UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 37

Docket No. DE-0752-11-0319-I-2

Christopher J. Chavez,

Appellant,

v.

Small Business Administration,

Agency.

May 28, 2014

Seth J. Benezra, Esquire, and Sarah Parady, Esquire, Lakewood, Colorado, for the appellant.

Claudine Landry, Esquire, Washington, D.C., for the agency.

Kathleen Eldridge, Esquire, Buffalo, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The parties have filed cross-petitions for review of the administrative judge's initial decision mitigating the appellant's removal to a 60-day suspension, a reduction in grade, and an optional reassignment to a vacant position after determining that the deciding official failed to conduct a proper penalty analysis under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). For the reasons that follow, the administrative judge's initial decision mitigating the appellant's removal is AFFIRMED IN PART and VACATED IN PART. The

agency's charges of misconduct against the appellant are SUSTAINED, and the appellant's removal is MITIGATED to a 60-day suspension and reduction in one grade level.[1]

BACKGROUND

¶2 The agency removed the appellant from his position as a GS-13 Public Affairs Specialist based upon two charges: improper use of a government computer based upon 22 specifications of him sending sexually oriented images and videos from his work computer; and lack of candor due to his response under oath to investigators during an internal agency investigation into an allegation that a coworker was creating a hostile work environment in the agency's Denver office. Initial Appeal File (IAF), Tab 7, Subtab 4h. Through an internal agency investigation, which commenced in early 2010, the agency discovered that the appellant, along with several other employees in the agency's Denver office, had been sending and receiving sexually explicit material on their work computers using their work email addresses. IAF, Tab 9, Subtab 4w at 3. When asked by investigators whether he had received "emails with a sexual connotation" from his coworker, the appellant averred under oath that he had "personally . . . not received emails from [this individual] that were sexual in nature." *Id*. The agency's ensuing investigation, however, demonstrated the contrary. *Id*. at 3-4. The agency proposed the appellant's removal, which the deciding official sustained, and the appellant was removed effective March 28, 2011. IAF, Tab 9, Subtab 4w; IAF, Tab 7, Subtab 4h.

¶3 The appellant filed a timely appeal of his removal. IAF, Tab 1. Following an in-person hearing, the administrative judge sustained both of the agency's

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[1] 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 for review under the previous version of the regulations, the outcome would be the same.

charges, but mitigated the appellant's removal upon finding that the deciding official failed to properly weigh all of the *Douglas* factors. Refiled Appeal File (RAF), Tab 79, Initial Decision (ID) at 5-16. Specifically, the administrative judge determined that: (1) the agency declined to provide the deciding official with information that he requested about the factual circumstances of the other employees who were also found to have sent inappropriate emails as a result of the same investigation that led to the appellant's removal; and (2) the deciding official impermissibly construed the appellant's length of service as an aggravating factor. *Id*. at 9-10. After reweighing the *Douglas* factors, the administrative judge found that the maximum reasonable penalty under the facts of the case was a 60-day suspension, a reduction in grade, and an optional reassignment to a different position for which the appellant was qualified. *Id*. at 14. In rendering his penalty determination, the administrative judge noted that, although the charges against the appellant, who held a prominent position, were of a serious nature, *id*. at 10-11, his lack of disciplinary history, tenure with the agency, and rehabilitative potential, combined with the fact that "he had been working in an environment for several years in which his immediate supervisor . . . and other agency managers condoned the emailing of sexually oriented materials by employees," *id*. at 11-12, weighed in the appellant's favor.

¶4 The agency has filed a petition for review arguing that the deciding official properly assessed all of the *Douglas* factors and that any error in his penalty analysis was harmless error. Petition for Review (PFR) File, Tab 3. The appellant has filed a cross-petition for review responding to the agency's arguments and arguing that the penalty imposed by the administrative judge should be mitigated further.[2] PFR File, Tab 7.

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[2] The agency has filed an opposition to the appellant's cross-petition for review, which the appellant has moved to strike on the ground that it is a de facto reply in further support of the agency's petition for review, something which our regulations did not permit at the time the agency filed its petition for review. *See* PFR File, Tabs 11-12;

ANALYSIS

The agency proved both charges and established a nexus between the charges and the efficiency of the service.

¶5 Although the appellant has not specifically challenged the administrative judge's initial decision to sustain the charges against him, *see, e.g.*, PFR File, Tab 7 at 20, we have reviewed the decision and agree that the agency proved both of its charges by a preponderance of the evidence. *See* ID at 5-8. The appellant did not dispute the improper use of a government computer charge below, and we agree with the administrative judge that the record evidence supports the agency's charge and its 22 supporting specifications. *See id.* at 5; *see also Cole v. Department of the Air Force*, 120 M.S.P.R. 640, ¶ 9 (2014) (an appellant's admission can support an agency's charge of misconduct).

¶6 We further agree with the administrative judge that the agency established its lack of candor charge based upon the appellant's incomplete response to government investigators under oath. ID at 5-8. Lack of candor is a "broad[] and . . . flexible concept whose contours and elements depend on the particular context and conduct involved." *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). Such a charge does not require proof of intent, but rather "involve[s] a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete." *Id.* We agree with the administrative judge that the appellant was not entirely candid with agency investigators when he responded under oath that he had "personally . . . not received emails from [his coworker] that were sexual in

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see also 5 C.F.R. § 1201.114(a)(4) (allowing for a reply to a response to a petition for review) (effective November 13, 2012). The agency has opposed the appellant's motion to strike, arguing that the appellant's single pleading justified the manner in which the agency composed its reply. PFR File, Tab 13. We agree with the agency that the appellant did not delineate between the arguments in opposition to the agency's petition for review and the basis for challenging the initial decision. PFR File, Tab 11. The appellant's motion to strike is therefore denied.

nature" in light of his history of receiving such emails from several coworkers for more than a year. IAF, Tab 9, Subtab 4y at 7-8. The undisputed record reflects that the appellant regularly sent and received such emails using his government computer between November 2008 and February 2010, and that he received several sexually explicit emails from his coworker during this same period of time. *See* IAF, Tab 9, Subtab 4ii (coworker's email to the appellant). We concur with the administrative judge that the appellant's response to agency investigators was less than complete because it impermissibly left investigators with the impression that he had never received such emails on his work computer when in fact he had. *See, e.g.*, *Hoofman v. Department of the Army*, 118 M.S.P.R. 532, ¶¶ 13-15 (2012) (finding that the appellant lacked candor when he failed to explain the circumstances surrounding his leave request and he attempted to cover up his wrongdoing), *aff'd*, 526 F. App'x 982 (Fed. Cir. 2013). We therefore agree with the administrative judge's finding that the agency proved both of its charges.

¶7 We also have reviewed the administrative judge's findings of a nexus between the appellant's charges of misuse of a government computer and lack of candor and the efficiency of the service. We agree with the administrative judge that the agency has established that its disciplinary action promotes the efficiency of the service. ID at 8; *see Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 28 (2000) (the appellant's lack of candor strikes at the heart of the employer-employee relationship and directly impacts the efficiency of the service), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002).

The agency erred in its penalty analysis under Douglas when it declined to provide the deciding official with information about the factual circumstances of the other employees who were also found to have sent sexually explicit emails on their government computers as part of the same investigation that led to the appellant's removal.

¶8 When the Board sustains all of the agency's charges, as here, the Board may mitigate the agency's original penalty to the maximum reasonable penalty

when it finds the agency's original penalty too severe. *Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶ 8 (citing *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999)), *aff'd*, 355 F. App'x 410 (Fed. Cir. 2009). The Board's function, however, is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Parker*, 111 M.S.P.R. 510, ¶ 9; *see Peterson v. Department of Energy*, 6 M.S.P.R. 728, 730 (1981) (the purpose of the Board's review of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness). The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Parker*, 111 M.S.P.R. 510, ¶ 9. If the agency's penalty is beyond the bounds of reasonableness, the Board will mitigate only to the extent necessary to bring it within the parameters of reasonableness. *Id*.

¶9 A deciding official does not have to consider each of the *Douglas* factors in making his penalty determination. *See Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983) ("The [B]oard never intended that each factor be applied mechanically, nor did it intend mandatory consideration of irrelevant factors in a particular case."); *Douglas*, 5 M.S.P.R. at 306 (not all of the factors will be pertinent in every case, and it must be borne in mind that the relevant factors are not to be evaluated mechanistically). The deciding official, however, must consider the relevant *Douglas* factors which are implicated by the facts of the case before him. *See Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 10 (2013). Among the factors a deciding official may consider is the "consistency of the penalty with those imposed upon other employees for the same or similar offences." *Douglas*, 5 M.S.P.R. at 305. An appellant's assertion that the agency did not impose the same penalty for the same or similar offense is

part of the *Douglas* factors analysis going to the reasonableness of the agency's penalty and differs from an appellant's affirmative defense of discrimination. *See Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010).

¶10 The record reflects that the appellant initially raised the issue of the consistency of penalty with the deciding official in his written response to the agency's notice of proposed removal. *See* IAF, Tab 7, Subtab 4m at 17-24. Following the appellant's disparate penalty assertion, the deciding official inquired into the circumstances of the other employees who were charged with misconduct as part of the same investigation that led to the appellant's proposed removal. *See* ID at 9.[3] In response, the agency's human resources office informed the deciding official that "there are eight employee [sic] who will receive a proposal to suspend based upon their improper use of the government computer. Our office, in connection with the proposing official, did not find that the misconduct rose to the level of removal[,]" and that "it was decided to not provide you with our internal report of the specifics of the other cases[,] . . . [t]he key item of clarification is that the explicit content of the other suspension cases does not rise to the level" of the cases before the deciding official who reviewed the appellant's proposed removal. *See* RAF, Tab 41, Exhibit W-3. The human resources official further explained that "[t]here are a remaining 22 employees involved who will receive (or have received) a letter of reprimand or verbal warning for their behavior. None of these employees forwarded explicit material." *Id*. At the hearing, the deciding official confirmed that he never received information about any of the other cases except for the three proposed removals in which he was the designated deciding official. *See* November 8, 2011 Hearing Transcript at 273-78.

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[3] The record does not contain the deciding official's correspondence seeking such information.

¶11 Based upon this evidence, the administrative judge concluded that the agency violated *Douglas* by failing to provide the deciding official with the information he had requested about the other employees and what discipline, if any, had been imposed. *See* ID at 9. We agree with the administrative judge that the agency's withholding of requested information about putative comparator employees from the deciding official contravenes *Douglas*. A deciding official must be in an informed position in order to make a conscientious penalty determination under the facts of the case before him. *See Douglas*, 5 M.S.P.R. at 305-07. Under the facts of this case, where the appellant specifically raised the issue of the consistency of the penalty with the deciding official, we find that the agency prevented the deciding official from undertaking a conscientious consideration of the consistency of the penalty by withholding the information he requested. *See Williams v. Social Security Administration*, 586 F.3d 1365, 1368 (Fed. Cir. 2009); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 26 (2012). Under *Douglas*, it is insufficient for another agency employee to predetermine for the deciding official which instances of misconduct he should consider. *See* ID at 9 (noting that other "employees determined that he [the deciding official] should not be privy to the circumstances of the other cases in which he was not the deciding official"); RAF, Tab 41, Exhibit W-3. This is particularly true in this case where the deciding official was denied comparator information about employees whose misconduct was discovered during the same investigation that led to the appellant's disciplinary action. *See id.*; *see also Taylor v. Department of Veterans Affairs*, 112 M.S.P.R. 423, ¶¶ 11-13 (2009) (when the disciplinary actions taken against the appellant and two comparator employees were the result of the agency's unified response to the Office of Inspector General's findings, the Board determined that the agency impermissibly imposed disparate penalties when it removed the appellant but suspended the two other employees for similar misconduct without proving a legitimate reason for the difference in treatment), *holding modified by Lewis*, 113 M.S.P.R. 657, ¶ 15 n.4. We therefore agree with

the administrative judge's finding that the agency violated *Douglas* by withholding requested comparator information from the deciding official. ID at 9.

The agency did not improperly consider the appellant's length of service as an aggravating factor.

¶12 The administrative judge also concluded that the deciding official misapplied *Douglas* when he construed the appellant's length of service as an aggravating factor. ID at 9. Although an administrative judge's demeanor-based credibility determinations are entitled to deference, the Board may otherwise make determinations of fact different from those of the administrative judge where there is a sound reason to do so, based on the record. *Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶ 15 & n.4 (2009) (citing *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008)). The administrative judge did not offer any demeanor-based assessments in support of his conclusion that the deciding official considered the appellant's length of service to be an aggravating factor, thus leaving this factual conclusion open to a different interpretation based upon the weight of the evidence. ID at 9. As explained below, we find that the weight of the evidence does not support the administrative judge's factual conclusion.

¶13 The only evidence in the record to support the administrative judge's factual finding that the deciding official misconstrued the appellant's length of service is the deciding official's affirmative answer to a question posed to him on cross-examination as to whether "given his long record, [the appellant] should have known better than to have engaged in misconduct. Is that correct[?]" *See* November 8, 2011 Hearing Transcript at 315; PFR File, Tab 3 at 18 n.4. We do not believe that the deciding official's affirmative response to this one question, alone, establishes that the deciding official construed the appellant's length of service as an aggravating factor. Rather, we find that the deciding official's letter of decision, his *Douglas* factors worksheet, and the majority of his hearing

testimony reflects that he did not consider the appellant's length of service to be an aggravating factor.[4] *See* IAF, Tab 7, Subtab 4h at 3-4, Subtab 4j at 3; November 8, 2011 Hearing Transcript at 236-38. The deciding official's singular statement on cross-examination adopting the phrasing of the appellant's counsel's question does not demonstrate that the deciding official construed the appellant's length of service against him, and so we VACATE this portion of the administrative judge's penalty analysis. *See Brown v. Department of the Army*, 96 M.S.P.R. 232, ¶ 13 (2004) (holding that a deciding official's belief that a long-term employee "should be well aware of the rules" did not establish that the employee's length of service was considered as an aggravating factor).

The maximum reasonable penalty is a 60-day suspension and reduction in one grade level.

¶14 Based upon his finding that the agency failed to conduct a correct penalty analysis under *Douglas*, the administrative judge independently weighed the *Douglas* factors and concluded that the maximum reasonable penalty was a 60-day suspension, reduction in grade, and optional reassignment to a vacant position within the agency. *See* ID at 10, 16; *see also Raco v. Social Security Administration*, 117 M.S.P.R. 1, ¶ 13 (2011). For the reasons that follow, the administrative judge's penalty analysis is AFFIRMED IN PART and VACATED IN PART. Specifically, the mitigation of the appellant's removal to a 60-day suspension and reduction in grade is AFFIRMED, but the administrative judge's order permitting the appellant's optional reassignment to a vacancy for which he is qualified is VACATED.

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[4] In his cross-petition for review, the appellant only cites the deciding official's testimony on cross-examination in support of the administrative judge's factual conclusion that the deciding official impermissibly construed the appellant's length of service as an aggravating factor. PFR File, Tab 7 at 26-28. The appellant has pointed to no other evidence in the record that could support this factual conclusion, and we have found no such supporting evidence in the record.

¶15 On review, the agency argues that removal is the maximum reasonable penalty that should be imposed for the appellant's misconduct based upon the high level of his position with the agency and his dissemination of sexually explicit information outside of the agency. PFR File, Tab 3 at 22-25. The agency cites *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006), and *Social Security Administration v. Steverson*, 111 M.S.P.R. 649 (2009), *aff'd*, 383 F. App'x 939 (Fed. Cir. 2012), as precedent for removing an employee in a prominent position who sends sexually explicit images using a work computer. PFR File, Tab 3 at 24. We do not find that these cases support the appellant's removal from federal service.

¶16 In *Von Muller*, the Board found that the appellant's removal was appropriate because the employee "compromised the public image of the agency he was supposed to represent" by sending sexually explicit images to external constituents from his government email account at a time when the agency was under heavy public scrutiny. 101 M.S.P.R. 91, ¶ 23. In *Steverson*, the Board affirmed the removal of an administrative law judge for, inter alia, improperly using agency letterhead, misusing government equipment to store sexually oriented material, and lacking candor, based upon his position of prominence and lack of rehabilitative potential. 111 M.S.P.R. 649, ¶¶ 2, 19-20. As noted by the administrative judge in his initial decision, such similar, aggravating factors are absent in this case. ID at 12-14. Although the appellant interfaced with the public in his position with the agency, which the administrative judge acknowledged served as an aggravating factor, *id*. at 11, the administrative judge weighed this one aggravating factor against several mitigating factors, including the appellant's rehabilitative potential, his lack of disciplinary history, and the absence of clarity of notice from the agency that the appellant's conduct violated

agency policies in light of management's tolerance of such actions, *id*. at 11-13.[5] Given the mitigating factors present in this case, we find that *Von Muller* and *Steverson* do not warrant removing the appellant from federal service.

¶17 The agency also challenges the administrative judge's finding that the appellant's misconduct took place in an environment in which such conduct was condoned. ID at 12; PFR File, Tab 3 at 26-27. The agency's mere disagreement with the administrative judge's factual conclusion on this point, which is supported by the record, does not support re-imposing the appellant's removal from employment. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980). We find, moreover, that the agency's attempt to use the appellant's acknowledgment of his wrongdoing to counter the administrative judge's finding of an approbatory environment is a misapplication of *Douglas*. *See Casarez v. Department of the Army*, 70 M.S.P.R. 131, 134 (1996) (the truthful admission of misconduct is a mitigating, not an aggravating, factor); PFR File, Tab 3 at 26-27.

¶18 In contrast to the agency's argument that the appellant's removal should be reinstated, the appellant argues that the penalty should be further mitigated given the similarity between his conduct and the conduct of several other employees who were disciplined as part of the same investigation leading to his proposed removal. Specifically, the appellant argues that several other employees were issued either 7- or 14-day suspensions for disseminating a similar number of sexually explicit emails, and that another employee who was disciplined after the appellant only received a 60-day suspension without an accompanying reduction

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[5] It defies credulity in this day and age that any employee, private or public, at any level of responsibility, from entry to senior management, would think it appropriate to disseminate sexually explicit or inappropriate materials on work equipment and on work time. The ***only*** reason an absence of clarity of notice from the agency on this topic is relevant at all is because the evidence establishes that the agency itself has a history of tolerance of such actions.

in grade or reassignment. *See* PFR File, Tab 7 at 16-20, 37-43, Tab 19 at 7-9. We consider each group of proffered comparator employees in turn.

¶19 First, we find the appellant's argument that his misconduct was analogous to the conduct of several employees who were issued 7- or 14-day suspensions unpersuasive. PFR File, Tab 7 at 37-43. In an effort to align the appellant's misconduct with this group of employees, the appellant augments the circumstances of each comparator's misconduct by citing to actions which were not included as grounds for their discipline. *Id.* (enumerating uncharged conduct involving the other employees). The appellant relies on *Spahn v. Department of Justice*, 93 M.S.P.R. 195 (2003), for the principle that the deciding official was required to consider all of the emails sent or received by each employee which were uncovered during the investigation, not just the instances contained within the notices of proposed removal. *See* PFR File, Tab 7 at 30 n.28. *Spahn*, however, does not support the appellant's argument. *Spahn* instructs that the nature of an employee's misconduct—as opposed to the label ascribed to the misconduct—must be considered when assessing whether employees are similarly situated for purposes of a disparate treatment Title VII affirmative defense. *See* 93 M.S.P.R. 195, ¶¶ 13-14. *Spahn*, however, does not require a deciding official to consider the universe of conduct that was both charged and that could have been charged when conducting a disparate penalty analysis under *Douglas*. *See Lewis*, 113 M.S.P.R. 657, ¶ 15 n.5 (noting that the disparate penalty analysis discussed in *Spahn* concerns Title VII discrimination law); *see also Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 13 (2012) (to establish disparate penalties, the appellant must show that the charges and the circumstances surrounding *the charged behavior* are substantially similar) (emphasis added). As our decisions explain, a claim of disparate penalties focuses on whether an imposed penalty is appropriate for the sustained charges. *Lewis*, 113 M.S.P.R. 657, ¶ 15 n.4.

¶20 We further agree with the administrative judge that the appellant's sustained misconduct justifies the imposition of a penalty greater than a 14-day suspension. *See* ID at 11-12. Unlike the four comparators cited by the appellant who were only charged with misuse of a government computer, the appellant was charged with two separate charges, misuse of his government computer and lack of candor. *Id*. The administrative judge found the nature of both charges against the appellant to be very serious, *id*. at 10, and more severe than the misconduct of the putative comparators, *id*. at 11-12. We discern no basis for reversing these findings. *See Ly*, 118 M.S.P.R. 481, ¶ 15 (noting that the difference between the offenses committed by the appellant and a putative comparator did not support a claim of disparate penalties).

¶21 The appellant also raises for the first time on review a disparate penalty claim based upon a 60-day suspension the agency imposed on a putative comparator employee almost 2 years after the appellant was removed. *See* PFR File, Tab 19 at 7-9.[6] The Federal Circuit has held that the Board should consider post-removal mitigation evidence when determining whether a penalty is reasonable. *See Norris v. Securities & Exchange Commission*, 675 F.3d 1349, 1357 (Fed. Cir. 2012). Although *Norris* instructs that the Board should consider post-removal evidence as a part of its statutory obligation to develop a de novo record on both the charges against an employee and the penalty imposed by the agency, *Norris* does not express an opinion as to the weight to be given such mitigating evidence. *See id*. at 1355-57.

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[6] The Board previously granted the appellant's motion for leave to submit an additional pleading based upon the discovery of new evidence concerning post-removal comparator discipline and gave the parties an opportunity to brief this issue. *See* PFR File, Tab 18.

¶22 Although we have some prudential concerns about considering post-removal comparator evidence in all cases,[7] under the circumstances of this case, where both the appellant and the subsequent comparator were disciplined as part of the same agency investigation into employee misconduct, we will consider the appellant's post-removal comparator evidence for the first time on review. However, for the following reasons, we find that the new comparator evidence is entitled to little weight, and we find that the appellant has failed to establish that the penalty imposed by the administrative judge should be mitigated further.[8] *See Norris*, 675 F.3d at 1357; *Davis v. U.S. Postal Service*, 120 M.S.P.R. 457, ¶¶ 8, 14-16 (2013) (finding that the agency established a legitimate reason for the difference in discipline between employees).

¶23 First, we find that the significant amount of time between the appellant's removal and the post-removal evidence undermines any disparate penalty showing the appellant could otherwise make. *See Davis*, 120 M.S.P.R. 457, ¶ 8 (an appellant must show that there is enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently). As a general matter,

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[7] The Board's disparate penalty decisions have generally looked backward to determine if the penalty selected by the agency is consistent with those which have been historically imposed by the agency. *See, e.g.*, *Davis v. U.S. Postal Service*, 120 M.S.P.R. 457, ¶ 15 (2013) (an agency is not foreclosed from proffering evidence that the penalty for a certain offense was too lenient in the past); *Lewis*, 113 M.S.P.R. 657, ¶ 15 n.4. Because, however, the appellant and the subsequently disciplined comparator were disciplined as part of the same agency investigation into employee misconduct, we will consider the appellant's newly submitted post-removal evidence of disparate penalties. We do not decide under what other circumstances, if any, the Board should consider a claim of disparate penalties based upon post-removal evidence.

[8] Although not argued by either party, we note that the chronology of events could certainly suggest that the administrative judge's decision to mitigate the penalty in this case affected the agency's decision to impose the post-removal discipline which the appellant now cites in support of further mitigating his penalty. This possibility also supports our decision to give the appellant's post-removal comparator evidence little weight in evaluating his claim of disparate penalties.

a comparison of events which are attenuated is less persuasive than a comparison of those which share a close temporal nexus. *E.g.*, *Salinas v. Department of the Army*, 94 M.S.P.R. 54, ¶ 10 (2003) (citing decisions holding that 2- and 3-year gaps were too long to establish the knowledge and timing causal connection in individual right of action appeals); *Song v. U.S. Postal Service*, EEOC Appeal No. 01A45901, 2005 WL 689439, at *4 (E.E.O.C. Mar. 16, 2005) ("Where . . . complainant relies solely on the temporal proximity between the employer's knowledge of protected [equal employment opportunity] activity and the allegedly discriminatory action to establish a nexus, the time elapsed between these events cannot be great."); *cf. Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("[P]roximate cause thus serves, inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."). We thus find the 2-year lapse between the appellant's removal and the discipline imposed on the subsequent comparator lessens the relevancy of the appellant's post-removal comparator evidence.

¶24 Second, applying the Board's disparate penalties precedent, we find that there are legitimate reasons for the imposition of different penalties for the appellant and the subsequent comparator. *See Davis*, 120 M.S.P.R. 457, ¶ 14-15. For instance, the appellant and the subsequent comparator employee were disciplined by different agency officials and worked in separate chains of command within the agency. *See* PFR File, Tab 20 at 6-7. In addition, not only did the appellant hold a higher position of employment than the subsequently disciplined comparator employee, but the nature of the appellant's responsibilities also differed from that of the comparator employee; specifically, whereas the appellant was responsible for interfacing with the community at large as a Regional Communications Director, the subsequently disciplined comparator served as a surety bond guarantee specialist with no public responsibilities. *Id.* at 6. Finally, although both employees were charged with improper use of a

government computer and lack of candor, the appellant disseminated inappropriate emails outside of the agency, whereas the subsequent comparator only sent inappropriate emails to his own email address. *Id*. at 6-7. We thus find that there existed a legitimate reason for the agency's decision to impose a lesser penalty on the comparator employee 2 years after it removed the appellant from federal service, and that these differences support affirming the appellant's 60-day suspension and reduction in grade without further mitigation.

¶25 In sum, weighing the appellant's more than 24 years of service, absence of prior disciplinary history, rehabilitative potential, and the history of supervisory approval for the transmission of sexually explicit email messages at work, we find the administrative judge properly mitigated the appellant's removal to a 60-day suspension and reduction in grade level. Additionally, while we have considered the appellant's post-removal comparator evidence, we find that it does not warrant further mitigating the administrative judge's penalty. *See Hooper v. Department of the Interior*, 120 M.S.P.R. 658, ¶ 8 (2014); *Davis*, 120 M.S.P.R. 457, ¶¶ 14-16. The administrative judge's mitigation of the appellant's removal to a 60-day suspension and reduction in grade is AFFIRMED.

¶26 In rendering his penalty determination, the administrative judge additionally found that the agency could reassign the appellant "to a different position for which he is qualified." ID at 16. Prior Board decisions which have upheld reassignment as a part of an employee's penalty under chapter 75, however, have involved factual findings that the employee cannot perform his prior position given the nature of his sustained misconduct and that there exist vacancies within the agency to which the appellant could be reassigned. *See, e.g., Wilson v. Department of Veterans Affairs*, 74 M.S.P.R. 65, 69 (1997) (finding that reassignment of a law enforcement official to a vacant maintenance worker position was appropriate due to the appellant's lack of rehabilitation potential in the law enforcement field and the nature of responsibility and trust in supervisory law enforcement positions). The administrative judge, however,

made no such findings in this case, and we find that the appellant's sustained charges do not preclude the agency from returning him to his prior position as a Regional Communications Director. *See id.*; *see also Blyther v. U.S. Postal Service*, 112 M.S.P.R. 537, ¶ 8 (2009) (an initial decision must identify all material issues of fact and law, as well as the authorities on which that reasoning rests). Accordingly, the administrative judge's order permitting the agency to reassign the appellant to a vacancy within the agency for which he is qualified is VACATED.

ORDER

¶27 We ORDER the agency to CANCEL the appellant's removal and SUBSTITUTE in its place a 60-day suspension without pay and simultaneous reduction of no more than one grade. The appellant is further ORDERED REINSTATED to his prior position of employment at a reduction of no more than one grade. These actions must be accomplished no later than 20 calendar days after the date of this decision. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984).

¶28 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.

¶29 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).

¶30 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶31 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.

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

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request 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. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:

   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.

5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.