

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2014 MSPB 34

Docket No. AT-0752-13-0165-I-1

**Patrick Phillip Arena, Jr.,
Appellant,**

v.

**United States Postal Service,
Agency.**

May 15, 2014

Matthew R. Kachergus, Esquire, Jacksonville, Florida, for the appellant.

Eric B. Fryda, Esquire, Dallas, Texas, for the agency.

Margaret L. Baskette, Esquire, Tampa, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that mitigated the appellant's removal to a 120-day suspension. For the following reasons, we GRANT the agency's petition for review, AFFIRM the portion of the initial decision sustaining the charge, and MODIFY the initial decision to SUSTAIN the removal action.

BACKGROUND

¶2 The agency proposed and effected the removal of the appellant, a preference eligible Maintenance Mechanic, based on a single charge of “improper conduct.” Initial Appeal File (IAF), Tab 5 at 32-39. The charge was supported by three specifications: (1) smoking marijuana on various dates while on duty; (2) failing to stay gainfully employed;¹ and (3) failing to cooperate in a postal investigation. *Id.* at 37-38. The appellant filed an appeal of his removal and stipulated to the first two specifications. IAF, Tab 1, Tab 16 at 4. After a hearing, the administrative judge found that the agency proved each of the specifications and sustained the charge. IAF, Tab 17, Initial Decision (ID) at 2-5. She also found that the agency proved a nexus between the articulated grounds for the removal and the efficiency of the service because the conduct occurred on agency premises while the appellant was on duty. ID at 5-6.

¶3 The administrative judge found, however, that the agency failed to establish the reasonableness of the penalty. ID at 5-9. In particular, she found that the deciding official’s testimony concerning the safety issues presented by the appellant’s conduct was belied by the agency’s failure to immediately remove him from duty. ID at 7. She found that the appellant admitted to his wrongdoing, sought counseling for his personal problems, appeared to have good potential for rehabilitation, and would continue to provide valuable service to the agency if he were allowed to return to his position. ID at 8-9. In addition to these factors, the administrative judge considered the appellant’s unblemished disciplinary and work record of 18 years, his prior military service, and his diagnosis of depression in determining that the penalty of removal exceeded the bounds of reasonableness, and she mitigated the removal to a 120-day suspension. ID at 9.

¹ It appears that the agency defines “failure to stay gainfully employed” as not working during periods of time in which an employee should have been working. IAF, Tab 5 at 38.

¶4 The agency has filed a petition for review challenging the administrative judge's finding that the deciding official did not properly consider the relevant mitigating factors and arguing that the administrative judge improperly substituted her own judgment for that of the agency. Petition for Review (PFR) File, Tab 1 at 23-34. The agency also challenges the administrative judge's conclusion that its failure to remove the appellant immediately upon discovering his drug use belied its claim that it considered him a safety risk. *Id.* at 16-22. The appellant has filed a response to the petition for review, arguing that the administrative judge correctly concluded that the deciding official did not consider the mitigating factors and that the penalty of removal was unreasonable. PFR File, Tab 9 at 12-23. The agency has also filed a reply to the appellant's opposition to its petition for review and attaches an arbitration decision that upheld the removal of another employee who had smoked marijuana in the workplace with the appellant.² PFR File, Tab 12.

ANALYSIS

¶5 We affirm the administrative judge's findings that the agency proved the charge by a preponderance of the evidence. The appellant stipulated to the first two specifications, IAF, Tab 16 at 4, and he has not cross-petitioned for review of the administrative judge's finding that the agency proved the third specification of failing to cooperate in a postal investigation, PFR File, Tab 9. We discern no

² The appellant has filed a motion to strike this pleading, and the agency has responded. PFR File, Tabs 14, 15. The agency may file a reply to the appellant's opposition, and it properly requested and was granted an extension of time to file a reply. PFR File, Tabs 10, 11; *see* [5 C.F.R. § 1201.114\(a\)\(4\), \(f\)](#). We do not, however, rely upon the attached arbitration decision. First, such arbitration decisions are not binding on the Board. *Leazenby v. U.S. Postal Service*, [8 M.S.P.R. 384](#), 390 n.4 (1981). Second, the relevant information—that an individual caught smoking marijuana with the appellant was also removed—was already in the record below, *see* *infra* note 4, and the agency could have submitted below any additional information about the consistency of the penalty in support of its decision to remove the appellant.

error in the administrative judge's conclusions concerning this specification or her finding that the agency proved nexus between the misconduct and the efficiency of the service. Thus, the only question on review is whether the administrative judge properly mitigated the appellant's removal to a 120-day suspension.

¶6 When, as here, the agency's charge is sustained, the Board will modify an agency-imposed penalty only when it finds that the agency failed to weigh the relevant factors under *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), or the penalty imposed clearly exceeded the bounds of reasonableness. *Cole v. Department of the Air Force*, [120 M.S.P.R. 640](#), ¶ 14 (2014). It is not the Board's role to decide what penalty it would impose, but, rather, whether the penalty selected by the agency exceeded the maximum reasonable penalty. *Adam v. U.S. Postal Service*, [96 M.S.P.R. 492](#), ¶ 7 (2004), *aff'd*, 137 F. App'x 352 (Fed. Cir. 2005). In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. *Singletary v. Department of the Air Force*, [94 M.S.P.R. 553](#), ¶ 12 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004). For the following reasons, we conclude that the agency's selected penalty did not exceed the bounds of reasonableness, and we sustain the removal.

¶7 The record reflects that on or around October 31, 2011, an anonymous employee reported to the deciding official—a Maintenance Manager and the appellant's second-line supervisor—that the appellant and another employee were smoking marijuana while on duty and on the agency's premises. IAF, Tab 5 at 52. The deciding official referred the anonymous tip to the Office of Inspector General (OIG) for investigation. *Id.* The OIG initiated its investigation on or

around November 1, 2011. *Id.*; Hearing Transcript (HT)³ at 24 (testimony of the deciding official). The OIG investigation period was from January 13, 2012, through August 27, 2012. IAF, Tab 5 at 47. During that period of time, the appellant was caught four times on a surveillance camera in the act of smoking while on unauthorized breaks. *Id.* at 48-49. On August 27, 2012, the OIG conducted a search of the appellant's toolbox and interviewed him. *Id.* at 50. The OIG agents discovered a green leafy material and a pipe in the appellant's toolbox. *Id.* at 50. The material and a sample of the substance in the pipe were sent for chemical testing, which revealed the green leafy material and the contents of the pipe to be marijuana. *Id.* at 50, 78.

¶8 Also on August 27, 2012, the appellant's supervisors became aware that there was evidence of the appellant's drug use and ordered him to take an emergency fitness-for-duty test. *Id.* at 80; HT at 25 (testimony of the deciding official). The appellant tested positive for marijuana metabolites and was not allowed to return to duty after August 27, 2012. IAF, Tab 5 at 29; HT at 25-27 (testimony of the deciding official).

¶9 The September 14, 2012 OIG report of investigation concluded that the appellant used narcotics while on duty and took unauthorized breaks. IAF, Tab 5 at 46-48. The report included four dates, in January and May 2012, in which the appellant was caught on a surveillance camera in the act of smoking while on duty and on an unauthorized break. *Id.* at 48-49. The OIG report also included the September 10, 2012 chemical examination results. *Id.* at 50, 78. The appellant's managers conducted further fact-finding after receiving the OIG report, *id.* at 37, 40-43, 47, and the appellant's first-line supervisor proposed the appellant's removal on October 23, 2012, *id.* at 36.

³ On review, both the agency and the appellant attach the hearing transcript. PFR File, Tabs 1, 9.

¶10 The deciding official sustained the charge and decided that removal was the appropriate penalty. *Id.* at 32-34. In his decision letter, the deciding official referred to the appellant's personal circumstances as presented by the appellant in his reply, the appellant's efforts to seek counseling through the employee assistance program, and his length of service. *Id.* at 32-33. He stated that the appellant was a potential safety risk and posed a danger to himself and others given his work with machinery. *Id.* at 33. He also stated that the appellant's lack of honesty about his conduct demonstrated that he could not be rehabilitated. *Id.* During the hearing, the deciding official testified that he considered the information provided by the appellant in his reply to the notice of proposed removal, including his diagnosis of depression and other personal circumstances. HT at 18-19. He also considered the availability of other penalties short of removal and the appellant's length of service and lack of prior discipline. HT at 69-71, 85. The deciding official testified that he considered that the appellant was aware of the agency's policies concerning drug use, repeatedly used illegal drugs while on duty on agency premises, and was not honest in his representations concerning his conduct. HT at 18, 20-23. He testified that the seriousness of the multiple incidents of drug use and absences from the work area during unauthorized breaks, in addition to the appellant's repeated lack of honesty concerning his conduct, outweighed any mitigating factors.⁴ HT at 71, 79; *see* IAF, Tab 5 at 33 (decision letter). He also testified at length about the appellant's responsibility for maintenance and repair of heavy machinery and the potential danger posed by the appellant if he were impaired while on duty. HT at 12-17.

⁴ The OIG investigation caught two other employees using drugs, at times with the appellant. IAF, Tab 5 at 49. These other two employees were also removed. HT at 72-73 (testimony of the deciding official). One of them had prior discipline that factored into the decision to impose a removal penalty, *id.* at 72, 80, but the other did not, *id.* at 84-85.

¶11 We find that the deciding official properly considered the mitigating factors and reasonably exercised his management discretion to conclude that the penalty of removal was the maximum reasonable penalty under the circumstances. *See Cole*, [120 M.S.P.R. 640](#), ¶ 15. In particular, he considered the appellant's drug use while on duty to be serious because the appellant was responsible for the maintenance and repair of heavy machinery and his impairment could have resulted in serious bodily harm to himself or others, or in significant damage to property. HT at 12-17. He testified that the appellant's failure to remain gainfully employed was a serious offense in itself worthy of removal. HT at 59-60. He also considered the appellant's repeated infractions and his repeated lack of honesty concerning his drug use to outweigh any mitigating factors.⁵ HT at 71, 79. Thus, we find that the deciding official properly considered the *Douglas* factors in deciding the appropriate penalty.

¶12 Further, we find that the agency did not unreasonably delay in removing the appellant from the workplace. We further find that any such delay did not contradict the deciding official's testimony regarding the safety concerns and seriousness of the appellant's misconduct. *See ID* at 7. There is nothing to suggest that the deciding official or any of the appellant's managers were aware of the existence of any evidence corroborating the anonymous tip concerning the appellant's marijuana use until August 27, 2012. HT at 25; IAF, Tab 5 at 36-51. The deciding official testified that the appellant was not allowed to return to work after August 27, 2012. HT at 25-27. He also testified, and the record reflects, that the appellant's managers acted swiftly to proceed with administrative action once the OIG concluded its investigation and furnished its report. *Id.*; IAF, Tab 5

⁵ We find that the appellant's belated admission of wrongdoing in stipulations submitted the week before the hearing is not a significant mitigating factor. *ID* at 9 & n.4; IAF, Tab 16; *see* IAF, Tab 5 at 43 (repeatedly denying that he smoked marijuana but stating that he was sorry); HT at 77-78 (testimony of the deciding official).

at 32-46. Thus, we find that the agency's actions did not belie the deciding official's testimony⁶ concerning the seriousness of the appellant's conduct.⁷

¶13 We also find that the agency's selection of the removal penalty was a proper exercise of managerial judgment and did not exceed the limits of reasonableness. The Board has frequently upheld removals for the use of illegal drugs at work, especially where the work performed under the influence of such substances could endanger the safety of others. *Thomas v. U.S. Postal Service*, [96 M.S.P.R. 179](#), ¶¶ 18-19 (2004) (the administrative judge erred in mitigating a

⁶ We find unpersuasive the appellant's attempt to argue that the administrative judge made a negative credibility determination concerning the deciding official. PFR File, Tab 9 at 12-14, 17. The administrative judge did not question his credibility in any manner. ID at 7. Instead, she found that his testimony did not support the agency's argument concerning the danger posed by the appellant's behavior because the agency knew as early as January 2012 that the appellant had engaged in marijuana use, but did not remove him from the workplace until August 2012. *Id.* As discussed above, the deciding official received an anonymous tip regarding the appellant's then-alleged drug use in January 2012, which he referred to the OIG. However, the OIG discovered the evidence on which this action is based during the course of its investigation, which did not conclude until August 27, 2012, and such information was not shared with the appellant's workplace managers for appropriate administrative action until that time. IAF, Tab 5 at 47-50; HT at 25, 51. Further, the record reflects that the appellant's managers took immediate action to remove him from the workplace once they learned of evidence of his drug use. HT at 25-26.

⁷ Although the agency bears the burden of proving its case by preponderant evidence, the appellant failed to submit any evidence, including testimony, to rebut the agency's evidence. *See Cole*, [120 M.S.P.R. 640](#), ¶ 9. Further, while the appellant informed the deciding official of his personal circumstances and depression, as evidenced by the testimony and decision letter, there is neither evidence to demonstrate the truth of these assertions, nor evidence about how they affected the appellant's behavior. IAF, Tab 5 at 32; HT at 18-19. Thus, we find that they do not weigh in favor of mitigation. *See, e.g., McCurn v. Department of Defense*, [119 M.S.P.R. 226](#), ¶¶ 29-30 (2013) (affirming an arbitrator's finding that personal circumstances did not excuse drug use); *Zazueta v. Department of Justice*, [94 M.S.P.R. 493](#), ¶ 10 (2003) (where the Board sustains a charge of involvement with a controlled substance on duty, stress or personal problems experienced by the appellant generally should not be considered as a mitigating or relevant factor in determining the reasonableness of an agency's penalty selection, absent a reasoned explanation of the relationship between the appellant's personal circumstances and the charged misconduct), *aff'd*, 104 F. App'x 166 (Fed. Cir. 2004).

removal to a 120-day suspension where the employee smoked marijuana on duty, was responsible for moving heavy equipment so that his impairment by drugs could cause injury to himself or others, and was in a position of trust); *see, e.g., Cole*, [120 M.S.P.R. 640](#), ¶¶ 8-9, 15-19 (sustaining removal for one charge of marijuana use because the appellant performed work that, if he were impaired, could result in substantial danger to life and property, notwithstanding other mitigating factors); *Savage v. Department of the Air Force*, [49 M.S.P.R. 77](#), 80-81 (1991) (removal of a Pneudraulic Systems Mechanic was appropriate where he had possessed, used, and transferred illegal drugs on and off government premises during work hours); *see also Huff v. Department of the Navy*, [21 M.S.P.R. 615](#), 616-17 (1984) (removal was the proper penalty for a Boilermaker Helper who possessed marijuana on agency premises, in part, due to safety considerations inherent in the agency's work), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table).⁸ Therefore, the agency's removal action is SUSTAINED.

⁸ We also find distinguishable the cases relied upon by the administrative judge to mitigate the removal. *See Laing v. Department of the Navy*, [60 M.S.P.R. 104](#), 105-06 (1993) (a decision concerning interim relief in which the Board affirmed, but did not analyze, the initial decision mitigating a removal for a first offense of use of illegal drugs); *Tierney v. Department of the Navy*, [44 M.S.P.R. 153](#), 158-59 & nn.3-4 (1990) (mitigating a removal for one incident of unauthorized possession of marijuana where there was strong evidence of rehabilitation potential); *Bolling v. Department of the Navy*, [43 M.S.P.R. 668](#), 670, 673 (1990) (mitigating a removal to a 90-day suspension for one charge of unauthorized possession of marijuana on agency premises where the agency allowed the appellant to proceed to work after it found the marijuana and where the appellant had a good potential for rehabilitation); *Tucker v. U.S. Postal Service*, [43 M.S.P.R. 515](#), 519 (1990) (mitigating a removal to a 60-day suspension for distributing drugs based on 21 mitigating factors, including the appellant's admission of wrongdoing, his expression of remorse, and his good prospects for rehabilitation); *Schaffer v. U.S. Postal Service*, [39 M.S.P.R. 153](#), 157-59 (1988) (mitigating a removal to a 120-day suspension because the appellant admitted to his wrongdoing, testified about his difficult circumstances, and showed deep remorse). In the instant case, the appellant only admitted to his on-duty drug use the week before the hearing.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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*, [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 Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. 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.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.