UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JACKIE J. CISNEROS, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	DOCKET NUMBER DE-0752-98-0309-I-1 DATE: September 1, 1999

H. Thomas Stevenson, Esquire, Stevenson & Smith, P.C., Ogden, Utah, for the appellant.

Loren L. Baker, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board upon the agency's petition for review and the appellant's cross petition for review of the December 31, 1998 initial decision that mitigated to a 90-calendar-day suspension the agency's action removing the appellant from his position. For the reasons stated below, the Board GRANTS the agency's petition for review under 5 C.F.R. § 1201.115 and DENIES the appellant's cross petition for review, finding that it does not meet the criteria for review under 5 C.F.R. § 1201.115. The Board AFFIRMS the initial decision as

MODIFIED by this Opinion and Order. The agency's removal penalty is SUSTAINED.

BACKGROUND

¶2 The appellant appealed the agency's April 26, 1998 action removing him from his GS-12 Assistant Commissary Officer position, Defense Commissary Agency, Hill Commissary, McClellan Air Force Base, California. Appeal File (AF), Tab 1 and Tab 4, Subtabs 4A, 4B, 4G. The agency based its removal action on two charges, i.e., "conduct unbecoming a Federal employee" and "violati[on] [of] Defense Commissary Agency and Southwest Region Policy on Sexual Harassment which created an abusive, hostile work environment." AF, Tab 4, Subtab 4G. In a March 13, 1998 removal proposal notice, which replaced an earlier December 17, 1997 removal proposal notice, the agency asserted that the charges arose from the appellant's allegedly unwelcome, inappropriate, physical contacts and remarks directed at three Hill Commissary female workers. *Id*. The agency noted in the removal proposal notice that the appellant had received an August 2, 1997 suspension for 10 days for disrupting Commissary operations. *Id*. In his defense, the appellant alleged "discrimination based on race or national origin" (Hispanic), retaliation for previously filing an equal employment opportunity (EEO) complaint, "res judicata" on the basis that the agency had previously disciplined him by imposing the August 2, 1997 suspension for 10 days for the same offenses and raised various harmful errors by the agency, including alleged inadequacies in the removal proposal notice and the agency's investigation into his misconduct. AF, Tab 1, Appeal Form and Appellant's Statement at 1-2; AF, Tab 13 at 1-2.

¶3 Following a hearing, the administrative judge, based primarily on the testimonial evidence presented, found both charges supported by preponderant evidence and sustained them. As to the appellant's affirmative defenses, the administrative judge found that the appellant presented insufficient evidence to

prove them. The administrative judge found, however, that the removal penalty was unreasonable in view of the existing mitigating factors. Thus, he mitigated the penalty to a 90-calendar-day suspension. Initial Decision at 2-20.

¶4 The agency has filed a petition for review, contending that the administrative judge erred by mitigating the removal penalty. Petition for Review (PFR) File, Tab 1. The appellant has timely responded in opposition to the petition for review and has timely filed a cross petition for review, challenging the administrative judge's findings on the merits of the charges and contending that the administrative judge erred by not finding that the doctrine of res judicata applies to the agency's removal action. He also reiterates his harmful error allegations in relation to the inadequacy of the removal proposal notice and the inadequacy of the agency's investigation into his alleged misconduct. *Id.*, Tab 4. The appellant has not sought review of the administrative judge's findings on his remaining affirmative defenses, and we find no basis for reviewing the initial decision on these issues.

ANALYSIS

The Appellant's Cross Petition for Review

The appellant has not shown reversible error in the administrative judge's findings on the merits of the charges and on his affirmative defenses.

¶5 With respect to the first charge, "conduct unbecoming a Federal employee," the agency alleged four specifications of misconduct against the appellant involving Tammi Merrill, the Deli/Baker Manager of Tony's Fine Foods, and three specifications involving Lennis Yingling, Merchandiser/Vendor Stocker. The agency alleged that the appellant engaged in inappropriate conduct from June 1995 to December 1996, over a period of approximately 18 months. AF, Tab 4, Subtab 4G at 1-3.

¶6 The agency stated that: (1) In June 1995, the appellant went into Merrill's work area, placed his arm around her, touched her, and acted towards her in an

"overly friendly[] and overbearing" manner; (2) in November/December 1995, he told her that he wanted to kiss her; (3) in the summer of 1996, while she was in the bakery freezer, he groped under her skirt to her crotch and then made inappropriate comments and smelling gestures about his action throughout the day of the incident; and (4) in December 1996, he asked her to sit on his lap and stated, when she warned him "that she was ready to call the 'hot line,' regarding [his] behavior ... that 'anyone who [made] trouble would pay like hell.'" AF, Tab 4, Subtab 4G at 1-2.

¶7 The agency further alleged that: (1) Some time in April 1996, the appellant commented that Yingling "looked nice," and, approximately 2 months later, began complimenting her on her appearance again, touched her shoulder and appeared to be "looking [her] up and down," *id*. at 2; (2) on one occasion when Yingling was wearing a new pair of pants, the appellant remarked, "[T]hose are really nice looking pockets you have," a comment Yingling interpreted as sexual, *id.* (testifying that she believed the appellant was referring to "[t]he pockets on [her] behind," Hearing Transcript (Tr.) at 174); (3) on another occasion, the appellant offered to brush off "something" that fell on Yingling's shirt, an offer she refused, and commented, while Yingling was demonstrating cookies that "[he] would like to eat her cookies." AF, Tab 4, Subtab 4G at 2-3. The agency stated that the appellant's behavior continued despite the fact that these individuals repeatedly communicated to the appellant that his conduct was unwelcome. *Id*. at 1-3.

¶8 With respect to the charge of "violating Defense Commissary Agency and Southwest Region Policy on Sexual Harassment which created an abusive, hostile work environment," the agency's Policy Statement on Sexual Harassment provides in pertinent part as follows:

> It is the policy ... to provide an employment environment free from all forms of intimidation, hostility, offensive behavior and discrimination, including sexual harassment. Such discrimination or harassment may take the form of unwarranted verbal or physical conduct, verbal or written derogatory or discriminatory statements,

> which may result in decisions affecting status, promotions, raises, favorable work assignments, or recommendations. Such behavior, or tolerance of such behavior, violates the policy of [the Defense Commissary Agency] and may result in disciplinary action including termination. The conduct herein described is contrary to [Defense Commissary Agency] policy and is illegal under both state and federal law.

AF, Tab 4, Subtab 4R. Because the agency charged the appellant with violating its own sexual harassment policy and not with violating Title VII of the Civil Rights Act of 1964, the agency was required to prove only that the appellant's conduct violated that policy. *See Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 234-35 (1993).

¶9 The agency alleged that the appellant violated its sexual harassment policy as described in three specifications of misconduct committed by the appellant against Cynthia Jefferson, Lead Sales Store Checker. The agency alleged that, beginning in June 1994, until about September or October 1996, the appellant continually placed his arm around Jefferson's shoulder, whispered in her ear that she looked and smelled "good," told her, "[Y]ou make me feel horny," and remarked, when Jefferson returned from attending to her ailing husband during her lunch period wearing changed clothing, "[M]aybe you go home to give dessert to your husband," and "I'm jealous of your husband." AF, Tab 4, Subtab 4G at 3. The agency stated that the appellant persisted in his behavior even though Jefferson told him repeatedly that it was unwelcome. *Id*.

¶10 The three complaining witnesses, the appellant, and other witnesses testified regarding the charges. The administrative judge found the agency's charges sustained based primarily on his assessment of the credibility of the testimonies presented at the hearing. Initial Decision at 3-11. Among the relevant credibility factors that the administrative judge considered were the mutual corroboration of the complaining witnesses' testimonies, corroboration of their testimonies by their written statements, similarities in their testimonies that established a pattern of

sexual abuse by the appellant, and the witnesses' demeanor, which the administrative judge found was straightforward. *Id.* at 5-7.

¶11 On the other hand, the administrative judge found that the appellant's testimony denying the misconduct was inconsistent and inherently improbable. *Id*. at 7. Further, the administrative judge accorded limited weight to the witnesses who testified on the appellant's behalf. He found that one witness's testimony that Merrill told him that she was pressured by two employees in the agency's EEO office to make the sexual harassment allegations against the appellant "did not ring true" because it was contradicted by the facts and noted that the witness was the appellant's friend. The administrative judge noted that another witness was also the appellant's friend and that his job was dependent in part on the appellant. As to the appellant's other witnesses, who testified that the appellant acted professionally around them, the administrative judge found that they had no knowledge of how the appellant acted around the complaining witnesses, whom he had accosted in isolation. *Id.* at 8.

¶12 The appellant challenges virtually all of the administrative judge's credibility findings with respect to the merits of the agency's charges. PFR File, Tab 4, Appellant's Cross Petition for Review at 10-12. A review of those challenges indicate that the appellant is merely expressing disagreement with the administrative judge's credibility determinations without showing error in those determinations. *Id*. Our review of the record shows that the administrative judge fully considered the testimonies of the appellant, the complaining female workers involved, and other witnesses, and fully resolved the credibility issues consistent with *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Initial Decision at 7-9, 11. Because the appellant has not shown error in the administrative judge's fully explained credibility and fact findings, we find that they are entitled to due deference. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (special deference must be given to the

administrative judge's findings regarding credibility where those findings are based on the demeanor of witnesses). *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (the Board must give due deference to the credibility findings of the administrative judge, and mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

¶13 With respect to the appellant's contention relating to the issue of res judicata, we find that the appellant incorrectly asserted res judicata with respect to his allegation that the agency erred by disciplining him twice for the same offenses and that the administrative judge improperly considered the issue as res judicata. In *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995), the Board stated that the doctrine of res judicata precludes parties from relitigating issues that were, or could have been, raised in a prior action and that the doctrine is applicable if: (1) The prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. Here, there was no prior judgment by a forum with competent jurisdiction. Rather, the administrative judge should have analyzed this issue as a claim that the agency cannot impose disciplinary or adverse action more than once for the same misconduct. *See Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993). Nevertheless, the administrative judge's error in this regard did not prejudice the appellant's substantive rights under *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). The record shows that, in the suspension action, the agency, based on Merrill's complaint, charged the appellant with harassing Allison Hill, one of Merrill's subordinate employees, and causing disruption in the Deli/Bakery, a charge that is

totally unrelated to the current charges. AF, Tab 4, Subtab 4P. Because the suspension action and the removal action were based on different grounds, the appellant's claim of error is without merit. *Wigen*, 58 M.S.P.R. at 384.

¶14 As to the appellant's contentions relating to the inadequacy of the removal proposal notice and the inadequacy of the agency's investigation into the appellant's alleged misconduct, we find that the administrative judge also fully examined and correctly determined those issues in the initial decision, *see* Initial Decision at 12-14, and the appellant has presented no sound reason for disturbing those determinations. Moreover, even assuming that the administrative judge erred in his findings on these issues of harmful error, the appellant has not shown resulting prejudice to his substantive rights. *See Panter*, 22 M.S.P.R. at 282.

The Agency's Petition for Review

The administrative judge erred by mitigating the removal penalty to a 90-calendar-day suspension.

¶15 In mitigating the removal penalty, the administrative judge found that the appellant's misconduct was serious but found that neither the proposing nor the deciding official appeared to have fully weighed certain relevant penalty factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), noting that the deciding official testified that he only infrequently made disciplinary decisions. Thus, the administrative judge considered the following favorable penalty factors: The appellant's approximately 14 years of service and his very good work performance, which was outstanding in all but 1 year; the many letters of award and appreciation he had received and his special assignments to other commissary stores as Commissary Officer; his prior disciplinary record, which included only the 10-day suspension (which was issued in June 1997, approximately 6 months before the first rescinded removal proposal notice was issued December 1997, and to which the administrative judge accorded limited weight because the misconduct was concurrent with the currently charged

misconduct); the absence of notoriety attached to the charged misconduct; the appellant's demonstration of rehabilitative potential, as the administrative judge found was indicated by evidence that the appellant did not engage in further misconduct of a similar kind after he was placed on a detail; and extenuating circumstances in the appellant's work environment that indicated that he was operating under stress because of tension with his supervisor and evidence that the appellant did not engage in the misconduct when his supervisor was away from work. Initial Decision at 18-20.

¶16 The agency contends that the administrative judge improperly substituted his judgment for the agency's and challenges each of the mitigating factors upon which the administrative judge relied. PFR File, Tab 1, Agency Petition for Review at 3-7.

¶17 We find that the seriousness of the appellant's misconduct outweighs the favorable penalty factors discussed by the administrative judge. In this regard, we note that the three female employees concerned testified regarding the impact of the appellant's sexual misconduct on their lives. Yingling testified that the appellant's conduct affected her to the extent that she deliberately changed the way she dressed to be "less dressed" in an effort to deter his behavior but that her efforts were unsuccessful. Tr. at 177. Merrill testified that the appellant's conduct upset her and adversely affected her performance on the job. She testified that male employees in the meat department tried to persuade her not to complain about the appellant's behavior and that when she complained to the Grocery Manager about the appellant's behavior, the Grocery Manager accused her of not performing her work, which left her "in tears." Tr. at 115-16, 119. She also testified that the appellant "[sa[id] that anyone who ma[de] trouble would pay like hell." Tr. at 119. In addition, she testified that the appellant's conduct affected her personal life. Tr. at 115. Jefferson testified that she attempted to avoid being in the appellant's presence, that the appellant's conduct almost caused

her to cry, that it made her feel uncomfortable at work, that it kept her "scared" that he would make inappropriate remarks to her, and that he made her "scared" that she would lose her job. Tr. at 77-78.

¶18 The deciding official testified that he removed the appellant because his misconduct was serious and involved many instances of sexual harassment and inappropriate contact over a period of time that caused the female employees involved "to change the way they acted in terms of dress and speech and schedules of work hours." Tr. at 6-9. He testified that he took into consideration the fact that the appellant was a supervisor, that he was trained regarding sexual harassment, and that he was responsible for ensuring that the agency's sexual harassment policy was followed. Tr. at 7-9. He stated that the appellant's position as a supervisor made his misconduct unacceptable. Tr. at 7.

¶19 We find that the appellant's acts of sexual misconduct were not isolated but were continual over a period of approximately 18 months and that the appellant completely ignored the requests of the female workers concerned to cease his behavior. We further find that the appellant's behavior adversely affected these employees' lives, including their work environment. The Board has recognized that supervisors are responsible for maintaining a work environment free of sexual harassment. *See Evans v. Department of the Army*, 22 M.S.P.R. 340, 342 (1984), *aff'd*, 770 F.2d 180 (Fed Cir.) (Table), *cert. denied*, 474 U.S. 979 (1985). As a supervisor, the appellant exhibited poor judgment in engaging in the charged acts of sexual misconduct. An agency is entitled to hold a supervisory employee to a higher standard of conduct than other employees. *Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996); *Smith v. Department of the Navy*, 62 M.S.P.R. 616, 620 (1994).

¶20 Thus, we find that, notwithstanding the favorable penalty factors upon which the administrative judge relied, removal is a reasonable penalty in view of the seriousness of the appellant's sexual misconduct, particularly its continual,

unrelenting nature, its pervasiveness, its perpetration on several female employees, and his position as a supervisor. *See Payne v. U.S. Postal Service*, 74 M.S.P.R. 419, 427-30 (1997) (despite supervisory employee's 8 years of satisfactory service with the agency and his prior clean disciplinary record, removal was a reasonable penalty for sustained charges of conduct unbecoming a supervisor, striking another supervisor, and sexual harassment of a supervisor), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (Table); *Alexander v. U.S. Postal Service*, 67 M.S.P.R. 183, 186-92 (1995) (despite, inter alia, supervisory employee's 31 years of combined military and civilian service and numerous letters of commendations, awards, and compliments, removal was a reasonable penalty for his violation of agency's sexual harassment policy by verbal and physical sexual misconduct, including exposing himself to subordinate female employee and indicating that she could receive a promotion by having sex with him); *Kirk v. Department of the Navy*, 58 M.S.P.R. 663, 672 (1993) (citing *Vakili v. Department of Agriculture*, 35 M.S.P.R. 534, 539 (1987)) (physical contact was an aggravating factor that justified a more severe penalty than might otherwise have been warranted against nonsupervisory employee); *Pugh v. U.S. Postal Service*, 20 M.S.P.R. 326, 327 (1984) (removal was a reasonable penalty for sexual harassment involving a single incident of physical contact).

ORDER

¶21 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 FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar

days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

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

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.