UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 44

Docket No. PH-0752-09-0155-I-1

Michael H. Walker,
Appellant,
v.
Department of the Air Force,
Agency.

March 22, 2011

THE FINAL ORDER IS NONPRECEDENTIAL

Michael O. Kassak, Esquire, Cherry Hill, New Jersey, for the appellant.

Jennifer C. Hyzer, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a dissenting opinion.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to review the initial decision issued by the administrative judge. For the reasons explained below, we DENY the appellant's petition for review, AFFIRM the initial decision as modified by this final order, and SUSTAIN the appellant's removal.

BACKGROUND

The agency removed the appellant from the position of Supervisory Computer Technician based upon two charges of misconduct: (1) failing to properly request leave; and (2) failing to carry out assigned work. Initial Appeal File (IAF), Tab 6, Subtabs 4c, 4g. The agency alleged that the appellant failed to properly request leave in a narrative charge, as follows:

> On or about 12 August 2008, at McGuire Air Force Base, New Jersey, you failed to properly request leave.
>
> During the week of 4 August 2008, you casually mentioned to me that you scheduled a medical appointment the following week. You did not mention the time or date of the appointment. You did not submit an OPM Form 71, Request for Leave, with the details of your requested leave. Because you did not submit a proper request, I did not approve your leave.
>
> On 12 August 2008, you failed to report for duty. At about 1400 on 12 August 2008, I attempted to call you at home. A male, presumably one of your sons, answered the phone and advised that you weren't home. When he mentioned you were unreachable by cell phone, I left a message with him for you to call me as soon as possible.
>
> On 13 August 2008, you stated you didn't receive the message and reminded me of your medical appointment. I advised you that since you hadn't provided a leave request, I was unaware of the appointment date, and asked why you didn't report to work after your medical appointment. You cited "family issues" and thought that I would call you when you didn't report to work.
>
> After further discussion, you told me you would submit a retroactive leave request. When I received your request, it was not for a medical appointment, but for eight (8) hours of annual leave due to "addressing of family issues." I denied the request and charged you with eight (8) hours of Absence Without Approved Leave (AWOL).
>
> On 14 August 2008, you and MAJ Daniel Castiglia, 305 MDSS Deputy Squadron Commander, requested a meeting with me to discuss my 13 August 2008 MFR in which I noted my denial of your leave & charged you AWOL. You indicated you included me as an informational addressee on an e-mail that provided the date & time of your medical appointment. I told you that I searched my e-mail files before writing the MFR and asked you to forward the e-mail to

> me. I said I would reconsider my decision for the morning of 12 August 2008, but not the afternoon.
>
> You subsequently sent me an e-mail addressed to SSgt Kevin Pflanz, 305 Communications Squadron, at 0803 on 6 August 2008. In that e-mail, you explained you couldn't attend a 12 August 2008 meeting due to a medical appointment but would send an alternate. I was not included on the message as an addressee.
>
> After much thought and consideration, I decided to approve four (4) hours of annual leave for the morning, but have retained four (4) hours of AWL for the afternoon of 12 August 2008 due to your failure to properly request leave.
>
> There is absolutely no excuse for your failure to properly request leave, especially since you have regularly submitted an OPM Form 71, Request for Leave, in support of your absences in the past. To be clear, addressing an e-mail meeting invitation to me as an optional attendee is not an acceptable method of advising me when your medical appointments are scheduled. Furthermore, you admitted you did not attend your scheduled medical appointment. You failed to either report to work or call me to request annual leave.

See IAF, Tab 6, Subtab 4g. The agency also charged the appellant in narrative form with failure to carry out assigned work, to wit:

> On 11 August 2008, at McGuire Air Force Base, New Jersey, you failed to draft a timely e-mail regarding telephone service downtime, as you had been assigned.
>
> During our morning meeting on 11 August 2008, I assigned you to submit a draft e-mail regarding telephone service downtime and potential impact due to a General Dynamics Telephone Upgrade Team visit from 12-15 August 2008. I expected you to complete the task no later than close of business. I followed up my verbal instructions with an e-mail, sent at 1016 on 11 August 2008.
>
> You did not meet my suspense. Instead, you sent me a draft e-mail at 0811 on 13 Aug 2008. This was over twenty-four (24) hours late and after the upgrade visit had already started.
>
> I find your continued failure to carry out assigned work to be particularly egregious, especially since I suspended you for the same offense last year.

Id.

The appellant filed this appeal and alleged that the agency's action constituted disability discrimination based upon his medical condition of traumatic brain injury and that the penalty of removal was unreasonable. *Id.*, Tab 1. Following a hearing, the administrative judge issued an initial decision that sustained the charges, rejected the appellant's affirmative defense of disability discrimination, and affirmed the removal penalty. IAF, Tab 23.

The appellant filed a timely petition for review of the initial decision after requesting and obtaining an extension of time from the Office of the Clerk of the Board. Petition for Review (PFR) File, Tabs 1, 2, 3. The agency filed a timely response to the appellant's petition for review. *Id.*, Tab 4.

ANALYSIS

On review, the appellant does not challenge the sufficiency of the evidence or the administrative judge's conclusions regarding the charges and nexus. We discern no error with the administrative judge's decision to sustain the charges. On petition for review, the appellant contends that the administrative judge erred in denying his affirmative defense of disability discrimination and in finding that the penalty of removal did not exceed the limits of reasonableness. PFR File, Tab 3.

The appellant failed to prove his affirmative defense of disability discrimination.

The appellant raises several arguments to challenge the administrative judge's denial of his affirmative defense of disability discrimination. In particular, the appellant contends that the administrative judge erred by: (1) failing to consider whether the agency regarded the appellant as being disabled; (2) finding that he was not disabled under the Americans with Disability's Act (ADA) and the 2008 Amendments to the ADA; (3) failing to consider whether the appellant was subjected to disparate treatment discrimination; and (4) finding the appellant was not a qualified individual with a

disability under the ADA. PFR File, Tab 3. None of these issues provide a basis to reverse the initial decision.

The appellant bears the burden of proof, by preponderant evidence, regarding his affirmative defense of disability discrimination. 5 C.F.R. § 1201.56(a)(2)(iii). In the absence of direct evidence of discrimination, the Board typically uses the "pretext standard" of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under this framework, an employee may establish a prima facie case of prohibited discrimination by introducing evidence to show that he: (1) is a member of a protected group; (2) suffered an appealable adverse employment action; and (3) that the unfavorable action gives rise to the inference of discrimination. 411 U.S. at 802. As to the third element, an employee may rely on *any* evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g., Chappell-Johnson v. Powell*, 440 F.3d 484, 488-89 (D.C. Cir. 2006); *Stella v. Martin*, 284 F.3d 135, 145 (D.C. Cir. 2002) (no requirement in a failure to hire case that plaintiff show that employer filled position with person outside protected class.).

If an appellant meets his prima facie burden, the burden of production shifts to the employer to "articulate some legitimate nondiscriminatory reason" for its action.[1] *McDonnell Douglas*, 411 U.S. at 802. If the employer does so, the appellant must then be given an opportunity to demonstrate that, based on all of the evidence, the stated reason is a pretext and that the action was taken for a

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[1] In most appeals of adverse actions taken under 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, i.e., the charged misconduct. Accordingly, the agency has done everything that would be required of it if an appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). As a result, in most Board appeals, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id*.

discriminatory reason. *Id; see also Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006).

In the initial decision, the administrative judge found that both the proposing official and the deciding official credibly testified that they did not take the removal action against the appellant because of his claimed disability. IAF, Tab 22 at 11. Indeed, the record shows that the proposing official, Captain Sophie Kiesow, testified that she was completely unaware that the appellant had traumatic brain injury or any disabling condition. She also testified that she was not aware that he had ever requested a reasonable accommodation for a disabling condition. PFR File, Tab 3, Hearing Transcript at 31-35. In addition, the deciding official, Colonel Donald Cole, testified that he became aware of the appellant's traumatic brain injury only when the appellant presented his oral reply to the removal action. *Id.* at 64-70. Colonel Cole also testified that, on several occasions, he requested the appellant to provide documentation to support his claim of a traumatic brain injury, and the appellant failed to provide him with any documentation. *Id.* at 100. The appellant acknowledged in his own testimony that he did not share his medical condition or make a request for a reasonable accommodation with Captain Kiesow or Colonel Cole because he considered it to be personal information that he did not share with others. *Id.* at 165-67. He also testified that he had only shared the information regarding his traumatic brain injury with a prior supervisor, Lieutenant Colonel Jeffrey Snyder. *Id.* There is no evidence in the record that Lieutenant Colonel Snyder shared the appellant's disclosure of his medical condition with Captain Kiesow or Colonel Cole. Therefore, there is nothing in the record suggesting that either the proposing or deciding officials had knowledge of an alleged *disabling condition*; Colonel Cole merely knew that the appellant had alleged a brain injury at the time he, Cole, made the removal decision.

The record thus shows that the appellant has failed to present evidence creating the inference that Captain Kiesow's or Colonel Cole's actions were taken

as a result of his claimed disability; they had no knowledge of his claimed disability. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1175 (11th Cir. 2005). With regard to claims of disability discrimination, an employer cannot be held liable for firing an employee when it lacks knowledge of the employee's disability. *See Cordoba*, 419 F.3d at 1175; *Singleton-Grant v. Shinseki*, 2010 WL 1638821 (EEOC Apr. 15, 2010). Therefore, even if the administrative judge erred in his handling of the appellant's disability discrimination claims, it did not affect the result in the appeal. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The agency's penalty of removal does not exceed the bounds of reasonableness.

Where, as here, all of the agency's charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Penland v. Department of the Interior*, 115 M.S.P.R. 474, ¶ 7 (2010); *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Penland*, 115 M.S.P.R. 474, ¶ 7; *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Douglas*, 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Penland*, 115 M.S.P.R. 474, ¶ 7; *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004).

The record reflects the agency considered the relevant *Douglas* factors in arriving at its removal penalty. Colonel Cole, the deciding official, attached to his letter of decision a well-reasoned and thorough evaluation of the pertinent

Douglas Factors and concluded that the appellant's removal was reasonable. *See* Agency File, Tab 6, Subtabs 4c, 4d. In his hearing testimony, Colonel Cole stated that he fully considered the relevant *Douglas* factors. Hearing Transcript at 51-59. Specifically, he explained that the appellant's offenses were serious and repeated. He testified that he also considered the appellant's length of service and satisfactory performance but found that those factors were outweighed by the seriousness of the appellant's misconduct. He stated that he also considered the appellant's role as a supervisor and thought he should be held to a high standard of conduct. Finally, Colonel Cole testified that he considered the appellant's past disciplinary record which included a 10-day suspension for deliberate misrepresentation and failing to carry out assigned work and a 4-day suspension for failure to comply with proper orders, discourteous conduct towards his supervisor, and lack of candor.

The appellant's disciplinary history and his 2003 traumatic brain injury are worthy of note in our review of the agency's penalty choice. Both prior disciplinary actions implicated the appellant's lack of integrity. In late November 2006, the agency suspended the appellant for 5 days (reduced to 4 days in a grievance decision dated February 1, 2007) for failure to comply with proper orders, discourteous conduct towards his supervisor, and lack of candor. The decision letter on this first suspension concludes that, among other things:

> Your failure to comply with proper orders … resulted in significant embarrassment for the entire 305th Medical Group. Additionally, there is no excuse for your discourteous conduct towards your supervisor …. [the appellant had told Captain Kiesow to take his performance appraisal and "stick [it] where the sun don't shine."] Finally, your continued misconduct after your receipt of the initial [proposed suspension] demonstrates complete disregard for the Air Force core value of integrity first. … I find your credibility to be suspect at best and hope that this disciplinary action causes you to re-evaluate your priorities.

IAF, Tab 6, Subtab 4p.

In April 2007, Captain Kiesow proposed that the appellant be suspended for 10 days for deliberate misrepresentation and failing to carry out assigned work. The deliberate misrepresentation charge arose because the appellant had requested sick leave for a "medical appointment" but had gone pheasant hunting. That May, Colonel Cole issued a decision sustaining the proposed 10-day suspension. Colonel Cole informed the appellant in his decision that:

> Your deliberate misrepresentation of the purpose of your leave … and both instances of failing to carry out assigned work are inexcusable. You continue to display a complete disregard for the Air Force core value of integrity first. I find your credibility remains suspect at best and hope that this disciplinary action causes you to re-evaluate your priorities. ... Further misconduct on your part may result in more severe disciplinary action, up to and including removal from Federal Service.

Id., Subtab 4m. The appellant's prior discipline plainly placed him on notice that continued similar misconduct could result in his removal.

Also, in appropriate circumstances not present here, mental impairment may be entitled to considerable weight as a mitigating factor.[2] *See Malloy v. U.S. Postal Service*, 578 F.3d 1351, 1357 (Fed. Cir. 2009) ("voluminous" relevant evidence of mental impairment, i.e., depression, improperly not considered by the Board) (citing *Roseman v. Department of the Treasury*, 76 M.S.P.R. 334, 345 (1997)); *see also Sublette v. Department of the Army*, 68 M.S.P.R. 82, 89 (1995); *Douglas*, 5 M.S.P.R. at 305. As we explained above, the appellant failed to establish that his mental impairment rose to the level of a disability. However, even when a mental impairment does not rise to the level of a disability, the Board may consider the condition in determining the appropriate penalty "if the agency knew about it before taking the action at issue." *Roseman*, 76 M.S.P.R. at 345; *see Sublette*, 68 M.S.P.R. at 89.

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[2] Although the appellant has not specifically argued that his removal should be mitigated based on his alleged mental impairment, we have addressed the issue *sua sponte* because he has asserted disability discrimination based on traumatic brain injury.

As we explained above, neither the deciding official nor the proposing official was aware of the appellant's alleged mental impairment when proposing or deciding the removal action; Colonel Cole was only aware that the appellant claimed a traumatic brain injury, but the appellant had failed to provide Colonel Cole any information about the alleged injury as Cole had requested. Moreover, even though the appellant's attorney initially requested the appellant's doctors as witnesses, he withdrew that request during the prehearing conference. Accordingly, the appellant presented no medical testimony during the hearing, and the appellant did not submit any medical records that were dated after early 2006. Thus, there is no written or testimonial medical evidence to support a showing that the appellant had not recovered from his 2003 brain injury by August 12, 2008, or that he continued to have cognitive issues. Because the appellant (who was represented by an attorney) failed to submit sufficient, relevant medical evidence, we conclude that *Malloy* does not support an argument that the appellant's removal should be mitigated based on alleged mental impairment.[3]

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[3] The dissent believes "the record is insufficiently developed to make a determination that the penalty of removal did not exceed the bounds of reasonableness." We disagree. If the record lacks sufficient evidence to justify mitigation of the agency's removal penalty, that responsibility lies squarely on the back of the appellant. The appellant, represented by an attorney, failed to submit any medical records regarding his mental condition dated after February 2006. He also withdrew his requests to present hearing testimony of Lewis Lazarus, Ph.D., a licensed clinical neuropsychologist, and Dr. Seth Keller, a medical doctor, the authors of two February 2006 reports regarding the appellant. IAF, Tab 20 at 2. *Malloy* and related Board decisions require that a mental impairment be considered as a mitigating factor, even though it does not rise to the level of a disability, when an appellant's evidence shows that the mental impairment was known by the agency when it took its action and the mental impairment relates to the misconduct at issue. *Malloy*, 578 F.3d at 1357; *Roseman*, 76 M.S.P.R. at 345. Unlike *Malloy*, where the appellant submitted "voluminous" relevant evidence of mental impairment, the appellant simply failed to provide sufficient evidence to suggest, nor has he argued, that his 2003 brain injury should result in mitigation of the agency's choice of the removal penalty for his August 2008 misconduct. We therefore find no basis to remand the appeal.

In short, the agency's penalty determination was entitled to deference, and the agency has provided a reasoned explanation for its choice of penalty. We find no basis to disturb it. Accordingly, we SUSTAIN the appellant's removal.

ORDER

After fully considering the filings in this appeal, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States

district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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:

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

DISSENTING OPINION OF ANNE M. WAGNER

in

Michael H. Walker v. Department of the Air Force

MSPB Docket No. PH-0752-09-0155-I-1

I agree with the Nonprecedential Final Order's determination to sustain the charges and to find the appellant failed to prove his affirmative defense of disability discrimination. However, I respectfully must dissent because I believe the record is insufficiently developed to make a determination that the penalty of removal did not exceed the bounds of reasonableness.

Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001); *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 12, *review dismissed*, 135 F.3d 773 (Fed. Cir. 1997) (Table); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. However, in cases where the deciding official failed to appropriately consider the relevant

factors, the Board need not defer to the agency's penalty determination. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶¶ 10-11 (2000); *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 134 (1997).

In this appeal, the record is unclear whether the deciding official, Colonel Cole, failed to appropriately consider the relevant *Douglas* factors. In his written analysis of those factors, Colonel Cole stated that there was no evidence of mental impairment, without even mentioning appellant's claim of traumatic brain injury, in making his penalty determination. IAF, Tab 6, Subtab 4d. Yet, at the hearing, Colonel Cole testified that he did consider the appellant's traumatic brain injury in his penalty analysis. PFR File, Tab 1 at 94 of 239 (Hearing Transcript, Cole Testimony). Colonel Cole further testified that he had requested medical documentation from the appellant several times, but never received any such documentation. *Id.* at 100. Contradicting that version of events, the appellant testified that he had offered to provide the documentation to Colonel Cole on several occasions. *Id.* at 156 (Hearing Transcript, Appellant's Testimony). The appellant also testified that he had given medical documentation to Colonel Cole's predecessor, Lieutenant Colonel Snyder, and that he had informed Colonel Cole in a prior disciplinary action that he had provided the documentation to Lieutenant Colonel Snyder, but that Colonel Cole indicated that he did not want to look at the documentation. *Id.* at 176. Lieutenant Colonel Snyder testified that the appellant had provided him with medical documentation of his traumatic brain injury, that he (Lieutenant Colonel Snyder) left the documentation for Colonel Cole when he departed, and thought that Colonel Cole had reviewed the documentation. *Id.* at 118, 126-29 (Hearing Transcript, Snyder Testimony). The administrative judge did not make credibility determinations to resolve this disputed evidence.

As the majority notes in the Nonprecedential Order, our reviewing court has found that mental impairment, when present, warrants consideration and

weight in assessing the reasonableness of the action taken and that, if it played a part in employee's charged misconduct, it is ordinarily entitled to considerable weight as a mitigating factor. *Malloy v. U.S. Postal Service*, 578 F.3d 1351, 1357 (Fed. Cir. 2009). In addition, failure to consider a significant mitigating factor constitutes an abuse of discretion. *Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1386-87 (Fed. Cir. 1983). In this case, there are unresolved factual disputes regarding whether the deciding official properly considered the appellant's mental condition in his consideration of the mitigating and aggravating factors relevant to the penalty. Therefore, I would remand this appeal to determine whether Colonel Cole failed to properly consider the appellant's mental condition in his analysis of the *Douglas* factors.

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Anne M. Wagner
Vice Chairman