

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011 MSPB 87**

Docket No. PH-0752-10-0543-I-1

**Mary C. Raco,
Appellant,**

v.

**Social Security Administration,
Agency.**

September 29, 2011

Joseph Ponisciak, Philadelphia, Pennsylvania, for the appellant.

Alexander L. Cristaudo, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review and the appellant has cross petitioned for review of the initial decision that mitigated the appellant's removal to a 30-day suspension. For the reasons set forth below, we VACATE the initial decision's findings regarding the charge and nexus, AFFIRM as modified the initial decision's findings regarding the penalty analysis, and MITIGATE the penalty to a 14-day suspension.

BACKGROUND

¶2 The agency proposed the appellant's removal from the position of Claims Examiner with the Inquiries and Expediting Unit for conduct unbecoming a federal employee. Initial Appeal File (IAF), Tab 4, Subtabs 4-d, 4-f.¹ The agency based its decision to remove her on 22 discrepancies between the time that she recorded on her credit hours forms and the time that she actually departed, alleging that the appellant departed work prior to the times she claimed on her credit hour forms. IAF, Tab 4, Subtab 4-f at 1. Of the 22 discrepancies, 19 of them involved increments of time less than 5 minutes. *Id.* at 2. The remaining 3 discrepancies were 7.5 minutes, 10.5 minutes, and 34 minutes. *Id.*

¶3 The appellant filed an initial appeal alleging that the agency failed to consider the *Douglas* factors,² did not apply progressive discipline, did not consider her successful performance, and applied an unreasonably harsh penalty. IAF, Tab 1 at 3. She further alleged that the agency applied a disparate penalty to her and did not remove other similarly situated employees for similar charges. IAF, Tab 10 at 1, 3, Tab 14.

¶4 The administrative judge mitigated the penalty to a 30-day suspension. IAF, Tab 19, Initial Decision (ID) at 11. She sustained the charge based on the appellant's departure time on 3 of the 22 dates in question. ID at 6. The administrative judge further found that the appellant established that she was subjected to a disparate penalty. ID at 8. The administrative judge found that the agency did not establish a nexus between the appellant's misconduct and the efficiency of the service because it adduced no evidence that the appellant's conduct adversely affected her performance or the agency's mission. ID at 9.

¹ The deciding official sustained the removal penalty, and the appellant retired prior to the effective date of the removal. IAF, Tab 4, Subtabs 4-c, 4-d.

² *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), sets forth a number of factors relevant for consideration in determining the appropriateness of an agency's penalty.

Finally, the administrative judge found that the agency did not properly weigh the *Douglas* factors, failed to appropriately consider mitigating factors, and selected a penalty that exceeded the bounds of reasonableness. ID at 10-11. She found several mitigating factors, including the appellant's 20 years of successful service, the availability of alternate sanctions, her ability to be rehabilitated, and the disparate penalty imposed upon her.

¶5 The agency has filed a substantial petition for review, arguing, among other things, that the administrative judge applied the wrong standard in considering nexus, erroneously weighed the *Douglas* factors, incorrectly discounted 19 of the 22 discrepancies, and erred in finding that the appellant had established that she was subjected to a disparate penalty. Petition for Review (PFR) File, Tab 1. The agency has also requested oral argument. *Id.* at 4. The appellant has filed a cross-petition for review arguing that the penalty should be further mitigated to a 1-week suspension. PFR File, Tab 3.

ANALYSIS

The agency's charge of conduct unbecoming a federal employee

¶6 The administrative judge sustained the charge of conduct unbecoming a federal employee in connection with the appellant's departure times on 3 of the 22 dates. ID at 6. In its petition for review, the agency objects to the administrative judge's finding that only 3 of the 22 incidents supported the charge and argues that the administrative judge did not properly consider the appellant's conduct during the investigatory meeting in response to her manager's inquiries regarding the time discrepancies. PFR File, Tab 1 at 7-8. We agree that the agency demonstrated by preponderant evidence that the appellant's recording of her credit hour times resulted in 22 discrepancies between her recorded departure time and actual departure time and that all 22 discrepancies support the charge.

¶7 In order to prove a charge of conduct unbecoming, the agency is required to demonstrate that the appellant engaged in the underlying conduct alleged in

support of the broad label. *Canada v. Department of Homeland Security*, [113 M.S.P.R. 509](#), ¶ 9 (2010). The agency charged the appellant with 22 discrepancies between her claimed departure time, according to her credit hours form, and her actual departure time. IAF, Tab 4, Subtab 4-f at 2. Specifically, the agency stated that it became aware that the appellant departed 30 minutes prior to her recorded sign-out time on the Serial Credit Hours Sign-In/Out Sheet on May 10, 2010. *Id.* at 1. As a result, the agency initiated an investigation and compared the appellant's computer log off times, sign-out times, and departure times according to the security system DVR video for a period of 30 days. *Id.* The investigation revealed 22 discrepancies between April 20, 2010, and May 21, 2010. *Id.* at 1-2. The appellant admitted to the 22 discrepancies, and there are no factual disputes as to whether she incorrectly signed out on those 22 occasions. IAF, Tab 4, Subtab 4-e at 1; Hearing Transcript (HT) at 99-100, 116. Although 19 of the 22 discrepancies involved less than 5-minute increments of time, even down to a fraction of a minute, the appellant admitted to the discrepancies and any de minimus nature of the misconduct is more appropriately analyzed in context of the penalty determination. *See, e.g., Ray v. Department of the Army*, [97 M.S.P.R. 101](#), ¶ 58 (2004) (distinguishing between sustaining the specification underlying the conduct unbecoming charge and a finding concerning the seriousness of the misconduct), *aff'd*, 176 F. App'x 110 (Fed. Cir. 2006). Consequently, we find that the agency proved all 22 discrepancies supporting the charge of conduct unbecoming. We wish to be clear, however, that we are not persuaded by the agency's insistence, on review, that the appellant falsified her time. The appellant was not charged with falsification as a basis for the agency's action, the agency did not prove intent, and we are not persuaded by any argument to the contrary. *See* PFR File, Tab 1 at 6-7; *Leatherbury v. Department of the Army*, [524 F.3d 1293](#), 1300 (Fed. Cir. 2008) (explaining the elements of a falsification charge); *see also O'Keefe v. U.S. Postal Service*, [318 F.3d 1310](#),

1315 (2002) (the agency's penalty may not be based on allegations that were not within the scope of the notice of proposed removal).

¶8 In support of the same charge, the agency alleged that the appellant displayed open hostility towards the charging official when confronted about the discrepancies and provided incorrect information regarding her activities between logging off her computer and her actual sign-out times. IAF, Tab 4, Subtab 4-f at 2-3, Subtab 4-g. In particular, the agency alleges that the appellant stated that she made telephone calls after logging off, and a review of her telephone call log revealed that on 10 of the dates in question, she did not make any phone calls between logging off her computer and signing out. IAF, Tab 4, Subtab 4-f at 2-3, Subtab 4-g at 2. The administrative judge implicitly found that the appellant's conduct during the investigatory meeting did not support the charge, and we agree. ID at 4, 6.

¶9 Insofar as we can interpret the agency's narrative in the notice of proposed removal as asserting that the appellant's alleged misconduct during the investigatory meeting supports the charge of conduct unbecoming, the agency has not met its burden of proof on that specification. After learning of the 30-minute time discrepancy, the agency conducted a 2½-week investigation into the appellant's credit hour reporting for a period of 30 days. HT at 18-19. Roe Markiewicz, the appellant's manager, then met with the appellant and her representative to discuss the time discrepancies discovered during the course of the investigation. HT at 36. Although Ms. Markiewicz notified the appellant of the meeting 2 hours prior and informed her that she could bring a representative with her, the appellant testified that she was not given advance notice of the allegations against her or the fact that an investigation had already been conducted. HT at 36 (testimony of Ms. Markiewicz), 98 (testimony of the appellant). Consequently, she felt ambushed by the meeting and was visibly upset during the meeting. IAF, Tab 4, Subtab 4-e at 1; HT at 117. Ms. Markiewicz stated that, when questioned about her activities between the time she

logged off her computer and the time she left the building, the appellant stated that she did not remember specifically what she did on the occasions in question but sometimes made work-related phone calls after logging off her computer. HT at 39, 51; IAF, Tab 4, Subtab 4-e at 2. Additionally, in the appellant's response to the notice of proposed removal, she stated that she might have been reading operations bulletins or doing extracts. IAF, Tab 4, Subtab 4-e. The fact that the appellant, who did not remember the exact events in question and had just learned of the allegations for the first time, offered that she might have been on the phone when questioned about the time difference between when she logged off and when she departed the building does not support the conclusion that she acted inappropriately during the meeting. Thus, to the extent that the agency relied on her conduct during the investigation as a specification to the charge of conduct unbecoming, that specification is not sustained.

¶10 In sum, we find that the 22 time discrepancies support the charge of conduct unbecoming, and the agency's charge is sustained on that basis.

The agency demonstrated nexus.

¶11 The administrative judge found that the agency failed to adduce evidence that the appellant's conduct adversely affected her performance or the agency's mission. ID at 9. We agree with the agency, however, that it established nexus by demonstrating that the appellant's conduct affected management's trust and confidence in her job performance. *See Adams v. Department of Labor*, [112 M.S.P.R. 288](#), ¶ 8 (2009). The appellant's manager and second-line supervisor both stated that the appellant's conduct caused them to lose trust in her. IAF, Tab 4, Subtab 4-f at 6; HT at 66 (testimony of Ms. Brockington). The Board has consistently found nexus between time and attendance related violations and the efficiency of the service. Therefore, we find that the agency demonstrated nexus in this case.

The agency failed to properly weigh the Douglas factors and imposed a penalty that exceeded the bounds of reasonableness.

¶12 In its petition for review, the agency argues that the Board should sustain the agency's removal penalty. In her cross petition for review, the appellant argues that the Board should further mitigate the penalty to a 1-week suspension. For the following reasons, we find that a 14-day suspension is the maximum reasonable penalty under the facts and circumstances of this case.

¶13 When the Board sustains all of the charges, it will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Woebcke v. Department of Homeland Security*, [114 M.S.P.R. 100](#), ¶ 7 (2010); *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 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. When, as here, the Board sustains the agency's charge, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds that the agency's original penalty is too severe or that the agency failed to weigh the relevant mitigating factors. *Parbs v. U.S. Postal Service*, [107 M.S.P.R. 559](#), ¶ 22 (2007), *aff'd*, 301 F. App'x 923 (Fed. Cir. 2008).

¶14 The Board has identified several factors as relevant in determining the appropriateness of a penalty. *See Douglas*, 5 M.S.P.R. at 305-06. The Board has held that the most important of the *Douglas* factors is the nature and seriousness of the offense. *See Edwards v. U.S. Postal Service*, [116 M.S.P.R. 173](#), ¶ 14 (2010). The agency places much emphasis on the fact that there were 22 discrepancies in the appellant's time and thereby she improperly earned 5.75 credit hours.³ Credit hour time is earned in quarter-hour increments, and the agency claims that its policy is to award each quarter hour of credit based on the entire 15 minutes worked, so any shortage, no matter how small, would cancel the 15 minutes of credit. HT at 17-18, 32 (testimony of Ms. Markiewicz). Thus, the agency argues that even minor discrepancies in time are significant and the appellant's 22 discrepancies amount to a serious offense deserving of removal. Although we agree that discrepancies between hours worked and claimed credit time can be serious, under the facts of this case, we find the agency's argument unconvincing. First, 19 of the 22 incidents involved variances of less than 5 minutes. IAF, Tab 4, Subtab 4-f at 2. Indeed, one discrepancy was for three-quarters of a minute. *Id.* Additionally, the agency acknowledged that the clocks throughout the building were not all synchronized, HT at 21, 65, so minor variances in time could be explained by a difference in the timekeeping devices throughout the building. We find that such slight differences do not support any penalty at all, even if they did occur repeatedly, particularly because the appellant was not warned that such insignificant differences in time amount to a violation of any agency policy or subject the appellant to disciplinary action. HT at 104. Thus, although the agency attempts to paint the recurrence of this behavior as egregious and worthy of removal, we find that the de minimus nature of 19 of the discrepancies do not support an argument in favor of disciplinary action. *See, e.g., Skinner v. Department of the Army*, [32 M.S.P.R. 586](#), 588 (1987) (de

³ The total amount of time represented by all 22 discrepancies is 1 hour 42 minutes. IAF, Tab 4, Subtab 4f at 2; HT at 81.

minus nature of time and attendance violation did not support any penalty that would promote the efficiency of the service). Furthermore, the administrative judge appropriately found mitigating circumstances with respect to the 34-minute discrepancy.⁴ ID at 3, 10. The agency failed to appropriately consider the nature of the discrepancies in its *Douglas* factors analysis, and, under the facts and circumstances of this case, the penalty is disproportionate to the seriousness of the misconduct. See, e.g., *House v. U.S. Postal Service*, [80 M.S.P.R. 138](#), ¶¶ 12-15 (1998) (mitigating removal penalty where the appellant falsified time and attendance records); *Perez v. U.S. Postal Service*, [48 M.S.P.R. 354](#), 357-58 (1991) (mitigating removal penalty where the appellant falsified his time card for personal gain); *Drowns v. Office of Personnel Management*, [24 M.S.P.R. 395](#), 397 (1984) (mitigating removal penalty where the appellant falsely claimed \$9.50 in parking expenses, 24 extra hours of work, and 3 overtime hours); *Parsons v. Department of the Air Force*, [21 M.S.P.R. 438](#), 445-46 (1984) (mitigating removal penalty where the appellant took unauthorized leave and falsified a leave request).

¶15 We agree with the administrative judge that the appellant's 20 years of successful service is a mitigating factor under the circumstances of this case. ID at 10; HT at 96-97; IAF, Tab 10, Ex. B1-B3, C1-C14, Tab 11, Ex. 8 at 1, Ex. 23 at 2; see *Gill v. Department of Defense*, [92 M.S.P.R. 23](#), ¶ 27 (2002). The agency found that the appellant's prior letter of reprimand was a significant aggravating factor and demonstrated that she could not be rehabilitated. IAF, Tab 4, Subtab

⁴ The appellant stated that she sometimes entered her sign-in and sign-out times on the credit hour form when she signed in for credit time. IAF, Tab 4, Subtab 4-e. On the particular date in question, the appellant left 30 minutes earlier than she had anticipated because she received an upsetting telephone call from her elderly father that he had locked himself out of his home, and she was aware that he was upset because May 10 is the birthday of her deceased mother. HT at 97. Consequently, she left work to render assistance to her father without thinking to correct her sign-out time. HT at 98; IAF, Tab 4, Subtab 4-e at 2.

4-d at 4, Subtab 4-f at 4. Although the record is devoid of the actual letter of reprimand, it appears that it was based upon an incident in December 2009 between the appellant and a co-worker in which both employees raised their voices. IAF, Tab 4, Subtab 4-f at 4, Tab 16 at 7; HT at 44-45 (testimony of Ms. Markiewicz). We do not believe that this incident demonstrates the appellant's inability to be rehabilitated for discrepancies in her credit hour sign-in/sign-out practices. Further, we find that the letter of reprimand does not justify removal for a second offense under these circumstances. *See Suggs v. Department of Veterans Affairs*, [113 M.S.P.R. 671](#), ¶¶ 10-15 (2010) (mitigating a removal to a 30-day suspension despite a prior 3-day suspension), *aff'd*, 415 F. App'x 240 (Fed. Cir. 2011).

¶16 The agency argues that the appellant's lack of remorse is a further aggravating factor in this case and disagrees with the administrative judge's finding that the appellant admitted to wrongdoing and expressed remorse for her conduct. PFR File, Tab 1 at 8-9, 13; ID at 5. In particular, the agency argues that, although the appellant confessed to her inappropriate conduct and apologized for it in her reply to the notice of proposed removal, "following this 22-word admission of guilt, [she] used the next 1,251 words to accuse the Agency of wrongdoing, showing that she was far from remorseful." PFR File, Tab 1 at 9. The agency's characterization of the appellant's reply is inaccurate, and we agree with the administrative judge that the appellant admitted to wrongdoing and expressed remorse. IAF, Tab 4, Subtab 4-e, Tab 16 at 3; HT at 116. The appellant's reply included an explanation of her behavior and the mitigating factors that weighed in her favor. IAF, Tab 4, Subtab 4-e. That the appellant mounted a defense against the agency's charges does not indicate that she lacked remorse or failed to admit to wrongdoing, and we are not persuaded by the agency's attempt to argue otherwise. *See Dubiel v. U.S. Postal Service*, [54 M.S.P.R. 428](#), 434 (1992).

¶17 The agency also objects to the administrative judge's finding that it applied a disparate penalty to the appellant. The consistency of the penalty with those imposed upon other employees for the same or similar offenses is one of the factors to be considered under *Douglas* in determining the reasonableness of an agency-imposed penalty. *Woebcke*, [114 M.S.P.R. 100](#), ¶ 20. To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, [16 M.S.P.R. 404](#), 407 (1983). For the following reasons, we find that the record supports the conclusion that the agency applied a substantially more severe penalty to the appellant than to other employees who engaged in similar offenses.

¶18 The agency charged the appellant with conduct unbecoming a federal employee, a broad and unspecific charge, but the essence of the charge is most analogous to a violation of time and attendance policies. To that end, the appellant submitted documents and offered testimony regarding several employees who had been charged with similar offenses and faced substantially lesser discipline. IAF, Tab 14; HT at 120-25 (testimony of Jorge Moyett), 129-38 (testimony of Robert North), 140-47 (testimony of Damani Lee). When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by preponderance of the evidence before the penalty can be upheld. *Lewis v. Department of Veterans Affairs*, [111 M.S.P.R. 388](#), ¶ 8 (2009).

¶19 The administrative judge carefully considered the consistency of the penalty imposed upon the appellant with discipline imposed upon other employees and found that the appellant demonstrated that the agency subjected her to a disparate penalty. ID at 6-9. Robert North, a Technician with 10 years of service with the agency, testified that he was charged with stealing time when he punched in and then left to move his car. HT at 129-31. The agency approached him about his conduct on the same day and "took back" 15 minutes of

credit hour time that he had claimed that day. HT at 131. Nashida Craig, a Trainee, was charged with “falsification of time and attendance records” when she signed a co-worker out of a training 30 minutes early. IAF, Tab 14 at 4-7. Laverne Brockington, the deciding official in this case, imposed a 5-day suspension. HT at 66-67 (testimony of Ms. Brockington).⁵ The agency suspended the telework agreements of a group of employees when it learned that the employees were not adhering to their fixed start and end times and had only logged onto their computers for a few hours a day instead of their 8-hour shifts. IAF, Tab 14 at 16-26.

¶20 In addition, the appellant offered the testimony of Jorge Moyett, a Benefit Authorizer with 7 years of service with the agency. HT at 120. Mr. Moyett received a 2-day suspension for providing inaccurate information on an official government record which resulted in a 17-minute discrepancy between his arrival sign-in time and his actual arrival.⁶ IAF, Tab 11, Ex. 1 at 1; HT at 70. Ms. Brockington was the deciding official. HT at 70-71. In sustaining the discipline, Ms. Brockington considered the fact that he “showed little or no remorse,” “chose to deflect the focus to unrelated issues,” and indicated that the investigatory meeting “made [him] feel like [he] were some type of criminal.” IAF, Tab 11, Ex. 1 at 2. Ms. Brockington testified that the difference between Mr. Moyett’s 2-day suspension and the appellant’s removal was attributable to the fact that Mr. Moyett had no prior discipline. HT at 71. Although this explanation could justify a harsher penalty for the appellant than for Mr. Moyett, it does not justify the appellant’s removal in light of Mr. Moyett’s 2-day suspension. *See Lewis, 113 M.S.P.R. 657*, ¶¶ 16-17. Furthermore, although the appellant and Mr. Moyett

⁵ The file includes a redacted proposal to suspend an employee who appears to be Ms. Craig. *Compare* IAF, Tab 14 at 4 *with* HT at 66-67. The proposed suspension is for 3 calendar days. *Id.*

⁶ We note that the agency approached Mr. Moyett the next day instead of proceeding with a full investigation of his signing-in practices. HT at 120.

were supervised by different individuals, the agency has not explained how this difference justified a different penalty, particularly because Ms. Brockington was the deciding official in both cases. *See Woebcke*, [114 M.S.P.R. 100](#), ¶ 22. Moreover, to the extent that the agency is arguing that the repetitive nature of the appellant's conduct warrants a penalty of removal despite evidence that other employees received lesser forms of discipline, as we discussed above, the penalty is not proportionate to the seriousness of the misconduct. In light of the evidence regarding the discipline imposed upon other employees for similar misconduct, we find that a 14-day suspension is the maximum reasonable penalty for the sustained charge. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶¶ 15-18 (2010); *Woebcke*, [114 M.S.P.R. 100](#), ¶¶ 20-22.

The agency's arguments regarding adjudicatory error

¶21 The agency makes several other arguments that we have considered and find to be without merit. First, we have considered all of the agency's remaining arguments regarding the administrative judge's factual determinations and have concluded that they constitute mere disagreement that does not warrant reversal of the initial decision.⁷ *See Yang v. U.S. Postal Service*, [115 M.S.P.R. 112](#), ¶ 12 (2010) (mere disagreement with the administrative judge's findings is insufficient to disturb the initial decision); *see also Broughton v. Department of Health &*

⁷ Several of the agency's arguments actually misstate the administrative judge's findings. The agency mistakenly argues that the administrative judge improperly considered the appellant's post-investigatory meeting apology as a mitigating factor. PFR File, Tab 1 at 13, 18; ID at 9-11. The agency also mistakenly argues that the appellant's practice of clocking in at 5:45 a.m. and her testimony regarding signing in and out at the same time were improperly considered mitigating factors. PFR File, Tab 1 at 27-28; ID at 5, 9-11. The administrative judge did not consider these to be mitigating factors, and, in discussing these issues, she was simply either summarizing the record or making findings of fact on disputed issues. ID at 5. The administrative judge clearly laid out her penalty analysis and properly considered the appellant's 20 years of service, minor prior discipline, past successful work performance, explanation for the 30-minute discrepancy, availability of alternate sanctions, ability to be rehabilitated, and evidence of lesser penalties for similar offenses to be mitigating factors. ID at 9-11.

Human Services, [33 M.S.P.R. 357](#), 359 (1987) (there is no reason to disturb the conclusions of the administrative judge when the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility). Additionally, the agency argues that the administrative judge improperly stopped a line of questioning related to the appellant's remorse and failure to "truly" admit to her misconduct. PFR File, Tab 1 at 16. The administrative judge has wide discretion to control the proceedings, including the authority to exclude testimony she believes would be irrelevant, immaterial, or unduly repetitious, and we discern no error in the administrative judge's decision to exclude the testimony at issue. *See Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 10 (2010). The agency also argues that the administrative judge relied on improper credibility determinations to find that the agency misevaluated the *Douglas* factors, but we find that the administrative judge properly weighed the evidence and made appropriate credibility determinations. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002); *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). The agency further argues that the administrative judge's finding that the agency committed procedural error in failing to give her 30 days advance written warning of its intent to remove her does not warrant mitigation. PFR File, Tab 1 at 32-33. The administrative judge, however, clearly found that this technical error did not amount to harmful procedural error and did not include it in her penalty analysis. ID at 8-9. Thus, the agency's argument that the administrative judge improperly considered this as a mitigating factor is without merit.

¶22 The agency argues that the administrative judge erred in finding that Ms. Brockington referred to conduct with which the appellant was not charged. PFR File, Tab 1 at 31. Although we agree with the agency's argument that Ms. Brockington did not improperly rely on prior misconduct in determining the appropriate penalty, we do not attribute that meaning to the administrative

judge's finding. In her analysis of the reasonableness of the penalty, the administrative judge noted that Ms. Brockington's decision letter made reference to the appellant's alleged "disregard for the truth," false response to the charge, and false recording of time, even though the appellant was not charged with falsification or any other similar offense. ID at 10. As we discussed above, the agency's insistence that the appellant engaged in falsification is troubling because the agency did not charge the appellant with falsification, nor did it prove intent as required for a charge of falsification, and we agree with the administrative judge's finding insofar as it concerns the agency's argument that the appellant engaged in falsification.

New documents on review

¶23 Both the appellant and the agency submit new documents on review regarding the appellant's application for unemployment compensation. PFR File, Tab 3 at 6-7, Tabs 6, 7. State unemployment tribunal decisions are not binding on the Board. *Christopher v. Defense Logistics Agency*, [44 M.S.P.R. 264](#), 272 (1990). Furthermore, there is nothing in the Unemployment Commission Board of Review's decision that would provide a basis for invalidating the administrative judge's findings. *See Buster v. Department of Veterans Affairs*, [52 M.S.P.R. 206](#), 208 n.* (1992); *Shelton v. Department of Labor*, [38 M.S.P.R. 1](#), 2-3 (1988) (absent a showing of material evidentiary conflict or clearly erroneous legal conclusions, mere inconsistency in result between the state tribunal's decision and the administrative judge's initial decision constitutes no persuasive basis for further Board review). Thus, these documents are not material to this case and do not affect the Board's decision. *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

The agency's request for oral argument and the appellant's petition for enforcement

¶24 Finally, we DENY the agency's request for oral argument. *See Kravitz v. Department of the Navy*, [104 M.S.P.R. 483](#), ¶ 4 n.3 (2007); *Social Security*

Administration v. Carr, [78 M.S.P.R. 313](#), 320 (1998), *aff'd*, [185 F.3d 1318](#) (Fed. Cir. 1999). Furthermore, we FORWARD the appellant's petition for enforcement to the Northeastern Regional Office for processing as a petition for enforcement under the provisions of [5 C.F.R. § 1201.116\(b\)](#).

ORDER

¶25 We ORDER the agency to cancel the appellant's removal and substitute in its place a 14-day suspension without pay. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶26 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶27 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶28 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶29 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶30 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.