

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

87 M.S.P.R. 56

ANDREW LUDLUM,

Appellant,

DOCKET NUMBER

NY-0752-99-0088-I-1

v.

DEPARTMENT OF JUSTICE,

Agency.

DATE: October 5, 2000

Lawrence A. Berger, Esquire, Garden City, New York, for the appellant.

Betsy J. Levensohn, Esquire, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed its removal action. For the following reasons, we GRANT the agency's petition for review, REVERSE the initial decision, and MITIGATE the agency's penalty of removal to a 120-day suspension.

BACKGROUND

¶2 The agency removed the appellant from his GS-11 Special Agent position with the Federal Bureau of Investigation (FBI) based on charges of making an unauthorized traffic stop, transporting an unauthorized passenger in his agency vehicle, committing time and attendance violations, and lack of candor during an

administrative inquiry. Appeal File (AF), Tab 5, Subtabs 4a and 4e. The appellant timely petitioned for appeal asserting that the agency could not prove its charges and did not consider appropriate mitigating factors. *Id.*, Tab 1. The parties later stipulated that the sole issue in the case was whether the appellant evinced a lack of candor in an April 6, 1998 sworn statement he signed during the agency's investigation. *Id.*, Tabs 9 and 11; Hearing Transcript (HT) at 3.

¶3 After a hearing, the administrative judge (AJ) reversed the action upon finding that the agency did not prove the stipulated charge. AF, Tab 20. The AJ found that the agency did not show that the appellant signed the April 6, 1998 statement with an intent to deceive, i.e, his professed "confusion of recall" was a plausible explanation sufficient to defeat a circumstantial inference of deception.

¶4 The agency has filed a timely petition for review, and the appellant has filed a timely response opposing the petition for review.¹

ANALYSIS

The Agency's Procedural Arguments are Without Merit.

¶5 The agency asserts that the AJ erred when he interpreted the parties' stipulation as limiting the case to the lack of candor charge because the agency intended to limit only the charge presented at the hearing. The agency also claims that the AJ erred when he refused to rule on its motion to deem its request for admissions admitted, and excluded evidence that it claims would have impeached the appellant's credibility. These arguments are without merit.

¶6 At a prehearing conference the parties agreed that "the sole issue, at trial, will be the 'candor' matter. The exact framing of this issue will be placed in the record at start of trial." AF, Tab 11. At the hearing, the AJ found that the parties' stipulation "will supersede the letter of proposed removal," and that the

¹ The agency has submitted evidence of compliance with the AJ's interim relief order, and the appellant has not challenged that evidence.

stipulation "defines the sole issue of the case and that sole issue is whether or not the Appellant evinced a lack of candor in his April 6, 1998 statement which he gave during his OPR [Office of Professional Responsibility] investigation." HT at 3. Both parties concurred in that stipulation. HT at 3-4. Thus, contrary to the agency's contention, the stipulation superseded the notice of proposed removal, which contained additional charges, and the AJ properly adjudicated only the lack of candor charge. *See, e.g., Taylor v. Department of the Army*, 44 M.S.P.R. 471, 473-74 (1990) (where the appellant stipulated to the narrowing of the charges at the hearing and did not object to or seek clarification of the stipulation, he could not challenge the stipulation on review).

¶7 We also find that the AJ's failure to rule on the agency's motion to have its requests for admissions deemed admitted did not prejudice the agency's rights. *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 agency served its discovery requests, including its request for admissions, on January 11, 1999. AF, Tab 6, Ex. A. A response from the appellant was therefore due twenty days later, or by January 31, 1999. *Id.*; 5 C.F.R. § 1201.73(d)(2). As the agency correctly notes, the appellant did not submit a response by that date. The time limit for a motion for an order compelling discovery, however, is 10 days after the time limit for the appellant's response has expired. 5 C.F.R. § 1201.73(d)(4); *see* 5 C.F.R. § 1201.74(a). The agency's motion to compel was filed on February 16, 1999, six days after the February 10, 1999 deadline. AF, Tab 6. Therefore, it was untimely filed. *See Golden v. U.S. Postal Service*, 60 M.S.P.R. 268, 271 n. (1994) (the appellant's motion to compel discovery was untimely filed, and the AJ therefore properly denied it).

¶8 Further, because the agency's representative did not preserve an objection to the AJ's ruling at the hearing excluding evidence the agency claims would have impeached the appellant's credibility, HT at 187-90, it may not object to this

ruling for the first time on review, *see Whitehurst v. Tennessee Valley Authority*, 43 M.S.P.R. 486, 491 (1990).

The Charge is Sustained.

¶9 The agency's primary contention is that the AJ did not address the stipulated issue of whether or not the appellant lacked candor, i.e., whether his April 6, 1998 statement was true or false, instead finding that the agency did not prove that the statement accurately reflected what the appellant had told the investigator, Supervisory Special Agent Robert J. Liberatore. Petition for Review (PFR) at 10-12. The agency claims that the AJ improperly rejected its definition of "lack of candor," which it contends means a failure to provide full and truthful information under oath, instead finding that the agency's definition "could encompass the most innocent of failure of recollection or absence of detail amounting to a demand for an almost total recall." *Id.* at 12-15 (quoting the initial decision at 7). The agency further argues that the AJ erred by reviewing the appellant's misconduct under a falsification standard, rather than a distinct lack of candor standard that does not require proof that "the employee was certain his statement was incorrect and nevertheless deliberately misrepresented the facts." *Id.* at 16-18. Even assuming that the AJ correctly applied a falsification standard, the agency claims that there is sufficient evidence in the record to satisfy that standard. *Id.* at 18-27. Finally, the agency contends that the AJ did not make proper credibility determinations because he did not consider the credibility of the agency's witnesses who contradicted the appellant, and did not consider the appellant's inconsistent statements. *Id.* at 28-31.

¶10 The gravamen of this case involves an April 6, 1998 statement the appellant signed under oath that deals with the frequency of his use of a government vehicle for transporting an unauthorized person (his minor daughter). In explaining a traffic stop he made while his daughter was in the government vehicle, the appellant wrote that "I want to mention that I was not authorized by

my Supervisor or any [sic] anyone else to pick up my daughter or any one else this evening. Nor have I ever received permission to have an unauthorized person in a Buvehicle." AF, Tab 5, Subtab 4n at 5-6. The appellant further stated:

This was not the only occasion I picked up my daughter with a Buvehicle. Similar emergency circumstance[s] occurred once in December, 1997 and once again in January, 1998. *Other than these three occasions, I never had any other unauthorized person in a Buvehicle.* I have had other persons, namely informants and Assistant United States Attorneys, in Buvehicles, but these were all work related.

Id. at 6 (emphasis added). A subsequent investigation of day-care center records revealed that the appellant had picked up or dropped off his daughter from day care on more than three occasions. *Id.*, Subtab 4f at 3. In a May 8, 1998 written statement the appellant averred:

I have reviewed a number of records ... reflecting my daughter's name along with dates, times and initials. A number of these documents have my initial[s] and time listed. On these occasions I either picked up or dropped off my daughter. On each of these [twelve or fourteen] occasions, listed below, I used a Bureau automobile, without authorization, to pickup [sic] or drop off my daughter *I did not mention this during my previous interview for fear of causing me further problems as I was uncertain of the previous occasions and apologize for leaving out these material facts.* I am aware, after reviewing these records that it was more than three occasions, as stated in my original statement, but those three occasions I mentioned earlier I remembered more vividly since my wife had called and each was an emergency situation. On these other occasions, it was planned earlier in the day I would pick up my daughter and on the occasion I dropped her off, it was on my way to work.

Id., Subtab 4h at 1-2 (emphasis added).

¶11 The AJ found that the agency did not prove its "lack of candor" charge because "the underlying statements in [sic] which they rely accumulate to form a Roshomon-like exercise in deconstruction." The AJ noted that the agency did not subject the appellant to a polygraph examination even though he agreed to such an examination. The AJ further found that, because the appellant's April 6, 1998

statement was confessional in nature, any subsequent misstatement as to the exact number of times he used his government vehicle to pick up his daughter "does not support an inference of intent to deceive." Because the agency did not enter into evidence the questions to which the appellant was responding, the AJ found that a variety of inferences could be drawn from the April 6, 1998 statement. The appellant could have been referring to like "emergency" situations or could have been genuinely confused regarding whether he had been using his government or personal vehicle. The AJ found that because the April 6, 1998 statement was reconstructed by Liberatore before being reviewed and signed by the appellant, it could have reflected Liberatore's subjective "perceptual projection as to what he thought pertinent as opposed to what [the] appellant stated to be his understanding of the center of gravity of interrogation."

¶12 The AJ further found that the statement could not form the basis for a falsification charge because the co-interviewer, Supervisory Special Agent John Bowe, corroborated the appellant's testimony that the appellant stated on April 6, 1998, that he could not give the exact number of times he had actually picked up his daughter. The AJ decided that this cast doubt on the objectivity and validity of the final written version of the interview, that the fact that Bowe had no input in the statement left "the recollection and reconstruction of the entire interview within the perception of one interviewer," and that this absence of corroboration had a "further negative impact on the integrity of this procedure." The AJ determined that "[a]ll of this adds up to a faulty memorialization procedure." Finally, the AJ found that the appellant's testimony was unfaltering, coherent, straightforward, and not inherently improbable, and that the appellant's explanation "of confusion of recall, as buttressed by the testimony of Special Agent Bowe" was "persuasive as a plausible explanation sufficient to defeat a circumstantial inference of deception." The AJ concluded that, having produced no independent evidence bearing on an intent to deceive, the agency did not prove that the appellant intentionally withheld the truth with intent to deceive.

¶13 We find that the agency is correct that the issue in this case is whether the agency proved a charge of "lack of candor," not a charge of falsification. The parties stipulated that the notice of proposed removal had been "superseded," and that the "sole issue of the case" was whether or not the Appellant evinced a "lack of candor." A "lack of candor" charge may encompass a broader range of misconduct than a falsification charge. See *Friedrick v. Department of Justice*, 52 M.S.P.R. 126, 133 (1991) (in upholding a "lack of candor" charge, the Board found that "[a]sserting a fact under oath without actual knowledge of the fact, in the hope that it is true, is not a standard of credibility that is acceptable to the FBI."), *aff'd*, 980 F.2d 742 (Fed. Cir. 1992) (Table); *Gootee v. Veterans Administration*, 36 M.S.P.R. 526, 530 n.4 (1988) (although the appellant's answer to the question "What arrangements were made to have team pictures taken?" was technically correct, a lack of candor charge could still be sustained where he failed to admit that he knew the photographs were taken with agency equipment and materials); see also *Swan Creek Communications, Inc. v. Federal Communications Commission*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (lack of candor exists when an applicant breaches the duty "to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited."). In fact, the proposing official testified that a "lack of candor" meant a failure to answer fully and truthfully the questions posed during an administrative inquiry. HT at 80; see HT at 142-43 (deciding official's testimony that "lack of candor" means lack of forthrightness, lack of testifying truthfully including all the relevant circumstances).²

² This testimony is consistent with the agency's Manual of Administrative Operations and Procedures, which provides that employees must be "entirely frank and cooperative" in answering inquiries of an administrative nature. AF, Tab 5, Subtab 4aa. Further, the FD-645 form the appellant signed on April 6, 1998, provides, "[y]ou have a duty to reply to these questions and agency disciplinary action, including dismissal, may be undertaken if you refuse to answer or fail to reply fully and truthfully." *Id.*, Subtab 4o.

¶14 This is a very close case on the merits of the agency's charge of lack of candor. The AJ found that: (1) the appellant's testimony that he was uncertain regarding how many times he transported his daughter was very credible; (2) the appellant's testimony that he said at the interview (which was the basis for his April statement) that he could not give the exact number of times he transported his daughter and was confused about this issue was corroborated by the testimony of Supervisor Special Agent Bowe, who was the co-interrogator at the interview; (3) there was no tape or transcript of the interview that led to the April statement; (4) the agency did not enter into evidence the interview questions to which the appellant was responding and a variety of inferences could be drawn from the appellant's subsequent statements concerning issues covered in the April statement; and (5) the customary procedure of having both special agents confer on the draft statement to recall what transpired during the interview was not used here. Initial Decision at 6-8. We find considerable merit in the AJ's finding that because of the faulty process that the agency used in memorializing the questions the appellant was asked during his April interview and the appellant's responses to those questions, a variety of inferences can be drawn from his subsequent statements about issues covered in the April interview. *Id.* at 7.

¶15 Nevertheless, as set forth below, we find that there is enough evidence to find that the agency met its burden of proving the lack of candor charge. We begin our analysis with the following key sentence in the April statement: "Other than these three occasions, I never had any other unauthorized person in a Buvehicle." The appellant focuses on the second phrase of this sentence, asserting that it is true because the agency has not shown that he ever had any unauthorized person in his government vehicle other than his daughter. PFR, Ex. 2 at 2. Thus, he contends that the agency's charge cannot be sustained.

¶16 We first note, however, that contrary to the AJ's finding, there is no dispute that the appellant was asked how many times he had transported his daughter in his government vehicle. HT at 23 (testimony of Liberatore), 198 (testimony of

Bowe), 211-12 (testimony of the appellant); AF, Tab 5, Subtab 4r at 3 (March 24, 1998 instructions from OPR that during the interview "SA Ludlum should provide information on the number of occasions he has utilized the Bureau vehicle for transporting his infant child, wife or other unauthorized passengers in his Bureau vehicle."). The April statement reflects the appellant's understanding that he had to "reply *fully* and truthfully." AF, Tab 5, Subtab 4n at 1 (emphasis added). Moreover, he acknowledged that he was given an opportunity to make changes to the statement as drafted by Liberatore. AF, Tab 5, Subtab 4c at 2-3; HT at 213.

¶17 Yet when the appellant signed the statement indicating that he had transported his daughter on three emergency occasions, he clearly did not mention other occasions on which he had transported his daughter in a government vehicle, nor did he mention any uncertainty as to whether there were other occasions on which he had transported his daughter in a government vehicle. In his May statement, the appellant admitted that he had transported his daughter in his government vehicle on twelve to fourteen occasions, and indicated that he did not mention these other occasions during his April interview "for fear of causing me further problems as I was uncertain of the previous occasions and apologize for leaving out these material facts." AF, Tab 5, Subtab 4h. Similarly, the appellant admitted at the hearing that he was afraid of "undue reprisals" for speculating with respect to the number of times he transported his daughter in a government vehicle. HT at 223. He explained in an August 21, 1998 sworn statement that "[i]n an effort to move the OPR process along, I signed my [April 6] statement even though it was not completely accurate." AF, Tab 5, Subtab 4c at 3. Thus, the subsequent statements and the appellant's testimony reflect that there were other occasions on which he transported his daughter in a government vehicle, he may have been "uncertain" as to those occasions when he signed the April statement, and he did not mention them or his uncertainty in the April statement because he was afraid of causing himself further problems. We therefore find that the appellant lacked candor in his April statement, i.e., did not

respond fully and truthfully, when he failed to mention his uncertainty as to whether he had transported his daughter in his government vehicle, thereby creating an impression that there were only three occasions. *See Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 337 (1994) (the agency may rely on an appellant's admissions to an investigator in support of its charge), *aff'd*, 64 F.3d 678 (Fed. Cir. 1995) (Table).

¶18 Although the appellant interprets the sentence in question as true in the sense that one phrase indicates that he did not transport anyone other than his daughter in a government vehicle, we disagree with this interpretation. We first note that the appellant did not indicate in either his May or August statements that this was what his April statement meant, nor did he raise this argument during his oral response to the notice of proposed removal. AF, Tab 16; HT at 139-40 (testimony of the deciding official). In fact, his May statement suggests otherwise. The appellant's admission that "it was more than three occasions *as stated in my original statement*," AF, Tab 5, Subtab 4h (emphasis added), indicates that in May he interpreted his April statement to mean that the three occasions he mentioned were the only occasions on which he had transported his daughter in his government vehicle. *Beck v. Department of Justice*, 67 M.S.P.R. 219, 223 (1995) (a statement against one's interest is generally regarded as highly reliable), *aff'd*, 70 F.3d 129 (Fed. Cir. 1995) (Table). The appellant's testimony at the hearing, by contrast, suggests that his more recent interpretation is a post-hoc rationalization that conflicts with his earlier understanding of the meaning of his April statement. *See* HT at 177, 181 (the appellant testified that "our defense has somewhat evolved from that initial assertion where I never used the word 'never' ..., and that "[t]he way our defense has evolved since moving away from the use of the word 'never' because since we've carefully and time and time again re-examined the language of that first statement, it appears that there is an interpretation which would tolerate the use of the word 'never'."). In addition, the appellant's May statement is entitled to greater weight because it was made closer

in time to the April statement. See *Hillen v. Department of the Army*, 66 M.S.P.R. 68, 92-93 (1994), *recons. denied*, 72 M.S.P.R. 369 (1996); *Berube v. General Services Administration*, 37 M.S.P.R. 448, 454-55 (1988) (deposition testimony was entitled to greater weight than hearing testimony where, among other things, it was closer in time to the removal). Although an extrajudicial admission is not conclusive on the party who made it or to whom it is attributable, the appellant has not adequately explained, rebutted, or contradicted it. *Garibay v. Veterans Administration*, 35 M.S.P.R. 327, 333 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table).

¶19 Moreover, the "I never had any other unauthorized person in a Buvehicle" phrase does not make sense under the appellant's latest interpretation when read in the context of the first part of that sentence, "[o]ther than these three occasions." The sentence would imply, if the appellant's interpretation were correct, that on those three emergency occasions specifically mentioned in the April statement he had someone in addition to his daughter in the vehicle. Yet, the appellant denies that he had someone besides his daughter in the vehicle on those three occasions. HT at 225-26. The sentence begins with the confessional statement, "[t]his was not the only occasion I picked up my daughter with a Buvehicle," and identifies two other occasions on which the appellant transported his daughter in his government vehicle. When considered in the context of the entire April statement and in conjunction with his May statement, we find that the April statement leaves the distinct impression that the three occasions mentioned were the only occasions on which the appellant had transported his daughter in his government vehicle. Thus, we find that the appellant made a statement lacking in candor because there were substantially more instances than three.

¶20 The appellant asserted that he did not use the word "never" during the April interview, did not mean to convey during the interview that there were not other occasions that he may have picked up his daughter in his government vehicle, and signed the April statement even though it was not completely accurate "[i]n an

effort to move the OPR process along." AF, Tab 5, Subtab 4c. Whether the appellant testified credibly that he was truthful or confused during his oral interview, however, is beyond the scope of the agency's charge, which relates to a lack of candor by the appellant in his sworn, written statement of April 6, 1998, which he signed on April 9, 1998. AF, Tab 5, Subtab 4n; *see Wolak v. Department of the Army*, 53 M.S.P.R. 251, 259 n.11 (1992) (whether the appellant made a false statement to co-workers was not within the scope of the agency's charge, which related to false statements made during an interview by members of the Directorate of Law Enforcement and Security and the FBI).

¶21 We recognize that special deference must generally be given to an AJ's findings regarding credibility where those findings are based on the demeanor of witnesses. *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985). Nevertheless, the Board may substitute its own determinations of fact for those of an AJ, even when his credibility findings are based in part on demeanor, when it articulates a sound reason, based on the record, for a contrary evaluation of the evidence. *Coppola v. U.S. Postal Service*, 47 M.S.P.R. 307, 318 (1991). As set forth above, we have substituted our own determinations of fact because the AJ essentially focused on determining whether the appellant was truthful during the *oral interview*, and whether there were inaccuracies in reducing the interview to writing, without considering the appellant's May and August statements admitting misconduct. He did not assess whether the *written* statement demonstrated a lack of candor, which was the essence of the agency's charge. *See Lewis v. Department of the Army*, 63 M.S.P.R. 119, 125 (1994) (where the AJ used a flawed analysis in making his factual findings, the Board set aside those findings and substituted its own determinations of fact using the proper analysis), *aff'd*, 48 F.3d 1238 (Fed. Cir.) (Table).

¶22 We also disagree with the AJ's conclusion that, because the appellant's April statement was confessional in nature, any subsequent misstatement as to the exact number of times he used his government vehicle to pick up his daughter did not

support an inference of an intent to deceive. The appellant confessed to three infractions that were the product of emergency situations. A reasonable person in the appellant's position likely would have believed that any punishment for these infractions would be less severe than punishment for twelve to fourteen infractions, the majority of which were not emergencies but were planned.³

¶23 Despite the AJ's determination that the appellant could have been referring to "emergency" situations or could have been confused regarding whether he had been using his government or private vehicle, the appellant's May statement, which the AJ did not address in his reversal of the agency's charge, supports our determination that the appellant lacked candor in his April statement. Regardless of whether the April statement accurately reflected everything that was discussed during the interview, the appellant, as a special agent, was responsible for the statement he voluntarily signed under oath. *See Bize v. Department of the Treasury*, 3 M.S.P.R. 155, 169 (1980) (an Internal Revenue Service criminal investigator was not coerced in signing an affidavit where, among other things, he was a criminal investigator with knowledge of interviewing techniques and any changes were made with his approval).

¶24 Although the appellant relies on the Supreme Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973) in support of his argument that the agency's

³ Moreover, the agency's decision not to subject the appellant to a polygraph examination does not bear on whether the agency proved its lack of candor charge. There has been no showing that the agency was required to conduct a polygraph examination. Even if a polygraph examination had been conducted, it is not clear that the results would be admissible or probative. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 254-55 (1980) (factors to be considered in determining the admissibility and probative value of polygraph examinations). We also do not find the appellant's agreement to undergo a polygraph examination to be particularly probative. *See United States v. Bursten*, 560 F.2d 779, 785 (7th Cir. 1977) (willingness to submit to a pretrial polygraph examination was "so unreliable and self-serving as to be devoid of probative value."); *Meier*, 3 M.S.P.R. at 253-54 (because the courts had consistently held that the refusal of a person to take a polygraph test is inadmissible, the Board held that it would not permit an adverse inference to be drawn from such a refusal).

charge cannot be sustained, we find that *Bronston* is distinguishable from this appeal. In *Bronston* the petitioner was convicted of perjury when, in response to a question during a bankruptcy hearing as to whether he had ever had any bank accounts in Swiss banks, he responded that "the company had an account there for about six months, in Zurich." *Bronston*, 409 U.S. at 354. The petitioner did have a personal bank account in Switzerland several years before the hearing, but his answer that the company had an account there was literally true. *Id.* at 354-55. The Court, reversed, finding that because the statute prohibiting perjury confined the offense to a witness who "willfully ... states ... any material matter which he does not believe to be true," a statement that was true but nonresponsive to the question could not be prosecuted. *Id.* at 357-58.

¶25 Here, by contrast, the appellant was not charged with perjury, but with the broader charge of lack of candor. His failure to set forth his uncertainty as to other possible occasions on which he transported his daughter in his government vehicle constituted a failure to respond fully and truthfully. Moreover, while *Bronston* made no incorrect statement, we have found that the appellant did make an incorrect statement. Thus, *Bronston* does not require a different result in this case. In sum, we find that the agency's charge is SUSTAINED.

The Agency Proved Nexus, but the Penalty is Mitigated to a 120-day Suspension.

¶26 The parties' stipulation that the lack of candor charge was the "sole issue of the case" could reflect their agreement that removal promoted the efficiency of the service and was a reasonable penalty if the charge was proven. *See Cooper v. U.S. Postal Service*, 42 M.S.P.R. 174, 180 (1989) (parties stipulated to reasonableness of removal action), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990) (Table). In support of such a determination, we note that the appellant did not challenge the reasonableness of the penalty in either his prehearing submission or his post-hearing brief. PFR, Ex. 2; AF, Tab 19. Moreover, neither the parties nor the AJ asked the deciding official about the penalty. HT at 125-67.

¶27 Even assuming, however, that the parties' stipulation covered the nexus and penalty issues, the Board is not bound by those determinations because a stipulation involving a mixed question of law and fact is not binding on the Board. *See Anderson v. Tennessee Valley Authority*, 77 M.S.P.R. 271, 276 (1998) (parties' stipulation that the appellant's competitive level was proper under the reduction in force regulations was not binding on the Board). The Board can review these issues because they are not purely factual.

¶28 Regarding nexus, an agency has a right to expect its workers to be honest, trustworthy, and candid. The appellant's lack of candor strikes at the very heart of the employer-employee relationship. *Stein v. U.S. Postal Service*, 57 M.S.P.R. 434, 441 (1993). Therefore, we find that the appellant's action directly impacted the efficiency of the service. *See* 5 U.S.C. § 7513(a).

¶29 Of the original four charges that the agency relied upon in removing the appellant, only one charge, the most serious, remains. We must, therefore, carefully consider whether it merits the penalty imposed by the agency. *See Hagmeyer v. Department of the Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Hernandez v. Department of Agriculture*, 83 M.S.P.R. 371, ¶ 10 (1999). The sustained charge is serious, *see Gootee*, 36 M.S.P.R. at 530, and the appellant served with the agency for only three years. The agency has the right to hold its special agents to a high standard of conduct, *see Capozzella v. Federal Bureau of Investigation*, 11 M.S.P.R. 552, 557 (1982), and the appellant was on clear notice of his responsibility to respond to the agency's questions fully and truthfully, AF, Tab 5, Subtabs 4n and 4o. Nevertheless, there are several other factors that we find support mitigation in this case.

¶30 As previously set forth, the AJ found that the appellant had a credible explanation (confusion of recall) for the statement at issue, and the appellant's explanation was corroborated by a second special agent conducting the interview. HT at 198-99. In addition, the appellant was working double shifts during the

period in question (16+ hours) and was not sure of when he had use of the agency vehicle, as opposed to his privately-owned vehicle. HT at 228-29.

¶31 Moreover, law enforcement status does not preclude mitigation of the penalty. *Larry v. Department of Justice*, 76 M.S.P.R. 348, 361 (1997). Here, the record reflects that the appellant received a “Superior” rating in 1997 and a “Fully Successful” rating in 1996, that he has no prior disciplinary record, and that he has “progressed well” as a Special Agent, according to Liberatore. AF, Tab 5, Subtab 4f at 6-7, 21. Liberatore and the agency’s OPR considered the appellant’s lack of experience as a special agent to be a mitigating factor, and we agree with this assessment. *Id.* at 6, 24.

¶32 The appellant’s supervisor, another supervisory special agent, and numerous colleagues wrote letters to the deciding official detailing their extremely high regard for the appellant and suggesting that the penalty be mitigated. AF, Tab 5, Subtab 4d. These letters suggest that the appellant could still work well with them, demonstrating possible rehabilitation potential. *See Stein*, 57 M.S.P.R. at 441. The appellant’s supervisors and colleagues were especially impressed by his decision to volunteer for two one-week tours of duty manning a trawler dredging the ocean floor for aircraft debris following the TWA Flight 800 crash during the late fall and early winter of 1996-97. AF, Tab 5, Subtab 4d. This was an assignment that the vast majority of other agents shunned due to the severe weather conditions that made many agents seasick, and the twenty-four hour per day nature of the assignment that removed agents from their families during the holiday season. *Id.* The appellant’s supervisors and colleagues found this type of service to be indicative of the appellant’s dedication to the agency. *Id.* Finally, in reviewing the factors set forth by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981) to be considered in determining the appropriate penalty, the agency’s OPR indicated that, in view of the appellant’s prior record, “he is entitled to the presumption that he would not

repeat this offense if retained as a Special Agent of the FBI.” AF, Tab 5, Subtab 4f at 23.

¶33 Accordingly, under the circumstances of this case, we find that the penalty of removal exceeds the tolerable limits of reasonableness, and that a 120-day suspension is the maximum reasonable penalty. *Cf. Larry*, 76 M.S.P.R. at 359-62 (a 120-day suspension was the maximum reasonable penalty for a law enforcement officer charged with falsification, assaults, and violent threats). Although Mr. Larry had fourteen years of satisfactory service, compared to the appellant's three years of unblemished service, this did not appear to be the primary factor that the Board relied upon in mitigating Mr. Larry's penalty, and there are additional mitigating factors present here that were not present in the *Larry* case. Such mitigating factors include the unique circumstances surrounding the appellant's making of the April 6, 1998 written statement, and the confidence expressed in the appellant by his supervisors and colleagues.

ORDER

¶34 We ORDER the agency to cancel the appellant's removal and to substitute in its place a 120-day suspension effective November 13, 1998. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶35 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.

- ¶36 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 of 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).
- ¶37 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 on 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).
- ¶38 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. § 1201.202. 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.