

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

2011 MSPB 102

Docket No. CH-0752-10-0864-I-1

**Marietta Reeves,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 23, 2011

Glen L. Smith, Esquire, Grand Rapids, Michigan, for the appellant.

James E. Campion, Jr., 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 appellant petitions for review of the initial decision that sustained her demotion. For the reasons set forth below, the Board DENIES the appellant's petition, AFFIRMS the initial decision as MODIFIED by this Opinion and Order, and SUSTAINS the appellant's demotion.

BACKGROUND

¶2 On May 5, 2010, the agency proposed the appellant's removal from the position of Manager, Customer Service, based on a charge of "Improper Conduct/ Failure to Follow Financial Reporting Procedures/ Failure to Secure Stamp Stock/

Delay of Mail.” Initial Appeal File (IAF), Tab 7 at 22. The agency specified that the appellant failed to secure stamp stock when, on January 26, 2010, an unknown amount of stamp stock was found unsecured in a bassinet in the appellant’s unlocked office. *Id.* The agency further specified that it immediately audited the retail floor stock and unit reserve stock in the appellant’s facility. The audit found that the retail floor stock was short by \$3,419.72, and the unit reserve stock was over by \$5,247.65. *Id.* The agency noted that a prior audit of the unit reserve stock had found no shortage or overage just 10 days earlier, and that a prior audit of the retail floor stock had found a shortage of only \$912.84 just 12 days earlier. *Id.* The agency also alleged that stamp stock was found unsecured in the appellant’s desk drawers and in the manager’s lavatory. *Id.*

¶3 With respect to failure to follow financial reporting procedures, the agency specified that the appellant had not conducted her monthly unit reserve stock audits in compliance with agency procedures. IAF, Tab 7 at 22. The agency noted that employee Vanessa Ewell, whom the appellant had identified as the second person to count the stock, gave a sworn statement to the Office of Inspector General (OIG) indicating that she had not verified all of the stock, that the appellant knew she had not verified it, and that the appellant had verbally supplied her with the count for the unit reserve stock. *Id.* The agency noted that the appellant had received additional guidance and assistance from the district Finance office after prior failed audits. *Id.*

¶4 With respect to delay of mail, the agency specified that in February 2010, more than 200 pieces of mail of various classes were found locked in a back storage room of the appellant’s facility. IAF, Tab 7 at 23. The agency noted that a supervisor at the facility gave a statement indicating that she had reported the undelivered pieces of mail to the appellant in January 2010. *Id.*

¶5 The agency referenced several provisions from its manuals and handbooks that the appellant had allegedly violated. IAF, Tab 7 at 23-24. The agency also noted that the appellant had received a proposed letter of warning in lieu of a

7-day suspension in February 2009 and a letter of warning in May 2008. *Id.* at 25.

¶6 After the appellant responded to the notice of proposed removal, *see* IAF, Tab 7 at 19-21, the agency issued a decision letter sustaining the charge but imposing the penalty of demotion to the non-supervisory position of part-time flexible (PTF) Clerk, rather than removal, *id.* at 15-18.

¶7 The appellant filed a Board appeal challenging her demotion. IAF, Tab 1. Prior to the hearing, she raised a claim of sex discrimination. IAF, Tab 20 at 2-3. After holding the appellant's requested hearing, the administrative judge issued an initial decision affirming the demotion. IAF, Tab 30. With respect to the allegation of failure to follow financial reporting procedures, the administrative judge credited Ewell's testimony that the appellant had pressured her to falsely sign a form indicating that she had counted the unit reserve stock. *Id.* at 3-6. She also found that the agency proved its allegations that the appellant failed to secure stamp stock and that she delayed mail. *Id.* at 6-12. The administrative judge further found that the agency established nexus, *id.* at 12, that the appellant failed to establish sex discrimination, *id.* at 13-15, and that the agency's chosen penalty did not clearly exceed the bounds of reasonableness, *id.* at 16-18.

¶8 On review, the appellant argues that the deciding official had ended a mediation session and had immediately turned the meeting into the appellant's opportunity to respond to the proposed removal. Petition for Review File (PFR File), Tab 3 at 5. She further argues that the administrative judge erred in preventing the appellant from questioning the deciding official about that meeting. *Id.* at 5-6. The appellant also submits an initial decision in another Board appeal in which a different deciding official testified that delaying mail was not a "removal offense." *See id.* at 6, 23 n.1. She argues that such testimony undermines the testimony of the deciding official in the present case about the seriousness of delaying mail. *Id.* at 6.

¶9 With respect to the charge, the appellant argues that in addition to the 3 specifications addressed by the administrative judge, there was an additional specification of “improper conduct” that the agency failed to prove. PFR File, Tab 3 at 7-8. She also challenges the administrative judge’s credibility determination with respect to the failure to follow financial reporting procedures, *id.* at 8-12, and she challenges the administrative judge’s findings with respect to the remaining specifications as well, *id.* at 12-16. In addition, the appellant argues that she was treated disparately with respect to failure to secure stamp stock because another supervisor at her facility admitted that he failed to secure stamp stock but was not disciplined, despite the fact that his failure resulted in a \$35,000 shortage. *Id.* at 16-19. Finally, she argues that the penalty was too harsh and that a suspension of between 14 and 30 days would be an appropriate penalty. *Id.* at 19-21. The agency has responded in opposition to the petition for review. PFR File, Tab 6.

ANALYSIS

The appellant’s evidence submitted for the first time on review does not warrant reversal of the initial decision.

¶10 Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). The appellant submits the initial decision in *Keys v. U.S. Postal Service*, MSPB Docket No. CH-0752-09-0832-I-2, which was issued on March 15, 2011. PFR File, Tab 3 at 22-54. The appellant cites the testimony of the deciding official in *Keys*. PFR File, Tab 3 at 6. The hearing in *Keys* was held on

February 15, 2011, *see* PFR File, Tab 3 at 23, after the record closed in the present appeal, *see* 1/24/11 Hearing Transcript at 201-02 (closing the record at the end of the last day of the hearing). We therefore find that the appellant's evidence was unavailable despite her due diligence before the record closed in the present appeal.

¶11 Although the appellant's evidence might be new, the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980). The appellant argues that the testimony of the deciding official in *Keys* that he did not consider delay of mail a "removal offense" undermines the credibility of the claim by the deciding official in the present case about the seriousness of delay of mail. PFR File, Tab 3 at 6. However, the deciding official in the present case never indicated that delay of mail warranted removal; indeed, he chose to demote the appellant rather than removing her as proposed, despite finding that she delayed mail, failed to secure stamp stock, and failed to follow financial reporting procedures. Thus, the appellant has not shown how the testimony of the deciding official in *Keys* warrants an outcome different from that of the initial decision.

The appellant has not shown any reversible error in the administrative judge's evidentiary rulings.

¶12 The appellant argues that the administrative judge erred in denying her an opportunity to present testimony and question the deciding official about the circumstances surrounding a mediation session prior to the issuance of the decision to demote the appellant. PFR File, Tab 3 at 5-6. An administrative judge has broad discretion to regulate the course of the hearing and to exclude evidence that has not been shown to be relevant or material to the issues of the case. *Townsel v. Tennessee Valley Authority*, [36 M.S.P.R. 356](#), 359 (1988); *see* [5 C.F.R. § 1201.41\(b\)](#). The Board has held that in order to obtain reversal of an initial decision on the ground that the administrative judge abused her discretion

in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed. *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 10 (2010); *Jezouit v. Office of Personnel Management*, [97 M.S.P.R. 48](#), ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). The appellant has not demonstrated on review that the administrative judge abused her discretion¹, or that the excluded testimony could have affected the outcome of the appeal. We therefore find that the appellant has not shown that the administrative judge's exclusion of testimony provides a basis for reversing the initial decision.

The administrative judge properly affirmed the charge.

¶13 The appellant argues on review that, in addition to the 3 specifications addressed by the administrative judge, the agency was required to prove an additional specification of "improper conduct." PFR File, Tab 3 at 7-8. However, the administrative judge indicated in her prehearing conference summary that she construed the charge as consisting of 3 specifications. IAF, Tab 20 at 1-2. She gave the parties an opportunity to object to her summary, *id.* at 6, but the appellant raised no objection to the administrative judge's charge construction. Therefore, the appellant failed to preserve any objection to the

¹ The Board's regulations require that a petition for review "state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record." [5 C.F.R. § 1201.115](#)(a). The appellant argues that she lacks the financial resources to purchase the hearing transcripts or tapes, and is therefore unable to provide specific citations to the record. PFR File, Tab 1 at 5. However, the Board's regulations provide procedures through which a party may request an exception to paying the cost of providing a hearing tape recording or written transcript. [5 C.F.R. § 1201.53](#)(c). There is no indication in the record that the appellant, who is represented by counsel in this appeal, requested such an exception. In any event, we have reviewed the hearing transcript and we discern no error in the administrative judge's evidentiary rulings. Specifically, the administrative judge correctly excluded testimony about conversations that took place during a confidential mediation session, while allowing testimony about conversations that took place after the mediator left. *See* 12/9/10 Hearing Transcript at 284-89.

administrative judge's charge construction. In any event, we find that the administrative judge properly construed the charge as consisting of 3 specifications.

¶14 With respect to the specification of failure to follow financial reporting procedures, the appellant acknowledges that the Board's finding turns on a credibility determination. PFR File, Tab 3 at 8-12. She argues, however, that the administrative judge erred in crediting the testimony of Ewell over that of the appellant.

¶15 The Board will defer to the credibility determinations of an administrative judge when they are based, explicitly or implicitly, upon the observation of the demeanor of witnesses testifying at a hearing because the administrative judge is in the best position to observe the demeanor of the witnesses and determine which witnesses were testifying credibly. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1300-01 (Fed. Cir. 2002); *see Smith v. Department of Veterans Affairs*, [93 M.S.P.R. 424](#), ¶ 4 (2003). The credibility determinations of an administrative judge are virtually unreviewable on appeal. *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1364 (Fed. Cir. 2002); *see Hambsch v. Department of the Treasury*, [796 F.2d 430](#), 436 (Fed. Cir. 1986). The appellant argues that the administrative judge ignored the fact that Ewell signed a form indicating that she had personally counted the stamp stock, and that Ewell's signature on the form was inconsistent with her testimony that she had simply recorded the numbers the appellant gave her. PFR File, Tab 3 at 10. However, the administrative judge noted Ewell's testimony that she had signed the form because the appellant, her manager, had directed her to do so. IAF, Tab 30 at 4. Thus, the administrative judge did note the inconsistency between Ewell's signature on the form and her hearing testimony, and she nevertheless found Ewell to be more credible than the appellant. We have reviewed the administrative judge's credibility determination and we find no sufficiently sound reason to overturn it. *See Haebe*, 288 F.3d at 1301.

¶16 The appellant also challenges the administrative judge's findings with respect to the specifications of failure to secure stamp stock and delay of mail. PFR File, Tab 3 at 12-16. However, she does not dispute the essential facts found by the administrative judge in support of those specifications. She challenges the administrative judge's credibility determination with respect to the delay of mail specification, but she has not provided an adequate basis for reversing that determination. *See Haebe*, 288 F.3d at 1301.

The administrative judge properly found that the appellant failed to prove her claim of sex discrimination.

¶17 The appellant's claim of sex discrimination is based on the relative treatment received by her and Ulysses Butler, another supervisor in the same post office. She argues that Butler gave out his pass codes to several individuals in order to allow them to issue stamp stock, resulting in a \$35,000 shortage, and that Butler was merely reassigned to another supervisory position and required to repay the \$35,000. PFR File, Tab 3 at 16. The administrative judge found that the appellant and Butler were not similarly situated because they had different supervisors and Butler did not engage in the same conduct for which the appellant was demoted. IAF, Tab 30 at 14.

¶18 For employees to be deemed similarly situated for purposes of a disparate treatment discrimination claim, the Board has held that all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparative employee(s). *Spahn v. Department of Justice*, [93 M.S.P.R. 195](#), ¶ 13 (2003).² We agree with the administrative judge that the appellant failed to

² As the administrative judge correctly noted, the standard for determining whether employees are similarly situated for purposes of a discrimination claim differs from the standard for determining whether they are similarly situated for purposes of a disparate penalty claim. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶ 15 (2010). The appellant's disparate penalty claim is addressed below.

establish that she and Butler were similarly situated, and that she therefore failed to prove her claim of sex discrimination.

The administrative judge properly affirmed the penalty.

¶19 The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). When the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999).

¶20 We agree with the administrative judge that the deciding official considered the relevant *Douglas* factors in deciding to demote the appellant, and that the penalty of demotion to a PTF Clerk position is within the tolerable limits of reasonableness. We note that the appellant raises a disparate penalty argument on review. PFR File, Tab 3 at 19-21. 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 v. Department of Homeland Security*, [114 M.S.P.R. 100](#), ¶ 20 (2010). 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). The appellant alleges that she was treated less favorably than Butler with respect to the specification of failure to secure stamp stock. PFR File, Tab 3 at 16-19. However, the appellant was not demoted based on that specification alone, and she does not argue that Butler was found to have delayed mail or failed to follow financial reporting procedures. We therefore find that Butler was not similarly situated to the appellant, and that his more favorable treatment does not establish a claim of disparate penalties. *See Bencomo v. Department of Homeland Security*, [115 M.S.P.R. 621](#), ¶ 20 (2011) (appellant

failed to establish a disparate penalty claim where the alleged comparators engaged in conduct similar to only one of the charges for which the appellant was removed); *see also Lewis*, [113 M.S.P.R. 657](#), ¶ 12 (for the consistency of the penalty factor to be considered in a penalty determination, there must be a great deal of similarity, not only between the offenses committed and the proposed comparator, but as to other factors, such as whether the employees worked in the same unit, had the same supervisor, and whether the events occurred relatively close in time).

ORDER

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request 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 Codes, 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 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:

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