

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

2008 MSPB 25

Docket No. DA-0752-07-0091-I-1

**Gilbert L. Rodriguez,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

January 31, 2008

Jose Salvador Tellez, Esquire, Laredo, Texas, for the appellant.

J. Douglas Whitaker, Esquire, Omaha, Nebraska, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that affirmed his removal. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115 and AFFIRM the ID as MODIFIED by this Opinion and Order, still SUSTAINING the appellant's removal.

BACKGROUND

¶2 Effective October 28, 2006, the agency removed the appellant from his position as a GS-11 Deportation Officer in the San Antonio, Texas, Field Office of the agency's Office of Immigration and Customs Enforcement (ICE) based on the following three charges: (1) Making Misstatements; (2) Conduct

Unbecoming; and (3) Noncompliance with Procedures, Policies, and Instructions. Initial Appeal File (IAF), Tab 7, Subtabs 4a, 4b.

¶3 The charges arose from the events of March 25, 2001, when the appellant was employed as a Detention Enforcement Officer (DEO) in the San Antonio District Office of the Department of Justice's Immigration and Naturalization Service (INS), the predecessor to ICE.¹ IAF, Tab 7, Subtabs 4h, 4k (U.S. district court transcript) at 3-4. The appellant's duties as a DEO included transporting aliens who had been apprehended by the INS to various locations in a passenger bus. *Id.*, Subtab 4k at 4, 6-7, 52. During that weekend, the INS conducted an operation that resulted in the apprehension of about 35 illegal aliens, including Serafin Carrera, who was severely injured by three of the District Office's deportation officers while he was being taken into custody. *Id.* at 9-10, 63; Tab 27, Exhibit A at 3. Pursuant to the instructions of one of those deportation officers, Richard Gonzales, the appellant transported some of the aliens, including Mr. Carrera, to the Comal County Jail, where they were to be detained pending criminal prosecution. IAF, Tab 7, Subtab 4k at 21, 59-60. However, the jail's medical personnel refused to accept custody of Mr. Carrera because of his injuries, and he was transported by ambulance to a local hospital. *Id.* at 28-30, Tab 27, Exhibit A at 6. The appellant left about five aliens at the jail and transported the remaining aliens to the San Antonio District Office for processing and completion of various INS forms prior to their being returned to Mexico. IAF, Tab 7, Subtab 4k at 31, 62. En route to San Antonio, the appellant learned that Mr. Carrera had sustained a broken neck. *Id.* at 104-08. When he arrived at

¹ Effective March 1, 2003, the INS's functions were transferred from the Department of Justice to the newly created Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, P. L. No. 107-296, 116 Stat. 2135; *Marcotrigiano v. Department of Justice*, 95 M.S.P.R. 198, 198 n.1 (2003). After the DHS was created, the San Antonio District Office became the San Antonio Field Office. ID at 9 n.5.

the District Office, the appellant unplugged the camera from the IDENT² machine and told his supervisor, Oscar Chapa, that the machine was not functioning. *Id.* at 31-33, 35, 65-66. As a result, the remaining aliens could not be processed through IDENT. *Id.* at 32-33. Thus, after the INS paperwork was completed, DEOs from Laredo, Texas, drove the aliens to the Mexican border for deportation and the appellant went home. *Id.* at 32-34, 110.

¶4 The appellant, represented by his attorney, filed an appeal with the Board and requested a hearing. IAF, Tab 1 at 4. He alleged that his removal was the result of reprisal for his whistleblowing activity. *Id.* at 3. The administrative judge (AJ) apprised the appellant of the burden and elements of proof as to his affirmative defense and advised him that the document that he identified as a protected disclosure, his March 26, 2001 memorandum to District Director Kenneth Pasquarrell regarding the events of the previous day, IAF, Tab 1, Exhibit C, did not appear to contain any disclosure of information protected by 5 U.S.C. § 2302(b)(8), IAF, Tab 16 at 2-3. The AJ therefore ordered the appellant to submit additional information on this issue. *Id.* In response, the appellant filed a submission in which he asserted that his memorandum to Mr. Pasquarrell was “a disclosure of information that he had reason to believe was a violation of law.” IAF, Tab 19 at 2. The AJ then issued an order advising the parties that she was not accepting the whistleblower claim as an affirmative defense. IAF, Tab 20.

¶5 After a hearing, the AJ issued an ID affirming the agency’s action. IAF, Tab 30, ID. The AJ found that the agency proved its charge by preponderant evidence, ID at 5-13, and showed that the action promotes the efficiency of the service and that the penalty of removal is reasonable, ID at 13-16.

² IDENT is the acronym for “Automated Biometric Identification System.” IAF, Tab 7, Subtab 4j. Under IDENT, criminal and non-criminal deportable aliens are fingerprinted and photographed, and this information, along with their personal biographical data, is entered into a database so that IDENT users can identify aliens quickly and accurately. *Id.*; IAF, Tab 7, Subtab 4k at 31-32.

¶6 In his petition for review (PFR), the appellant challenges the AJ's credibility determination regarding Mr. Chapa and alleges that the AJ erred in denying his affirmative defense of reprisal for whistleblowing activity. Petition for Review File (PFRF), Tab 1, appellant's answers to questions 2, 4. The agency has filed a response in opposition to the PFR. PFRF, Tab 3.

ANALYSIS

The AJ correctly found that the charges are supported by preponderant evidence.

¶7 Each charge against the appellant is supported by a specification. The specification supporting the first charge, Making Misstatements, alleges as follows:

On March 25, 2001[,] you reported to your supervisor (Oscar Chapa) that the IDENT system was down to avoid IDENTing the alien witnesses, knowing that the system was not down but [was] in fact working.

IAF, Tab 7, Subtab 4h at 1.

¶8 In sustaining this charge, the AJ pointed out that, during both the hearing in this appeal and the May 2003 Federal criminal trial of the three deportation officers who injured Mr. Carrera, the appellant testified that he unplugged the camera from the IDENT machine and told Mr. Chapa that it was not working. IAF, Tab 7, Subtab 4k at 32; ID at 5-6. The AJ also noted that Mr. Chapa testified at the hearing that the appellant came into his office and told him that the IDENT machine was not working. ID at 6. The AJ therefore found it undisputed that on March 25, 2001, the appellant made a misstatement when he told Mr. Chapa that the IDENT machine was inoperable when, in fact, the appellant had disabled the system. ID at 7. We see no reason to disturb this explained finding.

¶9 The specification supporting the second charge, Conduct Unbecoming, alleges as follows:

On March 25, 2001, you intentionally unplugged the IDENT machine to avoid processing certain aliens' information into the data base [sic]. By doing so, the aliens' digital right index fingerprints, photographs, and personal biographical data could not be obtained[,] thus making the aliens' identities unknown. The aliens were then loaded on to a bus and returned to Mexico. Your conduct was improper and detracted from your performance as a [DEO].

IAF, Tab 7, Subtab 4h.

¶10 In her discussion of this charge, the AJ pointed out that, in his hearing testimony, the appellant confirmed that he unplugged the only IDENT machine in the detention area that was fully operational on March 25, 2001, so that 25 or more aliens were not processed through the IDENT system that day, but he asserted that all of the other necessary immigration documents were prepared for each alien. ID at 7-8. In addition, the AJ noted that Mr. Chapa also testified that, although these aliens were not processed through the IDENT system, the other required immigration paperwork was prepared for each alien. ID at 8.

¶11 Sustaining the charge, the AJ found that the agency established that on March 25, 2001, the appellant intentionally unplugged the IDENT camera to avoid having to process the aliens through the IDENT system, which would have required him to remain at the District Office for a minimum of two additional hours. ID at 8. The AJ also found that "it is undisputed that [the aliens'] digital right index fingerprints, photographs, and personal biographical data were not input into INS's computer database." *Id.* The AJ further found that, even if all of the other necessary paperwork was completed for each alien, the appellant's actions in unplugging the IDENT machine constituted conduct unbecoming a DEO and law enforcement officer. *Id.* We see no reason to disturb these explained findings.

¶12 The third charge, Noncompliance with Procedures, Policies, and Instructions, is supported by the following specification:

On March 25, 2001[,] you failed to follow procedures in processing the aliens, and failed to use the IDENT machine to process the illegal aliens apprehended to allow the system to maintain their records prior to deporting the aliens to Mexico. All aliens in custody are required to be processed using the IDENT system prior to removal.

IAF, Tab 7, Subtab 4h.

¶13 In determining whether the INS had a policy in March 2001 that the data of all aliens be input into IDENT, the AJ considered the hearing testimony of various witnesses, including deciding official Marc Moore, Director of the San Antonio Field Office, who testified about an August 10, 1998 memorandum to INS Regional Directors from the Executive Associate Commissioner, Office of Field Operations, regarding new procedures for entering data into IDENT. IAF, Tab 7, Subtab 4j at 4-12; ID at 9. The memorandum states that these procedures are effective immediately and requires each District Director and Chief Patrol Agent to certify by September 4, 1998, that the new procedures have been distributed to and read by their employees involved with arresting aliens and processing aliens for removal. IAF, Tab 7, Subtab 4j at 4. Mr. Moore testified that by March 2001, every district in the region, including the San Antonio District, reported that all of their employees had been trained in these procedures. ID at 9.

¶14 In his hearing testimony, the appellant asserted that the INS did not have a policy on March 25, 2001, that required him to process aliens through the IDENT system and DEOs did not input information into the IDENT system. ID at 10. He also denied ever receiving classroom training on how to use IDENT. *Id.* The AJ pointed out that, in May 2003, the appellant testified in Federal court that the INS had a policy that everyone would be IDENTed, especially after the 1999 arrest of Rafael Resendez-Ramirez, a Mexican national and serial killer who was

apprehended by Border Patrol agents several times in 1998 while crossing the border illegally and was “voluntarily returned” to Mexico by the INS each time despite his extensive criminal record and outstanding warrants for his arrest. IAF, Tab 7, Subtab 4k at 54-57, Tab 27, Exhibit E at 1-2; ID at 9 n.6, 10. In his Federal court testimony in May 2003, the appellant also stated that the media attention that resulted from the Resendez case prompted the INS to dramatically change its policy to ensure that deportable aliens were processed through the IDENT system. IAF, Tab 7, Subtab 4k at 57.

¶15 Mr. Chapa testified at the hearing that DEOs did not use the IDENT machine on a regular basis before March 2001, because the processing of aliens was handled mostly by Border Patrol agents, investigators, and inspectors, who input the aliens’ information into the IDENT system. ID at 11-12. He also testified that it was not mandatory that all aliens be input into the IDENT system until after the March 25, 2001 incident involving Mr. Carrera, when a letter was issued stating that no alien would be removed from the United States without being IDENTed. ID at 12.

¶16 After considering the entire record, the AJ found it more likely true than untrue that the policy in effect in the San Antonio District Office in March 2001, was that the data of all aliens was to be input into the IDENT system. ID at 13. She therefore found that the agency met its burden of proving that the appellant violated that policy when he disabled the IDENT machine on March 25, 2001, and more than 25 aliens were not processed through the IDENT system. *Id.* Accordingly, the AJ sustained the third charge. *Id.*

¶17 On PFR, the appellant argues that the AJ erred in finding that the testimony of Mr. Chapa was not credible. PFRF, Tab 1, appellant’s answer to question 4. To resolve credibility issues, an AJ must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

¶18 The ID clearly shows that the AJ complied with *Hillen*. In sustaining the third charge, the AJ acknowledged Mr. Chapa's testimony that investigators, not DEOs, IDENTed all aliens that were brought into the San Antonio District Office that were going to be deported, but found that Mr. Chapa's credibility was questionable due to the fact that he had a potential bias against the agency for removing him in 2005. ID at 12-13; *see Hillen*, 35 M.S.P.R. at 459-60. The appellant's argument that the AJ erred in finding that Mr. Chapa's testimony not credible is, therefore, mere disagreement with the AJ's explained credibility determinations and thus provides no reason for disturbing the ID. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The AJ erred by refusing to accept the appellant's whistleblower reprisal claim as an affirmative defense for adjudication in this appeal; however, this error did not prejudice the appellant's substantive rights.

¶19 In whistleblowing claims involving otherwise appealable actions, such as the present case, the appellant must show by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in the agency's personnel action. *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 14 (2004). If the appellant makes this prima facie showing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action absent any protected activity. *Id.*, ¶ 15.

¶20 A protected disclosure is one the appellant reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 5 (2000). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the Whistleblower Protection Act (WPA) is whether a disinterested observer, with

knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *White v. Department of the Air Force*, 95 M.S.P.R. 1, ¶ 28 (2003), *aff'd*, 391 F.3d 1377 (Fed. Cir. 2004).

¶21 On review, the appellant reiterates his argument below that his March 26, 2001 memorandum to Mr. Pasquarrell is a protected disclosure and asserts that the memorandum “describ[es] the excessive use of force by the [INS] agents.” PFRF, Tab 1, appellant’s answer to question 2. This memorandum states as follows:

On March 25, 2001[,] [DEO] Cruz and I were assigned to go to Bryan, Texas to assist the Fugitive Operations Unit in the transportation of several detainees. Upon arrival at the Brazos County detention facility, Sandy Point[,] Officer Cruz and I were advised that several of the detainees were in two of the detention vans, one being later identified as CARRERA, Serafin a.k.a. Olvera, Serafin. Fugitive Operations Unit advised that Carrera did not want to be detained and was being belligerent and assaultive. Officer Cruz and I were advised that arrangements were made for Carreras [sic] detention and any medical attention at the Comal County Jail because Comal County [Jail] has a Nurse on duty. Carrera was transported to Comal County [Jail] and was being observed through out [sic] the transport.

On arriving at Comal County Jail, [t]he duty Nurse advised us that it did not seem that Carrera had any [visible] injuries but that Carrera needed to be checked out by a doctor before Comal County Jail would detain him. I advised Deportation Officer Richard Gonzalez [sic] of the situation and was later notified that Carrera would be transported by ambulance to a local hospital for further evaluation.

IAF, Tab 1, Exhibit C.

¶22 As noted above, in her prehearing telephonic conference summary, the AJ advised the appellant that his memorandum to Mr. Pasquarrell “did not appear to contain any disclosure of information protected by 5 U.S.C. § 2302(b)(8)” and ordered him to submit additional information on this issue “before I accept his

affirmative defense of whistleblower retaliation as an issue to be adjudicated in this appeal.” IAF, Tab 16 at 3. In response, the appellant filed a submission on February 22, 2007, in which he characterized the March 26, 2001 memorandum as “an attempt to inform upper management that an alien had sustained some sort [of] injuries in the operation” and claimed that the memorandum “was a disclosure of information that he had reason to believe might have been a violation of law.” IAF, Tab 19 at 2. The following day, the AJ issued an order that stated, “After reviewing the appellant’s February 22, 2007 submission, as well as the March 26, 2001 memorandum he submitted as Attachment C to this appeal, the parties are advised that I am not accepting whistleblowing as an affirmative defense to be adjudicated in this appeal.” IAF, Tab 20. The appellant objected to this ruling at the hearing. Hearing Tape 1, Side A.

¶23 Neither the AJ’s order nor the ID explains why the AJ decided not to accept the appellant’s whistleblowing claim as an affirmative defense for adjudication in this appeal, nor does the AJ cite any authority in support of her decision. IAF, Tab 20; ID. This was error. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an ID must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ’s conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶24 Nevertheless, because the record is fully developed with respect to whether the appellant made a protected disclosure under the WPA, and the Board is not basing its findings on witnesses’ demeanor, remand is not necessary, and the appellant’s whistleblowing claim can be adjudicated at this level. *See, e.g., Gregory v. Federal Communications Commission*, 84 M.S.P.R. 22, ¶ 6 (1999), *aff’d*, 232 F.3d 912 (Fed. Cir. 2000) (Table).

¶25 We find that the appellant’s March 26, 2001 memorandum does not meet the definition of protected disclosure under the WPA because it does not contain any information that the appellant could have reasonably believed evidenced a

violation of law or any other type of misconduct identified in 5 U.S.C. § 2302(b)(8). Contrary to the appellant's assertion on review, this memorandum does not "describ[e] the excessive use of force by the [INS] agents" against Mr. Carrera, nor does it indicate any wrongdoing on the part of those agents or any other government employee. PFRF, Tab 1, appellant's answer to question 2. In fact, during the criminal trial of the deportation officers in Federal court in May 2003, the appellant admitted that he deliberately failed to include information in the memorandum that would have indicated such wrongdoing. Specifically, the appellant testified that in the memorandum he did not disclose that the deportation officers had intentionally used mace on Mr. Carrera because "I didn't want to get blackballed, called a snitch. I didn't want to rat on Richard [Gonzales]." IAF, Tab 7, Subtab 4k at 35. As a result of his reticence to "rat on" Mr. Gonzales, the appellant's March 26, 2001 memorandum is a sanitized version of the events of the previous day, and actually creates the impression that government personnel assiduously attempted to safeguard Mr. Carrera's health by: (1) making arrangements for Mr. Carrera to be detained at Comal County Jail because that facility had a nurse on duty; (2) observing him throughout his transport to Comal County Jail; (3) requiring that a doctor evaluate him in order for him to be detained at Comal County Jail even though the nurse on duty there opined that he did not seem to have any visible injuries; and (4) transporting him by ambulance to a local hospital for further evaluation. IAF, Tab 1, Exhibit C. Further, the memorandum arguably implies that any injuries Mr. Carrera sustained during the operation were attributable to his belligerent and assaultive demeanor, rather than to any wrongdoing by INS employees. *Id.*

¶26 In any event, even assuming that the memorandum did reveal misconduct on the part of government employees, it would not qualify as a protected disclosure because the record demonstrates that the appellant wrote the memorandum in the normal course of his duties. Under the WPA, disclosures made by employees in the normal performance of their duties cannot constitute

"protected disclosures." *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353 (Fed. Cir. 2001). During his May 2003 testimony in Federal court, the appellant testified that duty deportation officer Gilbert Menchor telephoned him on March 25, 2001, and informed him that "the next morning there was [sic] going to be some memos to be written." IAF, Tab 7, Subtab 4k at 34. Accordingly, when the appellant went to work on March 26, 2001, he "went ahead and typed up the memorandum [to Mr. Pasquarrell] of the events that had occurred [the previous day]." *Id.* The appellant also testified in Federal court that, when Mr. Gonzales asked him who told him to write a memorandum, he "told [Mr. Gonzales] that's the normal thing you do. ... Anytime you do anything out of the ordinary you write a memo." *Id.* at 38.

¶27 Thus, while the AJ erred in refusing to adjudicate the appellant's whistleblower reprisal claim, her error did not prejudice the appellant's substantive rights since he did not establish a prima facie case of whistleblower reprisal and thus he has not shown a basis for reversing the ID. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an ID).

The AJ correctly found that the penalty of removal is reasonable.

¶28 Where all the charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Holland v. Department of Defense*, 83 M.S.P.R. 317, ¶ 9 (1999); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Further, the Board will mitigate the penalty only where it finds that the agency's judgment clearly exceeded the limits of reasonableness in selecting the penalty. *Id.*

¶29 In selecting the penalty of removal, the agency considered the nature and seriousness of the charges against the appellant, and their relation to the appellant's duties, position, and responsibilities, which is the most significant

Douglas factor. See *Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, ¶ 23 (2001), *aff'd*, 30 F. App'x 973 (Fed. Cir. 2002). Specifically, Mr. Moore considered the appellant's conduct "extremely serious" and found that, as a law enforcement officer, the appellant is held to a higher standard of conduct. IAF, Tab 7, Subtab 4b at 1-2. Mr. Moore emphasized that the appellant's integrity and his ability to provide honest, credible, and factual testimony or accounts of events is a core function of his position as a law enforcement officer and pointed out that the United States Attorney for the Western District of Texas had concluded that the appellant was *Giglio*-impaired³ and that this critically impacted the appellant's ability to continue performing the duties of his position. *Id.* at 1, Subtab 4d.

¶30 With respect to the other *Douglas* factors, Mr. Moore related that he considered the appellant's length of Federal service (10 years) and that his work performance was minimally successful during the 2004-05 rating period and excellent during the 2005-06 rating period. IAF, Tab 7, Subtab 4b at 2. He also considered that the appellant had received a number of outstanding performance ratings as well as multiple awards for superior performance during the past several years. *Id.* In addition, he considered that the appellant displayed no remorse for his misconduct. *Id.* Mr. Moore also considered that the appellant had been disciplined on two prior occasions: (1) on June 15, 2004, he received a written reprimand for noncompliance with instructions, IAF, Tab 7, Subtab 4f at 3-4; and (2) in February 2005, he received a two-day suspension for misuse of a

³ Under *Giglio v. United States*, 405 U.S. 150 (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, potential impeachment evidence with respect to the agents involved in the case. The prosecutor then exercises his discretion as to whether the impeachment evidence must be turned over to the defense. A "*Giglio*-impaired" agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case, which means, of course, that a case that depends primarily on the testimony of a *Giglio*-impaired witness is at risk. See *Hathaway v. Department of Justice*, 384 F.3d 1342, 1349 (Fed. Cir. 2004).

government issued credit card, *id.* at 1-2, Subtab 4b at 2. Mr. Moore concluded that there was no alternative sanction that could restore the appellant's credibility so that he could perform as a federal law enforcement officer. IAF, Tab 7, Subtab 4b at 2.

¶31 In assessing the reasonableness of the selected penalty, the AJ first considered whether the agency properly relied upon the appellant's two prior disciplinary actions as an enhancing factor in deciding on a penalty in this action. ID at 15-16. As the AJ explained, in order for an agency to rely on prior discipline in selecting a penalty, it must advise the appellant in the notice of proposed removal that it intends to do so. ID at 15. Further, under *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981), an agency may consider past disciplinary actions when they were effected in writing, made a matter of record, and the appellant had the opportunity to have them reviewed by a higher-level authority than the one that imposed the discipline. ID at 15.

¶32 Applying these criteria here, the AJ noted that the proposal notice informed the appellant that the agency intended to use his 2006 written reprimand and 2005 two-day suspension to enhance the penalty. IAF, Tab 7, Subtab 4h at 2; ID at 16. She also found that the appellant's prior disciplinary actions appear to have met the *Bolling* criteria. ID at 16. She therefore found that the agency's use of these prior actions as an enhancing factor in deciding on a proper penalty in the current action was proper. *Id.*

¶33 The appellant argues on review that the AJ erred in not allowing him to present evidence about his disciplinary history which, he asserts, "viewed cumulative [sic] shows an intent [by agency management] to retaliate against" him. PFRF, Tab 1, appellant's answer to question 3. This argument is without merit. As the AJ explained, where, as here, the *Bolling* criteria for reliance on a past disciplinary record have been met, the Board's review is limited to whether the action was clearly erroneous. ID at 16; *see Bolling*, 9 M.S.P.R. at 339-40.

Thus, the AJ did not err in refusing to allow the appellant to present evidence that his prior disciplinary actions were taken in retaliation against him.⁴

¶34 The appellant also argues on review that the AJ erred by not finding that his promotion and annual performance ratings outweighed his disciplinary record. PFRF, Tab 1, appellant's answer to question 4. As discussed above, the record shows that the AJ properly considered the *Douglas* factors in assessing the reasonableness of the penalty. Specifically, the AJ found that the appellant's proven misconduct was extremely serious and inconsistent with his duties and responsibilities as a law enforcement officer. ID at 16. She also noted that the Board has consistently held that law enforcement officers are held to a higher standard of conduct than other employees. *Id.* The AJ therefore found that the appellant's removal does not exceed the tolerable bounds of reasonableness. *Id.* The appellant's argument is thus mere disagreement with the AJ's explained findings and, as such, does not warrant disturbing the ID. *See Weaver*, 2 M.S.P.R. at 133-34.

⁴ Although not raised by the appellant below or on review, we note that the record indicates that, in addition to the two disciplinary actions cited in the notice of proposed removal, IAF, Tab 7, Subtab 4h at 2, deciding official Moore also considered two other oral reprimands in determining the appropriate penalty in this case. Specifically, both the *Douglas* Factors Review Form and Mr. Moore's hearing testimony indicate that Mr. Moore considered that the appellant received an oral reprimand in May 1999 and in August 2005 for misuse of a government-issued credit card. *Id.*, Subtab 4c at 2; Hearing Tape 1, Side B. The Board has never held that an agency must also include in the proposal notice each instance in which it has notified an employee of applicable rules or has warned him about a particular type of misconduct. *Biniak v. Social Security Administration*, 90 M.S.P.R. 682, ¶ 7 (2002). Even assuming that Mr. Moore erred by relying on the two prior oral admonishments because they were not cited in either the notice of proposed removal or in the decision notice and were mentioned for the first time when Mr. Moore testified that he relied on these prior offenses in determining the penalty, *see Brown v. Department of the Treasury*, 91 M.S.P.R. 60, ¶ 14 (2002); *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 426 (1996), we find for the reasons stated in this Opinion and Order that this error does not warrant disturbing the ID because removal is within the bounds of reasonableness even without considering those admonishments. *See, e.g., Mingledough v. Department of Veterans Affairs*, 88 M.S.P.R. 452, ¶¶ 7-16 (2001), *review dismissed*, 35 F. App'x 873 (Fed. Cir. 2002).

¶35 Accordingly, we agree that the penalty of removal in this case does not exceed the bounds of reasonableness.

ORDER

¶36 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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*, 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). 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.

FOR THE BOARD:

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