

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

2008 MSPB 167

Docket No. CH-0752-07-0532-I-1

**Anthony D. Cunningham,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 30, 2008

Anthony D. Cunningham, Cleveland, Ohio, pro se.

Joseph E. McCann, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that mitigated its removal of the appellant to a 30-day suspension. For the reasons set forth below, we GRANT the agency's petition for review under 5 C.F.R. § 1201.115 and REVERSE the initial decision, SUSTAINING the appellant's removal.

BACKGROUND

¶2 Effective June 16, 2007, the agency removed the appellant from his Mail Handler position based on a charge of Improper Conduct/Violation of Zero Tolerance Policy after the appellant engaged in a physical altercation with a co-worker, Melvin Allmond, on Postal property. Initial Appeal File (IAF), Tab 5,

Subtabs 4a, 4b, 4c. The appellant filed an appeal in which he contended that the removal was improper because he was physically assaulted by Mr. Allmond and was merely defending himself. IAF, Tab 1.

¶3 Following a hearing, the administrative judge sustained the charge upon finding that the agency proved that the appellant engaged in the underlying misconduct. Initial Decision (I.D.) at 3-27. The administrative judge further found that the appellant acted in self-defense in that he “retreated in good faith by informing Mr. Allmond on numerous occasions . . . that he did not want to fight,” and because he responded to Mr. Allmond’s physical aggression with reasonable force. *Id.* at 24-27. In addition, the administrative judge determined that the deciding official believed that the agency’s zero tolerance policy required removal for a sustained charge of violence in the workplace, and that he abused his discretion in imposing the penalty of removal without weighing or considering the relevant mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). I.D. at 30-31. She therefore did not afford the agency’s penalty determination deference and, instead, found that a 30-day suspension was the maximum reasonable penalty under the circumstances of the case. *Id.* at 27-32. The administrative judge ordered the agency to afford the appellant interim relief in the event it filed a petition for review. *Id.* at 33.

¶4 The agency petitions for review of the initial decision. Petition for Review (PFR) File, Tabs 1, 3. The appellant has filed an untimely response to the petition for review. PFR File, Tab 4.

ANALYSIS

The Board will not dismiss the agency’s petition for review for failure to comply with the interim relief order.

¶5 In his response to the petition for review, the appellant contends that the agency has not fully complied with the administrative judge’s interim relief order. PFR File, Tab 4. The agency submitted acceptable certification of its

compliance with the interim relief order, however. PFR File, Tab 1 at 6-8; *see* 5 C.F.R. § 1201.115(b)(1). Because the appellant's challenge to the agency's certification is untimely, PFR File, Tabs 2, 4, we find no basis for dismissing the agency's petition for review, *see Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1332-34 (Fed. Cir. 2004); 5 C.F.R. § 1201.116(a).

¶6 In any event, in response to the appellant's claim that the agency failed to issue him a check for the appropriate amount of back pay, the agency has submitted evidence showing that it initially made mistakes in its processing of his back pay check that resulted in a delay in the appellant's receiving proper payment, but that the agency has now corrected those mistakes and issued a check in the appropriate amount. PFR File, Tab 8. To the extent that the appellant asserts that the agency had not totally complied with the interim relief order as of the time that it filed its petition for review, his assertions do not warrant dismissing the agency's petition for review. *See, e.g., Parbs v. U.S. Postal Service*, 107 M.S.P.R. 559, ¶ 6 (2007); *Lavette v. U.S. Postal Service*, 96 M.S.P.R. 239, ¶¶ 13-15 (2004).

The administrative judge erred by accepting the appellant's claim of self-defense.

¶7 The appellant does not dispute that he was involved in a physical altercation with Mr. Allmond at approximately 11:00 p.m. on February 11, 2007. He contends, however, that Mr. Allmond was the aggressor and that he merely fought back in self defense.

¶8 According to the appellant's testimony, the incident with Mr. Allmond began earlier in the day on the workroom floor. He testified that Mr. Allmond was operating a tow motor and had stopped in the aisle for no apparent reason, which blocked the appellant from driving his own tow motor down the aisle. Hearing Transcript (Tr.) at 294 (testimony of the appellant). The appellant, speaking to a co-worker, called Mr. Allmond a "dummy." *Id.* Mr. Allmond drove away. *Id.*

¶9 Later, according to the appellant, Mr. Allmond came up to him while the appellant was driving his tow motor, asked the appellant what time he was getting off work, and indicated, in very profane language, that he was going to beat up the appellant. Tr. at 295 (testimony of the appellant). The appellant responded, “man, go on with that,” and drove to the scale. *Id.* Mr. Allmond then approached the appellant at the scale, pointed his finger at the appellant, and was restrained by a co-worker, Tracy Lumpkin. Tr. at 199-200, 214, 295-96 (testimony of Lumpkin, the appellant). Mr. Lumpkin testified that, during this incident, Mr. Allmond threatened to beat up the appellant. Tr. at 199 (testimony of Lumpkin). The appellant testified that Mr. Allmond said something to him, but that he did not hear what Mr. Allmond said. Tr. at 295 (testimony of the appellant).

¶10 Toward the end of his tour of duty, the appellant, who was a union official, was in the union office conducting union business along with fellow union officials Michael Young and Darryl Young. Tr. at 224-25, 260, 296 (testimony of M. Young, D. Young, the appellant). Mr. Allmond went into the union office at approximately 10:30 p.m., pointed his finger at the appellant, and again threatened to fight the appellant after work. Tr. at 200, 205-06, 224-25, 260, 296-97 (testimony of Lumpkin, M. Young, D. Young, the appellant). Not all of the witnesses to this incident agree as to exactly what language Mr. Allmond used, but they all agreed that he used profanity. Tr. at 200, 205-06, 224-25, 260, 296 (testimony of Lumpkin, M. Young, D. Young, the appellant). The appellant responded that he did not want to fight. Tr. at 200, 262, 296 (testimony of Lumpkin, D. Young, the appellant). Michael Young testified that he told Mr. Allmond to leave. Tr. at 225 (testimony of M. Young).

¶11 Thereafter, the appellant clocked out, then returned to the union office and stated that Mr. Allmond was waiting for him outside on the steps. Tr. at 235, 273, 297 (testimony of M. Young, D. Young, the appellant). Michael Young testified that he jokingly offered to escort the appellant out of the building, but he did not actually do so. Tr. at 236, 297-98 (testimony of M. Young, the appellant).

¶12 Meanwhile, according to a videotape of the surveillance camera at the exit of the building, Mr. Allmond was, in fact, waiting for the appellant. I.D. at 3.* At approximately 11:00 p.m., the appellant exited the building. I.D. at 4. In doing so, he passed the security desk, where Postal Police Officer Jonas Johnson was stationed immediately inside the door. Tr. at 50-51, 299 (testimony of Johnson, the appellant). The appellant proceeded through the turnstile and out the door, and turned to go down the steps, but stopped when he saw Mr. Allmond waiting for him. Tr. at 299 (testimony of the appellant). The two exchanged words; Mr. Allmond challenged the appellant to a fight and the appellant responded that he did not want to fight. *Id.* Mr. Allmond then invited the appellant to meet him at a nearby bar, and the appellant responded that he would. *Id.* at 299-300. Mr. Allmond then pushed the appellant in the chest and went down the stairs. I.D. at 4. The appellant remained at the top of the stairs. *Id.* Mr. Allmond came up the stairs again, shoved the appellant with his body, and went back down the stairs. *Id.* The appellant then went down the stairs toward Mr. Allmond, who was waiting with a balled fist. *Id.*

¶13 From that point, it appears that Mr. Allmond struck the appellant first, knocking the appellant's glasses off. Tr. at 266, 302 (testimony of D. Young, the appellant). In the course of approximately four minutes, the appellant and Mr. Allmond fought three times, and were separated three times. The administrative judge found, and the agency does not dispute, that Mr. Allmond attacked the appellant each of the three times that the parties fought. I.D. at 24; *see* Tr. at 182, 266-67, 302-03 (testimony of Short, D. Young, the appellant). In the end, the fight was broken up by some of the appellant's co-workers (Short and D. Young) and by the Postal Police Officers who responded to the scene (Jonas

* In her initial decision, the administrative judge provided a detailed description of the contents of the videotape, I.D. at 3-4, which neither party challenges on review. We rely on her summary of the videotape here to the extent that the altercation occurred within the range of the surveillance camera.

Johnson, Larry Hall). Tr. at 90-92, 104-08, 180-82, 195-96, 200-01, 266-67, 302-03 (testimony of Johnson, Hall, Short, Lumpkin, D. Young, the appellant). At the end of the fight, Mr. Allmond was bleeding from a cut over his left eye. Tr. at 64-65, 90, 108 (testimony of Johnson, Hall).

¶14 To support an assertion of self-defense, the appellant must prove, inter alia, that he used only so much force as was reasonably necessary to free himself from another's unwanted grasp. See *Mahan v. Department of the Treasury*, 89 M.S.P.R. 140, ¶ 8 (2001); *Fuller v. Department of the Navy*, 60 M.S.P.R. 187, 190 (1993), *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). The doctrine of self-defense may not be successfully invoked if the person raising it was not free from fault in bringing on the difficulty, unless that person retreats in good faith, intending to abandon the difficulty that eventually led to the aggression. *Fuller*, 60 M.S.P.R. at 190.

¶15 The administrative judge found that the above-noted facts supported the appellant's claim of self-defense because he told Mr. Allmond numerous times that he did not want to fight, because Mr. Allmond was the aggressor, and because each time the fight broke up, the appellant attempted to walk away. I.D. at 19, 24-26. The administrative judge further discounted evidence concerning the appellant's interactions with Mr. Allmond on the workroom floor earlier that day on the basis that the appellant was not charged with "baiting or goading" Mr. Allmond. *Id.* at 26-27.

¶16 In considering the appellant's claim of self-defense, the administrative judge particularly relied on the testimony of the appellant, Mr. Short, and Darryl Young, because they were eyewitnesses to the physical altercation. I.D. at 19. The administrative judge found that their testimony was credible based on the witnesses' demeanor and on the fact that their testimony was plausible, consistent with each other, and corroborated by the videotape of the altercation. *Id.* at 19-21. The administrative judge rejected as not credible the testimony of

Officer Johnson and the written statement prepared by Mr. Allmond. *Id.* at 21-24.

¶17 To resolve credibility issues, the trier of fact 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, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). The United States Court of Appeals for the Federal Circuit held in *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002), that the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing. *Id.* at 1301; *see Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304-05 (Fed. Cir. 2008); *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). The Board may, however, overturn demeanor-based credibility findings if the Board has sufficiently sound reasons for doing so. *See Leatherbury*, 524 F.3d at 1305; *Haebe*, 288 F.3d at 1301; *Faucher*, 96 M.S.P.R. 203, ¶ 8. The Board has stated a similar rule, namely, that it does not owe deference to the administrative judge's credibility findings where her findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *DeJohn v. Department of the Army*, 106 M.S.P.R. 574, ¶ 11 (2007); *Faucher*, 96 M.S.P.R. 203, ¶ 8.

¶18 The administrative judge found that the appellant acted in self defense based on several factors: (1) The appellant's credible testimony that he acted in self-defense, I.D. at 19; (2) the credible testimony of Mr. Short and Darryl Young

that the appellant acted in self-defense, *id.* at 19-21; (3) the appellant's credible testimony that "he informed Mr. Allmond numerous times that he did not want to fight," *id.* at 19; (4) the appellant's credible testimony that he made efforts to walk away from the fight and go to his car, *id.* at 19; (5) the videotape of the altercation, *id.* at 20, 23; and (6) the appellant's credible testimony that "he did not fight back when Mr. Allmond pushed him twice and only engaged in using minimal force to defend himself when attacked by Mr. Allmond on three separate occasions," *id.* at 24. Contrary to the administrative judge's findings, however, the record as a whole does not support the appellant's claim of self-defense.

¶19 First, the administrative judge did not properly consider whether the appellant was free from fault in bringing on the difficulty. *Fuller*, 60 M.S.P.R. at 190. Although she recited the testimony concerning the events preceding the physical altercation, I.D. at 9-13, she did not make any mention of the earlier events in her discussion of the appellant's claim of self-defense, except to note that the appellant had "informed Mr. Allmond numerous times that he did not want to fight," *id.* at 19. In fact, according to the appellant's own testimony, which the administrative judge found credible, the evidence shows that the appellant was not free from fault in bringing on the difficulty earlier that day by calling Mr. Allmond a "dummy" on the workroom floor. Tr. at 294 (testimony of the appellant). Further, because the appellant asserted in his oral reply to the notice of proposed removal that he acted in self-defense, Tr. at 136 (testimony of Hostetler), and because the issue of "free[dom] from fault" is material to a claim of self-defense, *see Fuller*, 60 M.S.P.R. at 190, it was not improper for the deciding official to mention the incident in the removal notice, IAF, Tab 6, Subtab 4a at 1, as a way of explaining why he believed that the appellant did not act in self-defense. The agency was not required to charge the appellant with baiting or goading as a separate incident and the administrative judge erred by treating the earlier incident as irrelevant to the fight that followed.

¶20 Second, the administrative judge focused her analysis of the evidence on whether, once Mr. Allmond had thrown the first punch, the appellant was permitted to fight back, rather than looking at all the record evidence to determine whether the appellant took all reasonable steps to avoid the physical altercation in the first place. I.D. at 19, 24. All of the witnesses to the earlier incidents with Mr. Allmond testified that they did not believe that Mr. Allmond's threats were serious. Tr. at 206-08, 213, 225, 261, 330-32 (testimony of Lumpkin, M. Young, D. Young, the appellant). Further, although the appellant returned to the union office after clocking out and told Michael and Darryl Young that Mr. Allmond was waiting for him, the administrative judge appears to have accepted the appellant's testimony that this was not true and he was merely joking. I.D. at 13, 16; *see* Tr. at 235-36, 273-74, 297-98, 315 (testimony of M. Young, D. Young, the appellant). Even assuming that the appellant was joking, once he exited the building and saw Mr. Allmond was, in fact, waiting for him, he reasonably should have known that Mr. Allmond was still angry and possibly intended to follow through on his threat to fight the appellant. Further, although at this point the appellant again stated that he did not want to fight, he testified that he agreed to meet Mr. Allmond at a bar later, Tr. at 299-300 (testimony of the appellant), which could have created the impression that the appellant was willing to fight with Mr. Allmond off agency premises. Even if that was not the appellant's intent, the appellant used extremely poor judgment in making this sort of remark because it could easily have been perceived as contributing to the hostilities rather than defusing them. *See Fuller*, 60 M.S.P.R. at 192 (the appellant was not free from fault in causing the difficulty and thus could not claim self-defense where, when she found herself in a confined space with a co-worker who, two weeks before, had threatened to fight her, chose to confront that co-worker with questions that tended to escalate the tension between the parties). The administrative judge did not mention any of this evidence in her discussion of self-defense.

¶21 Furthermore, and most important, even after Mr. Allmond ascended the stairs and pushed him *twice*, the appellant did not take all reasonable steps to avoid the fight. *See Fuller*, 60 M.S.P.R. at 192 n.4 (the appellant could not claim self-defense where, after she and the other combatant had been fighting and were separated, both parties continued to reach for each other, evidencing the appellant's apparent persistence in engaging the other party in mutual combat). Even according to the appellant's testimony, "[t]he fight started as [the appellant] walked down the steps." Tr. at 317 (testimony of the appellant). Quite simply, instead of descending the stairs where Mr. Allmond was waiting for him with a balled fist, the appellant could have gone back inside the building where Officer Johnson was at his security post immediately inside the door. The appellant testified that he did not do so because others were coming out the door. Tr. at 304, 320 (testimony of the appellant). The appellant offered no corroboration for this testimony, even though his own witness, Darryl Young, exited the building almost immediately after the appellant, Tr. at 268-69, 275 (testimony of D. Young), and would have been in a position to provide evidence as to whether it was impossible for the appellant to return inside. Even assuming *arguendo* that it was, in fact, impossible to return inside, the appellant could have asked Darryl Young or one of the people coming out of the building to get Officer Johnson. Tr. at 321 (testimony of the appellant). He also could have stayed at the top of the stairs until it was clear to go back in. Tr. at 321-22. He chose not to exercise any of these options to retreat. In his own words, "I chose to go home, sir. I was off the clock. I was trying to go home, sir." Tr. at 322. The administrative judge did not mention any of this evidence either in her discussion of the appellant's claim of self-defense.

¶22 Although the administrative judge found the appellant's testimony to be credible, she did not consider critical elements of the appellant's own testimony that undercut his claim of self-defense. Further, as described above, the administrative judge did not fully consider whether the appellant was free from

fault in bringing on the difficulty, and she omitted from her discussion key points from the appellant's testimony that do not support his claim that he retreated in good faith from the altercation, i.e., that even after Mr. Allmond pushed him twice, the appellant advanced down the stairs towards Mr. Allmond rather than either retreating, calling for assistance, or staying at the top of the stairs. Because the administrative judge did not completely analyze all relevant aspects of the doctrine of self-defense, and because she failed to address all material evidence both supporting and controverting the appellant's claim of self-defense, we find that there are sufficiently sound reasons not to defer to her credibility findings. *See Rapp v. Office of Personnel Management*, 108 M.S.P.R. 674, ¶¶ 14-17 (2008) (the Board did not defer to the administrative judge's credibility determinations where his exclusion of relevant evidence rendered his determinations incomplete and inconsistent with the weight of the evidence and did not reflect the record as a whole); *Faucher*, 96 M.S.P.R. 203, ¶¶ 11-18 (the Board did not defer to the administrative judge's credibility determinations where the administrative judge did not identify and discuss all material evidence relevant to a credibility determination and where his determination did not reflect the record as a whole). In addition, we find that, because the appellant did not retreat in good faith before the fight began, he cannot successfully claim self-defense. *See Fuller*, 60 M.S.P.R. at 190.

¶23 The AJ found that the appellant responded to Mr. Allmond's attacks with reasonable force and, that, although Mr. Allmond received a cut above his eye, he was not seriously injured. I.D. at 23, 25-26. The agency disputes this finding, submitting for the first time on review a document purporting to show that Mr. Allmond received medical attention after the altercation. PFR File, Tab 3, Attachment 3. Because the agency has not shown that this evidence was not readily available prior to the close of the record below despite its due diligence, we do not consider it. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). In any event, in light of our finding above that the appellant was not

entitled to claim self-defense, the degree of force he used in responding to Mr. Allmond's attacks is not material to our decision.

The penalty of removal is within the tolerable limits of reasonableness.

¶24 Where the Board sustains the charge and underlying specifications, it will defer to an agency's penalty determination unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or unless the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Batten v. U.S. Postal Service*, 101 M.S.P.R. 222, ¶ 9 (quoting *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987)), *aff'd*, 208 F. App'x 868 (Fed. Cir. 2006). That is because the agency has primary discretion in maintaining employee discipline and efficiency. *Balouris v. U.S. Postal Service*, 107 M.S.P.R. 574, ¶ 6 (2008). The Board will not displace management's responsibility, but will instead ensure that managerial judgment has been properly exercised. *Id.*; *Batten*, 101 M.S.P.R. 222, ¶ 9. Mitigation is appropriate only where the agency failed to weigh the relevant factors or where the agency's judgment clearly exceeded the limits of reasonableness. *Balouris*, 107 M.S.P.R. 574, ¶ 6. The deciding official need not show that he considered all the mitigating factors. *Id.* The Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding on a penalty. *Balouris*, 107 M.S.P.R. 574, ¶ 6; *Batten*, 101 M.S.P.R. 222, ¶ 11.

¶25 In this appeal, the administrative judge acknowledged that the deciding official, Senior Plant Manager James H. Hostetler, testified that he considered the *Douglas* factors. I.D. at 30. She found, however, that the deciding official "revealed that he is of the view that the agency's zero tolerance policy requires removal for a sustained charge of violence in the workplace." *Id.* The administrative judge then correctly noted that the agency's zero tolerance policy provides, inter alia, that acts of violence will not be tolerated and *may* result in removal from the Federal service. *Id.*; IAF, Tab 5, Subtab 4e. She determined

that, “to the extent the deciding official applied the [zero tolerance] policy as a per se rule requiring removal, . . . he abused his discretion.” I.D. at 30. She further found that mitigation of the removal penalty was warranted because there was no evidence that the appellant used a weapon, Mr. Allmond was not seriously injured, and Mr. Allmond was the aggressor. *Id.* at 31. She determined that, because “the appellant could have gone back into the building and informed the postal police following Mr. Allmond’s initial push rather than descending the stairs . . . a significant penalty is warranted to impress upon the appellant the seriousness of his misconduct and the potential damage he could have inflicted as a result of his behavior.” *Id.* She concluded that a 30-day suspension was the maximum reasonable penalty. *Id.* at 32.

¶26 The Board has held that, when an agency imposes removal under a zero tolerance policy without giving bona fide consideration to the appropriate *Douglas* factors, its penalty determination is not entitled to deference. *See Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 15 (2006), *aff’d*, 218 F. App’x 1001 (Fed. Cir. 2007); *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶ 11 (2000). In such a case, the Board will independently weigh the relevant *Douglas* factors to evaluate the reasonableness of the penalty. *Wiley*, 102 M.S.P.R. 535, ¶ 15; *Omites*, 87 M.S.P.R. 223, ¶ 11.

¶27 Contrary to the administrative judge’s finding, we see no basis in the record on which to conclude that the deciding official did not give bona fide consideration to the relevant *Douglas* factors. Mr. Hostetler specifically testified that he was familiar with the *Douglas* factors and that he considered them in making his determination that removal was the appropriate penalty for the appellant’s misconduct. Tr. at 128-29 (testimony of Hostetler). He testified that he was aware that the appellant had worked on a special assignment, Tr. at 135-36, and that he had no prior disciplinary record, Tr. at 137. He also considered the appellant’s claim that he acted in self-defense. Tr. at 136. He testified that he reviewed the videotape of the altercation, Tr. at 134, and when

asked whom he considered to be the aggressor in the altercation, he stated that the tape indicated that the appellant was pushed. Tr. at 135.

¶28 However, Mr. Hostetler found, “[T] here were factors that I believe [the appellant] was involved with that led to this whole situation. And that I also believed that there were several opportunities where [the appellant] could have taken steps to prohibit it from happening.” Tr. at 141. He testified that, when the appellant went outside the building and saw Mr. Allmond waiting for him there, he could have retreated into the building and informed the Postal Police Officer that Mr. Allmond was outside. Tr. at 143.

¶29 As to the agency’s zero tolerance policy, Mr. Hostetler testified that “[t]he case stood alone.” Tr. at 138. He explained, “[W]hen I have to make decisions like this that deal with the no tolerance policy, is [sic] I look at the specific issues of the case.” Tr. at 138. He elaborated that this does not mean he does not consider the *Douglas* factors but instead he considers the *Douglas* factors in all disciplinary cases. Tr. at 139.

¶30 The deciding official’s testimony shows that this is not a case in which he reflexively and rigidly applied a zero tolerance policy to impose removal without consideration of the *Douglas* factors or the individual circumstances of the case. Thus, this case is distinguishable from cases such as *Wiley*, 102 M.S.P.R. 535, ¶ 15, and *Omites*, 87 M.S.P.R. 223, ¶¶ 10-11, where the Board found that the deciding officials imposed the penalty of removal based on their mistaken beliefs that removal was the proper penalty for any violation of the zero tolerance policy, without any genuine consideration of a lesser penalty. Because the deciding official duly weighed the relevant factors in arriving at the penalty of removal, the administrative judge erred by failing to afford the agency’s penalty determination deference. See *Harris v. U.S. Postal Service*, 100 M.S.P.R. 613, ¶ 13 (2005) (the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of

reasonableness in determining the penalty), *review dismissed*, 206 F. App'x 990 (Fed. Cir. 2006).

¶31 Similarly, we see no basis on which to conclude that the penalty of removal was clearly excessive under the circumstances. The Board has upheld the removal of employees for engaging in physical altercations even when their acts were provoked to some degree. *See Balouris*, 107 M.S.P.R. 574, ¶¶ 2, 7 (removal of Letter Carrier for “unacceptable conduct/assault” upheld where the appellant claimed he unintentionally struck a co-worker when he reflexively pushed back after the co-worker spat on him); *Harris*, 100 M.S.P.R. 613, ¶ 14 (removal of Customer Services Supervisor for “improper conduct” upheld where the appellant struck a postal customer who had verbally abused her with offensive, profane, and racially derogatory language, and where the appellant had the opportunity to avoid the physical confrontation that led to her removal). Furthermore, we note that the agency also removed Mr. Allmond for his participation in the altercation. *See Allmond v. U.S. Postal Service*, MSPB Docket No. CH-0752-07-0514-I-1 (Initial Decision, Jan. 3, 2008).

¶32 Accordingly, we find that the deciding official considered the *Douglas* factors most relevant to this case and that there is no basis for disturbing the agency’s exercise of the management discretion entrusted to it.

ORDER

¶33 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, 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.