UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

76 M.S.P.R. 348

Docket Number NY-0752-94-0708-I-1

JAMES LARRY, II,[1], Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: August 20,1997

Rosemarie Rhodes, Esquire, Harper & Paul, Philadelphia, Pennsylvania, for the appellant.

Barry R. McCauley, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The appellant petitions for review of an initial decision that sustained the agency's removal action. For the reasons discussed below, we GRANT the appellant's petition, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still SUSTAINING the first charge, NOT SUSTAINING the second charge, and MITIGATING the penalty of removal to a 120-day suspension.

BACKGROUND

Effective August 9, 1994,[2] the agency removed the appellant from his GS-8 Correctional Officer position for (1) off-duty misconduct, (2) threatening a supervisor, and (3) refusing to cooperate in an investigation. Initial Appeal File (IAF), Tab 5, Subtabs 4b, 4c. On appeal to the Board, an administrative judge (AJ) held a hearing and then issued the initial decision affirming the removal action. The AJ did not sustain

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[1] The caption of the initial decision erroneously refers to the appellant's name as "JAMES LARRY, III." Initial Decision (ID) at 1, Initial Appeal File (IAF), Tab 23.

[2] The initial decision erroneously refers to the effective date as August 8, 1994. ID at 1. Neither party has raised this matter on petition for review, however, and it is not material to the disposition of this appeal.

the third charge, but sustained the remaining two charges. He then found that there was a nexus between the sustained charges and the efficiency of the service and that the penalty of removal was reasonable. Initial Decision (ID), IAF, Tab 23.

The appellant has timely filed a petition for review of the initial decision. He does not dispute the nexus issue but raises arguments regarding the AJ's conduct of the hearing below, and disputes the charges and the penalty. Petition for Review (PR), Petition for Review File (PRF), Tab 1. The agency has timely responded in opposition to the petition. PRF, Tab 3.

ANALYSIS

The appellant was not denied his right to legal representation during the hearing.

The appellant argues on petition for review that he was denied his right to legal representation during the hearing. In support of this argument, he contends as follows: His attorney below, Michael D. Miller, Esquire, initially advised him that the appeal would be decided based on the written record and that a hearing would not be held; Miller later told him that he would have to represent himself at any hearing and, in fact, did not appear at the hearing; and because the appellant was unaware that he could have requested a continuance to obtain another attorney, he had to proceed at the hearing on his own, although inadequately prepared. PR at 1-2.

The record shows that the appellant did not initially request a hearing, and did not respond to the AJ's specific notice regarding his right to request a hearing. IAF, Tabs 1, 2. The AJ nevertheless scheduled a hearing, IAF, Tab 9, and neither party objected. On December 15, 1994, Miller timely filed prehearing submissions, and informed the AJ that he would "not be appearing with [the appellant] at the time of his hearing" but that it was his understanding that "if given the chance, [the appellant] would like this matter to be heard." IAF, Tab 19. The appellant appeared alone at the December 22, 1994 hearing, and informed the AJ that he did not want legal representation at the hearing because he could not afford for his attorney to travel back and forth for the hearing. Hearing Tape (HT), Side 1. He stated that he wished to go forward with the hearing and that he wished to represent himself. *Id*.

Thus, contrary to the appellant's argument on review, the record shows that the appellant was not denied his right to legal representation at the hearing but, rather, that he voluntarily chose to forego the right in consultation with his attorney. To the extent the appellant may be arguing that Miller was negligent in some manner, the Board has long held that an appellant is responsible for the actions and inactions of his chosen representative. *See, e.g., Brackins v. Office of Personnel Management*, 66 M.S.P.R. 535, 542 (1995).

The appellant also argues on review that, in light of the fact that he received Employee Assistance Program (EAP) counseling, "strong consideration should have been given to whether he was competent to represent himself at the hearing." PR at 2-3. We disagree. The appellant was represented by an attorney below: although the attorney did not accompany him to the hearing, the attorney did not withdraw his representation. Neither the appellant nor his attorney below alleged that the appellant was mentally incompetent. *See Marbrey v. Department of Justice,* 45 M.S.P.R. 72, 75

(1990). The fact that he received some EAP counseling is insufficient, without more, to show that he was mentally incompetent, and there was no medical evidence of record addressing his mental competency. *See generally Merriweather v. Department of Transportation*, 64 M.S.P.R. 365, 372-73 (1994), *aff'd*, 56 F.3d 83 (Fed. Cir. 1995) (Table); *Brown v. Department of the Air Force*, 64 M.S.P.R. 93, 96 (1994), *aff'd*, 47 F.3d 1180 (Fed. Cir. 1995) (Table); *Dombeck v. Office of Personnel Management*, 43 M.S.P.R. 43, 46 (1989). We find, under these circumstances, that the AJ was not obligated to ascertain the appellant's competence.3 *See id.*

The charge of off-duty misconduct is sustained.

Regarding this charge, the agency specified as follows:

On March 3, 1994,[4] you [referring to the appellant] were involved in an incident with Military Police on Fort Dix Military Base. Specifically, you refused to cooperate with the Military Police by not answering their questions concerning a reported disturbance at your home. You were taken to the station house at which time you struck Military Police Captain Bielecki and Investigator Persson. You attempted to leave the station house using your eighteen month old son as a shield. When you were confined to a cell, you threatened to kill Military Police Storey and the other Military Police involved. You were charged by the Fort Dix Military Police and are scheduled to appear before the U.S. Magistrate Court in Trenton, New Jersey for Aggravated Assault Against a Police Officer, Endangering the Welfare of a Child, Terroristic Threats and Obstructing the Administration of Law. This violates Program Statement: 3420.06, Standards of Employee Conduct and Responsibility which you signed in receipt of on February 21, 1992.

IAF, Tab 5, Subtab 4e.

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[3] *Cf. Gulbenkian v. Department of the Navy*, 55 M.S.P.R. 237, 241 n.7 (1992) (the Board's obligation to ascertain an appellant's competency under *French v. Office of Personnel Management*, 810 F.2d 1118 (Fed. Cir. 1987), exists only in cases involving a potential right to an annuity), *aff'd*, 996 F.2d 318 (Fed. Cir. 1993) (Table), *cert. denied*, 510 U.S. 1179 (1994); *Marbrey v. Department of Justice,* 45 M.S.P.R. 72, 75 (1990) (same); *cf. also Rozar v. Office of Personnel Management*, 54 M.S.P.R. 557, 561 (1992) (the Board's obligation under *French* exists only where the appellant is "entirely pro se"); *Beech v. Office of Personnel Management*, 34 M.S.P.R. 513, 519 & n.3 (1987) (same).

The agency contends on review that the AJ, "prior to going on the record and prior to the commencement of the hearing, examined appellant and found him to be competent to not only represent himself but to question witnesses, give testimony and evidence on his own behalf and to call witnesses." PRF, Tab 3 at 5. There is no record evidence or finding by the AJ regarding any such examination. In light of our disposition of the appellant's argument, we find it unnecessary to further consider the agency's contention in this regard.

[4] As the appellant points out on petition for review, this incident occurred on March 19, 1994, and not on March 3, 1994. *See* IAF, Tab 5, Subtab 4h; HT, Side 2 (testimony of Military Police Investigator Eric Persson). This error by the agency is not relevant to whether this charge should be sustained, although it is relevant in determining the penalty, as discussed in the text below.

The appellant argues on petition for review that new evidence reveals that the misconduct did not occur and that the criminal charges were dismissed. PR at 3. In support of this argument, the appellant has submitted an affidavit dated May 2, 1996, by his wife (Valerie Bolden), and an order of dismissal dated September 21, 1994, by the United States District Court, District of New Jersey. For the reasons discussed below, we have not considered these documents.

The May 1996 affidavit by Bolden pertains to the March 1994 incident in issue. The appellant's attorney below (Miller), in his December 15, 1994 prehearing submission, informed the AJ that Bolden would not appear for the December 22, 1994 hearing but that she would be submitting an affidavit. IAF, Tab 19, Appellant's Prehearing Submission at 6. Although the appellant contends on review that Bolden submitted an affidavit to Miller, PR at 2, he does not submit a copy of the purported 1994 affidavit or explain why he could not have obtained a copy for submission at the hearing since he had advance notice that Miller would not appear at the hearing. In addition, the appellant is bound by any negligence of his chosen representative. *See Brackins*, 66 M.S.P.R. at 542. We therefore find that he has failed to show that the document was not previously available despite his due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

The District Court's September 1994 order of dismissal is dated well before the date of the hearing, and there is no showing that it was unavailable before the record closed below despite the appellant's due diligence. 5 C.F.R. § 1201.115. Although the appellant appears to argue on review that his failure to submit this evidence below was due to Miller's negligence, he is bound by any negligence of his chosen representative. *See Brackins*, 66 M.S.P.R. at 542.

The appellant further argues on review that "it is significant" that the criminal charges related to this misconduct charge were dismissed. The record below shows that the criminal charges were indeed dismissed. IAF, Tab 5, Subtab 4a. To the extent the appellant is arguing that the dismissal of the criminal charges warrants not sustaining the "off-duty misconduct" charge, we disagree. The undisputed fact that the appellant was criminally "charged" based on his misconduct was included as part of the agency's factual description in support of the overall misconduct charge; the misconduct charge was based on the appellant's conduct rather than the merits of the criminal charges themselves. Nor did the agency's proof rely on the criminal proceedings. In such situations, the misconduct charge may be sustained notwithstanding the dismissal of the criminal charges. *See Farrier v. Department of Veterans Affairs*, 60 M.S.P.R. 71, 74 & n.3 (1993); *Hofmann v. Department of Agriculture*, 31 M.S.P.R. 399, 402 (1986); *cf. Payne v. U.S. Postal Service*, 69 M.S.P.R. 503, 508 (1996) (where the appellant was removed solely based on the fact of his criminal conviction, not on the underlying misconduct, the reversal of the conviction warrants reversing the removal).

To the extent that the agency's charge may be construed as including a separate specification that the appellant was criminally charged, the dismissal of the criminal charges would negate such a specification. This would not warrant reversing the

charge, however. *See Hicks v. Department of Treasury*, 62 M.S.P.R. 71, 74 (1994) (the agency is required to prove only the essence of its charge, and need not prove each factual specification in support of the charge), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table); *Royster v. Department of Justice*, 58 M.S.P.R. 495, 498 (1993) (proof of one or more of the supporting specifications may be sufficient to sustain the charge). We therefore find that the appellant has failed to show that the AJ erred in sustaining this charge.

The charge of threatening a supervisor is not sustained.

The agency specified as follows:

On March 17, 1994 in a discussion with Mary Miklevasis, a psychotherapist [of the agency's Employee Assistance Program (EAP)], [the appellant] stated that [he was] going to kill Captain [Glen] Trammel [his second-level supervisor].

IAF, Tab 5, Subtab 4e. On petition for review, the appellant argues that he does not recall the specific threatening statements he made but that, assuming he made them, the Board should consider that they were made in expressing his "frustration, stress and anger" in the course of psychotherapy to treat "a mental illness." PR at 3-4. These arguments are addressed below.

In determining whether an actionable threat has been made, the Board must use the connotation that "a reasonable person would give to the words." *Metz v. Department of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). In applying this "reasonable person" standard, the Board must consider (1) the listener's reactions, (2) the listener's apprehension of harm, (3) the speaker's intent, (4) any conditional nature of the statements, and (5) the attendant circumstances. *Id.* The Board "must give objective evidence heavy weight," although credible subjective evidence should also be considered. *Id.* at 1003 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)); *Hutson v. Department of the Interior*, 67 M.S.P.R. 432, 436 (1995). Before considering whether an actionable threat has been made, however, the Board must determine the actual words used by the appellant to convey the alleged threat. *See Hutson v. Department of the Interior*, 64 M.S.P.R. 107, 110 (1994); *Sims v. Department of Defense*, 58 M.S.P.R. 131, 135 (1993).

Miklevasis orally notified Trammel and other agency officials of the alleged threat, as further discussed below. However, upon consultation with her supervisor at the EAP, she refused to put the appellant's alleged threatening statements "in writing or be a part of any court proceedings." IAF, Tab 5, Subtab 4g; *see* HT, Side 1 (the agency representative stated that Miklevasis was "unavailable" for the hearing, without further explanation). In a one-sentence memorandum to Associate Warden Susan Gerlinski dated March 17, 1994, Trammel stated that he "received a call" that day from Miklevasis and that she told him that the appellant "threatened to kill" him. IAF, Tab 5, Subtab 4k; *see* HT, Side 3 (Trammel's testimony). In a March 31, 1994 memorandum to the file, Gerlinski stated that she had spoken with Miklevasis about the appellant's "expressing his desire to kill Captain Glenn Trammel." IAF, Tab 5, Subtab 4g. The appellant did concede under oath that he "did make a statement that [he] wanted to hurt the Captain, maybe [he] did say something about killing someone," although he did not recall

precisely what he said. IAF, Tab 5, Subtab 4f.[5] He did not provide further clarification during the hearing. HT, Side 4.

There is no record evidence specifying the actual words the appellant used to convey the alleged threat, although there is evidence showing the general import of his statements. However, assuming the evidence is sufficient to establish the agency's allegation that the appellant stated he was "going to kill" Trammel, we conclude that the agency failed to establish an actionable threat. In reaching this conclusion, we have considered *de novo* the individual *Metz* factors because the initial decision does not. ID at 3.

The first and second Metz factors--the listener's reaction and apprehension of harm

Miklevasis' reaction was to notify Trammel of the alleged threats. This suggests that she believed the appellant's threatening statements were serious. According to a memorandum to the file dated March 31, 1994, by Gerlinski, Miklevasis "stated that she was concerned that the Captain did not take the threat to kill him as serious as she felt he should have." IAF, Tab 4, Subtab 4g. The record also shows that Miklevasis contacted Emily Garad, the agency's staff psychologist who referred the appellant to Miklevasis, and notified her of the appellant's alleged threat to Trammel. HT, Side 1 (testimony of Leslie K. Knutson, the agency's Chief Psychologist). The objective evidence consisting of Miklevasis' notifying Trammel is consistent with the hearsay, subjective evidence that she considered the threats as being serious. On the other hand, the record does not show that Miklevasis notified the police, although Knutson testified that a psychotherapist has a duty to also call the police when she hears serious threatening statements. *Id.*; *Powell v. Department of Justice*, 73 M.S.P.R. 29, 37 (1997).

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[5] In response to the question, "What Statement [sic] did you make? Did you say that you wanted to kill the Captain?" the appellant stated:

During my meeting with Mary [Miklevasis], I made several, maybe numerous references to the Captain. I did make a statement that I wanted to hurt the Captain, maybe I did say something about killing someone, I said so many things. When I said those things, it was the immediate feeling of an individual, totally frustrated, whose perception of his life, career and family had gone to hell, because of the things that the Captain was doing to me. This was not the real James Larry talking, I never fostered any plans to hurt anyone, except myself. I do no [sic] want to go jail [sic], I wouldn't hurt anyone. Although fully aware of my problems, Captain Trammel did not offer any support.

Trammel testified during the hearing that he was "concerned" when he was notified of the statements by Miklevasis but that he "didn't get overly excited" and waited to hear further details. HT, Side 3; *see Battle v. Department of Transportation*, 63 M.S.P.R. 403, 406 (1994) (although the allegedly threatened individual did not hear the threat directly from the speaker, his reaction after indirectly hearing of the threat is a consideration under *Metz*). Although Trammel testified that he took the threat "seriously," there is no record evidence on what actions, if any, he took in response to the threat. HT, Side 3; *cf. Battle*, 63 M.S.P.R. at 406-07 (the threatened individual took protective action by altering his driving route to work and wearing a bullet-proof vest, and agency officials took security precautions). The record does show that the appellant was placed on home-duty status the following day. HT, Side 3 (testimony of J. R. James, the deciding official). We find that the evidence is equivocal as to these *Metz* factors.

<u>The third and fifth *Metz* factors--the speaker's intent and the attendant circumstances</u>

It is undisputed that the appellant was under severe emotional distress due to personal and work-related problems before he sought EAP counseling on March 17, 1994. *See* IAF, Tab 1 (the appellant's March 30, 1993 "hardship" transfer request), Tab 5, Subtab 4d; HT, Side 4 (James's testimony). On March 17, 1994, the appellant informed Trammel that he was going to obtain EAP counseling. HT, Side 3 (Trammel's testimony). He went to the agency's Psychological Services Department and spoke to Garad, the Staff Psychologist, who referred him to the EAP. HT, Side 1 (Knutson's testimony). As the agency alleged, the appellant made the alleged threatening statements during the counseling session with Miklevasis, the EAP psychotherapist.

In *Powell*, 73 M.S.P.R. at 34, the Board found that the appellant's having voluntarily obtained EAP counseling "suggest[ed] an individual who want[ed] to talk out his frustration rather than one who intend[ed] to make a threat ...." Similarly, the appellant here made the alleged threatening statements during the course of psychotherapy. The context in which the statements were made shows that they were not made with the intent to threaten Trammel but, instead, were made with the intent to obtain professional treatment for such violent feelings.

We note that there are no other attendant circumstances to be considered. The record evidence does not show, for instance, that the appellant previously threatened Trammel or anyone else at the agency. *Cf. Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 504 (1995)(the appellant's prior threatening statements were attendant circumstances tending to support an actionable threat), *aff'd,* 79 F.3d 1165 (Fed. Cir. 1996) (Table); *Sims*, 58 M.S.P.R. at 136 (same); *cf. also Powell*, 73 M.S.P.R. at 35 (the appellant's seeking EAP counseling was a departure from his past contentious conduct). The Board has stated that the speaker's mental condition may be considered as attendant circumstances. *Battle*, 63 M.S.P.R. at 407. As discussed above, however, there is no record evidence showing that the appellant was mentally incompetent or mentally ill. *Cf. id.* (the appellant was "diagnosed with bipolar disorder, i.e., manic depression," but his threatening statements were not shown to be merely an outgrowth of his mental illness); *cf. McMillan v. U.S. Postal Service*, 48 M.S.P.R. 590, 592-93 (1991) (even if the medical evidence established that the appellant was mentally

ill when he assaulted his supervisors, it does not establish that the misconduct was caused by his mental illness, and, in any event, mental illness does not negate the misconduct which does not involve wrongful intent).

The fourth *Metz* factor--the conditional nature of the statement

The evidence does not show whether the statements were conditional.

Conclusion

Upon consideration of the *Metz* factors, particularly the speaker's intent and the attendant circumstances, we find that the agency failed to meet its burden of proving the threat charge by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(ii).

The penalty of a 120-day suspension is reasonable under the circumstances.

Where as here not all of the agency's charges are sustained, the Board will independently select the reasonable penalty. *See White v. U.S. Postal Service*, 71 M.S.P.R. 521, 524 (1996). The sustained charge of off-duty misconduct, involving refusal to answer questions posed by MPs, striking several MPs, and threatening to kill MPs is serious, particularly in view of his position as a correctional officer.6 *See Royster v. Department of Justice*, 58 M.S.P.R. 495, 501 (1993) (the sustained charge of off-duty misconduct involving threatening and abusive conduct toward a woman was serious, given the nature of the appellant's position as a correctional officer in a women's prison). Moreover, a law enforcement officer is held to a higher standard of conduct. *See id.; Thompson v. Department of Justice*, 51 M.S.P.R. 43, 50 (1991).

However, there are some circumstances surrounding the misconduct that mitigate its seriousness, as follows. As noted above, it is undisputed that the appellant was under severe emotional distress at the time of the misconduct due to personal and work problems. When, in an effort to deal with this emotional distress, he sought psychotherapy from the agency's EAP on March 17, 1994, his statements to the psychotherapist were reported to Trammel and other agency officials as threats. Two days later, on March 19,7 after a heated (but apparently nonviolent8) argument with his

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[6] The agency's allegations and the AJ's findings state that the appellant used his child "as a shield." IAF, Tab 5, Subtab 4e; ID at 4. There is no record evidence specifically describing how the appellant was using his child as a shield, however, although the record shows that he was holding his son when he attempted to leave the MP station, several MPs physically restrained him from doing so, and a struggle between him and the MPs ensued. HT, Side 2 (Persson's testimony); IAF, Tab 5, Subtab 4h.

[7] *See supra* n.4.

[8] Military Police Investigator Eric Persson testified that the appellant's wife appeared to be "hiding" in a closet when he arrived on the scene; however, there was no record evidence that the appellant had physically harmed her. HT, Side 2. The wife informed Persson that "there was no physical violence." IAF, Tab 5, Subtab 4h (Persson's contemporaneous written statement). The appellant testified that he was not sure why his wife remained in the closet, but speculated, not implausibly, that she might have been embarrassed and upset due to being

wife, the appellant was involved in the sustained misconduct. It is apparent under these circumstances that the appellant's extreme emotional distress during the several days preceding the incident, as well as during the incident, contributed to the off-duty misconduct with which he was charged and, therefore, is a factor to consider in evaluating the seriousness of his misconduct.9 *See Crouse v. Department of the Treasury*, 70 M.S.P.R. 623, 629 (1996) (the death of the appellant's wife, with no close family members to help raise his 13-year old daughter, the trauma he experienced after deciding to terminate his wife's life support system, and his voluntarily seeking counseling, were considered as mitigating factors); *Hawkins v. U.S. Postal Service*, 35 M.S.P.R. 549, 553 (1987) (similar holding); *see also Slaughter v. Department of Agriculture*, 56 M.S.P.R. 349, 355 n.11 (1993) (an AJ may evaluate the seriousness of the misconduct, based on a showing that emotional distress contributed to it, even if there is no medical evidence); *cf. Hanna v. Department of the Army*, 42 M.S.P.R. 233, 241 (1989) (where the appellant provided no evidence showing how his misconduct involving falsification of a subordinate's time cards related to his alleged emotional distress, the evidence regarding his mental condition is of minimal weight as a mitigating factor).

Regarding the specification that the appellant "struck Military Police Captain Bielecki and Investigator Persson," the testimony of Investigator Persson establishes that the appellant did not intentionally assault the MPs. Rather, when the appellant was physically restrained by the MPs from leaving the station with his 18-month-old son, he began to flail his arms "erratically," and in doing so struck the MPs, causing nonserious injuries. HT, Side 2 (Persson's testimony); *see also* IAF, Tab 5, Subtab 4h. Regarding the specification that the appellant threatened to kill several MPs, we find that, while it is serious, the agency did not allege that such statements rose to the level of an actionable threat.

In addition to the mitigating circumstances surrounding the misconduct, there are other mitigating factors. The appellant had more than fourteen years of satisfactory federal civilian service. IAF, Tab 5, Subtab 4b; HT, Side 4 (James's testimony). It is undisputed that he received several commendations for his job performance for the years immediately preceding his removal, in 1992 and 1993. *See* IAF, Tab 1. The agency did not rely on any past disciplinary record.10 Contrary to the AJ's finding that

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underdressed during the early morning incident and the MPs being called to her home. HT, Side 4. Moreover, the appellant provided undisputed testimony that his wife informed the MPs that "[e]verything [was] fine," and that she repeatedly requested that the MPs leave her home. HT, Side 4; *see also* IAF, Tab 5, Subtabs 4d, 4h (Persson's written statement). Moreover, contrary to the AJ's apparent finding that the appellant "threat[ened] ... a female companion," i.e., there is no record evidence that the appellant threatened her with physical harm.

[9] *Cf. Barry v. Department of the Treasury*, 71 M.S.P.R. 283, 297 (1996) (with respect to a charge of involvement with an illegal controlled substance on duty, stress or personal problems generally should not be considered as a mitigating factor as to the penalty, absent a reasoned explanation of the relationship between such problems and the misconduct).

[10] The deciding official testified that the appellant did have a disciplinary record, HT, Side 3, but conceded that he apparently did not have any such record during the past several years. In any

the appellant "expressed no contrition" for his misconduct, ID at 5, the deciding official testified that the appellant stated he "regretted" his misconduct under the first charge. HT, Side 3 (James's testimony). Finally, the record shows that Trammel, the second-level supervisor with whom the appellant had a difficult relationship, transferred to California in August 1994. HT, Side 3.

The Board has stated that law enforcement status does not preclude mitigation of the penalty. *Crouse*, 70 M.S.P.R. at 629. Under these circumstances, we find that a 120-day suspension is a reasonable penalty.11 *See Quinata v. U.S. Postal Service*, 51 M.S.P.R. 76, 77 (1991) (although the seriousness of the misconduct, assaulting a supervisor, was self-evident, the Board found that a 120-day suspension, rather than a removal, was reasonable, in light of unusual job tensions and provocation by the supervisor); *see also Crouse*, 70 M.S.P.R. at 625 (penalty of demotion of a supervisory police officer was mitigated to a 90-day suspension where the offense of violation of procedures was a one-time, first-time offense, the appellant had twenty-four years of satisfactory federal service, and he had good potential for rehabilitation); *Jacobs v. Department of the Army*, 62 M.S.P.R. 688, 690, 695 (1994) (the Board affirmed without discussion the AJ's mitigation of the removal penalty to a 30-day suspension, based on a charge involving verbal assault on a security officer); *cf. Thomas v. Department of Defense*, 66 M.S.P.R. 546, 551-53 (the Board sustained a removal based on sustained charges including contemptuous behavior toward constituted authority where the charges involved an altercation with a supervisor, the appellant only had eight years of service, and had a prior disciplinary record consisting of three relatively recent prior counseling for similar misconduct), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 120-day suspension in lieu of the removal. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

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event, a prior disciplinary record not mentioned in the agency's notice and decision may not be relied upon in imposing the penalty. *See Burrell v. Defense Logistics Agency*, 58 M.S.P.R. 372, 376 (1993).

[11] We note that the agency's table of penalties provides for a penalty of an official reprimand to a removal for a first offense of the type charged here. *See* IAF, Tab 5, Subtab 5M, Table of Penalties, Item 8 ("Disobedience to constituted authorities, or refusal to carry out a proper order from any supervisor or other official having responsibility for the work of the employee; insubordination"), Item 20 ("Disorderly conduct, fighting, threatening, or attempting to inflict bodily injury to another, engaging in dangerous horseplay"), Item 22 ("Disrespectful conduct; use of insulting, abusive or obscene language to or about others"), Item 51 ("Misconduct off the job"). We further note that the deciding official testified that he considered the combined seriousness of the off-duty misconduct charge and the threat charge, in deciding on the removal penalty; he did not state his opinion on the appropriate penalty based solely on the off-duty misconduct charge. HT, Sides 3-4.

We also ORDER the agency to issue a check to the appellant for the appropriate 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 compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.