UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

64 M.S.P.R. ***425***

Docket Number CH-0752-94-0096-I-1

NATHANIEL BROWN, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: SEP 16, 1994

Timothy A. Bridge, Esquire, Wheaton, Illinois, for the appellant.

JoAnne Jacobsen, Chicago, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

Chairman Erdreich issues a dissenting opinion.

OPINION AND ORDER

The appellant timely petitions for review of an initial decision that sustained the agency's removal action. For the reasons set forth below, we DENY the appellant's petition for failure to meet the criteria for review under 5 C.F.R. f 1201.115. We REOPEN the appeal on our own motion under 5 C.F.R. 5 1201.117, however, to consider his claim that the administrative judge failed to consider relevant mitigating factors in the penalty determination, and AFFIRM the initial decision as MODIFIED by this Opinion and order, still SUSTAINING the removal action.

BACKGROUND

The agency removed the appellant from his EAS-15 Supervisor, Mail Transport Equipment Center position, effective October 20, 1993, based on a charge of fraudulent submission of a PS Form 3971 (Request for/or Notification of Absence) and a June 3, 1993 medical statement to receive

sick leave for the period from May 10 through May 28, 1993. See Appeal File (AF), Tab 3, Subtabs 3, 4. The agency asserted that the appellant was in fact incarcerated in the Cook County Jail from April 20, 1993 through May 25, 1993, when he was released on bail. *See id.* When the Postal Inspection Service had questioned the appellant regarding his use of sick leave, the appellant essentially admitted that ,a had been incarcerated during the period in question, but asserted that he was ill and unable to work while incarcerated and was not being deceptive by using his sick leave while in jail. Sea AF, Tab 3, Subtab 5P.

The appellant timely filed a petition for appeal asserting, inter alia, that his removal was based on age and race discrimination, and requesting a hearing. *See* AF, Tab 1 at 3-4. The appellant also moved to reverse the removal action based on the agency's submission to the Board of the appellant's arrest and prior conviction record along with the investigative report it had included in the appellant's case file. *See* AF, Tab 6. The appellant claimed that his right to due process and fair treatment was prejudiced as a result of the agency's submission of his criminal record. see Id. at 3. The appellant further claimed that the scope of his appeal included, inter alia, his August 23, 1993 reassignment, his September 2, 1993 placement in an off duty status without pay through September 15, 1993, and his placement thereafter on administrative leave *until the* October 20, 1993 effective date of his removal. *See* AT, Tab 10 at 5.[1] Additionally, the appellant challenged the reasonableness of the penalty and asserted, inter alia, that the agency's action constituted reprisal for "engaging in concerted and protected activity and otherwise making known his opposition to what he reasonably and in good faith believed constituted discriminatory terms and *conditions* of employment.° *Id.* at 6-7.

The appellant subsequently filed a motion to disqualify the administrative judge based upon the administrative judge's "[r]eview and consideration"' of the appellant's criminal record. AF, Tab 14. After the administrative judge denied the motion to disqualify, see AF, Tab 16, the appellant filed a motion for certification of an interlocutory appeal, *see* AF, Tab 17, which the administrative judge also denied, *see* AF, Tab 18. The appellant further filed a motion to strike all references to his arrest and prior conviction from the agency's file, and a motion to compel discovery. *See* AF,

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[1] **In a separate appeal, the Board's Chicago Regional Office dismissed for *lack* of jurisdiction the appellant's claim that his placement in an off duty status without pay constituted an appealable *suspension* of over 14 days. *Brown v. U.S. Postal Service,* MSPB Docket No. CH-0752-94-0018-I-1 (Initial Decision, *Nov. 17, 1993).* The Board denied the appellant's petition for review of that initial decision. *Brown v. U.S. Postal Service,* MSPB Docket No. *CH-0752-94-0018-I-1* (Mar. *31, 1994).***

Tab 19. The administrative judge denied both of these motions. *See* Hearing Transcript (HT) at 4.

After affording the appellant his requested hearing, the administrative judge sustained the changed misconduct upon finding that the agency proved by preponderant evidence that the appellant submitted incorrect information with the intent to deceive. *See* Initial Decision (ID) at 3-4. The administrative, judge also found that the appellant failed to prove his affirmative defenses by preponderant evidence, that the agency's action promoted the efficiency of the service, and that the penalty of removal was reasonable. *See* ID at 4-8.

The appellant has petitioned for review of the initial decision and the agency has filed a timely response in opposition to the petition. *See* Petition for Review File, Tabs 1, 3.

ANALYSIS

The appellant asserts on review that the administrative judge committed reversible error by: (1) Considering his criminal record, which was submitted by the agency as part of its investigative report; (2) denying his motion to disqualify the administrative judge; and (3) *denying* his motion to compel discovery. See Petition for Review (PFR) at 11-20. The appellant also contends that the agency failed to prove its charge by preponderant evidence. *See* PFR at 24 - 29.

We find that there is no indication in the initial decision that the administrative judge relied upon the appellant's criminal record in adjudicating the appeal, and that the administrative judge did not abuse his discretion by not disqualifying himself from the appeal. We also find that the appellant's failure to preserve, on the record, an objection to the administrative judge's ruling on his notion to compel precludes him from objecting to that ruling now. *See Drawn v. Department of the Navy*, 57 M.S.P.R. 621, 625 (1993): *Smith v. U.S. Postal Service,* 55 M.S.P.R. 348, 352 (1992). We further find that-the appellant's *contention* that the agency failed to prove its charge by preponderant evidence constitutes more disagreement with the administrative judge's explained findings and credibility determinations, and does not warrant full review of the record by the Board. *See Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133-34 (1980), *review denied,* 669 F.2d 613 (9th Cir. 1982) (per curiam).

The appellant also asserts on review that the administrative judge committed reversible error by excluding evidence concerning, inter alia, his 'reassignment," placement in an off duty status without pay from September 2 through September 15, 1993, and placement on administrative leave thereafter until his removal effective October 20, 1993. PFR at 20-24. The appellant contends than these actions constituted a unified penalty over

which the Board has jurisdiction, and he cites to the Board's decisions in *Clark v. U.S. Postal Service,* 52 M.S.P.R. 634 (1992), and *Christensen v. U.S. Postal Service,* 51 M.S.P.R. 681 (1991), *aff'd,* 979 F.2d 216 (Fed. Cir. 1992) (Table), for support. *See* PFR at 20-21.

The agency had notified the appellant in an August 20, 1993 letter that he would be temporarily assigned to the Transportation Department at the Chicago Hulk Mail Center, effective August 23, 1993. See AF, Tab 10, Appellant's Exhibit O. This letter also informed the appellant that the temporary assignment "will continue until further instructed by this office." *Id.* The agency subsequently issued a "Notice of Emergency Placement in an off Duty Status of 14 Days or Less," informing the appellant that he would be placed in an off duty (without pay) status effective September 2, 1993, and continue in that status until he was Toady to perform the duties assigned or further advised by this office." *Id.,* Appellant's Exhibit Q. The agency stated that the reasons for the placement in an off duty status were that:

> It appears that your retention in an active duty status may result in damages to government property or may be detrimental to the interests of the government, or injurious to you, your fellow workers, or the general public. Specifically, you have refused to perform the duties which you have been assigned.

Id. The agency issued a revised notice on September 7, 1993, informing the appellant that the specific reasons for the September 2, 1993 action were that "you have refused to perform the duties which you have been assigned and are becoming disruptive to the workplace." AF, Tab 10, Appellant's Exhibit R. Although the appellant asserts that he was placed on administrative leave from' September 16 through his removal on October 20, 1993, he does not allege that he was placed *on such* leave without pay.

We first find that our decision in *Clark* is distinguishable from this appeal. In Clark, 52 M.S.P.R. at 640, the Board held, Inter alia, that an agency's decision to take both an emergency suspension for more than 14 days and a removal action based on the same act of misconduct was "not in accordance with law." Here, however, the agency's emergency placement of the appellant in an off duty status without pay from September 2 to September 15, 1993, was based on the appellant's failure to perform his assigned duties and disruption of the workplace, not on his fraudulent submission of a sick leave application and a physician's medical statement. Further, the suspension through September 15, 1993, did not last for more than 14 days and thus is not appealable to the Board. See supra note *. Regarding the appellant's placement on administrative leave, the appellant has not alleged or shown that he was placed in a nonpay status; thus, he cannot reasonably claim that he was still suspended if he was receiving pry on and after September 16, 1993. *See Fidler v. U.S. Postal Service,* 53

M.S.P.R. 440, 442-43 (1992). Moreover, agencies have authority generally to place employees on short term administrative leave while instituting adverse action procedures. *See* 5 C.F.R. § 752.404(b)(3)(iv); *Tyler v. U.S. Postal Service,* MSPB Docket No. CH-0353-94-0061-I-1, slip op. at 8 n.2 (May 20, 1994). Because it appears that the appellant was retained in a pay status under 5 U.S.C. § 7513(b)(1) for more than 30 days during the advance notice period of the proposed removal action, he was accorded his entitlement to pay for this period. *See Hawkins v. Department of the Navy,* 49 M.S.P.R. 501, 504 (1991); *Stephen v. Department of the Air Force,* 47 M.S.P.R. 672, 687-90 (1991). Therefore, we find no basis to conclude that these actions are part of a unified penalty in this appeal or are otherwise within our purview, and any adjudicatory error by the administrative judge in failing to admit additional evidence on these issues did not prejudice the appellant's substantive rights. *See Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1964).

Regarding the appellant's temporary assignment, the Board has held that it has jurisdiction over a reassignment, even if the reassignment is not effected simultaneously with an appealable adverse action, if the record shows that the adverse action and the reassignment constitute a unified penalty arising out of the set of circumstances of which the employee was found culpable. *See Christensen,* 51 M.S.P.R. at 689 (a reassignment was part of a unified penalty where the reassignment and the appellant's 60-day *suspension* occurred on different dates and were effected by different notices because the deciding and proposing officials testified that it was the nature of the sustained charges that caused them to reassign the appellant); *see also Welch v. Department of Agriculture,* 37 M.S.P.R. 18, 21-22 (1988), citing *Braver v. American Battle Monuments Commission*, 779 F.2d 663, 665 (Fed. Cir. 1985). This holding has permitted the Board to order an agency to return an employee to his or her former position *when* the unified penalty of reassignment and an adverse action that does not rise to the level of a removal is not reasonable or warranted. *See Brewer v. American Battle Monuments Commission,* 31 M.S.P.R. 243, 247 (1986); *see also Ostrout v. U.S. Postal Service,* 53 M.S.P.R. 586_0 587, 589 n.2 (1992) (the administrative judge reversed the agency's action where it failed to afford the appellant minimum due process rights, and ordered the agency to cancel the appellant's unified penalty of reassignment and pay freeze; the appellant could file a petition for enforcement with the Board's regional office if the agency failed to cancel his reassignment and restore him to his former position). Here, however, the appellant was temporarily assigned to an administrative position before the agency proposed and effected his removal from his EAS-15 Supervisor, Mail Transport Equipment Center position. Despite the temporary assignment, the appellant nevertheless retained his official position. Thus, although an agency official testified that the appellant was temporarily assigned to an administrative position pending the agency's

investigation into the facts surrounding his use of sick leave, *see* HT at 99-101, we find under these circumstances that such a temporary assignment or detail pending the agency's inquiry into the appellant's conduct does not constitute a unitary penalty and is not otherwise within the Board's jurisdiction. *See Maddox v. Merit Systems Protection Board, 759* F.2d 9, 10 (Fed. Cir. *1985)* (reassignment without loss of grade or pay is not an action appealable to the Board); *Snow v. Department of the Air Force, 39* M.S.P.R. *582, 584 (1989)* (temporary detail of an employee pending completion of a "conflict of interest" investigation is not appealable to the Board because the detail involved no reduction in grade or pay).

The appellant correctly asserts that the administrative judge failed to consider mitigating factors, such as the appellant's 23 years of Federal service with no prior disciplinary record, in assessing the reasonableness of the penalty. *See* PFR at 29-31; ID at 7-8. We note that the agency's deciding official may have failed to consider relevant mitigating factors. Although the removal decision notice states, in part, that "I have given full consideration to your written answer to [the notice of proposed removal] and all other evidence of record," AF, Tab 3, Subtab 3A, the decision notice does not specify whether ate deciding official considered any mitigating factors, and the record does not contain a copy of the appellant's September 27, 1993 response to the proposed removal. Moreover, the deciding official failed to indicate during his testimony that he considered relevant mitigating factors. *See* HT at 108-13.

In Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981), the Board stated that it will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of *reasonableness.* In *Douglas,* the Board set forth a list of generally recognized relevant factors. *See Id.* at 305-06. Here, the record contains no evidence that the agency considered factors favoring mitigation, as required by *Douglas.* An agency's determination of an appropriate penalty is not entitled to deference when the deciding official does not consider any of the relevant mitigating circumstances. *Bivens v. Tennessee Valley Authority*, 8 M.S.P.R. 458, 461 (1981). In such a situation, the Board may determine how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *See Daniels v. U.S. Postal Service,* 57 M.S.P.R. 272, 284-85 (1993); *Bivens*, 8 M.S.P.R. at 461; *see also Davis V. Department of the Army*, 33 M.S.P.R. 223, 226 (1987).

In deciding whether the penalty imposed is reasonable, the Board need not consider every *Douglas* factor, only the relevant ones. *See Daniels,* 57 M.S.P.R. at 285. The agency's deciding official considered as aggravating factors the seriousness of the offense, the appellant's job level as a supervisor, the effect of the offense upon the appellant's ability to function

as a supervisor, and the appellant's awareness as a supervisor of the standards to which the agency's employees are held. *See* AF, Tab 3, Subtab 3A; HT at 109-10. In his closing argument at the hearing, the appellant's representative asserted that the penalty of removal was too harsh in light of the appellant's 23 years of Federal service without prior discipline and the appellant's medical condition. See HT at 200. The appellant did not assert any other mitigating factors that he believed were significant. *See Yeschick* v. Department *of Transportation,* 801 F.2d 383, 385 (Fed. Cir. 1986) (the Board need not contemplate mitigating factors not identified by the appellant as significant).

Falsification of government documents is a serious offense because it goes to an employee's reliability, veracity, trustworthiness, and ethical conduct. *See Daniels,* 57 M.S.P.R. at 285. Falsification is an independent basis for an adverse action because an employer is entitled to honesty and truthfulness from its employees in every aspect of their employment. See *Id.* The Board has found that fraudulent acts by which an employee obtains financial benefits to which he is not entitled are grounds for removal, even when the appellant has extensive Federal service. *See, e.g., Walcott* V. *U.S. Postal Service,* 52 M.S.P.R. 277, 284 (removal of Postmaster was reasonable for charge of falsification even though employee had 27 years of service without prior disciplinary actions), *aff'd,* 980 F.2d 744 (Fed. Cir. 1992) (Table); *Gonzalez v. U.S. Postal* Service, 30 M.S.P.R. 82, 84 (1986) (removal sustained for Postal Inspector with 18 years of very satisfactory Federal service who filed false travel vouchers), *aff'd,* 818 F.2d 874 (Fed. Cir. 1987) (Table); *Hyatt* v. *Railroad Retirement Board,* 29 M.S.P.R. 390, 391-92 (1985) (removal of Supervisory Contact Representative sustained for filing false documents despite almost 22 years of satisfactory service). The Board has held that agencies are entitled to hold supervisors like the appellant to a higher standard of conduct than nonsupervisory because they occupy positions of trust and responsibility. *See, e.g., Walcott,* 52 M.S.P.R.. at 284; *Jackson v. U.S. Postal Service,* 48 M.S.P.R. 472, 476 (1991).

Evidence that an employee's medical condition or mental impairment played a part in the charged conduct is ordinarily entitled to considerable weight as a mitigating factor. *See*, e.g., *Walker V- Department* of the *Navy,* 59 M.S.P.R. 309, 324-25 (1993); *Wellman v. Department of* the *Navy,* 49 M.S.P.R. 149, 152 (1991); *Douglas,* 5 M.S.P.R. at 305. Here, however, the appellant has not shown or even alleged a relationship between his medical condition and his fraudulent submission of the PS Form 3971. We therefore need not consider his medical condition as a mitigating factor.

Accordingly, upon consideration of the relevant factors, we find that the penalty of removal was within the tolerable limits of reasonableness for the sustained misconduct.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C.§ 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, 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 should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C.

§§ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

DISSENTING OPINION OF CHAIRMAN ERDREICH

Nathaniel Brown v. U.S. Postal Service
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I respectfully dissent. The appellant has 23 years of unblemished service and was frank and open about his actions during the agency's investigation, demonstrating a good potential for rehabilitation. In applying the *Douglas*[2] factors, I would mitigate the penalty in this case to a demotion to the next lower graded, non-supervisory, full-time position.

SEP 19, 1994

Ben L. Erdreich, Chairman

[2] ***Douglas v. Veterans Administration*, 5 M.S.P.R. 280** (1981)