

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

**2013 MSPB 88**

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Docket No. CH-0752-12-0101-I-1

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**Jeffrey Hill,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

November 1, 2013

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Neil A. G. McPhie, Esquire, Arlington, Virginia, for the appellant.

Jennifer M. Payton, Esquire, Louisville, Kentucky, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

Member Robbins issues a separate dissenting opinion.

**OPINION AND ORDER**

¶1 The agency has filed a petition for review, and the appellant has filed a cross-petition for review of the initial decision that mitigated his removal to a 60-day suspension.<sup>1</sup> For the reasons set forth below, we DENY the agency's petition for review, GRANT the appellant's cross-petition for review, REVERSE

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<sup>1</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

the portion of the initial decision that sustained the charge of poor judgment, and VACATE the administrative judge's penalty analysis. However, we still MITIGATE the penalty to a 60-day suspension.

### BACKGROUND

¶2 On October 24, 2011, the agency removed the appellant from his position as a Lock and Dam Equipment Mechanical Supervisor, i.e., a Lockmaster, with the U.S. Army Corps of Engineers (ACOE), Louisville District based on two charges. Initial Appeal File (IAF), Tab 5, Subtabs 4c, 4e. First, the agency charged the appellant with exercising poor judgment in managing the operations of the Cannelton Locks & Dam,<sup>2</sup> thereby endangering the safety of persons and property, alleging that: (1) on June 2, 2011, the appellant simultaneously locked two vessels into the main and auxiliary chambers by himself, even though accepted locking procedures required that the appellant either lock one vessel while the other vessel waited or call for a trained lock operator to lock one vessel while the appellant locked the other vessel; and (2) the appellant had a temporary clerical employee, who had no training as a lock operator, assist him in the locking process on June 2, even though it was standard practice in the Louisville District to allow only trained lock personnel to operate the lock equipment while locking a vessel. *Id.*, Subtab 4o at 2-4. Second, the agency charged the appellant with providing a false statement to his supervisor during an investigation, alleging that the appellant denied both verbally and in writing that the clerical employee assisted him in locking the vessels on June 2, 2011. *Id.* at 1-2, 4.

¶3 The appellant timely filed a Board appeal of his removal. IAF, Tab 1. After holding a hearing, the administrative judge mitigated the penalty of removal

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<sup>2</sup> The Cannelton Locks and Dam is one of the locks and dams navigation facilities on the Ohio River. *See* Hearing Transcript (HT) at 5-6 (testimony of the proposing official and the Operations Manager of the Cannelton Locks and Dam). Vessels pass through chambers in the facility when traveling on the river. *See id.*

to a 60-day suspension. IAF, Tab 32, Initial Decision (ID) at 2, 20. She found that the agency proved both of the charges and that a nexus exists between the proven misconduct and the efficiency of the service. ID at 7-13. Regarding the poor judgment charge, the administrative judge specifically found that: (1) although the record evidence supports the appellant's position that it is common practice for a trained lock operator to simultaneously lock two vessels by himself, the agency proved that the appellant violated the Operating Manual for Navigation Locks (Operating Manual), and therefore she sustained the first specification; and (2) as the undisputed evidence shows that the appellant allowed a clerical employee, who was not a trained lock operator, to assist him in the locking process without direct supervision, the administrative judge sustained the second specification. ID at 7-10. Regarding the falsification charge, the administrative judge found that, during the agency investigation, the appellant intentionally provided a false statement regarding the clerical employee's involvement in opening the miter gates on June 2, and therefore she sustained the charge. ID at 10-12. Having sustained both charges, the administrative judge conducted her own independent penalty analysis upon finding that the deciding official failed to appropriately consider the relevant factors under *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-306 (1981),<sup>3</sup> and that the penalty of removal exceeded the tolerable limits of reasonableness; ultimately, she concluded that the maximum reasonable penalty was a 60-day suspension. ID at 15-20.

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<sup>3</sup> Contrary to the administrative judge's finding, the record evidence reflects that the deciding official did consider the *Douglas* factors, including the appellant's past work record and years of service, which the deciding official found to be mitigating factors. ID at 15; IAF, Tab 5, Subtab 4e at 5, Subtab 4f at 2.

¶4 The agency filed a petition for review, challenging the administrative judge's decision to mitigate the penalty.<sup>4</sup> Petition for Review (PFR) File, Tab 1. The appellant responded and filed a cross-petition for review, challenging the administrative judge's decision to sustain the charge of poor judgment.<sup>5</sup> PFR File, Tab 3. The agency responded to the appellant's cross-petition for review. PFR File, Tab 5.

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<sup>4</sup> With its petition for review, the agency submits an email and attached images that the Pittsburgh District Operations Manager sent to colleagues via government email, sharing his viewpoint on the Second Amendment to the U.S. Constitution. Petition for Review (PFR) File, Tab 1 at 36-39, 49. The agency proffers this evidence, which post-dates the close of the record on appeal, to show that the Pittsburgh District Operations Manager, who testified that the appellant's conduct on June 2 was not serious and did not warrant discipline, has a "cavalier attitude toward Government regulations and standards," which thereby diminishes his credibility. *Id.* at 31; *see* ID at 15-16, 19. However, evidence offered merely to impeach a witness's credibility is not generally considered material. *Deleson v. Department of the Interior*, [88 M.S.P.R. 121](#), ¶ 6 (2001). As the proffered evidence does not present a "significant challenge" to the credibility of the Pittsburgh District Operations Manager's testimony regarding the appellant's management of the Cannelton Locks and Dam, we find that the new evidence is immaterial. *See Cole v. Department of the Army*, [78 M.S.P.R. 288](#), 293 (1998) (evidence that presents a "significant challenge" to a witness's credibility is material, and therefore the Board will consider it).

On review, the agency alleges that the administrative judge erred in not deferring to the agency's selected penalty where, as here, the administrative judge sustained all of the charges, the deciding official considered all of the relevant factors under *Douglas*, 5 M.S.P.R. at 305-06, and the penalty falls within the tolerable limits of reasonableness. PFR File, Tab 1; *see Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). However, we need not decide this issue because we are not sustaining the poor judgment charge and, accordingly, are conducting an independent penalty analysis to determine whether removal is the maximum reasonable penalty based on the remaining sustained charge of falsification.

<sup>5</sup> As neither party disputes the administrative judge's decision to sustain the falsification charge or her nexus findings, and these findings are supported by the record evidence and the applicable law, we discern no reason to disturb them.

## ANALYSIS

### The administrative judge erred in sustaining the charge of poor judgment.

*The agency failed to prove specification 1 regarding the simultaneous locking of vessels.*

¶5 On review, the appellant alleges that the administrative judge erred in sustaining the first specification of the poor judgment charge based upon evidence that he allegedly violated the Operating Manual. PFR File, Tab 3 at 20-23; ID at 7-9. We agree with the appellant that where, as here, the agency charged him with exercising poor judgment, evidence that he failed to follow the Operating Manual does not, in and of itself, prove that he exercised poor judgment in simultaneously locking two vessels by himself. *See* IAF, Tab 5, Subtab 4o at 3-4.

¶6 Although the agency contends that the appellant demonstrated poor judgment in taking actions that were not in accordance with “[a]ccepted locking procedures,” *id.* at 3, it has not identified any policy or procedure to support this bare assertion. Paragraph 1-6 of the Operating Manual, which the agency cites in the proposal notice, merely states that the lockmaster must ensure that laws, rules, and regulations pertaining to navigational traffic between arrival points are properly followed and that equipment and real property appurtenant to the lock and dam facility are preserved. *Id.* In the decision notice, the deciding official implicitly alleged that the appellant violated paragraph 5-1(b)(3) of the Operating Manual, which requires a lock operator to give his full attention to the lockage of any craft “from the time the craft or tow enters the lock approach for passage until it safely exits the lock approach.” IAF, Tab 5, Subtab 4e at 3, Subtab 4dd at 1. However, we do not read this provision as prohibiting the simultaneous locking of two vessels or, alternatively, requiring a lock operator to lock each

vessel one at a time or call for another lock operator to lock the other vessel.<sup>6</sup> *Id.*, Subtab 4dd at 1.

¶7 Even assuming that the appellant's actions were not in accordance with "accepted locking procedures," the agency has not proven that the appellant exercised poor judgment in departing from the alleged policy and procedures. The appellant, who has been a qualified lock operator since 2000, testified that: (1) he simultaneously locked vessels by himself on numerous occasions; (2) it is routine for a lock operator to simultaneously lock vessels on his own; and (3) as the two vessels arrived at the lock and dam facility nearly 15 minutes apart on June 2, 2011, he determined that the situation did not present any safety concerns that would necessitate two lock operators to lock the two vessels. Hearing Transcript (HT) at 210-11, 220-21, 275, 277 (testimony of the appellant). The appellant's testimony that it is common practice for a lock operator to simultaneously lock two vessels by himself is corroborated by the testimony of the Pittsburgh District Operations Manager,<sup>7</sup> who further opined that the act was not inherently dangerous. *Id.* at 329 (testimony of the Pittsburgh District Operations Manager). The Pittsburgh District Operations Manager testified that, from his review of the security videos, the lockage of the two vessels at issue was routine, and there was no indication of any possible incidents or emergencies arising from the appellant's decision to simultaneously lock the two vessels by himself. HT at 321, 328-31 (testimony of the Pittsburgh District Operations Manager). Based on the foregoing, we find that the agency failed to prove that

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<sup>6</sup> For these reasons and the reasons explained in ¶ 9 below, we disagree with the dissent that it is "undisputed" that the appellant violated the Operating Manual.

<sup>7</sup> As stated previously, the appellant was employed by the Louisville District. However, the Pittsburgh District Operations Manager testified that the Pittsburgh District included three facilities similar to the Cannelton Locks and Dam. HT at 314-15 (testimony of the Pittsburgh District Operations Manager).

the appellant exercised poor judgment in simultaneously locking the two vessels by himself. Thus, we DO NOT SUSTAIN specification 1.

*The agency failed to prove specification 2 regarding the clerical employee's assistance in opening the miter gates.*

¶8 The administrative judge sustained the second specification, finding that it is undisputed that the clerical employee, who was untrained in lock operation, operated the levers to open the miter gates on June 2, 2011, and that the appellant was not directly supervising the clerical employee as she opened the gates, evidenced by the fact that the appellant was approximately 400 feet away from her. ID at 9-10. On review, the appellant asserts that the aforementioned finding is inherently inconsistent with the administrative judge's finding that "on June 2, after having given [the clerical employee] instructions on opening the gates, [the appellant] was 400 feet away from [the clerical employee] . . . and he had a golf cart with him which would have allowed him to reach her very quickly if necessary," and therefore the appellant's misconduct was not serious. PFR File, Tab 3 at 21-22; ID at 10, 16-17. We agree with the appellant.

¶9 Opening the miter gates is a simple process, HT at 329 (testimony of the Pittsburgh District Operations Manager), and the agency identified no rule or policy prohibiting untrained individuals from performing this task under supervision. The record evidence strongly supports that the appellant instructed the clerical employee on how to push levers to open the miter gates, which would thereby put the gates into the recesses in the lock wall and allow the vessel to exit the auxiliary chamber, and that the appellant was watching the chambers as the clerical employee carried out his instructions. See HT at 257-58, 267 (testimony of the appellant); IAF, Tab 5, Subtab 4h at 3, 5, Subtab 4i at 1-2, Subtab 4t. Furthermore, the appellant testified that, if anything went wrong, he could immediately communicate with the clerical employee via telephone or radio if he detected anything out of the ordinary. *Id.* at 267 (testimony of the appellant). Thus, despite the fact that the appellant was approximately 400 feet away from

the clerical employee, we find that the appellant directly supervised the clerical employee as she opened the miter gates. Based on the foregoing, we discern no reason to differentiate between the appellant's decision to allow the clerical employee to open the miter gates under his direct supervision and the agency's established practice of allowing visiting dignitaries to open the miter gates under the direct supervision of a lock technician. *See* IAF, Tab 5, Subtab 4e at 4, Subtab 4h at 6. The fact that the agency has an established practice of allowing individuals without lock operation training to open the miter gates greatly undermines its position that the appellant exercised poor judgment in allowing a clerical employee to perform the same tasks while under direct supervision.

¶10 We find that the administrative judge's analysis of the second specification should not have stopped here. More specifically, in analyzing whether the appellant exercised poor judgment in allowing the clerical employee to assist him in locking the vessels, the administrative judge should have also considered the nature of the work performed by the clerical employee during the locking operation, the margin of error in having the clerical employee open the gates, the risk of harm if the gates failed to properly open, and any incidents that arose from the clerical employee's operation of the gates. The record reflects that the clerical employee opened the miter gates, which is only 1 of 14 steps to locking a vessel, and that the miter gates open by themselves once the water pressure is equal on both sides, but will not open prior to that time. HT at 226, 258-60, 327, 329-31 (testimony of the appellant and the Pittsburgh District Operations Manager); *see* IAF, Tab 5, Subtab 4m. The appellant testified that "[i]t's impossible to open these gates inappropriately" as operating the two levers "is probably the most mindless operation that we do," and that opening the gates prematurely would not put undue stress on the equipment. HT at 226, 258-59, 290-91 (testimony of the appellant). The Pittsburgh District Operations Manager corroborated the appellant's testimony and further opined that "[t]he only danger would be if the gates weren't fully opened and the tow left the chamber and it

could hit the gate” and that tows are not allowed to proceed until they are signaled to do so. *Id.* at 269, 328-30, 336 (testimony of the appellant and the Pittsburgh District Operations Manager). To the extent that the appellant’s supervisor testified that the “tow” or vessel can drift into the recess area, causing the gates to “come back whenever you open them,” and that there can be debris that prevents the gates from fully opening, *id.* at 126, neither of these circumstances was present on June 2, 2011, *id.* at 266, 327 (testimony of the appellant and the appellant’s supervisor); *see* IAF, Tab 5, security videos. Furthermore, the appellant testified that, if anything went wrong, the clerical employee could have contacted him and he would have come to her assistance. HT at 267-68 (testimony of the appellant).

¶11 To the extent the agency alleges that the clerical employee had difficulty opening the gates, this argument is unavailing. The appellant credibly testified that the clerical employee did not contact him for help, noting that there was no reason for her to do so. *Id.* at 267, 293-94 (testimony of the appellant). The security videos and the testimony of the Pittsburgh District Operations Manager corroborate that the clerical employee had no difficulty opening the gates and the gates completely recessed into the wall. *Id.* at 267, 327, 329 (testimony of the appellant and the Pittsburgh District Operations Manager); *see* IAF, Tab 5, security videos. To the extent that the agency proffered the testimony of two mechanical workers who allegedly heard the clerical employee radio the appellant for assistance, the administrative judge afforded little weight to the hearsay evidence, finding that the witnesses were biased and that their testimony was improbable.<sup>8</sup> *See* ID at 17-18. We discern no reason to disturb these credibility findings.

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<sup>8</sup> As noted by the administrative judge, the agency could have but failed to call the clerical employee to testify, despite the fact that she was in the best position to testify regarding the events on June 2, 2011. *See* ID at 17 n.4.

¶12 Based on the foregoing, we find that the agency failed to prove that the appellant exercised poor judgment in allowing the clerical employee to assist him in locking the vessels. Thus, we DO NOT SUSTAIN the poor judgment charge.

Because the agency has only proven its falsification charge, we find that the maximum reasonable penalty is a 60-day suspension.

¶13 Where, as here, the Board does not sustain all the charges, it will carefully consider whether the sustained charges merit the penalty imposed by the agency. *Dogar v. Department of Defense*, [95 M.S.P.R. 52](#), ¶ 18 (2003), *aff'd*, 128 F. App'x 156 (Fed. Cir. 2005); *Douglas*, 5 M.S.P.R. at 308. The Board may mitigate the penalty imposed by the agency to the maximum penalty that is reasonable in light of the sustained charges as 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 for fewer charges. *Dogar*, [95 M.S.P.R. 52](#), ¶ 18 (citing *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999)). Here, the agency has made no such indication.

¶14 Although 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. *Reid v. Department of the Navy*, [118 M.S.P.R. 396](#), ¶ 25 (2012). Rather, the proper penalty must be determined on a case-by-case basis, considering the totality of the surrounding circumstances. *Id.* 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. *Id.*, ¶ 26.

¶15 Here, it is undisputed that the appellant committed a serious offense when he made false statements to his supervisor, denying that the clerical employee assisted him in locking the vessels. Further, the deciding official testified that, as

a result of the appellant's misconduct, he lost confidence and trust in the appellant, who was a supervisor and therefore was held to a higher standard of conduct compared to a nonsupervisory employee. HT at 165, 169; *see* IAF, Tab 5, Subtab 4e at 4-5, Subtab 4f at 1; *see also* *Edwards v. U.S. Postal Service*, [116 M.S.P.R. 173](#), ¶ 14 (2010) (agencies are entitled to hold supervisors to a higher standard than nonsupervisors because they occupy positions of trust and responsibility). However, we find that the circumstances weigh in favor of mitigation.

¶16 The record reflects that the appellant, who is a veteran, has worked for the ACOE for 11 years and served for 23 years in the Navy. IAF, Tab 5, Subtab 4h at 1. Based on his excellent work performance, the agency gave the appellant performance awards every year that he worked for the ACOE, promoted him to Lockmaster, and recruited him for an assistant operations manager position at the Newburgh Locks and Dam facility. *Id.* Further, the appellant has significant technical expertise and extensively worked on developing the training manual for lock operators and developed job descriptions for lock and dam personnel. *See id.*, Subtab 4f at 2, Subtab 4h at 8. We find that the appellant's misconduct does not diminish his ability to provide efficient service as a Lockmaster. Further, we afford little weight to the appellant's prior 1-day suspension for failing to follow instructions to apologize to another employee for name-calling. *See id.*, Subtab 4y. The appellant's refusal to apologize to another employee does not demonstrate an inability for rehabilitation. Furthermore, the appellant has not received prior discipline for falsification.

¶17 The Department of the Army Table of Penalties at Army Regulation 690-700 provides for a penalty ranging from a written reprimand to a removal for a first offense of lying to a supervisor. We note that the appellant has not raised a disparate penalties claim. After carefully weighing the relevant *Douglas*

factors, we conclude that a 60-day suspension is the maximum reasonable penalty based on the proven misconduct.<sup>9</sup>

### ORDER

¶18 We ORDER the agency to cancel the removal action and to retroactively restore the appellant to duty effective October 24, 2011. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency shall retroactively replace the removal action with a 60-day suspension. The agency must complete this action no later than 20 days after the date of this decision.

¶19 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.

¶20 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).

¶21 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

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<sup>9</sup> The appellant has not alleged that, to the extent that the Board reverses the administrative judge's decision to sustain the poor judgment charge, the Board should further mitigate the administrative judge-selected penalty of a 60-day suspension.

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).

¶22 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.

¶23 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 Clerk of the Board.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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](http://www.cafc.uscourts.gov).

Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

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



## 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.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

*Jeffrey Hill v. Department of the Army*

MSPB Docket No. CH-0752-12-0101-I-1

¶1 I respectfully dissent.

¶2 The facts are undisputed. Appellant is a Lockmaster with the U.S. Army Corps of Engineers in the Louisville District of its Ohio River operations. Contrary to provisions of the Operating Manual for Navigation Locks, he simultaneously locked two vessels into the main and auxiliary chambers with only the assistance of a temporary clerical employee with no lock operation training. The Corps proposed to remove him for exercising poor judgment in managing the lock's operations and for enlisting the assistance of an untrained temporary employee, and for providing a false statement to his supervisor during the subsequent investigation.

¶3 The majority reverses the administrative judge's decision and holds that the agency failed to prove either specification of the appellant's poor judgment charge regarding the simultaneous locking of vessels with the assistance of an untrained, temporary employee. Agreeing with the falsification charge, the majority sustains the penalty mitigation from removal to a 60-day suspension.

The administrative judge correctly sustained both specifications to the charge of poor judgment.

¶4 It is difficult for me to envision a clearer example of poor judgment by a professional and manager; poor judgment which could have led to significant damage to the locks, the vessels, or both. And the appellant's only defense to the poor judgment charge is that nothing bad resulted from his actions.

¶5 Despite the fact that no incident arose from the clerical employee's operation of the miter gate, a simple review of the video and still photographs in the record make it clear to me (as it did to the agency and the administrative

judge) that the appellant was far enough away from the clerical employee that it would have taken him a significant period of time to correct any errors or mitigate any damages resulting therefrom. That a non-percipient “expert” witness testified otherwise or that on occasion the Corps allows visiting dignitaries to ceremonially open the miter gates (under the direct supervision of a lock technician), is not material to the present circumstances.

The *Douglas* factors were appropriately applied by the agency.

¶6 Regardless of whether the poor judgment charge was sustained or not, I believe the agency appropriately applied the *Douglas* factors in reaching its decision to remove appellant. Mitigation does not afford the proper weight to the seriousness of the falsification offense or to the fact that the appellant is held to a higher standard of conduct as a supervisor. The Board has long affirmed the removal of a supervisor who committed falsification because such behavior raises serious doubts regarding the employee’s continued fitness for employment, despite that the appellant had many years of service, otherwise good work performance, and no prior discipline. See *Scheffler v. Department of the Army*, [117 M.S.P.R. 499](#), ¶¶ 2, 16 (2012) (affirming the removal of a supervisor for conduct unbecoming and falsification), *aff’d*, 522 F. App’x 913 (Fed. Cir. 2013); *Gebhardt v. Department of the Air Force*, [99 M.S.P.R. 49](#), ¶¶ 2, 21 (2005) (affirming the removal of a supervisor for falsification), *aff’d*, 180 F. App’x 951 (Fed. Cir. 2006). Thus, the law supports a finding that the penalty of removal is the maximum reasonable penalty for a single offense of falsification.

¶7 I would have sustained the administrative judge’s finding in support of the poor judgment charge, concurred with her finding in support of the falsification charge, and sustained the agency penalty of removal.

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Mark A. Robbins  
Member