superior Court of the District of Columbia on July 10, 2007. AR, Tab 4J, p.2. A "criminal information" differs from an indictment only in that it is brought by a prosecutor instead of by a grand jury. *See Thompkins v. U.S. Postal Service*, 23 M.S.P.R. 5 (1984).

In the proposal and decision letters, the proposing and deciding officials specifically referred to the fact that they considered that criminal charges were pending and that the TSA Office of Internal Affairs was conducting an independent investigation into the matter. AR, Tabs 4C and 4I. The criminal information, by itself, was part of the pending criminal charges and it provides the required reasonable cause to impose an indefinite suspension under TSA Management Directive No. 1100.75-3, Subsection (1). AR, Tab 4L at 11.

In addition, the deciding official stated that the proposal was based on information contained in the incident reports prepared by the Park Police, and on statements by the law enforcement officer who observed the incident. AR, Tab 4C. The incident reports prepared by the Park Police contain a statement of the observations by police officers, describing that one police officer observed the appellant under surveillance for one hour and that that officer communicated his observations to another police officer, who approached the appellant with a third officer. The two officers on the scene talked to a potential victim and observed her image on the appellant's camera. One of those two officers prepared a

statement, which reflects his observations and actions in regard to the appellant, his camera, and the victim. In my view, the agency had before it additional factual material culled from the police officer's statement, and the agency's review of this evidence was sufficient, even absent the criminal information, to show there was more than enough evidence of possible misconduct to meet the threshold reasonable cause requirement. *Dunnington v. Department of Justice*, 956 F.2d 1151, 1157 (Fed. Cir. 1992).

Therefore, I find the agency also met the reasonable cause standard under subsection (3) based on the proposing and deciding officials' consideration of the evidence on which the criminal charge against the appellant was based. For, I find that TSA conducted an investigation of conduct that it reasonably believes the appellant committed and that conduct was so serious that if true the employee's continued presence at the worksite would represent a threat to the effective operation of the workplace.[2] AR, Tab 4L at 11.

In regard to the charge, the appellant argues that the criminal charge in the proposal and decision letters was different than that set forth in the criminal information and that the agency's specification incorrectly described the type of camera identified in the record. While the proposal and decision letters refer to the appellant being charged with "Voyeurism" and "Video Voyeurism,"[3] respectively, and refer to the appellant as having used a personal cell phone camera, the appellant acknowledged during the prehearing conference, that he was arrested for taking pictures with a camera. Thus, the appellant was aware of the charged misconduct for which he was arrested and for which he was being indefinitely suspended--for voyeurism charges and for use of some type of

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[2] *See* nexus discussion, *infra,* on the issue of the relationship between the efficiency of the service and the charged criminal conduct.

[3] The criminal information identified the charge as "Voyeurism--Recording." AR, Tab 4J.

camera; any minor discrepancies in the type of the camera used by the appellant and the exact wording of the criminal charge is not material. *Cf. Cheney v. Department of Justice,* 479 F.3d 1343 (Fed. Cir. 2007) (In case involving indefinite suspension involving a security clearance, the statutory due process requirements of section 7513 are met if the notice provides the employee with an adequate opportunity to make a meaningful reply to the agency before being suspended.).

2. *Ascertainable end*

The decision letter states that the suspension will remain in effect pending resolution of the criminal charges against the appellant and the related internal investigation, or the agency's investigation shows there is sufficient evidence either to return him to duty or to support an administrative action against him. AR, Tab 4C. The decision letter further states that if it is determined that a removal action is warranted in his case, the suspension will continue through the notice period of the proposed removal. AR, Tab 4C. Therefore, I find that the decision letter provides for an ascertainable end to the suspension.

3. *Nexus*

The agency must also show that its action was taken for the efficiency of the service and that its penalty was appropriate in accordance with the *Douglas* factors.[4] AR, Tab 4l at 3, 5-6, and 11. As a Federal Air Marshal, the appellant, as a law enforcement officer, is required to have extensive contact with the public and provide for the safety of airline passengers, enforce laws, make arrests, conduct searches, interviews, and surveillance of potential witnesses and

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[4] TSA's procedures specifically state in two places that *Douglas* applies in adverse actions, including indefinite suspensions. AR, Tab 4L, at 5-6 and 11. In addition, in its final submission, the agency concedes that *Douglas* applies.

suspects. His charged criminal conduct is antithetical to the agency's mission and it raises legitimate concerns as to his ability to perform his duties in an unsupervised setting.

4. *Reasonableness of the penalty*

In the decision letter, SAC Reese stated that he considered the nature and seriousness of the criminal charge against the appellant, its relevance to his duties and his position, the fact he was on government travel at the time, his job level, and his contacts with the public. AR, Tab 4C. He also considered mitigating factors, such as his service as a FAM and his years of service, but he found that imposing an indefinite suspension was proper under the circumstances of this case.

The appellant argues that the agency's application of an indefinite suspension in this case was not consistent with the way in which it treated other FAMs it had reason to believe committed a crime for which a sentence of imprisonment may have been imposed. Those FAMs are: [redacted].

To prove a disparate treatment claim with regard to the penalty for an act of misconduct, an appellant must show that a similarly-situated employee received a different penalty. *Wentz v. U.S. Postal Service*, 91 M.S.P.R. 176, ¶ 22 (2002). The comparator employee must be in the same work unit, have the same supervisors, and the misconduct must be substantially similar. *Id.* If the appellant meets that burden, the agency must show that there was a legitimate reason for the difference in treatment. In his pleading entitled "petition for review," the appellant identified other individuals he believes were similarly situated who were treated less harshly.

SAC Reese testified that, to his knowledge, since the FAM Service has been part of TSA beginning in October 2005, no FAM at the Orlando Field Office

was arrested and charged with a crime based on alleged video voyeurism or otherwise. Exhibit 7, para. 4. He also testified that, while the FAMs were part of Immigration and Customs Enforcement (ICE), it was not their policy or practice to place employees on indefinite suspensions, and he did not become aware that TSA allowed the use of indefinite suspensions until approximately March 2006. Exhibit 7, para. 5.

The situations involving [redacted] and [redacted] occurred while the FAMs were part of ICE, which was a separate agency with different policies. As such, they are not valid comparators. In addition, regarding [redacted], he was arrested and charged with felony assault related to a fight in a Laundromat, but the evidence suggested he had acted in self-defense. Exhibit 7, para. 5. None of the other FAMs were arrested or subject to criminal prosecution. FAMs [redacted], [redacted] and [redacted] involved issues of personal relations between a FAM and a significant other. Exhibit 7, paras. 8 and 9. They did not involve conduct of a sexual nature, conduct against a member of the public, or conduct on-duty or on government travel; they all involved alleged domestic violence that was decided quickly by the courts. Exhibit 7, para. 9.

Regarding FAMs [redacted] and [redacted], they were accused of falsification of travel vouchers, involving allegations of carpooling and submitting individual travel vouchers for the travel. None of these FAMs were observed by law enforcement agencies in alleged criminal activity, none were arrested and charged with a crime, and SAC Reese believe resolution of the cases would be lengthy. Exhibit 7, para. 10.

None of the above-named FAMs, while employed by TSA (as opposed to ICE), engaged in substantially similar criminal activity for which the appellant is alleged to have committed and is presently being examined by the criminal justice system. For the reasons above, I find that the appellant has not identified a valid comparative employee who engaged in substantially similar conduct and was treated less harshly by TSA than he was.

5. *Affirmative defense*

The appellant is raising an affirmative defense of retaliation for exercising his right to file a complaint in court. To establish a prima facie case of retaliation for exercising an appeal right under 5 U.S.C. § 2302(b)(9), the appellant must show that: (a) he engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. *See Cloonan v. United States Postal Service*, 65 M.S.P.R. 1, 4 (1994). There is no evidence that the proposing or deciding officials knew the appellant was one of the participants in the class-action lawsuit filed by FAMs under the Fair Labor Standards Act, and there is no evidence of a genuine nexus between the lawsuit and the appellant's indefinite suspension.

6. *Conclusion*

For the reasons above, I find that the agency properly imposed an indefinite suspension, which is an action based on the existence of reasonable cause to believe a crime has been committed, not based on provable criminal conduct. The action has an ascertainable end, there is a nexus between the criminal conduct and the efficiency of the service, and the penalty is reasonable under the circumstances.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

Lynn P. Yovino
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 24, 2008**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the

Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.