UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 19

Docket No. CB-7521-08-0019-T-1

Social Security Administration,
Petitioner,
v.
Danvers E. Long,
Respondent,

January 27, 2010

Christopher G. Harris, Atlanta, Georgia, for the petitioner.

Selisa M. Wright, Esquire, Atlanta, Georgia, for the petitioner.

Christopher C. Sharp, Esquire, Plantation, Florida, for the respondent.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The petitioner filed a complaint pursuant to 5 U.S.C. § 7521 requesting the Board to find good cause to remove the respondent from his position as an administrative law judge (ALJ) based on a charge of conduct unbecoming an ALJ (2 specifications). The ALJ assigned to hear the case issued an initial decision (ID) in which he sustained the charge based on 1 of the 2 specifications and found good cause to suspend the respondent for 45 days rather than to remove him as requested by the petitioner. The petitioner has filed a petition for review

(PFR) of the ID, and the respondent has filed a cross-PFR. For the reasons explained below, we GRANT the petitioner's PFR, DENY the respondent's cross-PFR, AFFIRM the ID AS MODIFIED by this Opinion and Order, and FIND good cause to remove the respondent.

BACKGROUND

¶2 The respondent is employed by the petitioner, the Social Security Administration (SSA), as an ALJ in the Office of Disability, Adjudication and Review in Fort Lauderdale, Florida. Joint Hearing Exhibit (JHE) 1 (stipulations of the parties). The complaint brought by the petitioner arose out of a January 27, 2008, altercation between the respondent and Lilia Vanessa Castro, who was living with him and is the mother of their young child, Charlize Long Castro. The respondent was arrested by police officers of the Coral Springs, Florida, Police Department and was charged with one count of domestic violence battery and one count of culpable negligence. *Id.* The prosecutor entered a nolle prosequi on the criminal charges on September 29, 2008. *Id.*

¶3 On June 30, 2008, the petitioner filed a complaint charging the respondent with conduct unbecoming an ALJ and seeking his removal. Initial Appeal File (IAF), Tab 1. The charge contained two specifications as follows:

> **Specification 1:** On or about January 27, 2008, Respondent repeatedly struck, grabbed, and pushed Lilia Vanessa Castro.
>
> **Specification 2:** On or about January 27, 2008, Respondent struck Charlize Long Castro, while Lilia Vanessa Castro was holding her.

Id.

¶4 The record evidence shows that Ms. Castro went to the home of a neighboring couple, Lisa and Donald Feeney, after the altercation with the respondent. Hearing Transcript (HT) at 163, 186, 205. Mrs. Feeney placed a 911 call to the police on Ms. Castro's behalf. HT at 166. Three police officers responded, questioned Ms. Castro and the respondent, took photographs of her and the child, and placed the respondent under arrest. HT at 249-52, 281, 286-88;

Agency Hearing Exhibits (AHE) 6, 7, 9. After learning of the arrest from the police, the petitioner removed the respondent from conducting hearings on February 1, 2008, and placed him on administrative leave on February 15, 2008. HT at 100-01, 112, 115-16, 324; AHE 4, 5. Ms. Castro left the respondent's home for several months after the incident. HT at 194, 218-19. She and the respondent later reconciled and, at the time of the hearing, they were again living together. HT at 62, 221; JHE 1. At the hearing, he denied striking Ms. Castro or the child. HT at 32, 34-35, 39. In her testimony, Ms. Castro recanted her statements made to Mr. and Mrs. Feeney and the police officers on the night of the incident. HT at 205-15.

¶5 After a hearing, the Board's ALJ found that the petitioner proved the first specification of its complaint "in substance," but that it did not prove the second specification. IAF, Tab 38 (ID) at 21-23. He also held that there was a nexus between the proven misconduct and the respondent's position as an ALJ. ID at 24-29. Based on these reasons, he concluded that there was good cause for the imposition of a 45-day suspension, rather than removal as recommended by the petitioner. ID at 29-32.

¶6 The petitioner has filed a PFR in which it asserts that removal is the appropriate penalty under a proper application of the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). Petition for Review (PFR) File, Tab 3. In support of the removal penalty, the petitioner argues that it proved both specifications of the charge by preponderant evidence. *Id.* The petitioner also asserts that the ALJ erred in denying its post-hearing motion to amend the complaint to add a specification charging that the respondent presented false testimony during the hearing. *Id.*

¶7 The respondent filed a response in opposition to the petitioner's PFR and a cross-PFR. PFR File, Tabs 5, 6. The cross-PFR reiterates the respondent's argument on appeal that he was charged with conduct tantamount to domestic battery under Florida law and that the petitioner was therefore required to prove

the elements of that crime. *Id.*, Tab 6. It also asserts that the ALJ's factual findings were insufficient to sustain specification 1, and thus the charge of conduct unbecoming an ALJ, because a generic charge relies on the particular description of the conduct at issue. *Id.* In addition, the respondent argues that there was an insufficient nexus between his alleged off-duty misconduct and his position to find good cause for a disciplinary action. *Id.* The respondent also argues that the penalty was excessive. *Id.*

¶8 The Association of Administrative Law Judges (AALJ) has filed a motion to intervene and a brief as amicus curiae in support of the respondent's position regarding nexus. PFR File, Tab 8.

ANALYSIS

Procedural Matters

¶9 A party requesting to intervene in an appeal at the PFR stage must show that it will be affected directly by the outcome of the proceeding. 5 C.F.R. § 1201.114(g)(3). The AALJ's motion does not meet the regulatory standard; it has not shown that the outcome of this appeal would have a direct effect upon the organization. Therefore, the AALJ's motion to intervene is denied. We have considered its amicus brief, however, in deciding this appeal.

¶10 We also find that the ALJ did not err in denying the petitioner's motion to amend its complaint after the hearing to add a specification of false testimony in support of its charge against the respondent. ID at 18-21. The petitioner argued that the Board should amend the complaint to conform to the evidence, consistent with practice under the Federal Rules of Civil Procedure, specifically Fed. R. Civ. P. 15(b). IAF, Tab 32. The Board, however, is not bound by the Federal Rules of Civil Procedure but looks to them for guidance. *Triplett v. Office of Personnel Management*, 105 M.S.P.R. 575, ¶ 9 n.1 (citing *Kravitz v. Office of Personnel Management*, 75 M.S.P.R. 44, 47 (1997)), *aff'd*, 250 F. App'x 322 (Fed. Cir. 2007).

¶11 However, even under Fed. R. Civ. P. 15(b), amendment is not proper where the issue to be added was not tried by the express or implied consent of the parties. *Special Counsel v. Narcisse,* 51 M.S.P.R. 222, 226-27 (1991) *vacated in part on other grounds on reconsideration,* 60 M.S.P.R. 294 (1994); *Special Counsel v. Nichols,* 36 M.S.P.R. 445, 457 (1988). There was no express consent here. Further, the test for implied consent is whether the respondent failed to object to the introduction of evidence, or introduced evidence himself, that was relevant only to the new issue. *Narcisse,* 51 M.S.P.R. at 227; *Nichols,* 36 M.S.P.R. at 457. There was no implied consent here because the respondent's hearing testimony in this appeal was relevant to both the charge of conduct unbecoming an ALJ and the proposed amendment. *Narcisse,* 51 M.S.P.R. at 227; *Nichols,* 36 M.S.P.R. at 457. Therefore, the ALJ correctly denied the petitioner's motion.

Merits

Applicable Law and Burden of Proof

¶12 The Board has original jurisdiction to adjudicate actions against ALJs. An agency may take an action against an ALJ only for "good cause" as determined after a hearing by the Board. 5 U.S.C. § 7521(a), 5 C.F.R. §§ 1201.139-.140. The agency must prove good cause by a preponderance of the evidence. *Social Security Administration v. Steverson,* 111 M.S.P.R. 649, ¶ 12 (2009).

¶13 There is no statutory definition of good cause, leaving the interpretation of the term to the adjudicatory process and the facts of each case. *Brennan v. Department of Health and Human Services,* 787 F.2d 1559, 1561-62 (Fed. Cir. 1986); *Social Security Administration v. Mills,* 73 M.S.P.R. 463, 467-68 (1996), *aff'd,* 124 F.3d 228 (Fed. Cir. 1997) (Table). While there is no precise definition of the term good cause, the Board has made clear that it is not equivalent to the efficiency of the service standard under 5 U.S.C. § 7513 for adverse actions against other federal employees. *Mills,* 73 M.S.P.R. at 468 (citing *Social Security*

Administration v. Goodman, 19 M.S.P.R. 321, 330 n.8 (1984)). Cases under chapter 75, however, can provide some guidance for determining what is good cause for an action against an ALJ. *Social Security Administration v. Carr,* 78 M.S.P.R. 313, 338 (1998), *aff'd,* 185 F.3d 1318 (Fed. Cir. 1999); *Mills,* 73 M.S.P.R. at 468.

The petitioner established both specifications of the charge of conduct unbecoming an ALJ by preponderant evidence.

¶14 On PFR, both parties challenge the ID's findings regarding specification 1, and the petitioner challenges the ALJ's failure to sustain specification 2. PFR File, Tabs 3, 6. For the reasons explained below, we find that both specifications are supported by a preponderance of the evidence. In so holding, we rely on the hearing testimony of Mr. and Mrs. Feeney and two of the responding police officers, the reports that the officers prepared the night of the incident, Ms. Castro's sworn statement to the police officers, and a corroborating statement from the respondent's teenage daughter, Ana Long. We do not find reliable or probative the hearing testimony of the respondent and Ms. Castro.

¶15 The record evidence establishes that on the night of January 27, 2008, Ms. Castro arrived on foot at the home of Mr. and Mrs. Feeney, who lived about three-quarters of a mile away in an adjacent neighborhood. HT at 158, 180, 279.[1] The couple was awakened by Ms. Castro screaming and pounding on their door. HT at 161, 186. Mrs. Feeney testified that when Ms. Castro came in, she was crying, shaking and hysterical. *Id.* at 161-62. Mr. and Mrs. Feeney said Ms. Castro told them that the respondent had hit her and had also hit the child when striking her. *Id.* at 163-64, 186, 190. They each testified that there was a large

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[1] Mr. and Mrs. Feeney had previously been close neighbors and had become friendly with Ms. Castro at that time. HT at 158-60. Ms. Castro came to the respondent's home as a nanny about 7 years before the incident at issue. *Id.* The respondent has a son, Danvers Long, Jr., and a daughter, Ana, who were ages 14 and 16, respectively, at the time of the incident. AHE 6, 9.

red area on one side of Ms. Castro's face and Mrs. Feeney gave her ice for it. *Id.* at 162, 183, 187-88. Mr. Feeney also stated that Ms. Castro had swelling near her eye and that she "looked physically beat up." *Id.* at 186-87.

¶16 The first police officer to arrive at the Feeneys' home in response to the 911 call, at about 11:20 p.m., was Officer Patrick Madison. HT at 281; AHE 9. He then went to the respondent's home and was joined by Officers Xavier Reinoso and Brett Coleman. HT at 250-52, 286. Each of the three officers interviewed Ms. Castro, and Officer Reinoso took a tape-recorded statement from her. HT at 228, 241, 250, 254, 281-83. Officers Madison and Coleman prepared incident reports based on their conversations with Ms. Castro. HT at 241, 282; *see* AHE 6 (Coleman report), 9 (Madison report).[2] Officer Madison also executed a probable cause affidavit for the respondent's arrest, which contains the same narrative as his incident report. AHE 8. The affidavit stated, in pertinent part, as follows:

> The defendant Danvers Long knowingly and willing [sic] repeatedly struck the victim Lilia Castro with a closed fist in the face leaving visible signs of physical contact (scraches [sic] and abrasions on the forehead, eye area, and on the left side near her nose). The defendant Danvers also grabbed Lilia against her will leaving visible bruises on her left forearm and an abrasion on her left thigh. While Lilia was holding Charlize Long Castro (20 months old) Danvers attempted to hit Lilia and hit Charlize in the face, leaving a visible bruise on the left side of her face.

AHE 8. Officer Madison's report and affidavit provide the following chronology of events as recounted by Ms. Castro: that she had left the child in the respondent's care but returned to discover he was asleep and the child was not with him; that when she woke the respondent, they argued, and he pushed her and grabbed her arms; she pushed him away and struck him once on the back to get away from him; that she found the child with the respondent's older daughter,

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[2] Reinoso also prepared a report, which was not entered into evidence because he was unable to testify due to emergency surgery. HT at 226.

Ana, and carried the child into the kitchen; that the respondent entered, pushed her, and struck her repeatedly with his fist; that the respondent unintentionally struck the child at this time; that she left the house with the child to go to the neighbors' house, because the respondent would not allow her to call the police; that the respondent followed her in his car; and that, at the neighbors' house, he got out of the car and pushed and struck her again, until she released the child to him. AHE 8, 9. In his hearing testimony, Officer Madison recounted that Ms. Castro was disheveled and crying and that she told him "she was beat up." HT at 280-81. He also testified that Ms. Castro told him many times that the respondent had hit the child. HT at 284.

¶17 Officer Coleman's report is consistent with Officer Madison's account in most respects as to the events in the home, but it also states that Ms. Castro said the respondent hit her in the bedroom and that he followed her from the kitchen into the bathroom, where she had gone to put water on the child's face, and struck her again there. AHE 6. Officer Coleman testified at length, corroborating his report. HT at 238-78. He added the fact, not in his report, that Ms. Castro said she left after the respondent prevented her from calling the police. *Id.* at 248.

¶18 Ana Long, the respondent's 16-year-old daughter, gave a sworn statement to police the night of the incident and affirmed its accuracy in a January 15, 2009 deposition, which was entered into the record in lieu of her testimony. AHE 1. She told the police that she heard her father and Ms. Castro arguing in their room, heard "thumps," and heard Ms. Castro say "don't put your hand on me." *Id.*, Att. 1. Ms. Long said Ms. Castro took the child from her, and her father and Ms. Castro continued to argue in the kitchen. *Id.* Ms. Castro was holding the child and facing the respondent. AHE 1. Ms. Long saw her father grab Ms. Castro's arm "pretty hard," and she yelled at her father to stop. *Id.*, Att. 1. She did not observe her father hit the child but when she looked away toward her brother's room, she heard the child "start screaming and crying . . . and that's when she let me know she hurt herself really bad, that something hit her really bad." *Id.* Ms.

Long told the police that she saw Ms. Castro take the child into the bathroom and try to turn on the water and her father try to turn it off. *Id.* She heard Ms. Castro tell her father, "you hurt her, instead of hurting me, you hurt her," and her father deny it. *Id.* Ms. Long then ran out of the house because she was disturbed by the situation. *Id.*[3] Ms. Long said in her deposition that later that night she saw Ms. Castro had bruises on her arm and a cut above her eye. AHE 1. She did not recall any marks on the child. *Id.*

¶19 Both police officers observed injuries on Ms. Castro's face and a forearm. HT at 239, 280; AHE 6, 8, 9. The officers also observed a red mark on the child's face. HT at 272, 286. Officer Coleman took several digital photographs, copies of which were entered into the record. AHE 7. Ms. Castro refused medical attention for herself or the child. HT at 272, 297.

¶20 As noted above, Ms. Castro gave a tape-recorded statement to Officer Reinoso regarding the incident with the respondent the night it occurred. The statement was given in English.[4] The ALJ held that the transcript of the statement was not authenticated and, therefore, inadmissible. ID at 7. As discussed below, we find that this was error. The transcript shows that Ms. Castro said that she was touched or hit six times by the respondent. IAF, Tab 1, Exh. 7. She said that, when she first tried to find out from the respondent where the child was, "he told me I am a witch and a crazy woman and he hit me

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[3] In her deposition, at which the respondent personally made several objections and once instructed her not to answer, Ms. Long at first denied that there was any reason to believe that Charlize had been struck. AHE 1. However, when presented with her statement to police, she affirmed that the child was crying and that she heard Ms. Castro say her father had hurt the child. *Id.*

[4] The hearing record reflects confusion about the language in which Ms. Castro gave the statement and whether the transcript was a translation from Spanish. HT at 233-34. However, we rely on Ms. Castro's testimony that she gave the statement in English, HT at 231-33, and on the transcript itself, which is in imperfect English consistent with it being her second language. IAF, Tab 1, Exh. 7.

and pushed me." *Id.* She said she got the child from Ms. Long and then told the respondent she was going to leave and go to her sister's in Miami. *Id.* She stated that the respondent got angry and "he punched me and he hit me. And when I was in the kitchen, he was hit [sic] me in the face, but he hit the baby." *Id.* Ms. Castro affirmed that the respondent hit both her and Charlize with a fist. *Id.* She said he also grabbed her and hit her in the bathroom, and that when she said she was going to call the police he got angrier. *Id.* She stated that when Ms. Long left, she took it as the opportunity to leave also, i.e., saying they had to find Ms. Long, but the respondent followed her in the car. *Id.* She said he tried to get her into the car with the child and when she refused, "he hit me and pushed me to go to the car" and grabbed her arms. *Id.* Ms. Castro said she did not want to go back to the house because then she could not call the police or her sister. *Id.* She said she had to give the respondent the child when he hit her, and then she ran to the neighbors. *Id.*

¶21 Officers Coleman and Madison testified that when they questioned the respondent, he said there had been only a verbal altercation. HT at 263, 287-88. They said they let him know that there was a different account of what had transpired, but he offered no explanation. *Id.* at 263, 288. Officer Madison stated that he tried several times to get the respondent's version of the story. *Id.* at 288. The officers said he did not report that Ms. Castro had hit him. *Id.* at 262, 287. Because the respondent was briefly unresponsive once he was handcuffed and seated in the police car, he was taken to an emergency room. HT at 260-62. A physician there determined that he had experienced a transient ischemic attack and recommended prompt follow-up. Respondent's Hearing Exhibit (RHE) 2. The respondent did not comply with this recommendation, but on January 29, 2008, he saw an orthopedist complaining of multiple bruises and soreness. HT at 425-26; RHE 4. The physician's report indicates he found four bruises, i.e., on the respondent's left shoulder, left elbow, and both forearms. RHE 4.

¶22 In his hearing testimony, the respondent denied ever striking Ms. Castro during the incident at issue. HT at 32, 34, 35, 39. He also denied striking the child. *Id.* at 35. The respondent stated that when he got out of bed, Ms. Castro "shoved me hard, spinning me partially around, and struck me on the back." *Id.* at 24. He said that she struck him repeatedly thereafter, though he could not recall in what rooms this occurred, and that he sustained 11 bruises to his shoulder, arms and chest. *Id.* at 26, 30-31, 33, 41. He stated that he grabbed Ms. Castro in the bedroom and also pushed her away to get her to stop hitting him. *Id.* at 32, 47. He said he grabbed her again in the kitchen and may have grabbed her after following her in the car in an attempt to get the child back. *Id.* at 34, 48. He stated that he had gone about a half-mile when he was able to get the child back from Ms. Castro and did not observe Ms. Castro at the neighbors' house. *Id.* at 45, 49. The respondent stated that he did not think it was prudent to take the child out into the dark, because the house was near the Everglades and there could be alligators or snakes in the community. *Id.* at 43. He stated that his actions on the night of January 27, 2008, were in defense of himself and the child. *Id.* at 24, 86. The respondent also testified that the police officers who questioned him that night never asked him what his version of the incident was and that he did not recall telling them there was only a verbal altercation. *Id.* at 25, 53-54.

¶23 At the hearing, Ms. Castro denied the account of events that, as discussed above, she gave to five people, i.e., Mr. and Mrs. Feeney and three police officers, on the night of the incident, including in her sworn statement. She testified that the respondent only grabbed her arms to protect himself and never pushed or struck her. HT at 205, 207. She said she did not know if he accidentally struck the child. *Id.* at 209. Ms. Castro stated that she did not tell Mr. and Mrs. Feeney or the police officers that the respondent hit her and did not tell the police that he shoved her or accidentally hit the child. *Id.* at 214, 216. She said that Mrs. Feeney did not give her ice for her face, and that she asked

Mrs. Feeney to call the police only because she was upset that the respondent had not been taking care of the child. *Id.* at 215.

¶24 The ALJ concluded that it was neither possible nor necessary to determine with specificity what occurred during the incident at the respondent's residence on January 27, 2008. ID at 15. He discredited some of the testimony from Mr. Feeney and the police officers who spoke with and observed Ms. Castro on the night of the incident. *Id.* at 11, 13, 14. He stated that the photographs of Ms. Castro "militate against a finding that she was hit by a closed fist." *Id.* at 13. The ALJ concluded that Ms. Castro provoked the conflict with the respondent, *id.* at 28, 31, and that the two engaged in "mutual flailing." *Id.* at 22. The ALJ held that the respondent did not strike Ms. Castro repeatedly as charged, but because he had used violence against her, the petitioner had proved specification 1 "in substance." *Id.* The ALJ did not sustain specification 2, that the respondent struck Charlize, the child, finding credibility issues with the testimony on that point and no corroborative physical evidence. *Id.* at 23. The ALJ stated that he based his findings on the reliability of the testimony and evidence developed at the hearing, including the credibility of the witnesses and his observation of their demeanor. *Id.* at 4.

¶25 The Board is not "free to overturn an administrative judge's demeanor based credibility findings merely because it disagrees with those findings." *Leatherbury v. Department of the Army,* 524 F.3d 1293, 1304 (Fed. Cir. 2008). Rather, when the findings are explicitly or implicitly based on demeanor, the Board may make determinations of fact different from those of the judge only where it "articulate[s] sound reasons, based on the record, for its contrary evaluation of the testimonial evidence." *Haebe v. Department of Justice,* 288 F.3d 1288, 1300 (Fed. Cir. 2002). An administrative judge's findings are due only as much weight as the evidence of record and the strength of the judge's reasoning require. *Christopher v. Department of the Army,* 107 M.S.P.R. 580, ¶ 16, *aff'd,* 299 F. App'x 964 (Fed. Cir. 2008). Moreover, where, as here, the

record is sufficiently developed and we do not rely upon witness demeanor, it is not necessary to remand the case to the judge, and we may adjudicate the case on the record. *Aldridge v. Department of Agriculture,* 111 M.S.P.R. 670, ¶ 11 (2009); *Dogar v. Department of Defense,* 95 M.S.P.R. 527, ¶ 4 (2004), *aff'd,* 128 F. App'x 156 (Fed. Cir. 2005). For the reasons explained below, we find sound reasons, based on the record, to disagree with the ALJ's findings.

¶26 The ALJ's decision indicates that his primary concern was with lack of eyewitnesses to the incident between the respondent and Ms. Castro and the fact that the statements of Mr. and Mrs. Feeney and the police officers were hearsay. It is well settled, however, that hearsay is admissible in Board proceedings "and may be accepted as preponderant evidence even without corroboration if, to a reasonable mind, the circumstances are such as to lend it credence." *Kewley v. Department of Health and Human Services,* 153 F.3d 1357, 1364 (Fed. Cir. 1998) (citing *Hayes v. Department of the Navy,* 727 F.2d 1535, 1538 (Fed. Cir. 1984)); *Vaughn v. U.S. Postal Service,* 109 M.S.P.R. 469, ¶ 9 (2008) (hearsay evidence may be sufficient to sustain a charge) (citing *Social Security Administration v. Whittlesey,* 59 M.S.P.R. 684, 692 (1993), *aff'd,* 39 F.3d 1197 (Fed. Cir. 1994) (Table), *cert. denied,* 514 U.S. 1063 (1995)).

¶27 "The determination of whether hearsay evidence alone is sufficient to sustain a charge depends on its reliability and trustworthiness." *Vaughn,* 109 M.S.P.R. 469, ¶ 9. "[H]earsay must be evaluated on a case-by-case basis to determine if the hearsay is inherently truthful and more credible than the evidence offered against it." *Sanders v. U.S. Postal Service,* 801 F.2d 1328, 1331 (Fed. Cir. 1986). The Board evaluates the probative value of hearsay under the factors set forth in *Borninkhof v. Department of Justice,* 5 M.S.P.R. 77, 87 (1981). Those factors include the availability of persons with firsthand knowledge to testify at the hearing, whether the out-of-court statements were sworn, whether the declarants were disinterested witnesses to the events and whether their statements were routinely made, the consistency of the out-of-court

statements with other statements and evidence, whether there is corroboration or contradiction in the record, and the credibility of the out-of-court declarant. *Borninkhof,* 5 M.S.P.R. at 87. Witness credibility is assessed by the Board under the factors set forth in *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987).

¶28 In this case, we find that the evidence from Mr. and Mrs. Feeney and the police officers regarding Ms. Castro's assertion that the respondent repeatedly struck, pushed and grabbed her during the incident, and accidentally hit the child, is more credible and probative than the hearing testimony of the respondent and Ms. Castro denying that he did so. We base this conclusion on several factors, particularly the multiplicity and consistency of the accounts given by those to whom Ms. Castro turned for help on the night of January 27, 2008. Moreover, the accounts were contemporaneous with the incident; Mr. and Mrs. Feeney saw and heard Ms. Castro immediately afterward, and Officers Coleman and Madison observed and talked with her very shortly thereafter. Further, all of the witnesses testified at the hearing regarding seeing Ms. Castro's injuries. In addition, the police officers were disinterested parties, and, although the Feeneys were friends of Ms. Castro and had only a passing acquaintance with the respondent, there is no evidence that they bore him any animus prior to the incident. All these factors lead us to conclude that their accounts of Ms. Castro's statements to them describing the respondent's conduct are reliable and probative. *Borninkhof,* 5 M.S.P.R. at 87; *see also Eck v. U.S. Postal Service,* 260 F. App'x 311, 312-13 (Fed. Cir. 2008) (NP) (the AJ properly found that statements to police and a supervisor outweighed the appellant's later denial of assault on an off-duty coworker).

¶29 The ALJ found that language difficulties, i.e., Ms. Castro's lack of English proficiency, handicapped most of those who spoke with her from having a full understanding of the facts she was relaying to them. ID at 16. He cites the fact that a Spanish-speaking officer, Reinoso, was called to the scene. However, all

witnesses at the hearing who spoke with Ms. Castro on the night of the incident, i.e., Mr. and Mrs. Feeney and two police officers, indicated they had no trouble understanding her. HT, 159-60, 188, 197, 241, 256. Further, while it would be possible for a Spanish speaker to obtain details with more ease, there is no evidence that Ms. Castro was unable to communicate, in English, the facts relevant to the charge, i.e., that she was repeatedly struck, pushed and grabbed by the respondent and that he also hit the child while Ms. Castro was holding her.

¶30 With regard to Ms. Castro's physical injuries, the ALJ concluded that the photographs taken by the police indicated she was not struck with a fist. ID at 13. But there is no expert testimony regarding this point and the ALJ does not otherwise explain the foundation for this conclusion, i.e., how a photograph would indicate whether one was struck with a fist or in another way. In any case, the petitioner's charge states that the respondent struck Ms. Castro and the child, but does not specify that it was with a fist. The photographs are not of excellent quality but show redness and scratches on Ms. Castro's face and a red mark on Charlize's face. AHE 7. We find that the photographs, as well as the observations of Mr. and Mrs. Feeney and the police officers, corroborate Ms. Castro's statements that she and the child were struck. Her assertion that the respondent used a fist is neither undermined nor corroborated by the photographs, but this detail is unnecessary to sustain the charge.

¶31 In addition, we find that the ALJ's determinations as to why certain witnesses lacked credibility are inconsistent with the evidence. He found Officer Madison unable to testify in detail as to what Ms. Castro told him without referring to his incident report. ID at 14. However, the record indicates that Officer Madison referred to the report to get some exact quotes, e.g., whether Ms. Castro used the words "beat up" (when asked that by the ALJ) and a statement Ms. Long made to Ms. Castro and the respondent outside the bathroom, that "the baby does not need to see this." HT at 281-82, 289. He answered questions generally without reference to the report. *Id.* at 279-89. The ALJ also stated that

Officer Madison's probable cause affidavit, incident report and testimony were tainted by his reliance on statutory language. ID at 14. The officer testified, however, that only the words "knowingly and willingly" in his documents were from the statute and that this usage is routine. HT at 303-304. The ALJ also stated that Officer Madison's written accounts are less reliable because they reference Officer Reinoso's interview with Ms. Castro. ID at 14. However, the record shows that Officer Madison was present with Officer Reinoso when Ms. Castro gave her sworn, taped statement, and he testified that all the information in his report was based on information he obtained from Ms. Castro, not from other officers. IAF, Tab 1, Exh. 7; HT at 282.

¶32 The ALJ found discrepancies between Officer Coleman's testimony and his report which caused him to doubt the testimony, e.g., the police officer's statement at the hearing that Ms. Castro said the respondent prevented her from calling the police from their home. ID at 13. This supplemental information at the hearing, however, is not an inconsistency that undermines the officer's testimony. *See Garza v. Department of the Army*, 57 M.S.P.R. 214, 222 (a slight discrepancy was insufficient to find that the witness lacked credibility) (citing *Awa v. Department of the Navy*, 41 M.S.P.R. 318, 321 (1989)), *aff'd*, 11 F.3d 1073 (Fed. Cir. 1993) (Table). The ALJ also stated that the assertion by Ms. Castro that she was unable to call the police from her home is not supported by any other evidence. ID at 13. However, it is included in Officer Madison's incident report and his probable cause affidavit as well as in Ms. Castro's sworn, taped statement. AHE 8, 9; IAF, Tab 1, Exh. 7. In addition, the ALJ doubted Officer Coleman's statement that Ms. Castro said she was hit with a closed fist because she did not say this to others. ID at 13. However, Ms. Castro made the same statement to Officer Madison. HT at 303; AHE 8, 9. It is also in her sworn statement. IAF, Tab 1, Exh. 7.

¶33 The ALJ did not fully credit Mr. Feeney's testimony, concluding that he embellished when he said Ms. Castro stated that the respondent beat her up, that

she was "scared to death" of him, and that he hit the child while "taking a swing at" her. ID at 11. The ALJ noted that this was different from Mrs. Feeney's testimony. *Id.* However, the fact that Mr. Feeney used more colloquial expressions than his wife, who was more reserved in her language, does not undermine the substance of his testimony, i.e., that Ms. Castro stated that she was hit repeatedly and that the child was unintentionally hit. Nor does Mr. Feeney's additional recall of the fact that Ms. Castro was afraid of the respondent undermine his credibility. He had the opportunity to observe her firsthand and it is plausible that she would have expressed or shown fear. *Hillen*, 35 M.S.P.R. at 458 (a witness's opportunity to observe the event or act in question and the inherent improbability of a witness's account are among the factors to be considered in determining credibility).

¶34 Moreover, we find that the ALJ gave inadequate weight to the testimony of Ms. Long, who witnessed some of the exchange between the respondent and Ms. Castro. She saw them arguing in the kitchen and bathroom. AHE, Att. 1. Although Ms. Long did not see her father hit the child, she testified to hearing loud crying from the child, meaning to her that Charlize had been hurt, and also Ms. Castro's statement that the respondent had hurt the child. *Hillen*, 35 M.S.P.R. at 458 (the opportunity to observe is a factor in credibility).

¶35 We also find that the ALJ erred in precluding from the record the transcript of the sworn, taped statement Ms. Castro gave to the police officer on the grounds that it was not authenticated. Like the Federal Rules of Civil Procedure, the Federal Rules of Evidence are used as nonbinding guidance by the Board. *Hayden v. U.S. Postal Service*, 15 M.S.P.R. 296, 302 (1983), *aff'd*, 758 F.2d 668 (1984) (Table). Fed. R. Evid. 901(a) provides that the "requirement of authentication or identification . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." For the reasons explained below, we find that this requirement is met. The ALJ did not admit the transcript of Ms. Castro's sworn statement to police on the night of the incident

because she stated at the hearing that she could not understand all of it when she read it. ID at 7; HT at 231.[5] However, although she did not affirm the transcript's contents at the hearing, Ms. Castro did not deny it was her statement; she also stated that she had given the officer permission to make a tape recording. HT at 228, 231. Similarly, in a January 2009 deposition, she read the statement and did not deny that it was the statement she gave, but stated instead that she wished to correct the facts. AHE 10.[6] Respondent's counsel's questions at the hearing and deposition were directed not at the authenticity of the transcript but the reliability of the sworn statement Ms. Castro had given. HT at 226; AHE 10.

¶36 In response to questions from respondent's counsel, Ms. Castro said she was thinking more clearly than she had been on January 27, 2008, and indicated that is why she came to deny that the respondent punched her and the child. HT at 225; AHE 10. However, we find it more likely that she chose to recant because she had reconciled with the respondent.[7] We find that Ms. Castro's sworn statement on the night of the incident, as well as her statements to multiple police officers and to Mr. and Mrs. Feeney, are a more accurate reflection of what actually occurred. *See Hillen*, 35 M.S.P.R. at 458 (prior inconsistent statements and witness bias are considered in determining credibility).

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[5] We note that the ALJ would not permit the translator at the hearing, who was present because Ms. Castro testified in Spanish, to read the statement to her. HT at 231.

[6] Further, the transcript includes a certification by the transcriber under penalty of perjury that it is a true and complete transcript of the tape of Ms. Castro's statement. IAF, Tab 1, Exh. 7. In addition, the petitioner's complaint includes as an attachment the sworn statement of the SSA investigator that she obtained the tape from the police and had it transcribed. *Id.*, Exh. 12. The ALJ denied the agency's request to produce the tape at the hearing because it had not been produced in discovery. ID at 7 n.3.

[7] We note that, in its PFR, the petitioner argues that the ALJ erred in denying its motion to compel discovery regarding Ms. Castro's immigration status, because she had expressed a fear of deportation and this may have given her reason to lie. PFR File, Tab 3. Because we find Ms. Castro's hearing testimony lacking in credibility for other reasons, we need not address this argument.

¶37 The ALJ also failed to address aspects of the respondent's and Ms. Castro's hearing testimony that suggest they did not testify credibly. For example, we find it inherently improbable that the police officers would not have given the respondent an opportunity to explain the incident prior to arresting him. *Hillen*, 35 M.S.P.R. at 458. Also, his testimony indicating that he did not follow Ms. Castro as far as the neighbors' house is contradicted by that of Mr. Feeney, who saw his car outside their home. *Id.* (contradiction by or consistency with other evidence is a factor in credibility). In addition, the respondent's statement that he was repeatedly hit by Ms. Castro and sustained numerous bruises to his shoulder, arms and chest is not supported by her testimony at the hearing, where she recanted her previous account of the incident, but still asserted that she only hit him in the back. *Id.* Ms. Castro's denial that she told Mr. and Mrs. Feeney or the police officers that she and the child were hit by the respondent is belied by their several, consistent reports. *Id.* Her statement that she asked Mrs. Feeney to call the police merely because she was upset that the respondent had not been watching the child is inherently improbable, as is the idea that Mrs. Feeney would in fact place the call for this reason. *Id.*

¶38 In addition, both the respondent and Ms. Castro, who were reconciled at the time of the hearing, had an interest in the removal proposal not being upheld by the Board. Their testimony cannot be rejected merely because it is self-serving. *Baldwin v. Department of Veterans Affairs*, 111 M.S.P.R. 586, ¶ 23 (2009); *Bennett v. Department of the Air Force*, 84 M.S.P.R. 132, ¶¶ 10-11 (1999). However, witness bias is a factor in credibility determinations. *Hillen*, 35 M.S.P.R. at 458. In light of all the evidence in this case, we find that their testimony that the respondent did not repeatedly strike, push and grab Ms. Castro, and his statement that he did not hit the child, on the night of January 27, 2008, are too self-serving to be credible. *See Tom v. Department of the Interior*, 97 M.S.P.R. 395, ¶ 28 (2004).

¶39 For all the above reasons, we find that the ALJ's credibility determinations are inconsistent with the weight of the evidence, and that the conduct detailed in both specifications occurred as charged. Therefore, the petitioner proved both specifications of its charge of conduct unbecoming an ALJ. *See Lachance v. Merit Systems Protection Board,* 147 F.3d 1367, 1371-1372 (Fed. Cir. 1998); *Boltz v. Social Security Administration,* 111 M.S.P.R. 568, ¶ 16 (2009) (where an agency has employed a generic label for the charge, the Board must look to the specification to determine what conduct is the basis for the charge).

The respondent's misconduct is good cause for disciplinary action.

¶40 The ALJ position is "a position of prominence, whose incumbents usually engender great respect." *Steverson*, 111 M.S.P.R. 649, ¶ 20. Therefore, the Board has held that ALJs are required to conduct themselves in a fitting manner. *Social Security Administration v. Manion,* 19 M.S.P.R. 298, 302 (1984). This means, at a minimum, they must not violate generally accepted rules of conduct. *See Social Security Administration v. Carter,* 35 M.S.P.R. 485, 491 (1987), *aff'd*, 856 F.2d 202 (Fed. Cir. 1988) (Table); *Social Security Administration v. Davis,* 19 M.S.P.R. 279, 282, *aff'd*, 758 F.2d 661 (Fed. Cir. 1984) (Table). Behavior in contravention of this standard undermines public confidence in the administrative adjudicatory process. *Davis,* 19 M.S.P.R. at 282; *see also McEachern v. Macy,* 233 F. Supp. 516, 521-22 (W.D.S.C. 1964) (finding good cause for removal of a Social Security Administration hearings examiner for failure to pay debts, which brought discredit on the agency), *aff'd*, 341 F.2d 895 (4th Cir. 1965).

¶41 The Board also has held that the American Bar Association (ABA) Model Code of Judicial Conduct is an appropriate guide for evaluating the conduct of ALJs. *Whittlesey,* 59 M.S.P.R. at 696; *Matter of Chocallo,* 1 M.S.P.R. 612, 652-53 (1978). The ABA Model Code (February 2007) provides in pertinent part at Canon 1, Rule 1.2:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the

> judiciary, and shall avoid impropriety and the appearance of impropriety.

AHE 12 at 10.[8] Comment [1] to Canon 1 explains that, "Public confidence in the judiciary is eroded by improper conduct," and that the principle "applies to both the professional and personal conduct of a judge." *Id.*

¶42 The petitioner has proven that the respondent's actions were conduct unbecoming an ALJ, i.e., conduct which was improper, unsuitable or detracting from one's character or reputation. *Cf. Crouse v. Department of the Treasury,* 75 M.S.P.R. 57, 63 (1997), *rev'd on other grounds and remanded sub nom. Lachance, supra; Miles v. Department of the Army,* 55 M.S.P.R. 633, 637 (1992). Further, the respondent's physical altercation with his domestic partner, resulting in the involvement of neighbors and the intervention of police officers, clearly violated generally accepted rules of conduct. His conduct was inconsistent with maintaining respect for the administrative adjudicatory process.[9] Accordingly, we find that the petitioner has shown good cause for disciplinary action against the respondent.

¶43 The respondent's argument in his cross-PFR that the petitioner was required to prove the elements of a criminal charge under Florida law is incorrect. When an agency charges an employee with a crime, it must establish the elements of that offense. *King v. Nazelrod,* 43 F.3d 663, 666 (Fed. Cir. 1994) (charge of theft); *Fouquet v. Department of Agriculture,* 82 M.S.P.R. 548, ¶¶ 24-26 (1999)

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[8] "Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." AHE at 10, Comment [5].

[9] In this regard, we note that Mrs. Feeney stated that she thought judges "are beyond reproach" but "the trauma that was caused in our house . . . and within his own family, I felt was despicable." HT at 174. Mr. Feeney stated that "I don't think anyone in that position . . . passing judgment on other people, should be acting the way he acts." *Id.* at 195.

(charges of counterfeiting government checks and participating in various theft crimes). The petitioner, however, charged the respondent with conduct unbecoming an ALJ, not with the commission of the crime of domestic violence battery or other criminal offense. Therefore, it was not required to prove the elements of a crime. *See Mahan v. Department of the Treasury,* 89 M.S.P.R. 140, ¶ 6 (2001).

¶44 In his cross-PFR, the respondent argues also that there was not a sufficient nexus between the charged conduct and his position as an ALJ to support a finding of good cause. PFR File, Tab 6. The amicus brief by the AALJ also argues that nexus is not established. *Id.*, Tab 8. We find that these arguments, as well as the nexus discussion in the ID, reflect a misunderstanding of the applicable standard.

¶45 The analysis of the nexus requirement is required in cases under 5 U.S.C. chapter 75, where an agency must show as part of its burden of proof that an adverse action promotes the efficiency of the service. This requires that the agency prove three distinct elements, i.e., that the charged conduct occurred, that there is a nexus to the efficiency of the service, and that the particular penalty imposed is reasonable. *Pope v. U.S. Postal Service,* 114 F.3d 1144, 1147 (Fed. Cir. 1997) (citing 5 U.S.C. § 7513(a)); *Dixon v. Department of Commerce,* 109 M.S.P.R. 314, ¶ 8 (2008). Actions against ALJs, however, are authorized under a different statute and require a showing of good cause. 5 U.S.C. § 7521(a), 5 C.F.R. §§ 1201.139- .140. As discussed above, the Board has clearly stated that the good cause standard is not equivalent to the efficiency of the service standard. *Mills,* 73 M.S.P.R. at 467-68 (citing *Goodman,* 19 M.S.P.R. at 330, n.8); *see also Manion,* 19 M.S.P.R. at 303 (modifying an ALJ's finding that disciplinary action was warranted under 5 U.S.C. § 7521 because he held that there was a nexus to the efficiency of the service).

¶46 In determining whether good cause exists for disciplinary action against an ALJ, the Board has not undertaken a separate analysis of nexus. *See Steverson,*

111 M.S.P.R. 649 (removal for lack of candor); *Carr*, 78 M.S.P.R. 313 (removal for, inter alia, reckless disregard for another's personal safety), *Whittlesey*, 59 M.S.P.R. 684 (removal for violation of agency rules and a settlement agreement regarding the unauthorized practice of law and for time and attendance violations); *Social Security Administration v. Burris*, 39 M.S.P.R. 51 (1988) (removal, inter alia, for insubordinate and disruptive behavior), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table); *see also McEachern*, 233 F. Supp. 516 (removal for failure to pay personal debts). In accord with Board precedent, we do not engage in an analysis of nexus per se in this case. The good cause standard for disciplinary action has been met by the showing, set forth above, that the respondent engaged in conduct unbecoming an ALJ, which violated generally accepted rules of conduct and was inconsistent with maintaining public confidence in the administrative adjudicatory process.

Penalty

¶47 In original jurisdiction cases under 5 U.S.C. § 7521, it is the Board, rather than the employing agency, which selects the appropriate penalty. *Steverson*, 111 M.S.P.R. 649, ¶ 18; *Burris*, 39 M.S.P.R. at 64. The Board does not give deference to the agency's selection of a penalty, as it does in chapter 75 cases. *Social Security Administration v. Anyel*, 58 M.S.P.R. 261, 274 n.23 (1993). The Board uses the factors articulated in *Douglas*, 5 M.S.P.R. at 305-06, however, to guide its penalty determination. *Davis*, 19 M.S.P.R. at 282 n.5 (stating that, although *Douglas* deals with penalty selection in traditional adverse action cases, the considerations it details are equally appropriate to penalty determinations under 5 U.S.C. § 7521).[10]

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[10] The *Douglas* factors, which are not each relevant in all cases and which do not constitute an exclusive list, are: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment,

¶48 The Board considers first and foremost among the *Douglas* factors the seriousness of the misconduct and its relationship to the employee's position and duties. *Steverson*, 111 M.S.P.R. 649, ¶ 18; *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). In this case, the respondent's actions caused his managers to doubt his ability to serve adequately as a judge. Chief ALJ (CALJ) Frank Cristaudo and Regional CALJ (RCALJ) Ollie Garmon testified that the respondent's conduct demonstrated a lack of judicial temperament. HT at 125, 326. We agree. "The appellant's misconduct was serious and raises serious concerns about his lack of judgment and impulse control and his ability to perform the duties of his position." *Carlton v. Department of Justice*, 95 M.S.P.R. 633, ¶ 8 (upholding the removal of a Deputy U.S. Marshal for conduct unbecoming when he threw a vase at his wife, choked her and pointed a gun at her), *review dismissed*, 115 F. App'x 430 (Fed. Cir. 2004).

¶49 CALJ Cristaudo and RCALJ Garmon also stated that they believed some female claimants and representatives would question whether the respondent would give them a fair hearing or would treat women differently. HT at 114, 339.

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including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Douglas*, 5 M.S.P.R. at 305-06.

CALJ Cristaudo also testified that some disability benefits claims involved a history of domestic violence, and that claimants could request the respondent's recusal or reassignment or a remand, alleging bias. *Id.* at 339-40, 400. We find these concerns to be reasonable.[11] An agency need not wait until such adverse effects come to pass but may act based on its legitimate expectation of them. *Cf. Schumacher v. U.S. Postal Service*, 52 M.S.P.R. 575, 579-80 (1992).

¶50 Also to be considered under *Douglas* is the respondent's job level and type of employment, contacts with the public, and the prominence of his position. 5 M.S.P.R. at 305. As discussed above, the respondent holds a prominent position as an ALJ. As such, he is expected to behave in a fitting manner, in compliance with the ABA Model Code of Judicial Conduct, which addresses both professional and personal conduct. The Code provides that a judge should act at all times so as to promote public confidence in the judiciary. AHE 12 at 10. However, the respondent's conduct violated generally accepted standards of behavior and, as such, would diminish public confidence in the administrative adjudicative process. As CALJ Cristaudo testified, the respondent's actions "violated the public trust" and reflected on other agency ALJs. HT at 326. In such situations, removal is the appropriate penalty. As the Board stated in *Davis*, 19 M.S.P.R. at 294-95,

> [T]here is no doubt that respondent's actions violated generally accepted rules of conduct and must be proscribed. There is similarly no doubt that his actions could erode public confidence in the judicial functions both of the agency specifically and the federal service generally. Accordingly, it is concluded that such behavior constitutes good cause to remove [him].

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[11] CALJ Cristaudo also said he considered the respondent unsuitable to be an ALJ because he broke the law and was dishonest in denying his conduct to the police. However, the respondent was not charged with criminal conduct or making false statements. Therefore, we do not consider these as factors in our penalty determination.

See also McEachern, 233 F. Supp. at 521-22 (upholding the removal of a SSA hearing examiner for failure to pay debts, because the agency would be held in lower esteem if it continued to employ him); *cf. Stump v. Department of Transportation*, 761 F.2d 680, 681-82 (Fed. Cir. 1985) (upholding the removal of an air traffic controller who engaged in off-duty drug use because it would detract from public confidence in the agency).

¶51 We have considered the respondent's claim of provocation, since this may weigh in favor of a lesser penalty for an ALJ's misconduct. *Carr*, 78 M.S.P.R. at 339. However, we do not find that provocation is a mitigating factor, as did the ALJ who heard this case. ID at 31. Ms. Castro struck the respondent in an attempt to get away from him after he pushed and grabbed her when she woke him up. She did not explain why this was necessary; thus, her action may have been improper. However, this does not lessen the respondent's culpability for his conduct thereafter. As the ALJ stated in the ID, the situation escalated as the respondent followed Ms. Castro throughout the house and eventually out into the neighborhood. ID at 28. Because further conflict could have been avoided, but the respondent instead chose to pursue Ms. Castro and to strike her repeatedly, we do not find that he was provoked. *See Harris v. U.S. Postal Service*, 100 M.S.P.R. 613, ¶ 14 (2005) (the appellant was not provoked to strike a customer who was screaming profanity and racial slurs at her where she chose to follow the customer), *review dismissed*, 206 F. App'x 990 (Fed. Cir. 2006).

¶52 Furthermore, contrary to the ALJ's statement, ID at 32, the respondent has not shown remorse. He testified that he was sorry the incident had occurred but denied any culpability or wrongdoing. HT at 86. This does not suggest that there is a strong potential for rehabilitation as a mitigating factor. *Ward v. U.S. Postal*

Service, 112 M.S.P.R. 239, ¶ 13 (2009) (citing *Neuman v. U.S. Postal Service*, 108 M.S.P.R. 200, ¶ 26 (2008)).[12]

¶53 We have considered as a mitigating factor the respondent's long federal service without prior discipline. He has had a 35-year career, 28 years as an attorney for the Federal Aviation Administration and 7 years as an ALJ for the SSA. HT at 71-74. In that time, he has not been subject to any prior disciplinary action. *Id.* at 71. In addition, the record does not reflect that the incident of January 27, 2008, gained great public notoriety.[13] However, we do not find that these factors outweigh the nature and seriousness of the respondent's violent conduct and its adverse impact on his agency, as well as the absence of provocation and his lack of remorse. Nor do we find that a penalty less than removal would be sufficient to deter future conduct by the respondent or others similar to the conduct that took place in this case.

¶54 Therefore, under the circumstances of this case, we find that removal is the appropriate penalty. *See Kinslow v. Department of the Treasury*, 315 F. App'x 286, 289 (Fed. Cir. 2009) (NP) (upholding the removal of an Internal Revenue Service agent who assaulted his wife with a martial arts weapon); *Carlton*, 95 M.S.P.R. 633, ¶ 9; *Royster v. Department of Justice*, 58 M.S.P.R. 495, 501 (1993) (a correctional officer was removed for threatening and abusive calls to women).

ORDER

¶55 The Board authorizes the petitioner to remove the respondent for good cause shown, pursuant to 5 U.S.C. § 7521. This is the final decision of the Merit

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[12] By contrast, the Board has reduced a removal to a 120-day suspension where the appellant, a correctional officer, unintentionally struck military police responding to a domestic incident and where there was evidence that the appellant was experiencing severe underlying emotional distress and had expressed remorse for his action. *Larry v. Department of Justice*, 76 M.S.P.R. 348, 359-62 (1997).

[13] Although the record indicates his neighbors and SSA employees were aware of the incident, the matter did not obtain press coverage. HT at 109-11, 265, 383, 447, 475.

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 respondent 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.