NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL E. SHEIMAN,
Petitioner

v.

DEPARTMENT OF THE TREASURY,
Respondent

2022-2045

Petition for review of the Merit Systems Protection Board in No. SF-0752-15-0372-I-2.

Decided: April 3, 2024

GEORGE CHUZI, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, argued for petitioner. Also represented by AARON H. SZOT.

STEPHANIE FLEMING, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON, PATRICIA M. MCCARTHY.

Before PROST, SCHALL, and REYNA, *Circuit Judges*.

SCHALL, *Circuit Judge*.

DECISION

Michael E. Sheiman petitions for review of the May 24, 2022 Final Order of the Merit Systems Protection Board ("Board") that sustained the action of the Internal Revenue Service ("IRS" or "agency") that removed Mr. Sheiman from his position as a GS-13 Senior Appraiser in Honolulu, Hawaii. *Sheiman v. Dep't of the Treasury*, No. SF-0752-15-0372-I-2, 2022 WL 1667885 (M.S.P.B. May 24, 2022); J.A. 1–23.[1] We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9). For the reasons stated below, we *affirm*.

DISCUSSION

I

The events resulting in Mr. Sheiman's removal began when the agency received an anonymous letter dated September 16, 2011. The writer alleged that Mr. Sheiman was abusing his work time by, among other things, "golfing in the early afternoons during the work week." J.A. 2 (citation omitted). From September 26, 2011, to February 18, 2014, the Treasury Inspector General for Tax Administration ("TIGTA") conducted an investigation regarding the allegations in the letter. *Id.*

Based upon the TIGTA investigation, the agency issued an October 24, 2014 notice proposing to remove Mr. Sheiman from his position. The notice was based on two charges. The first charge was providing false information regarding official time and attendance records. The second charge was providing misleading information regarding official time and attendance records. Charge 1

[1] We refer to the Board's Final Order as its "final decision."

contained 168 specifications, each specifying a date when the agency alleged Mr. Sheiman played golf during his duty hours, during the time period August 4, 2006, through August 9, 2013. J.A. 26. Charge 2 contained 29 specifications, each specifying a date during the time period May 23, 2007, through July 18, 2013. On these dates, the agency charged, Mr. Sheiman played golf when he had requested, and had taken, sick leave. *Id.*

On February 3, 2015, Stephen C. Whiteaker, the agency's deciding official for the proposed removal, issued a notice sustaining all of the specifications in both Charge 1 and Charge 2. In addition, Mr. Whiteaker found that removal was the appropriate penalty for each of the charges. J.A. 133–34. Mr. Sheiman was removed from the agency effective February 6, 2015. Thereafter, he timely appealed to the Board.

II

The administrative judge ("AJ") to whom Mr. Sheiman's appeal was assigned conducted a hearing on October 1–2, 2015. Subsequently, on August 1, 2016, the AJ issued an initial decision. *Sheiman v. Dep't of the Treasury*, No. SF-0752-15-0372-I-2, 2016 WL 4161767 (M.S.P.B. Aug. 1, 2016); J.A. 24–55. In her initial decision, the AJ ruled (1) that Charge 1 was not sustained; (2) that eight of the 29 specifications of providing misleading information in Charge 2 were sustained; and (3) that Mr. Sheiman's removal should be mitigated to a 30-day suspension. J.A. 36–37, 40–42, 48.

Regarding Charge 1, the AJ stated:

> Based on the totality of the circumstances, considering the appellant's plausible explanation of his misunderstanding [regarding time and attendance reporting], the other record evidence corroborating his understanding, and the lack of circumstantial evidence from which an intent to defraud could be

> inferred, I find the agency did not show he intended to defraud or deceive the government when he completed his time and attendance records.

Id. at 36.

Considering Charge 2, the AJ found, with respect to each of the eight specifications she sustained, that Mr. Sheiman took sick leave on days when he was not seeking medical treatment and was not medically incapacitated. She also found that, in doing so, he "knowingly provided inaccurate information on his time and attendance records." *Id.* at 42. The AJ stated that Mr. Sheiman "knew or should have known that paid sick leave was for illness or medical treatment, not for engaging in a recreational activity or sport such as golfing" and that, "as a federal employee, he knew or should have known that he needed to take annual leave for recreational activities or a sport such as playing golf." *Id.* at 41–42.

As noted, though, the AJ mitigated the agency's penalty of removal to a 30-day suspension. She did so because she determined that the penalty of removal was not within the parameters of reasonableness. *Id.* at 46. The AJ began by stating that she agreed with Mr. Whiteaker that Mr. Sheiman had committed a serious offense when he took sick leave and played golf, especially given the nature of his position, which involved a great deal of trust due to the lack of on-site supervision. *Id.* at 47. "However," she continued, "there are strong mitigating factors here, including the appellant's potential for rehabilitation." *Id.* In addition, the AJ noted that Mr. Sheiman "was remorseful and acknowledged that he made mistakes in his time and attendance practices." *Id.* The AJ also noted that, immediately following his interview with the TIGTA investigator in February 2014, Mr. Sheiman contacted his supervisor for instructions regarding how to accrue, use, and properly record his hours and that he complied with all time and attendance requirements from that time until his

removal. Further, the AJ observed that most of the instances of Mr. Sheiman requesting sick leave to golf occurred about four years before his removal. *Id.* And finally, the AJ noted that Mr. Sheiman had faced no other disciplinary actions during his nine years of federal service. *Id.* Taking these several factors into account, the AJ concluded:

> I find that the penalty of removal exceeds the tolerable limits of reasonableness. Based on the mitigating factors[,] including [the appellant's] potential for rehabilitation, 9 years of service with the agency, record of good performance, and lack of prior discipline, I find that the agency's penalty is outside the bounds of reasonableness. I find that a 30-day suspension without pay is the maximum reasonable penalty under the circumstances of this case.

Id. at 48 (footnote omitted).

III

The agency and Mr. Sheiman, respectively, petitioned and cross-petitioned for review. In its petition, the agency advanced two grounds. First, it contended that, contrary to the AJ's finding, it proved Charge 1. J.A. 5. Second, it argued that, after she sustained eight specifications of Charge 2, the AJ erred in mitigating Mr. Sheiman's removal to a 30-day suspension. *Id.* at 6. Relevant here, in his cross-petition for review, Mr. Sheiman argued that the AJ erred in sustaining Charge 2. *Id.* He also argued that the AJ erred in finding that he knew his use of sick leave to play golf was improper and that he knowingly provided

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