

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

2013 MSPB 17

Docket No. CB-7121-12-0006-V-1

**Curtis McCurn,
Appellant,**

v.

**Department of Defense,
Agency.**

February 22, 2013

Chungsoo J. Lee, Trevose, Pennsylvania, for the appellant.

Michael Walby, Esquire, Battle Creek, Michigan, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant requests Board review of an arbitration decision that denied his grievance of the agency's removal action. For the reasons set forth below, the Board finds good cause to excuse the appellant's untimely filed request for review and, after full consideration, denies the appellant's request.

BACKGROUND

¶2 Effective July 11, 2009, the agency removed the appellant from his position as a Materials Examiner and Identifier (Fork Lift Operator) with the Defense Reutilization Marketing Service (DRMS) based on three charges:

(1) driving onto the Defense Distribution Depot San Joaquin (DDDSJ) military post in a vehicle containing marijuana and a switchblade knife; (2) being absent without leave (AWOL) from March 27, 2009, to April 10, 2009; and (3) testing positive for marijuana on a reasonable suspicion drug test. Arbitration Review File (ARF), Tab 10 at 22-27, 30-32. The appellant challenged the agency's removal action through the negotiated grievance process, and the grievance was ultimately submitted to arbitration by the American Federation of Government Employees, Local 1546. *Id.* at 21; ARF, Tab 8 at 7-26. Following a hearing, the arbitrator denied the grievance on May 21, 2010, finding, *inter alia*, that the agency's decision to remove the appellant was for just cause in accordance with the applicable laws and regulations. ARF, Tab 8 at 7-26.

¶3 On December 7, 2011, the appellant filed an appeal with the Board's Western Regional Office, raising, among other things, a claim of race discrimination in connection with his removal. ARF, Tab 1 at 5. In response to an agency motion to dismiss for lack of jurisdiction, the appellant asserted that the Board has jurisdiction because he raised a claim of discrimination with his union representative, which the arbitrator failed to address. ARF, Tab 8 at 5, Tab 11 at 4. The appellant also asserted that good cause existed to excuse his untimely filing with the Board. ARF, Tab 4 at 4-5. Recognizing that this matter was properly a request for review of the arbitrator's decision, which should have been filed with the Clerk of the Board, the administrative judge notified the parties that he was forwarding the request for review to the Clerk of the Board for docketing as a request for arbitration review. ARF, Tab 17; *see* [5 U.S.C. § 7121](#); [5 C.F.R. § 1201.154](#)(d) (Jan. 1, 2012).¹

¹ Because all of the filings in this matter were submitted before the Board's new regulations took effect on November 13, 2012, we are applying the version of the Board's regulations applicable at the time of the filings.

¶4 After the Clerk of the Board acknowledged the arbitration review request and afforded the parties the opportunity to file briefs in support of their respective positions, the appellant argued that the Board should reverse the arbitrator's decision, find that the agency discriminated against him based on his race, and find that the penalty of removal was excessive and inconsistent with the *Douglas* factors.² ARF, Tab 19, Tab 20 at 5-9. The agency has filed a response in opposition to the appellant's arguments and asserts that the request for review was submitted almost 18 months late. ARF, Tab 22.

ANALYSIS

The Board has jurisdiction over the appellant's request to review the arbitration decision.

¶5 The Board has jurisdiction to review an arbitration decision under [5 U.S.C. § 7121](#)(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the employee alleges discrimination as stated in [5 U.S.C. § 2302](#)(b)(1) in connection with the underlying action, and a final decision has been issued by the arbitrator. *Vena v. Department of Labor*, [111 M.S.P.R. 165](#), ¶ 4 (2009); *Hardison v. Department of the Treasury*, [13 M.S.P.R. 175](#), 176 (1982). Each of these criteria has been established here: (1) The subject matter of the grievance is a removal; (2) the appellant alleges race discrimination in connection with his removal; and (3) the arbitrator issued a final decision. Although the appellant did not raise a claim of discrimination before the arbitrator,³ under the Board's regulations and case law in effect when he filed his arbitration review request, he may raise a claim of discrimination for the first

² In *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), the Board articulated a nonexhaustive list of factors relevant to the penalty determination in adverse actions.

³ The appellant alleges that he raised his discrimination claim with his union representative and it was ignored. ARF, Tab 13 at 3. The record does not indicate that the appellant's representative raised discrimination before the arbitrator.

time in a request for Board review of an arbitration decision under [5 U.S.C. § 7121\(d\)](#).⁴ See *Agbaniyaka v. Department of the Treasury*, [115 M.S.P.R. 130](#), ¶ 4 (2010); *Means v. Department of Labor*, [60 M.S.P.R. 108](#), 115 (1993); see also *Jones v. Department of the Navy*, [898 F.2d 133](#), 135-36 (Fed. Cir. 1990). We therefore find that this matter is within the Board's jurisdiction.

Good cause exists to excuse the untimely filing of the arbitration review request.

¶6 The appellant asserts that he received a copy of the May 21, 2010 arbitration award on May 24, 2010. ARF, Tab 1 at 5. Pursuant to the requirements of [5 C.F.R. § 1201.154\(d\)](#), the appellant had 35 days from the issuance of the May 21, 2010 arbitrator's decision to file his request for review with the Board. The appellant did not file his request for review within the 35-day time period; instead, he filed it over 17 months late on December 7, 2011. ARF, Tab 1.

¶7 The Board will dismiss an untimely appeal unless the appellant establishes good cause for the delayed filing. *Mauldin v. U.S. Postal Service*, [115 M.S.P.R. 513](#), ¶ 5 (2011). In order to establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). The *Alonzo* standard also applies to the late filing of a request for review of an arbitration decision. *Kirkland v. Department of Homeland Security*, [119 M.S.P.R. 74](#), ¶ 5 (2013); *Hutchinson v. Department of Labor*, [91 M.S.P.R. 31](#), ¶ 7 (2001).

⁴ Under the Board's regulations that became effective November 13, 2012, the Board will only review discrimination claims raised for the first time in a request for review of an arbitration decision if the negotiated grievance procedure did not permit allegations of discrimination to be raised. [5 C.F.R. § 1201.155\(c\)](#). We cannot determine from the record in this matter whether the negotiated grievance procedure permitted discrimination allegations to be raised. In any event, because the regulations and case law in effect at the time this matter was filed with the Board do not include this requirement, we need not make a finding on this issue.

¶8 The Board has held that an agency's failure to provide adequate notice of appeal rights constitutes good cause for an untimely filing. *Kirkland*, [119 M.S.P.R. 74](#), ¶ 6; see *Foley v. Department of Health & Human Services*, [84 M.S.P.R. 402](#), ¶ 11 (1999). Further, an appellant who is not provided the required notice of his Board appeal rights by an agency is not required to show that he exercised due diligence in attempting to discover his appeal rights to show good cause to excuse his late filing; he must instead show that he was diligent in filing a Board appeal after he learned he could do so. *Kirkland*, [119 M.S.P.R. 74](#), ¶ 6; see *Hudson v. Office of Personnel Management*, [114 M.S.P.R. 669](#), ¶ 8 (2010).

¶9 In the instant case, the appellant argues that good cause exists to excuse his untimely filing because he was not informed of his post-arbitration appeal rights before the Board by his former union representative and that he only learned of his right to file a request for review of the arbitration decision from his current representative in November 2011. ARF, Tab 1 at 5, Tab 4 at 4-5. In support of his assertion, the appellant provides a sworn declaration stating that he was told by the union and a union attorney that he had no other recourse after the arbitration decision. ARF, Tab 4 at 32. He also submits an e-mail chain showing that he specifically asked the union attorney how to pursue his case beyond arbitration, and he was advised to file exceptions with the Federal Labor Relations Authority. *Id.* at 36-38.

¶10 In response to the appellant's argument, the agency asserts that the Board should dismiss the request for review as untimely filed because the agency (1) "very specifically" informed the appellant of his Board appeal rights in the adverse action decision letter; (2) provided the appellant with a Board appeal form; and (3) informed the appellant that he could obtain a copy of the Board's regulations by contacting the agency's personnel office. ARF, Tab 22 at 6-7. The agency also argues that, to the extent that the appellant's representative failed to inform him of his right to seek Board review of the arbitration decision,

the appellant is responsible for the actions of his chosen representative. *Id.* at 6; *see Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

¶11 The Board's regulations in effect when the agency issued its removal decision provided that, when an agency issues a decision to an employee on a matter appealable to the Board, the agency must, among other things, inform the employee "[w]hether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d)." [5 C.F.R. § 1201.21](#)(d) (74 Fed. Reg. 9343 (Mar. 4, 2009)).⁵ Here, the agency's removal decision informed the appellant of his right to directly appeal the adverse action to the Board but did not, as explicitly required by the Board's regulations in effect at that time, inform the appellant of his right to request Board review of a final decision on a grievance (an arbitration decision).⁶ Accordingly, this case falls squarely within the rule that an agency's failure to provide requisite notice of appeal rights constitutes good cause for excusing an untimely appeal.

¶12 We recognize that in *Simpson v. Department of Defense*, [53 M.S.P.R. 518](#), 521 (1992), and *Smith v. Department of the Navy*, [37 M.S.P.R. 560](#), 564 n.2 (1988), the Board held that providing an appellant with notice of his right to directly appeal an adverse action to the Board and a copy of the Board's regulations constituted sufficient notice of an appellant's right to request Board review of an arbitration decision. Those cases were decided prior to the Board's May 3, 2000 revision of its regulations to require agencies to inform employees in adverse action decision letters of their right to request Board review of an

⁵ We note that the Board's new regulations, that went into effect on November 13, 2012, do not change an agency's obligation in this regard, although the regulation governing requests for review of arbitrator's decisions is now found at [5 C.F.R. § 1201.155](#).

⁶ Although Board regulations do not impose a similar notification of appeal rights requirement on arbitrators in matters subject to further Board review, we note that the arbitration award in this case likewise did not include any information with regard to the appellant's rights to further review before the Board. ARF, Tab 8 at 12-31.

arbitration decision. 65 Fed. Reg. 25,624 (May 3, 2000). Simply put, *Simpson* and *Smith* have been superseded by the 2000 regulatory change. Thus, although the agency's decision letter informing the appellant that he could obtain a copy of the Board's regulations by contacting the agency's personnel office may have been adequate at one point, doing so was not adequate at the time of the agency's decision.

¶13 Finally, regarding the agency's argument that the appellant is responsible for the errors of his representative, we agree that such a principle is well established in Board law. See, e.g., *Miller v. Department of Homeland Security*, [110 M.S.P.R. 258](#), ¶ 11 (2008); *Sofio*, 7 M.S.P.R. at 670. However, as we explained in our recent decision in *Kirkland*, the critical and controlling fact is not the failure of the appellant's union attorney to inform the appellant of his Board appeal rights, but the agency's failure to give the appellant proper notice of his right to challenge the arbitration decision before the Board. *Kirkland*, [119 M.S.P.R. 74](#), ¶ 9. Because the appellant diligently filed his request for review within a month of learning of his right to do so, we find that good cause exists to excuse the appellant's untimely filing.

The Board's review of arbitration decisions is limited.

¶14 The standard of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Vena*, [111 M.S.P.R. 165](#), ¶ 5; *De Bow v. Department of the Air Force*, [97 M.S.P.R. 5](#), ¶ 5 (2004). The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Vena*, [111 M.S.P.R. 165](#), ¶ 5; *De Bow*, [97 M.S.P.R. 5](#), ¶ 5. Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it disagrees with the arbitrator's decision. *Vena*, [111 M.S.P.R. 165](#), ¶ 5; *De Bow*, [97 M.S.P.R. 5](#), ¶ 5.

The appellant has failed to establish his claim of race discrimination.

¶15 In this case, the appellant does not challenge before the Board the arbitrator's decision finding that the appellant engaged in the charged misconduct.⁷ ARF, Tab 20. Rather, as noted above, the appellant argues that the removal action was the result of race discrimination. *See id.*

¶16 In most adverse action cases involving claims of prohibited discrimination before the Board, where the appellant has established his prima facie case and the agency has articulated the charged misconduct as the nondiscriminatory reason for its action, resolution of the discrimination issue may proceed directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See Gregory v. Department of the Army*, [114 M.S.P.R. 607](#), ¶ 40 (2010); *Marshall v. Department of Veterans Affairs*, [111 M.S.P.R. 5](#), ¶ 16 (2008). The question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against him. *Gregory*, [114 M.S.P.R. 607](#), ¶ 41; *see St. Mary's Honor Center v. Hicks*, [509 U.S. 502](#), 507-08 (1993). The evidence to be considered at this stage may include (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Gregory*, [114 M.S.P.R. 607](#), ¶ 41; *see Aka v. Washington Hospital Center*, [156 F.3d 1284](#), 1289 (D.C. Cir. 1998) (en

⁷ Because the appellant does not challenge the arbitrator's findings regarding the merits of the agency's charges, we discern no basis on which to disturb the arbitrator's findings regarding the charges.

banc). While such evidence may include proof that the employer treated similarly situated employees differently, an employee may also prevail by introducing evidence (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activities; or (5) of incriminating statements by the employer. *Gregory*, [114 M.S.P.R. 607](#), ¶ 41; see *Brady v. Office of the Sergeant at Arms*, [520 F.3d 490](#), 495 (D.C. Cir. 2008).

¶17 To support his claim of race discrimination, the appellant identifies a number of purportedly similarly situated employees outside of his protected class who were allegedly treated more favorably by the agency. ARF, Tab 20 at 8-9. The Board has held that, for another employee to be deemed similarly situated for purposes of an affirmative defense of discrimination based on disparate treatment, all relevant aspects of the appellant's employment situation must be "nearly identical" to that of the comparator employee. *Ly v. Department of the Treasury*, [118 M.S.P.R. 481](#), ¶ 10 (2012); *Gregory*, [114 M.S.P.R. 607](#), ¶ 44. Thus, to be similarly situated, a comparator must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. *Ly*, [118 M.S.P.R. 481](#), ¶ 10; *Gregory*, [114 M.S.P.R. 607](#), ¶ 44.

¶18 The comparator employees identified by the appellant fail to meet the requirements articulated in *Ly* and *Gregory*. The appellant does not allege that the purported comparator employees worked for the same supervisor as he did. ARF, Tab 20 at 8-9. Moreover, three of the comparator employees identified by the appellant purportedly tested positive for drug use, but the appellant does not claim that these employees were also charged, as he was, with AWOL and with attempting to bring marijuana or a weapon onto the base. *Id.* Another purported comparator identified by the appellant allegedly participated in the theft of a television from the agency, but again there is no indication that he engaged in the

types of misconduct in which the appellant engaged. *Id.* at 8. The appellant also claims that two employees had known drug or alcohol problems and were never subjected to a drug test, but he does not indicate whether these alleged comparator employees held testing-designated positions, as he did. *Id.* at 9. Moreover, the appellant does not allege that these employees committed the same offenses that he did. In sum, the appellant fails to show that the comparator employees he identified were similarly situated to him. *See Ly*, [118 M.S.P.R. 481](#), ¶ 10; *Gregory*, [114 M.S.P.R. 607](#), ¶ 44. Thus, he has not established his claim of discrimination by showing that similarly situated employees who were not members of his protected class were treated more favorably.

¶19 The appellant also argues in support of his discrimination claim that the agency's purported reason for searching his vehicle as he entered DDDSJ, at which time the marijuana and the switchblade knife were discovered, was a pretext for discrimination. ARF, Tab 20 at 5-6. While the search of his vehicle is not a personnel action within the purview of the Board, because the discovery of marijuana and a weapon during the search either formed the basis for the adverse action or directly led to it, we will consider the appellant's claim.

¶20 According to the appellant, several white police officers conducted the search upon confusing him with his son, and the officers fabricated evidence and submitted a false report to accentuate his infraction. *Id.* The arbitrator's statement of facts indicates that there is a sign posted at the main gate of the agency facility stating that all vehicles must stop and all personnel are subject to a search, and the appellant was informed by an officer that he was randomly selected for a search when he attempted to enter DDDSJ on March 10, 2009. ARF, Tab 8 at 14. The appellant does not contest that finding and has offered nothing, other than his assertion, to suggest that the decision to search his vehicle as he attempted to drive onto the military base was a pretext for discrimination against him. *See* ARF, Tab 8, Tab 20. Moreover, the suggestion that the police officers fabricated evidence against the appellant and falsified a report is belied

by the arbitrator's uncontested finding that the appellant acknowledged that he possessed a switchblade knife and marijuana as he tried to enter DDDJS.⁸ ARF, Tab 8 at 15; *see id.*, Tab 10 at 23, 34. Finally, the appellant has not explained how the confusion of the appellant with his son, even if true, demonstrates that the decision to search the appellant's vehicle was a pretext for discrimination.

¶21 The appellant also argues that the agency's decision to subject him to a reasonable suspicion drug test on March 23, 2009, was a pretext for discrimination. ARF, Tab 20 at 5. In this regard, the arbitrator found that the appellant's supervisor was informed about the incident at the installation gate, received a copy of the police report, and was instructed by Human Resources to schedule the appellant for a reasonable suspicion drug test. ARF, Tab 8 at 15. As stated previously, the appellant occupied a testing-designated position, and he has presented nothing to support his assertion that the decision to subject him to a reasonable suspicion drug test less than two weeks after he was stopped with marijuana in his car while attempting to enter the military base was a pretext for discrimination. Based on our review of the record, nothing supports such a conclusion.⁹

¶22 The appellant's final pretext argument is based on a March 26, 2009 decision by the DDDSJ commander barring the appellant from the military installation "based on [his] possession of a switchblade knife and marijuana" on

⁸ We note that in his written response to the proposed removal, the appellant did not deny that his vehicle contained marijuana and a switchblade knife. ARF, Tab 10 at 28-29.

⁹ The appellant notes that the criminal charges against him for possession of marijuana and possession of a switchblade were dismissed in U.S. District Court, ARF, Tab 20 at 5-6, but the resolution of the criminal charges against him has no significance to the agency's administrative action, *see Larry v. Department of Justice*, [76 M.S.P.R. 348, 355 \(1997\)](#) (the dismissal of criminal charges related to the agency's misconduct charge did not preclude sustaining the misconduct charge where it was based on the appellant's conduct rather than the merits of the criminal charges themselves).

March 10, 2009, as he attempted to enter the base. ARF, Tab 10 at 34. Because he was barred from the base, the appellant was unable to report for duty and was charged with AWOL from March 27, 2009, until April 10, 2009, the date of the proposed removal. *Id.* at 30, 23. The arbitrator found that the agency, as a tenant on the military base, was subject to the security regulations and procedures of the host and had no authority to rescind the base commander's decision to bar the appellant from the facility. ARF, Tab 8 at 20.

¶23 In his request for review of the arbitration decision, the appellant argues that the purported reason for charging him with AWOL—his having been barred from the base—is “ludicrous” and therefore evidenced “a pretext for discriminatory animus against [the] [a]ppellant based on his race.” ARF, Tab 20 at 6. He further argues that the agency's position that it could not rescind the commander's letter “is flawed” and that “[i]t is ludicrous to argue and to accept the argument, as did the [a]rbitrator, that[] ‘[t]he bar is out of the [a]gency's control.’” *Id.*

¶24 In *Hollingsworth v. Defense Commissary Agency*, [82 M.S.P.R. 444](#), ¶¶ 2, 9-11 (1999), and *Rose v. Department of Defense*, [118 M.S.P.R. 302](#), ¶¶ 4, 9-13 (2012), the Board addressed a situation where an employee, who worked for a tenant agency on a military base, was barred from the installation by the host entity. The Board held that, to establish that the bar was a constructive suspension (which would vitiate the AWOL charge in this case), the appellant must show that: (1) He was absent because of circumstances beyond his control; (2) he informed the agency that, but for those circumstances, he was ready, willing, and able to work; (3) the agency was bound by agency policy, rule, regulation, contractual provision, or other authority to offer assistance to the employee with the circumstances beyond his control; and (4) the agency failed to offer such assistance. *Rose*, [118 M.S.P.R. 302](#), ¶ 4; *Hollingsworth*, [82 M.S.P.R. 444](#), ¶ 7.

¶25 As noted above, the arbitrator found that the appellant's employing agency, DRMS, was a tenant on DDDSJ, and the appellant does not dispute that finding. ARF, Tab 8 at 20. In addition, it is undisputed that the appellant was barred from DDDSJ by the military commander of that base and that the bar was outside of the appellant's control and was the reason for his absence from duty. The appellant does not allege that he informed the agency prior to his removal that, absent the bar, he was ready, willing, and able to work. Nor has the appellant pointed to anything, such as an agency policy or collective bargaining agreement provision, that obligated the agency to offer assistance in having the bar lifted or revised to allow him to return to work. Thus, the appellant has failed to establish that there was anything improper in the agency charging him with AWOL based on his failure to report for duty because of the bar issued by the DDDSJ commander. Because the appellant has failed to show that the agency's action was improper, he has not shown that it was a pretext for discrimination.¹⁰

¶26 In sum, although the appellant is a member of a protected group, he has not otherwise satisfied his burden with regard to his discrimination claim. Specifically, he has not shown that his removal was tainted by discrimination. Nor has he presented evidence from which the Board could infer that the agency took actions as a pretext for discrimination. Finally, the appellant has not shown that a similarly situated individual who was not a member of his protected group was treated less harshly.

The appellant has not shown legal error in the arbitrator's penalty analysis.

¶27 As noted above, the standard of the Board's review of an arbitrator's award is narrow, *Fanelli v. Department of Agriculture*, [109 M.S.P.R. 115](#), ¶ 6 (2008),

¹⁰ The arbitrator noted that the commander testified about his responsibility to ensure the safety and security of the base, and the arbitrator correctly observed that the "[p]rohibition of drugs and weapons is a security requirement." ARF, Tab 8 at 21. In addition, we note that the appellant has failed to submit evidence even suggesting that the commander's decision was the result of race discrimination.

and that deference extends to findings related to penalty determinations, *Fulks v. Department of Defense*, [100 M.S.P.R. 228](#), ¶ 20 (2005). In making findings related to penalty determinations, arbitrators are required to apply the same rules the Board applies. *Fulks*, [100 M.S.P.R. 228](#), ¶ 20.

¶28 Where, as here, all of the agency's charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 53 (2007). In doing so, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Id.* The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors in assessing the penalty or that the penalty clearly exceeded the bounds of reasonableness. *Id.*

¶29 In his request for review of the arbitration decision, the appellant contends that there are extenuating circumstances in his case that should have been considered as mitigating factors under the factors articulated by the Board in *Douglas*, 5 M.S.P.R. at 305-06. ARF, Tab 20 at 7-9. Specifically, the appellant asserts that he used marijuana on March 21, 2009, a few days prior to the drug test because he learned a few days previously that his son's 2007 death "may not have been a suicide but possibly a murder." *Id.* at 7. According to the appellant, this news was "overwhelming and 'unbearable,'" and, as a result, he suffered depression. *Id.* The appellant also asserts that a union representative falsely testified that he was unaware of any communications to agency management about the appellant's son's death and that an agency manager falsely testified that she had no knowledge of the appellant's son's death. ARF, Tab 20 at 7. The appellant also asserts in his review request that the fact that he admitted to

marijuana use and requested assistance through the Employee Assistance Program (EAP) while being escorted to the drug test was a mitigating factor. *Id.* at 7-8.

¶30 In her decision, the arbitrator addressed the appellant's claim about his son's death and found that "[n]o evidence was presented regarding [the appellant's] son's death and there was no evidence presented on how the misconduct was directly related to [the appellant's] personal problem." ARF, Tab 8 at 24. The arbitrator also addressed the appellant's request to participate in EAP and found that the so-called "safe harbor" provision of the applicable collective bargaining agreement and an executive order did not apply because the appellant had already taken the reasonable suspicion drug test when he admitted to illegal drug use and the agency was aware of the appellant's drug use based on the police report showing that marijuana had been found in the appellant's vehicle.¹¹ *Id.* The arbitrator also noted that the "safe harbor" provision did not preclude the agency from disciplining the appellant based on the possession of a weapon and AWOL. *Id.* Nothing presented by the appellant in his arbitration review request causes us to disturb the arbitrator's finding, particularly in light of the deference due to arbitrators and the narrow scope of the Board's review authority. See *Fanelli*, [109 M.S.P.R. 115](#), ¶ 6; *Fulks*, [100 M.S.P.R. 228](#), ¶ 20. In particular, like the arbitrator, we fail to discern how the information about the

¹¹ While the arbitrator found that the appellant admitted to his use of marijuana and requested assistance after the drug test, the appellant asserts in his review request that he disclosed his illegal drug use and requested to participate in EAP while on his way to the drug test. ARF, Tab 20 at 7-8. The appellant made a similar assertion in his response to the agency's proposal notice. ARF, Tab 10 at 28. The appellant has failed to explain the significance of the precise timing of his statement since he had already been informed that he would be subjected to a drug test based on the discovery of marijuana in his vehicle. Executive Order 12,564, which addresses illegal drug use in the federal workplace, provides that agencies "shall initiate action to discipline any employee who is found to use illegal drugs," except if the employee identifies himself as a user of illegal drugs "prior to being identified through other means." Exec. Order No. 12,564, § 5(b). The appellant has not asserted that agency policy or the applicable collective bargaining agreement deviates from the requirement of the Executive Order.

cause of his son's death excuses the appellant's use of an illegal drug, and we agree that, even if the "safe harbor" provision was applicable to the instant circumstances, which we do not believe is the case, the agency was not precluded from taking the disciplinary action based on the remaining charges.

¶31 In his arbitration review request, the appellant also asserts that he had no prior discipline and that the decision to remove him without progressive discipline was inconsistent with the *Douglas* factors. ARF, Tab 20 at 8. The arbitrator noted that the deciding official testified that she considered the relevant *Douglas* factors. ARF, Tab 8 at 23. Regarding the claim that his lack of prior discipline was not considered, the deciding official specifically stated in the decision notice that she considered the appellant's lack of prior discipline as a mitigating factor but that it did "not excuse the seriousness of the charges against [the appellant]." ARF, Tab 4 at 9. Regarding the appellant's claim about a lack of progressive discipline, we note that, given the appellant's approximately two years of service with the agency and the seriousness of the established misconduct, he has not shown that the arbitrator erred in sustaining the removal action.¹² Finally, the arbitration decision includes a portion of the agency's Table of Penalties, which shows that removal is within the range of penalties for the appellant's misconduct, and the arbitrator cites the testimony of the

¹² We also fail to discern how the appellant's claims that he had not used marijuana since the early 1980s, that he had tested negative in two previous drug tests, and that he expressed remorse for his actions show error in the arbitrator's conclusion that the sustained charges justify removal. ARF, Tab 20 at 8. To the extent the appellant is asserting that the penalty of removal constituted a disparate penalty based on his race, as set forth in our discussion of the appellant's discrimination claim, the record shows that the nature and scope of the appellant's misconduct and the requirements of his position differed significantly from the nature and scope of the misconduct engaged in by the purported comparator employees and requirements of their positions. See *Ly*, [118 M.S.P.R. 481](#), ¶ 10; *Gregory*, [114 M.S.P.R. 607](#), ¶ 44. We note that the appellant does not raise an allegation of disparate penalty independent of his unlawful discrimination claim. See *Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶¶ 5-17 (2010).

appellant's second-line supervisor that the Table of Penalties supports removal.¹³ ARF, Tab 8 at 11-12, 23.

ORDER

¶32 Based on the analysis set forth above, we find that the appellant's arguments in his arbitration review request fail to present a basis to set aside or modify the arbitrator's award. This is the final decision of the Merit Systems Protection Board in this matter. 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 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

¹³ Neither party asserts that arbitrator erred in this regard.

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) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

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

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.