UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 94

Docket No. PH-0752-09-0357-I-2

Leonard J. Reid,

Appellant,

v.

Department of the Navy,

Agency.

August 1, 2012

Andrew T. Walsh, Esquire, West Long Branch, New Jersey, for the appellant.

Joyce L. Whitman, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 The agency petitions for review of the initial decision that found the appellant established his disparate penalty claim and mitigated the agency penalty of demotion to a letter of reprimand. For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still mitigating the penalty of demotion to a letter of reprimand.

BACKGROUND

¶2 The appellant worked as a Supervisory Police Officer at the Naval Air Engineering Station (NAES) in Lakehurst, New Jersey. Initial Appeal File (IAF), Tab 4, Subtab 4a. On May 14, 2008, the agency proposed to suspend the appellant for 14 days based upon the following charges and specifications: (1) failure to conduct Non Lethal Weapons, Oleoresin Capsicum (OC or pepper spray) Contamination training (OC Contamination training) in accordance with established training policy and requirements on September 2, 2007, by (1)(a) spraying the trainee with his eyes open rather than closed, (1)(b) not providing independent medical personnel on the scene, and (1)(c) not establishing and affording the trainee the specified five separate engagement stations in a controlled fight through scenario after exposure to the OC Contaminant; (2) failure to properly investigate and initiate corrective action regarding mistreatment of the OC Contamination trainee post-OC training; and (3) falsely certifying the OC Contamination trainee's completion of the OC Contamination training requirements. IAF, Tab 4, Subtab 4h at 1-2. The agency verbally reassigned the appellant as a result of the charges, and the appellant filed an Equal Employment Opportunity (EEO) complaint of discrimination, alleging disparate treatment based on race because others in his department provided the same training in a similar manner without disciplinary action. IAF, Tab 1 at 18, 21-22.

¶3 The agency subsequently rescinded the proposal to suspend and, on September 30, 2008, issued a proposal to remove the appellant from federal service based upon the charges listed in the May 14, 2008 proposal to suspend plus the following two additional charges: (4) providing false certification of overtime hours worked; and (5) falsely reporting time in the weapons log book.[1]

---

[1] In the decision notice regarding the proposed removal, the deciding official referenced the charges in a confusing manner. To avoid further confusion, we refer to the charges as charges (1) through (5) with specifications labeled as (a), (b), and (c).

IAF, Tab 4, Subtab 4f at 1. Following consideration of the appellant's written reply, *id.*, Subtab 4c, the deciding official, Milton Hemmingsen, issued a decision, sustaining charges (1), (2), (3), and (5) and mitigating the penalty from removal to a demotion to a nonsupervisory Police Officer position, effective March 1, 2009, *id.*, Subtabs 4a-4b.

¶4 The appellant filed a timely appeal with the Board alleging that the agency failed to meet its burden of proof in sustaining the charges, that the penalty did not promote the efficiency of the service, that the penalty violated the theory of progressive discipline, and that other supervisors in the department engaged in similar behavior without any disciplinary action. IAF, Tab 1 at 3, 18. The appellant also raised the affirmative defenses of harmful error and discrimination based on race. *Id.* at 18; IAF, Tab 15 at 4, 6.

¶5 The administrative judge held the appellant's requested hearing and issued an initial decision, affirming the agency's action with modification and further mitigating the penalty from a demotion to a letter of reprimand. Refiled Appeal File (RAF), Tab 32, Initial Decision at 1. Specifically, the administrative judge sustained charge (1), failure to conduct OC Contamination training in accordance with agency policy and requirements, finding that the agency proved the appellant failed to afford the trainee the specified five separate engagement stations but that the agency did not prove the specifications regarding improperly spraying the trainee with open eyes and failing to provide independent medical personnel on the scene. *Id.* at 23-24. The administrative judge also sustained charge (3), finding that the appellant falsely certified that the trainee completed all five stations when he did not, and sustained charge (5), finding that the appellant improperly recorded the time that he signed out his weapon in the log book on June 6, 2008. *Id.* at 17, 24. The administrative judge found that charge (2), failure to properly investigate mistreatment of the OC Contamination trainee post-OC training, and charge (4), providing false certification of overtime hours worked, could not be sustained. *Id.* at 16, 25. In addition, the administrative

judge found that the agency exhibited disparate treatment of the appellant when compared to others who had conducted OC Contamination training in a similar manner but that the appellant failed to establish his affirmative defenses of harmful error or discrimination on the basis of race. *Id.* at 27-32, 34, 36. The administrative judge ordered the agency to provide interim relief to the appellant in the event that either party filed a petition for review. *Id.* at 37-38.

¶6 The agency has filed a petition for review as well as a certificate of compliance with the interim relief order. Petition for Review (PFR) File, Tab 3. The appellant has filed a response in opposition to the petition for review, asserting that the agency has not provided proper interim relief.[2] *Id.*, Tab 7.

ANALYSIS

The administrative judge properly sustained charge (1) alleging that the appellant failed to conduct OC Contamination training in accordance with established training policy.

¶7 In sustaining charge (1), the administrative judge found that the agency proved that the appellant failed to afford the trainee the specified five engagement stations during the September 2, 2007 OC Contamination training, but that the agency did not prove that the appellant improperly sprayed the trainee with open eyes or improperly failed to provide training site presence of independent medical personnel. Initial Decision at 23-24. Aside from a footnote

---

[2] The appellant claims that the agency has failed to comply with the administrative judge's Interim Order of Relief by not providing him back pay and otherwise making him whole. PFR File, Tab 7 at 5. The interim relief provisions, however, do not require the agency to grant the appellant back pay or other benefits to make him whole at the interim relief stage of the proceedings. *Batts v. Department of the Interior*, 102 M.S.P.R. 27, ¶ 6 (2006); *Cobb v. Department of the Air Force*, 57 M.S.P.R. 47, 50-51 (1993); 5 C.F.R. § 1201.115(c). The agency's evidence establishes that it provided the appellant with the appropriate interim relief. *See* PFR File, Tab 3 at 2-3. Accordingly, to the extent that the appellant's response to the agency's petition for review is intended as a motion to dismiss the agency's petition for failure to provide interim relief, we deny the motion. *See Ware v. Department of Veterans Affairs*, 76 M.S.P.R. 427, 431-32 (1997).

in the background section of its petition for review, in which the agency disputes the administrative judge's reliance on the fact that there was no written document requiring a trainee's eyes to be closed to find that the agency failed to prove specification (a) of charge (1), the agency does not contest the administrative judge's findings regarding charge (1).

¶8 With respect to the agency's footnoted assertion regarding specification (a), we agree with the administrative judge that the agency failed to prove this specification. *See* Initial Decision at 17-23. The agency relies in its petition for review on the testimony of Thomas Krall, a physical security specialist with the Naval Criminal Investigative Service who was one of the instructors at the April 2006 training during which the appellant was certified, in which Mr. Krall stated that it would be contrary to agency policy to spray a trainee directly in the eyes. PFR File, Tab 3 at 7; *see* Hearing Testimony (HT) at 66-67. However, it is undisputed that Mr. Krall was not the instructor who actually certified the appellant, that the agency did not call to testify the instructor who certified the appellant,[3] that Mr. Krall admitted that the training procedure manuals were updated in December 2008 to specify that the trainee's eyes shall be closed during the OC spraying, and that such a mandate was "not stated [in writing] anywhere else" prior to December 2008. *See* Initial Decision at 20-23; HT at 69, 76, 94-95. Accordingly, the agency failed to prove that, to the extent it was unwritten agency policy to spray trainees with their eyes closed, such a policy was ever communicated to the appellant, and thus failed to prove that the appellant did not follow the training procedures with respect to spraying the trainee with his eyes open on September 2, 2007. Furthermore, we discern no

---

[3] As the administrative judge noted, the instructor who certified the appellant, Tony Cooke, was in Bahrain in February 2008, although it is not clear where he was or whether he was available at the time of the hearing. *See* Initial Decision at 20; IAF, Tab 12, Ex. 9.

reason to disturb the administrative judge's other findings with respect to the specifications of charge (1).

The administrative judge properly did not sustain charge (2) alleging that the appellant failed to investigate post-training mistreatment of the trainee.

¶9 In its petition for review, the agency asserts that the administrative judge erred in making and relying on factual determinations that were unsupported by the record. PFR File, Tab 3 at 5, 12-15. In so doing, the agency challenges the administrative judge's finding that charge (2) could not be sustained. *Id.* at 13. Specifically, the agency argues that the administrative judge erred when she found that the deciding official, Mr. Hemmingsen, did not sustain charge (2) in his decision letter. *Id.* In the letter, Mr. Hemmingsen stated, inter alia, that he sustained the specifications as set forth in paragraph 2(a) of reference (a), which set forth agency charges (1) through (3). IAF, Tab 4, Subtab 4b at 1. Although he inaccurately referred to charges (1) through (3) as specifications, we agree with the agency that Mr. Hemmingsen sustained charge (2) in his decision letter. *See id.* We find, however, that the agency has failed to prove by preponderant evidence that the appellant engaged in the alleged misconduct.

¶10 Charge (2) accused the appellant of "failure to properly investigate and initiate corrective action regarding after OC Training mistreatment of the OC Contamination trainee." IAF, Tab 4, Subtab 4h at 1. The agency then alleged that the appellant became aware that one or more personnel on his watch participated in two improper acts toward the trainee, consisting of the taking and subsequent posting of a photograph of the trainee in distress and the taking and subsequent broadcasting of an audio recording of the trainee in distress. *Id.* The record, however, is devoid of pertinent information relating to this charge. For instance, the agency did not identify any agency policy, regulation, or guidance requiring the appellant to investigate the alleged mistreatment, let alone describing the steps of a "proper" investigation. Moreover, the agency conducted an investigation of the training and found no evidence of the alleged hazing and

no evidence of who was responsible for taking the picture or recording the trainee during the OC Contamination training. RAF, Tab 23 at 8-83. Therefore, we agree with the administrative judge that the charge cannot be sustained, and we find that the administrative judge's error in finding that the deciding official did not sustain the charge in his decision letter did not prejudice the agency's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The appellant falsely certified the trainee's completion of the OC Contamination training requirements under charge (3).

¶11 To sustain a falsification charge, the agency must prove, by preponderant evidence, that the appellant knowingly provided wrong information with the intention of defrauding, deceiving, or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed. Cir. 2002); *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 10 (2007). Because there is seldom direct evidence on the issue, circumstantial evidence must generally be relied upon to establish intent. *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986); *Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 525, ¶ 9 (2008). Whether the element of intent has been proven must be resolved from the totality of the circumstances. *See Rodriguez*, 108 M.S.P.R. 525, ¶ 9; *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). A conclusion that an appellant has provided incorrect information does not control the question of intent for purposes of adjudicating a falsification charge. *Rodriguez*, 108 M.S.P.R. 525, ¶ 9; *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001). However, intent may be inferred when an appellant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 6 (2010).

¶12 The administrative judge apparently jointly addressed and sustained specification (c) of charge (1), failure to conduct the OC Contamination training

in accordance with established requirements by not providing the five required fighting stations, and charge (3), providing false certification of the trainee's completion of all the requirements of the OC Contamination training. *See* Initial Decision at 24, 32. The administrative judge found that the appellant did not provide the five required fight stations during the OC Contamination training but that, because minor variations and errors in the training were generally condoned, the appellant "had no reason to believe that he was doing something seriously wrong." *Id*. at 24. In so finding, the administrative judge essentially sustained specification (c) of charge (1), with which we discern no error as discussed briefly above.

¶13 While the administrative judge's findings that minor variations and errors in training were generally condoned and that the agency did not give fair warning that such behavior would no longer be acceptable are relevant to charge (3), they are relevant only with respect to the penalty phase of that falsification charge. *See Avant v. Department of the Air Force*, 71 M.S.P.R. 192, 201 (1996) (although condonation is not a defense to the charge, it is relevant to penalty). Furthermore, the administrative judge erred in sustaining charge (3), providing false certification of the trainee's completion of all the OC Contamination training requirements, while also finding that the appellant did not believe he was doing anything wrong. As noted above, a charge of falsification cannot be sustained if the appellant did not knowingly provide wrong information with the intention of defrauding, deceiving, or misleading the agency. *See Haebe*, 288 F.3d at 1305. Nevertheless, while we disagree with her analysis, for the reasons set forth below, we agree with the administrative judge's conclusion that the agency proved that the appellant falsely certified the trainee's completion of the OC Contamination training.

¶14 In his prehearing submission, the appellant relied on *Mendez v. Department of the Treasury* and its holding that an appellant following a standard agency practice may be found to lack the requisite intent required to prove falsification

only when he earnestly believed that his conduct was proper. RAF, Tab 20 at 6; *see Mendez*, 88 M.S.P.R. 596, ¶¶ 18, 23. The appellant asserted that, like the appellants in *Mendez*, he simply acted in accordance with prior established operating procedures. *See* RAF, Tab 20 at 6. In *Mendez*, two Seized Property Specialists were removed by the agency for, inter alia, falsely certifying that they witnessed the destruction of narcotics when, based upon their time at the facility, complete destruction was impossible in light of the amount of time required for narcotics to be destroyed in an incinerator. *Mendez*, 88 M.S.P.R. 596, ¶¶ 2-3. The Board found that the appellants lacked the requisite intent to deceive the agency because they earnestly believed that they were following accepted agency practices in destroying narcotics, particularly in light of evidence that the agency's destruction operations were plagued by lack of clearly established lines of authority and delineation of responsibility, as well as poor training and inadequate briefings. *Id.*, ¶¶ 18-23.

¶15 *Mendez* is distinguishable from the instant case, however, because here the evidence indicates that the appellant was trained to complete each of the five fighting stations in the OC Contamination training, while in *Mendez* the Board found that the appellants were following the procedures they had been taught during their on-the-job training. *Id.*, ¶ 22; RAF, Tab 17 at 13-21. Therefore, while it may have been common practice to conduct the OC Contamination training in the manner in which the appellant conducted it, the evidence and testimony indicates that he did not conduct the training in accordance with his on-the-job training.[4] IAF, Tab 12, Subtab 9; RAF, Tab 17 at 13-21; HT at 68-70, 76-78.

¶16 Moreover, *Mendez* turned on the whether the appellants had the intent to deceive the agency with respect to whether the narcotics were destroyed in the

---

[4] As noted previously, the fact that variations in the training were common practice and/or condoned will be considered in the penalty phase.

incinerator. *See Mendez*, 88 M.S.P.R. 596, ¶ 23. The instant case turns on whether the appellant had the intent to mislead the agency when he certified that the trainee completed the OC Contamination training. Particularly important in considering the appellant's intent to mislead the agency is the wording of the certificate of completion. The certificate stated: "Completion of a 5 station fight-through drill involving; employment of the baton . . . threat assessment, Mechanical Advantage Control Holds . . ., and OC contamination to include distress and decontamination." IAF, Tab 12, Subtab 2. Thus, the appellant, in signing the form, certified not simply that the trainee completed the training but that the trainee completed the 5 station fight-through drills. *See id.* Regardless of whether the appellant believed the manner in which he conducted the training was common or condoned or whether he believed that the trainee essentially completed the training, he conceded that the September 2, 2007 training did not include the five fighting stations and yet he certified that it did. Accordingly, because it is distinguishable, *Mendez* does not control the Board's findings with respect to the charge of falsifying the trainee's certification of completion of the requirements of OC Contamination training. We therefore find that the appellant certified the trainee's completion of the OC contamination training on September 2, 2007, with the intent to mislead the agency and thus sustain charge (3). *See Haebe*, 288 F.3d at 1305.

The appellant falsely recorded the time he withdrew his weapon from the weapons safe on June 6, 2008.

¶17 The administrative judge sustained charge (5), which alleged that the appellant falsely recorded the time he withdrew his weapon from the weapons safe, even though she found that the agency had "not proven that the appellant was knowingly acting improperly in this instance or outside the common practice

of the office."[5] Initial Decision at 16-17; IAF, Tab 4, Subtab 4f. She found that the appellant indicated in the weapons log that he logged out his weapon at 1800 hours even though he conceded that he did not arrive at the station until 1820 hours and that this constituted a "technical violation." Initial Decision at 17; IAF, Tab 4, Subtab 4c at 28; *id.*, Tab 3, Exhibit (Ex.) C. However, as set forth above, a charge of falsification cannot be sustained if the appellant did not knowingly provide wrong information about logging out his weapon with the intention of defrauding, deceiving, or misleading the agency. *See Haebe*, 288 F.3d at 1305.

¶18 For similar reasons as set forth above with respect to charge (3), we find that the appellant falsely recorded the time he withdrew his weapon on June 6, 2008. The June 6, 2008 weapons log book shows that the appellant logged his weapon out at 1800 hours. IAF, Tab 3, Ex. C. The appellant conceded in a sworn statement that he arrived at the station at approximately 1823 hours, that he went to his office to retrieve his weapon belt, and that he then proceeded to the armory and took his weapon from the safe. *Id.*, Tab 4, Subtab 4c at 28-29. In recording the log out time for his weapon as 1800 hours, the appellant intended to reflect that he was at the station with weapon in hand more than 20 minutes before he even arrived at the station. Furthermore, while it may have been

---

[5] Charge (5) was set forth in the notice of proposed removal as a narrative. *See* IAF, Tab 4, Subtab 4f at 1. The narrative stated, in part, "a review of the Weapon's log book for 6 June 2008 indicates you recorded the time you withdrew your weapon from the weapons safe . . . as 1800 hours. However, statements from personnel working the front gate indicate your arrival time at the NAES at approximately 1900 hours." *Id.* In a separate paragraph immediately following the narrative, the proposal notice stated that "[t]hese recent incidents of falsely entering the number of hours of overtime worked and *falsely documenting the time of day you withdrew your weapon* . . . demonstrate a disturbing pattern of deception that cannot be tolerated." *Id.* at 2 (emphasis added). Further, in the introductory paragraph to the notice of proposed removal, the agency characterized the charge as "false reporting of time in the weapon's log book." *Id.* at 1. Accordingly, we find that the agency was required to prove the elements of falsification.

common practice among some officers to record the time their shift started on the weapons log book, it did not appear to be a practice among *all* officers as the log book shows that two officers on the 1430 shift logged out their weapons at 1426 hours while most others logged out their weapons at 1430 hours. *See* IAF, Tab 3, Ex. C. Additionally, the log book shows that all of the other officers were exact in logging their weapons back in as the log book shows that the officers on the 1430 shift logged their weapons back in at 2239 hours, 2240 hours, 2241 hours, 2242 hours, and 2243 hours respectively. *Id.* Furthermore, to the extent it was common practice among some officers to record the time the shift started in the weapons log book, such practice is not exculpatory of the appellant's actions but is rather a mitigating circumstance in the penalty phase. *See Schoeffler v. Department of Agriculture*, 47 M.S.P.R. 80, 90-91 (1991), *vacated in part*, 50 M.S.P.R. 143 (1991); *see also Pittman v. Department of the Interior*, 60 M.S.P.R. 365, 374 (1994). Accordingly, we find that the appellant possessed the requisite intent to mislead the agency and that charge (5) was properly sustained by the administrative judge.

The appellant failed to establish his claim of disparate penalties.

¶19 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). Establishing that the charges and circumstances surrounding the charged behavior are substantially similar may include proof that the proffered comparison employee was in the same work unit, was with the same supervisor, was subjected to the same standards governing discipline, and faced discipline close in time to the appellant. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶¶ 6, 12 (2010). Other factors may include whether the difference in treatment was knowing and intentional, whether an agency began levying a more severe penalty for a certain offense without giving notice of a change in policy, and whether an imposed penalty is appropriate for the sustained

charges. *Id.*, ¶ 15 n.4 (citing *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009)). Where 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 a preponderance of the evidence before the penalty can be upheld. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 20 (2010).

¶20 In her initial decision, the administrative judge found that the appellant established disparate penalties. Initial Decision 2 at 27. Specifically, she found disparate penalties with respect to Sergeant Michael Lancaster, a GS-7 Lead Police Officer, and Jeremy Buxton, an E-5 Operations Specialist, Second Class, active-duty military member, both of whom were stationed at NAES, Lakehurst, New Jersey, and both of whom received OC Contamination instructor training with the appellant. *Id.* at 29, 32; IAF, Tab 12, Subtab 5 at 5; *id.*, Subtab 10.

¶21 With respect to Mr. Lancaster, the appellant claimed in an EEO complaint that Mr. Lancaster performed OC Contamination training by spraying trainees with their eyes open and by taking "short cuts," but that he was never disciplined. IAF, Tab 1 at 18, 21. As a result of his EEO complaint, the agency initiated an investigation to determine whether the appellant's allegations had merit. RAF, Tab 21 at 7-9. The investigation concluded that the allegations were hearsay and that there were no grounds for criminal or administrative action. *Id.* at 8. During the investigation, however, the investigator only questioned the appellant, who stated that he had no information but that the investigator should talk to Chief of Police Weslie Fitzgerald. *Id.* at 8. The investigator, however, failed to contact Mr. Fitzgerald and ended the investigation. *Id.* During the hearing, Mr. Hemmingsen admitted that the investigation may not have been handled properly for that reason. HT at 132-33. The administrative judge found that the agency treated the appellant disparately from Mr. Lancaster for the same misconduct because it chose to investigate the allegations regarding the appellant (brought by the trainee), while it chose not to investigate the allegations against Mr. Lancaster

(brought by the appellant). Initial Decision at 29. The administrative judge further found that the agency's explanation, i.e., the investigation regarding Mr. Lancaster may have been handled poorly, was insufficient. *Id.*

¶22 The agency argues on review that the administrative judge erred in finding disparate penalties because she failed to properly consider the agency's legitimate reasons for treating the employees differently. PFR File, Tab 3 at 2. The analysis need not reach that point, however, because the appellant presented insufficient evidence to establish that he and Mr. Lancaster were similarly situated. First, the administrative judge sustained three charges against the appellant: (1) failure to conduct OC Contamination training in accordance with established training policy and requirements; (3) falsely certifying the OC Contamination trainee's completion of the OC Contamination training requirements; and (5) falsely reporting time in the weapons log book. In his EEO complaint and throughout these proceedings, the appellant primarily alleged, without providing any supporting information or documentation, that Mr. Lancaster also sprayed trainees in the eyes with pepper spray during the OC Contamination training and took "short cuts," but was never disciplined. IAF, Tab 1 at 18, 21. This allegation explicitly pertains to specification (a) of charge (1) and could conceivably pertain to specifications (b) or (c) of charge (1). The appellant did not present evidence that Mr. Lancaster had engaged in similar conduct with respect to each of the three charges sustained against the appellant but only claimed that their conduct was similar with respect to one charge. We therefore find that the appellant has not met his burden of establishing that Mr. Lancaster engaged in conduct similar to him. *See Bencomo v. Department of Homeland Security*, 115 M.S.P.R. 621, ¶¶ 2, 20 (2011) (the appellant failed to establish a disparate penalty claim where the alleged comparators engaged in conduct similar to only some of the charges for which the appellant was removed), *aff'd*, 486 F. App'x 986 (2012).

¶23 Regarding Mr. Buxton, the administrative judge found that the investigation into the OC Contamination training conducted by the appellant included a statement from Chief Fitzgerald indicating that Mr. Buxton had trained Chief Fitzgerald and sprayed him with his eyes open and without emergency medical personnel present. Initial Decision at 29; *see* RAF, Tab 23 at 70. The agency, however, took no action against Mr. Buxton. Initial Decision at 29. Accordingly, the administrative judge determined that that the agency treated the appellant disparately from Mr. Buxton without providing a legitimate reason for its actions. *Id.* However, we find that the appellant presented insufficient evidence to establish disparate penalties with respect to Mr. Buxton. Like Mr. Lancaster, the appellant only claimed their conduct was similar with respect to charge (1). Therefore, we find that, even absent consideration of his status as a military member, Mr. Buxton was not similarly situated to the appellant for purposes of establishing a disparate treatment claim. *See Bencomo*, 115 M.S.P.R. 621, ¶ 20. Nonetheless, as fully discussed below, the appellant's failure to prove his disparate penalties claim does not absolve the Board of its duty to consider all of the facts and surrounding circumstances of the case in imposing the maximum reasonable penalty, including the consistency of the penalty with those imposed on other employees who engaged in the same or similar conduct. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

A letter of reprimand is the maximum reasonable penalty.

¶24 Because we find that the appellant did not establish disparate penalties, we substitute our own penalty analysis for that of the administrative judge, still finding that a letter of reprimand is the maximum reasonable penalty under the circumstances. When not all of the charges are sustained, as here, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Douglas*, 5 M.S.P.R. at 308. The Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it

desires that a lesser penalty be imposed on fewer charges. *George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 10 (2007) (citing *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999)), *aff'd*, 263 F. App'x 889 (Fed. Cir. 2008). However, in doing so, the Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining employees. *Lachance*, 178 F.3d at 1258. In this case, the agency did not indicate that it desired a lesser penalty be imposed on fewer charges.

¶25 Although three charges against the appellant have been sustained, including two charges of falsification, we agree with the administrative judge that the penalty of demotion exceeds the maximum reasonable penalty in light of the unique circumstances in this case. While falsification is serious misconduct, the Board has repeatedly held that there is no per se rule as to the penalty to be imposed in cases involving falsification. *See Blake*, 81 M.S.P.R. at 394, ¶ 46. Rather, the proper penalty must be determined on a case-by-case basis, considering the totality of the surrounding circumstances. *Id.*; *Seas v. U.S. Postal Service*, 78 M.S.P.R. 569, 573 (1998); *Perez v. U.S. Postal Service*, 48 M.S.P.R. 354, 356-57 (1991); *Cade v. U.S. Postal Service*, 8 M.S.P.R. 717, 719 (1981).

¶26 The Board has held that the *Douglas* factors of particular relevance in determining the reasonableness of a penalty in a falsification case are: (1) The nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities; (2) the appellant's past disciplinary record; (3) the effect of the offense on the appellant's ability to perform at a satisfactory level; and (4) the mitigating factors surrounding the offense. *Hylick v. Department of the Air Force*, 85 M.S.P.R. 145, ¶ 18 (2000); *Brown v. Department of the Treasury*, 61 M.S.P.R. 484, 490-91 (1994); *see also Seas*, 78 M.S.P.R. at 573. Further, law enforcement officers and supervisors are held to a higher standard of conduct than other employees. *See, e.g., Prather v. Department of Justice*, 117 M.S.P.R. 137, ¶ 36 (2011); *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010). The agency in its petition for review has placed much emphasis on

the fact that the administrative judge failed to appreciate the nature and seriousness of the offense and failed to consider that the appellant was a supervisory law enforcement officer. *See* PFR File, Tab 3 at 6-7.

¶27 With respect to charges (1) and (3), the record reveals that the manner in which the appellant conducted the OC Contamination training was not out of the ordinary. RAF, Tab 23 at 8-83. The statements from other officers present at the training, which were taken as part of the agency's investigation into the matter, confirm that the training was conducted using the same or similar procedures that are normally used. *Id.* at 25, 28-29, 43, 46-47, 49-50. The agency asserts in its petition for review that each of these officers was biased because they, too, were under investigation at the time for hazing in connection with the September 2, 2007 training and because they declined to provide sworn statements. PFR File, Tab 3 at 12 n.5. However, while the agency presented testimony from Mr. Krall as to how the appellant was trained, Mr. Krall clearly had no personal knowledge of common practices at the Lakehurst NAES to contradict the appellant's assertions or the statements of the other officers indicating that the September 2, 2007 training was conducted according to common practice at the agency site.[6] Additionally, the testimony of Mr. Hemmingsen and Mr. Mitchell did not speak to common agency practices at the Lakehurst NAES with respect to the training for purposes of contradicting the appellant's assertions or the statements of the other officers in the investigative report.[7] If the agency wished to dispute the

---

[6] While the administrative judge found that the appellant's supervisors, Frontis Fallaw and Chief Fitzgerald were present during the OC Contamination training on September 2, 2007, *see* Initial Decision at 23, we found no evidence in the record supporting such a finding.

[7] While Mr. Mitchell provided conflicting statements regarding his previous OC Contamination training, in his second statement to the agency investigator Mr. Mitchell stated that he took an OC training course in Norfolk, Virginia and that he could not remember if five fighting stations were used or if a running buddy or medical personnel were provided, suggesting that training practices may be inconsistent agency wide. RAF, Tab 23 at 18.

statements in the investigative report, it was free to request to present such agency witnesses and testimony to contradict the statements regarding common practice at the NAES in Lakehurst, New Jersey with respect to OC Contamination training.

¶28 Moreover, the agency did not require the trainee to retake the training, whereas the training was repeated in another instance of a training failure, suggesting that the agency did not view the appellant's failure to provide all five fighting stations to the trainee as particularly serious. HT at 162-63, 170. Furthermore, Mr. Krall testified that incorrect variations of the training procedures sometimes occurred and generally were rectified by him with a telephone call when and if he learned of them.[8] *Id.* at 85-87. For all of these reasons, we find that the record reflects that the actions of the appellant in failing to provide the five fighting stations, but still certifying that the trainee completed the training, generally constituted a common practice, and therefore the appellant's certification that the trainee completed the training constituted a technical falsification. *See Gunn v. U.S. Postal Service*, 63 M.S.P.R. 513, 518-19 (1994) (finding that Ms. Gunn's falsification of another employee's leave slip without any benefit or personal gain and from which the agency did not suffer constituted a "'technical' falsification that is similar in nature to a de minimis theft"); *see also Pittman*, 60 M.S.P.R. 365 at 370, 374-75 (finding that an important factor affecting the seriousness of the charge of failing to timely complete a Receipt for Property was the fact that it was common practice to prepare such paperwork after the transaction in question had already occurred and mitigating the penalty from a 45-day suspension to a 5-day suspension in light of the appellant's past disciplinary record); *Schoeffler*, 47 M.S.P.R. at 90-91

---

[8] When asked if whether his first response upon learning that training was not conducted within the agency guidelines would be to initiate disciplinary proceedings, Mr. Krall replied "[t]hat's not my decision." HT at 85-86.

(finding that stating the correct number of hours worked while disregarding the actual clock hours worked was a common practice among agency employees and thus constituted a mitigating circumstance in determining the maximum reasonable penalty for falsely stating time and attendance records and falsely stating a travel document).

¶29 Similarly, with respect to charge (5), while the evidence does not show that every officer adhered to the practice of putting the start time of the shift down when logging out his weapon, the evidence does support the appellant's contention that it was common, as five of the seven officers who logged out their weapons on the 1430 shift on June 6, 2008, recorded 1430 as the time at which they logged out their weapons. IAF, Tab 3, Ex. C. We agree with the administrative judge that it was highly unlikely that every officer came in at precisely 1430 hours and logged their weapons out at the exact same time. *See* Initial Decision at 17.

¶30 In addition to the mitigating factors discussed above, we find the following factors weigh heavily in favor of a lesser penalty: the appellant is a long-time employee with more than 18 years of federal service, 10 of which were with the police force, IAF, Tab 4, Subtab 4b at 4; the appellant was a good police officer, notwithstanding this misconduct, who was promoted relatively quickly in his career, HT at 114; the appellant had no prior disciplinary record, *id.* at 120; the appellant admitted the errors that he made, RAF, Tab 23 at 56-57, 66; and the appellant was truthful throughout the course of the proceedings regarding his conduct, HT at 171. Additionally, while the appellant failed to prove his disparate penalty claim because he failed to identify an employee who was similarly situated with respect to all of the charges, there is evidence in the record suggesting that others did not follow agency policy and requirements in conducting OC Contamination training without repercussions. *See, e.g.*, IAF, Tab 1 at 22; RAF, 21 at 7-9; *id.*, Tab 23 at 25, 28-29, 43, 46-47, 49-50, 70. There is also evidence suggesting that other officers did not record the exact time that they

logged out their weapons without repercussions. IAF, Tab 3, Ex. C. Moreover, we find that the appellant has much potential for rehabilitation.

¶31 For the foregoing reasons, we find that the sustained charges do not merit a demotion, particularly considering that the appellant's conduct constituted common practices for which there is no evidence that other employees were disciplined, even when such conduct was reported for investigation, and the fact that the appellant has more than 18 years of previously-unblemished service.

¶32 In his discussion of the *Douglas* factors accompanying his decision letter, Mr. Hemmingsen stated that the agency's table of penalties supported discipline for the appellant between a reprimand and a removal. IAF, Tab 4, Subtab 4b at 4. Furthermore, while law enforcement officers and supervisors are typically held to a higher standard, such status does not preclude mitigation of a penalty, especially given the unique facts of this case. *Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 31 (2000) (law enforcement status does not preclude mitigation), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002); *see generally Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 11 (2002) (mitigating the removal of a supervisor to a demotion to a nonsupervisory position and a 30-day suspension). Accordingly, we find that a letter of reprimand is the maximum reasonable penalty based on the totality of the circumstances. *See Blake*, 81 M.S.P.R. 394, ¶ 46; *Seas*, 78 M.S.P.R. at 573.[9]

---

[9] This case is distinguishable from our recent decision in *Hamilton v. Department of Homeland Security*, 117 M.S.P.R. 384 (2012), which concerned a sustained charge of failure to cooperate in an agency investigation. Here, as in *Hamilton*, the agency did not indicate that it would have imposed a lesser penalty if fewer than all of the charges were sustained; the appellant failed to establish disparate penalties; and the sustained charge involved serious misconduct. *Id.*, ¶¶ 11-16. *Hamilton*, however, did not concern common practices for which other employees were not disciplined. Rather, the appellant in *Hamilton* provided misleading information concerning his alibi to the agency during the course of its investigation into allegations that he had committed a sexual assault. *Id.*, ¶¶ 4-5, ¶ 15. In light of the seriousness of that charge, we determined that consideration of the other relevant *Douglas* factors did not render removal outside the bounds of reasonableness under the circumstances of that case.

ORDER

¶33 We ORDER the agency to cancel the demotion action and to reinstate the appellant to his former position effective March 1, 2009. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). We ORDER the agency to issue the appellant a Letter of Reprimand for the charges sustained above. The agency must complete this action no later than 20 days after the date of this decision.

¶34 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.

¶35 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).

¶36 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).

¶37 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.

¶38 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 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)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

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. § 2000e-5(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.

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.

CONCURRING OPINION OF MARK A. ROBBINS

in

Leonard J. Reid v. Department of the Navy

MSPB Docket No. PH-0752-09-0357-I-2

¶1 Although I concur in the result, I write separately to express my concern that this decision will be viewed as precedent for the proposition that, whenever an agency has permitted imperfection or inconsistency in the management or conduct of program responsibilities, it will be seen as requiring mitigation of an otherwise proper penalty.

¶2 On the record we find that a supervisory law enforcement officer has falsified elements of a pepper spray contamination safety training program. Such serious actions call into question the integrity of the chain of command, and present serious risk of harm to not only law enforcement personnel being trained, but also to the public they will eventually be charged with protecting. This is what distinguishes the present action from those concerning technical falsification with de minimis consequences which might warrant, at most, a reprimand.

¶3 There is no question from the record that the agency's training program was poorly managed and inconsistently conducted. And one hopes that since the underlying facts of this case transpired, action has been taken to address and correct those underlying problems. While these circumstances may serve as justification for mitigation of appellant's penalty to a reprimand in this instance, and I am willing to defer to the Administrative Judge and my colleagues on that score, I would not want this construed as precedent, allowing any evidence of agency management imperfection or inconsistency in the conduct of program responsibilities to justify penalty mitigation.

_____

Mark A. Robbins
Member