UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 40

Docket No. DE-0752-05-0291-I-3

Jack Neuman,

Appellant,

v.

United States Postal Service,

Agency.

March 4, 2008

Armand Salese, Esquire, Tucson, Arizona, for the appellant.

Robert E. O'Connell, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Member Sapin issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review (PFR) of the December 19, 2006 initial decision (ID) that mitigated the appellant's removal to a demotion. The appellant has filed a motion to dismiss the PFR. For the reasons set forth below, we DENY the appellant's motion, GRANT the agency's PFR under 5 C.F.R. § 1201.115, REVERSE the ID with respect to Charge 3, AFFIRM the ID in part with respect to Charge 4, REVERSE the ID with respect to the penalty, and SUSTAIN the appellant's removal.

BACKGROUND

¶2 On April 15, 2005, the agency removed the appellant from the position of EAS-25 Tucson, Arizona Plant Manager based on four charges resulting from an investigation that it conducted in 2004: (1) Unacceptable conduct (two specifications); (2) improper influencing of employees' testimonies; (3) appearance of impropriety; and (4) failure to follow proper procedures (two specifications). First Initial Appeal File (IAF 1), Tab 11, subtabs 4B, 4D. The appellant filed a petition for appeal of the removal. *Id.*, Tab 1.

¶3 After holding a hearing, the administrative judge (AJ) mitigated the appellant's removal to a demotion. The AJ dismissed Charge 1 and found that the agency did not prove Charges 2 and 3. He found that the agency proved Charge 4 (both specifications). ID at 8-26. He rejected as unproven the appellant's affirmative defenses of harmful error and retaliation. *Id.* at 26-27. Because he found that the maximum reasonable penalty for the sustained charge was a demotion, *id.* at 27-29, the AJ ordered the agency to cancel the removal and to substitute "a reduction-in-grade action to a position similar in grade level and pay as the Manager of Distribution Operations position that the appellant occupied prior to becoming the Tucson Plant Manager," *id.* at 29. The AJ also ordered the agency to provide interim relief if a PFR were filed. *Id.* at 30.

¶4 The agency has filed a PFR. PFR File, Tab 1. The appellant has filed a motion to dismiss the PFR and a response opposing the PFR. *Id.*, Tab 5.

ANALYSIS

Interim Relief

¶5 The appellant has moved to dismiss the agency's PFR for failure to comply with the AJ's interim-relief order on the basis that he has not received pay for a portion of the interim-relief period, i.e., December 19, 2006, through January 26, 2007. PFR File, Tab 5. The Board therefore issued a show-cause order directing the agency to respond to the appellant's motion. 5 C.F.R. § 1201.115(b)(2); PFR

File, Tab 7. After considering the parties' responses, PFR File, Tabs 8, 10, 12, 13, we exercise our discretion not to dismiss the agency's PFR because the agency has presented sufficient evidence to show that it has now paid the appellant for the contested portion of the interim-relief period. *See, e.g.*, 5 C.F.R. § 1201.115(b)(4); *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1332-34 (Fed. Cir. 2004); *Chavies v. Department of the Navy*, 104 M.S.P.R. 81, ¶ 4 n.1 (2006); *Yinat v. Department of the Army*, 101 M.S.P.R. 328, ¶ 7 (2005).

Charges and Affirmative Defenses

¶6 The AJ sustained only Charge 4 and found that the appellant did not establish his affirmative defenses. The appellant has not filed a cross-PFR challenging those findings. PFR File, Tab 5 at 30 n.11. The agency in its PFR has not challenged the AJ's finding that it failed to prove Charge 2. *Id.*, Tab 1. The agency argues that the AJ erred in dismissing Charge 1 and in finding that it failed to prove Charge 3. We find it unnecessary to address the agency's argument concerning Charge 1 because we find that the agency proved Charge 3 and that removal is the maximum reasonable penalty for Charges 3 and 4. *See, e.g., George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 9 (2007); *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 41 (2006).

Charge 3

¶7 In the notice of proposed removal, Postmaster Carl Grigel alleged as follows regarding Charge 3, Appearance of Impropriety: During the investigation several witnesses stated that there was an appearance of favoritism towards Quality Improvement Specialist Jennifer Brindley and that the appellant and Brindley were involved in a relationship for several years. A review of telephone records from December 25, 2003, to May 25, 2004, showed that no other employee who directly reported to the appellant received close to the number of calls from the appellant that Brindley did during the same time period. Witnesses also stated that the appellant and Brindley had private meetings at hotels that the

appellant instructed subordinate employees to set up and to reserve on "their credit card." The appellant further created the appearance of impropriety when he made Brindley a direct report, which was contrary to District structure. Instead, Brindley should have reported to the In-Plant Support person who, in turn, would have reported directly to the appellant. Having Brindley report directly gave the appearance to other employees that Brindley was receiving preferential treatment and created the appearance of impropriety. As Plant Manager, the appellant was expected to avoid any actions that might result in or create the appearance of using his position to give preferential treatment to any person and of losing impartiality as a Plant Manager, which affected the integrity of the agency's operations. IAF 1, Tab 11, subtab 4D.

¶8 In sustaining Charge 3, Arizona District Manager Charles M. Davis stated that the charge alleged that the appellant created an appearance of impropriety in his relationship with a subordinate employee by taking her out of her established position of reporting directly to In-Plant Support Manager Jim Martiny and, instead, making her a direct report to the appellant. After considering the appellant's oral and written responses, Davis sustained Charge 3. IAF 1, Tab 11, subtab 4B.

¶9 The AJ did not sustain Charge 3. The AJ stated that "[m]ost, if not all, of the facts that are relevant to this charge are undisputed," ID at 16, but noted that, at the hearing, he ruled that making Brindley a direct report and holding an inappropriately large number of telephone calls with her during the specified period were the only specific instances of impropriety cited in Charge 3, *id.* at 16 n.5. The AJ found as follows:

> Almost immediately [after the appellant became the Tucson Plant Manager], the appellant began assigning projects to Brindley because he viewed her as being underutilized by Martiny. . . . This direct assignment of projects to Brindley became problematic when Martiny, in his supervisory role, made project-related suggestions to Brindley, which she would reject by indicating that is not how the appellant wanted projects/tasks accomplished. To resolve this

> problem, Martiny suggested that the appellant have Brindley report directly to him. The appellant readily accepted this suggestion and made Brindley a direct report, admittedly without seeking the approval of Garrison, the Manager of the Arizona District Human Relations Office, or others.

Id. at 16.

¶10 The AJ further found as follows: The appellant became responsible for assessing Brindley's performance and granting her leave requests; Brindley attended some meetings that the appellant scheduled with other plant supervisors who held higher-level positions than Brindley did; Brindley and the appellant admitted that they had heard rumors that they had an affair, but straightforwardly denied it; and the appellant estimated that only 60 phone calls between them took place during the cited time period. ID at 16-17.

¶11 The AJ cited the following for finding that the agency failed to show that the appellant created the appearance of impropriety or favoritism by making Brindley a direct report: Davis admitted that making Brindley a direct report did not violate any agency rules or policies; rather, Davis viewed the decision as "merely evidencing bad judgment by the appellant." ID at 17. The fact that no Arizona manager was aware of a similar situation, i.e., where a plant manager had made a quality improvement specialist a direct report, did not show impermissible favoritism because the appellant set forth a valid reason for his action. Specifically, the appellant needed help gathering information necessary to improve various statistics, and, with Brindley's help, those statistics improved. *Id.* at 17-18. Although the appellant's supervisor, Arizona District Senior Plant Manager John DiPeri, was "somewhat unsure if he knew that the appellant had made Brindley a direct report," he felt that the appellant was using Brindley effectively. *Id.* at 18. Other people testified that they knew that the appellant had made Brindley a direct report, that she was helping improve the statistics, and that making her a direct report "shielded her from unwarranted criticisms from other Tucson Plant managers." *Id.* at 18. Making Brindley a direct report

therefore was within "the appellant's legitimately-exercised managerial discretion." *Id.* at 18. The AJ found that, "given the important work being accomplished," there was nothing improper in the number of telephone calls, most accurately represented by the appellant's estimate. *Id.* at 18.

¶12 The AJ also found that the direct-report relationship did not present the appearance of impropriety because of rumors of a past affair and any additional tasks Brindley accomplished beyond her normally-assigned duties. The AJ found that the appellant and Brindley credibly denied having had an affair and there was no allegation or evidence of a current affair that would lead to the appearance of favoritism, that responding to every workplace rumor "hinders your ability to manage," and that performing additional tasks did not create the appearance of impropriety because they were all Postal Service-related. ID at 18-19.

¶13 The agency asserts that the AJ erred in finding that it failed to prove Charge 3. The agency notes that the AJ found that the facts underlying the charge were mostly undisputed. It asserts that the AJ erred in citing Davis's admission that making Brindley a direct report did not violate any rule in finding that it failed to prove the charge. It contends that it needed to show only that the appellant's conduct affected the efficiency of the service, a point that the AJ failed to address. It also contends that the AJ erred in substituting his business judgment for the agency's in concluding that Brindley was doing "important work" as a justification for the appellant's action. PFR at 3, 19, 22-25. The agency asserts that the charge did not involve the work that Brindley was performing but the appellant's creation of "the appearance of impropriety by making her a direct report and in the manner in which he did it without seeking approval from anyone and especially in light of the rumors of an affair." *Id.* at 24-25. Concerning the latter, the agency argues that the AJ erroneously discounted the rumors because, again, it did not charge the appellant with having an affair, but with giving the appearance of preferential treatment because he

admitted that he was aware of the rumors when he made Brindley a direct report. *Id.* at 25-26.

¶14 We find that the AJ, in essence, required the agency to prove a charge that it did not bring. First, despite the general reference in the notice of proposed removal that making Brindley a direct report "was contrary to District structure," the record does not show that the agency charged the appellant with violating any agency rule or regulation. IAF 1, Tab 11, subtab 4D. Thus, as the agency argues, Davis's admission that the appellant did not violate any rule or policy was irrelevant to whether it proved the charge. Second, as the agency also argues, it did not charge the appellant with having an affair with Brindley or with hurting the agency's efficiency by making Brindley a direct report. In finding that the appellant credibly denied an affair with Brindley, that making Brindley a direct report helped improve plant statistics and was within the appellant's managerial discretion, and that there was nothing "improper" in the number of phone calls between the appellant and Brindley, the AJ actually found that the agency failed to prove a charge of improper conduct, not a charge of appearance of impropriety. The agency was not required, however, to prove that the appellant actually engaged in improper conduct to support the charge. *See, e.g., Suarez v. Department of Housing & Urban Development*, 96 M.S.P.R. 213, ¶¶ 31-32 (2004), *aff'd*, 125 F. App'x 1010 (Fed. Cir. 2005). The Board must review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more adequate or proper basis. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

¶15 We also agree with the agency that it proved the actual charge brought – appearance of impropriety. Although Martiny testified that he suggested that the appellant have Brindley report to the appellant and that he was "relieved" when the appellant did so, February 6, 2006 Transcript (Tr.) at 134, 171, he made the suggestion because, although he asked the appellant to have the work flow go through him to Brindley, *id.* at 131, the appellant was assigning tasks directly to

Brindley "like three, four times a day," *id.* at 130, it was causing "conflict," *id.* at 131, and "friction" between Brindley and him that the other employees could see, *id.* at 134, they "weren't making any headway on it," *id.* at 134, and, in some ways, it was "undermining my authority within my own department," *id.* at 171. Martiny further testified that the new arrangement was "just informal," i.e., no paperwork was sent to him to show that Brindley was now a direct report to the appellant. *Id.* at 134-35.

¶16 Similarly, the appellant admitted that he made Brindley a direct report without seeking approval from the Human Relations Office or anyone else, despite his awareness of a rumor that he and Brindley had an affair or relationship. March 8, 2006 Tr. at 136-37, 207-08, 218. In addition, Martiny testified that he heard rumors "all the time," including that Brindley and the appellant were having an affair. February 6, 2006 Tr. at 139. Brindley also testified that she was aware of rumors that she was involved in a romantic relationship with the appellant. *Id.* at 42-43. Thus, we find that the agency showed that the appellant created an appearance of impropriety in making Brindley a direct report.[1]

Charge 4

¶17 In the notice of proposed removal, Grigel alleged as follows regarding Charge 4, Specification 1, Failure to Follow Proper Procedures Regarding Investigation of Sexual Harassment Claims: During the investigation resulting in the charges against him, the appellant admitted that Brindley told him that Tucson Plant Maintenance Manager Andy Graves had acted inappropriately

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[1] The agency notes that it preserved an objection to the AJ's limiting the alleged instances of impropriety concerning which it was allowed to present evidence. PFR at 20 n.2. We find it unnecessary, however, to address the agency's objection and the propriety of the number of telephone calls. For the reasons discussed above, we find that the agency proved the charge. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

towards her in the work place and on an off-site trip to Denver. The appellant did not follow the proper procedures after Brindley's complaints, however, and so there were no official records that a management inquiry was conducted regarding the allegations. It was District policy to conduct a management inquiry into sexual harassment allegations; the appellant, as a Plant Manager who had participated in sexual harassment training, was aware that he must take such allegations seriously; the appellant had an affirmative duty as a manager to either conduct an investigation or ensure that one was conducted, and to document the results; he failed to do so; and, consequently, he put the agency in a position of potentially increased liability. IAF 1, Tab 11, subtab 4D. In sustaining Charge 4, Specification 1, Davis found, inter alia, that the appellant acknowledged that Brindley had told him on three occasions that she was upset about the way Graves behaved towards her. *Id.*, subtab 4B.

¶18 Grigel alleged as follows regarding Charge 4, Specification 2, Failure to Follow Proper Procedures Regarding PATS (Performance Award Tracking System) program: In July 2004, it came to management's attention that the appellant had entrusted his secretary, Katie Franklin, with over $10,000 in cash and money orders until he returned from administrative leave. A subsequent audit concluded that the appellant submitted Forms 7381 "for gift certificates, etc.," based on performance dollars earned by Tucson Plant employees through the District PATS program, but did not follow proper procedures on how the performance dollars were to be spent; he failed to spend the funds no later than the end of the first quarter of fiscal year 2003, as required; he failed to keep proper log entries; and he did not use the funds for the purposes intended. As a Plant Manager, the appellant knew or reasonably should have known the procedures, rules, and regulations for acquiring and distributing performance dollars; he was well aware of the importance of keeping proper records; he had a fiduciary duty to disperse funds within the specified time and in the proper manner; and he was not authorized to control or possess the funds after the first

quarter of fiscal year 2003. IAF 1, Tab 11, subtab 4D. After considering the appellant's oral and written responses, Davis sustained both specifications and thus Charge 4. *Id.*, subtab 4B.

¶19 The AJ sustained Specification 1 of Charge 4 based on the third occasion that Brindley reported Graves's conduct to the appellant. ID at 21-22.[2] The AJ found that Brindley testified that, prior to April 2004, she had twice told the appellant that Graves acted inappropriately towards her. *Id.* at 20-21. Concerning the April 2004 incident, the AJ cited Brindley's testimony that she was in the office during the evening working. *Id.* at 21. He further cited her testimony that "Mr. Graves came in; ultimately started making comments to me, and walked up so close that his crotch was near my face. I pushed back, and he came forward and tried to touch me." *Id.*; February 6, 2006 Tr. at 39. The AJ found that she reported the incident to the appellant about one week later, noting that she was contemplating filing a discrimination complaint against Graves. ID at 21; February 6, 2006 Tr. at 40. The AJ found that the appellant and all relevant witnesses acknowledged the reporting requirement concerning that incident. The AJ considered the appellant's claim that he met the reporting and documenting requirements because Brindley did not tell him about the incident until Graves had left for a detail and he then mentioned it and Brindley's intent to file a sexual harassment complaint to DiPeri. ID at 23. The AJ found, though, that the appellant's efforts fell short of the reporting and documenting requirements for such a serious allegation. *Id.* The AJ cited DiPeri's credible testimony that he did not remember discussing Brindley's allegations with the appellant. The AJ also cited the appellant's admissions that he did not tell DiPeri

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[2] Although the agency has contested the AJ's findings concerning the first two occasions, PFR at 27, we find it unnecessary to address the agency's arguments because the AJ sustained the overall specification. *Cf. Burroughs*, 918 F.2d at 172 (where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge).

that he was "handing this issue off to him," DiPeri did not say what he was going to do, the appellant did not fully describe Brindley's allegation, and he did not fill out any of the applicable sexual harassment forms or contact the Human Resources Office. *Id*.

¶20 The AJ also sustained Specification 2 of Charge 4, which he found involved the appellant's admitted failure to distribute approximately $10,000 that the Tucson Plant had obtained under PATS. The AJ cited Auditor Linda Mounsey's explanation that she found $83 in cash and $9,562 in money orders that had not been distributed; that the appellant was responsible for administering the Plant's PATS funds; and that, once a facility earned money, the funds were available to withdraw from a Phoenix-based account to purchase various items and distribute them to the employees. The AJ found that the appellant did not deny having the undistributed funds in July 2004, knowing that PATS ended in September 2002, and knowing of the general requirement to spend PATS funds by the first quarter of the fiscal year after the current fiscal year. The AJ rejected the appellant's defense that he properly viewed the spending requirement as being satisfied by simply withdrawing the funds from the Phoenix account, rather than actually disbursing them to employees. ID at 23-24.

Penalty

¶21 It is appropriate for penalty purposes to consider this to be an appeal in which not all charges were sustained because we have not addressed Charge 1 and the agency has not contested the AJ's finding that it failed to prove Charge 2. Thus, we have considered only Charges 3 and 4 in determining whether removal is a reasonable penalty. *See Alvarado*, 103 M.S.P.R. 1, ¶ 44. Where the agency proves fewer than all of its charges, the Board may not independently determine a reasonable penalty. Rather, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated, either in its final decision or during proceedings before the Board, that it desires that a lesser penalty be imposed on fewer charges. *Id.* The Board likewise may mitigate to the maximum

reasonable penalty for the sustained misconduct when the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty, or when the chosen penalty exceeds the tolerable bounds of reasonableness. *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 8 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007). The Board may impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing the mitigating factors. The Board's function with regard to its review of an agency's penalty selection is not to displace management's responsibility, but to determine whether management exercised its judgment within the tolerable limits of reasonableness. *Alvarado*, 103 M.S.P.R. 1, ¶ 44.

¶22 In its PFR, the agency has not indicated its desire that a lesser penalty be imposed based only on Charges 3 and 4. Davis stated in his decision that the most serious charges were Charges 2 and 4 and that the appellant's "actions as spelled out in these charges are of such severity that they alone would warrant [his] removal." IAF 1, Tab 11, subtab 4B at 8. Similarly, Davis testified that, in his judgment, Charge 4 standing by itself warranted removal. March 9, 2006 Tr. at 188. In addition, as explained below, Davis considered specific, relevant mitigating factors before deciding upon the penalty, and we find that the penalty does not exceed the tolerable bounds of reasonableness.

¶23 In determining the propriety of a penalty, the Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities. *See, e.g.*, *Martin*, 103 M.S.P.R. 153, ¶ 13; *Batten v. U.S. Postal Service*, 101 M.S.P.R. 222, ¶ 10, *aff'd*, 208 F. App'x 868 (Fed. Cir. 2006). As the AJ found, ID at 27, agencies are entitled to hold supervisors, such as the appellant, to a higher standard of conduct than non-supervisors because they occupy positions of trust and responsibility. *See, e.g.*, *George*, 104 M.S.P.R. 596, ¶ 11; *Martin*, 103 M.S.P.R. 153, ¶ 13. The Board's role is not to displace the judgment of senior agency managers who must have

confidence that employees – particularly those in supervisory roles – will act appropriately at all times. *Martin*, 103 M.S.P.R. 153, ¶ 13.

¶24 We find that the agency did not err in determining that, given the appellant's position as the Tucson Plant Manager, Charge 4 represented serious misconduct. The appellant was one of the highest level managers in Arizona and held the highest ranking position at the Tucson plant. March 8, 2006 Tr. at 130-31; March 9, 2006 Tr. at 39-40. As previously noted, Davis considered the charge to represent serious misconduct. IAF 1, Tab 11, subtab 4B; March 9, 2006 Tr. at 188. Moreover, Davis emphasized the relationship of the charge to the appellant's position as Plant Manager, where he was responsible to oversee all functions of the Tucson Plant operation, including exercising his discretion to employ a large amount of agency resources. IAF 1, Tab 11, subtab 4B at 9. Concerning Specification 1, the AJ admittedly found it more likely than not that the appellant counseled Graves after Brindley's first two complaints and, thus, that the appellant's failure to report those incidents did not support Specification 1. Nonetheless, Brindley's first two complaints should have been sufficient to put the appellant on notice that he had to take more effective action on learning of the third incident, since discussing it with Graves obviously did not end Graves's misconduct. Yet, the appellant still did not comply with the reporting procedure. Concerning Specification 2, Davis testified that fiscal year 2002 was the last year that the PATS program was in existence; that it was being terminated effective December 31, 2002; that the whole intent of the program was to reward performance that had already occurred by then; and that he considered the $10,000 or so in unspent PATS funds that the appellant had in May or June 2004 to be a significant amount. March 9, 2006 Tr. at 179-80. In that regard, the AJ did not support his stated conclusion that the charge was less serious because the appellant, who was admittedly the Plant Manager, had been in the position only since 2001 or 2002. ID at 28-29. To the extent that the AJ meant that this was a

factor supporting demotion, we find that it does not warrant mitigation under the circumstances of this case.

¶25 Our decision to sustain Charge 3 additionally supports the removal penalty. Davis testified that he considered Charges 1 and 3 to be less severe than Charges 2 and 4, March 9, 2006 Tr. at 200-01, and stated that Charges 1 and 3, standing alone would not warrant removal, IAF 1, Tab 11, subtab 4B. But Davis also considered the conduct underlying Charge 3 to constitute "bad management." Tr. at 198. Moreover, in his decision letter, Davis noted the appellant's acknowledgment that his relationship with Brindley was a subject of rumors. Davis also found that Martiny recommended that Brindley become a direct report to the appellant only because the appellant's directions to Brindley undermined Martiny's managerial relationship with her and that Martiny said that he repeatedly stressed to the appellant his discomfort and unhappiness at having his directions summarily altered by the appellant. Davis stated that he was particularly concerned that, aware of those factors, the appellant unilaterally moved Brindley to a direct report position. Davis found that none of the appellant's reasons for doing so was compelling and significant concerns should have been raised in his mind on the appearance such a reporting relationship change would create. IAF 1, Tab 11, subtab 4B.

¶26 An evaluation of the other factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), likewise does not show that removal exceeds the maximum reasonable penalty for the sustained misconduct. In that regard, we note that Davis considered the mitigating factors cited by the AJ, including the appellant's 27 years of agency employment, past work record, and lack of prior disciplinary record. IAF 1, Tab 11, subtab 4B at 9; March 9, 2006 Tr. at 186; ID at 29.[3] Indeed, the AJ acknowledged that Davis considered

[3] Although Davis stated in his decision letter that the appellant, with his "experience," had the "knowledge, skills and ability to avoid such inappropriate actions," the

those mitigating factors. ID at 29. The Board has found that such mitigating factors, although significant, can be insufficient to overcome the agency's penalty determination. *See, e.g., Alvarado*, 103 M.S.P.R. 1, ¶ 46; *Stack v. U.S. Postal Service*, 101 M.S.P.R. 487, ¶ 9 (2006); *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 23, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006). Moreover, Davis did not err in considering that the appellant's rationalizations and lack of remorse indicated little rehabilitation potential and were aggravating factors. IAF 1, Tab 11, subtab 4B; *see, e.g., Talavera v. Agency for International Development*, 104 M.S.P.R. 445, ¶¶ 10, 12 (2007). In addition, Davis specifically noted that he had considered reassigning the appellant, but had lost confidence in him. IAF 1, Tab 11, subtab 4B; *see also* March 9, 2006 Tr. at 187-88. Loss of trust is a significant aggravating factor in a penalty determination. *Talavera*, 104 M.S.P.R. 445, ¶ 12.

¶27 In essence, the AJ simply weighed the relevant *Douglas* factors differently than did the agency. He stated, "Where I find that Davis' penalty analysis was unreasonable is in his determination that charge four, standing alone, should warrant the appellant's removal." ID at 29. The AJ did not explain his conclusion. Whether the AJ or the Board would have weighed the *Douglas* factors differently than did the agency is not the issue in deciding whether to mitigate a penalty. The issue in determining whether the Board should exercise its mitigation authority is whether the agency considered the relevant *Douglas* factors and reasonably exercised management discretion in making its penalty determination. *Cameron v. Department of Justice*, 100 M.S.P.R. 477, ¶ 11 (2005), *review dismissed*, 165 F. App'x 856 (Fed. Cir. 2006). As the foregoing discussion demonstrates, Davis considered the *Douglas* factors most relevant to this case and reasonably exercised his management discretion. Moreover,

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statement in context does not show that Davis improperly relied on the appellant's lengthy service as an aggravating factor. IAF 1, Tab 11, subtab 4B.

because we have sustained an additional charge, the AJ's basis for finding that Charge 4 alone did not warrant removal is less persuasive.

¶28 Accordingly, we find that the penalty of removal was within the tolerable limits of reasonableness for the sustained Charges 3 and 4.

ORDER

¶29 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 Codes, 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. 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.

DISSENTING OPINION OF BARBARA J. SAPIN

in

Jack Neuman v. United States Postal Service

MSPB Docket No. DE-0752-05-0291-I-3

¶1 The appellant had 27 years of agency service with an excellent performance record and no prior disciplinary record. In early May 2001, he became the Plant Manager of the agency's Tucson, Arizona, Processing and Distribution Center (Tucson Plant). On April 15, 2005, the agency removed the appellant based on four charges. First Initial Appeal File (IAF 1), Tab 11, subtabs 4B, 4D. The administrative judge (AJ) found that the agency proved Charge 4, alleging the failure to follow proper procedures. Noting that the proven charge was uniquely related to the duties of the Plant Manager position, and taking into account the many years of excellent and trouble free service prior to the appellant's promotion to Tucson Plant Manager, the AJ found that the maximum reasonable penalty for the sustained charge was a demotion and ordered the agency to place the appellant in the position of Manager of Distribution Operations, a position that he had occupied prior to becoming the Tucson Plant Manager. I see no reason to disturb the decision of Administrative Judge James A. Kasic. I respectfully disagree with my colleagues' decision to sustain Charge 3 and to uphold the penalty of removal. I have attached as an appendix relevant portions of the AJ's decision, which I adopt.

Charge 3

¶2 The appellant was charged with creating the appearance of impropriety by making Jennifer Brindley, the Tucson Plant's Quality Improvement Specialist, report directly to him rather to In-Plant Support Manager James Martiny and by holding an inappropriately large number of telephonic conversations with her over the five month period from December 25, 2003 through May 25, 2004. The AJ found that the agency failed to show that the appellant created the appearance

of impropriety by making Brindley a direct report because it was undisputed that the appellant needed help in gathering information necessary to improve the various mail-processing statistics used to evaluate all Arizona District plants and that those statistics improved with Brindley's help. The AJ noted that Senior Plant Manager for the Arizona District, John DiPeri, stated that the appellant was utilizing Brindley effectively to improve mail processing statistics. He further noted that Tucson Postmaster Alvaro Alvarez testified that he felt strongly that Brindley was helping improve plant statistics. Similar views were expressed by two other managers. On this basis, the AJ found that the appellant had a valid reason for making Brindley a direct report. He also found nothing improper in the number of phone calls from late December 2003 and May 2004 between the appellant and Brindley, given the important work being accomplished. My colleagues assert that the AJ substituted his business knowledge for that of the agency in determining that the appellant and Brindley were accomplishing important work, but this is not the case. The AJ was relying on the testimony of four senior managers that Brindley had significantly contributed to the improvement of mail-processing statistics after having been made a direct-report to the appellant.

¶3 Finally, the AJ found that the direct-report relationship did not present the appearance of impropriety because of rumors as to a past affair between the appellant and Brindley. The AJ found no reason to question the straightforward denial of a past affair by both the appellant and Brindley. He also noted that there was no allegation or evidence of a current affair that would lead to the appearance of favoritism. With respect to this, the AJ agreed with the statement of Tucson Postmaster Alvarez that "there are often workplace rumors and if you respond to every perception, it hinders your ability to manage." ID at 18-19. My colleagues assert that by making these findings, the AJ, in essence, required the agency to prove a charge it did not bring: the charge of improper conduct and not the charge of an appearance of impropriety. Again, I do not think that is the case.

In relying on the denial of a past affair and the absence of evidence of a current affair, the AJ was finding there was no basis for the rumors of an affair between the appellant and Brindley and therefore no ground for an appearance of impropriety in the direct-report relationship. In essence, the AJ was finding that rumors alone, without any basis in fact, are not sufficient to establish an appearance of impropriety.

The Penalty.

¶4 The AJ sustained Charge 4, finding that the agency showed that the appellant failed to follow proper procedures on documenting and reporting a sexual harassment claim and by failing to distribute approximately $10,000 of funds that the Tucson Plant obtained under an employee-awards program called the Performance Award and Tracking System (PATS). He found that this represented moderately serious misconduct because in both cases the appellant either knew the applicable procedures or acted in disregard in failing to seek necessary clarification. The AJ concluded, however, that the failure to follow procedures concerning the sexual harassment claim was mitigated by the appellant's action of giving enough information to his superior that the full investigation was only delayed by a week or two. Similarly, the failure to properly distribute the PATS funds was mitigated by the appellant's keeping an accurate accounting of the undistributed funds and never attempting to hide the fact that the finds had not been distributed. The AJ also placed great reliance on the fact that both failures appeared to be uniquely tied to the higher level of responsibilities that the appellant undertook when he became the Tucson Plant Manager.

¶5 The AJ then noted that the appellant had 27 years of service with the agency with an excellent performance record and no prior disciplinary record. He found that the agency's penalty analysis was unreasonable in its determination that charge four, standing alone, should warrant the appellant's removal. Recognizing the seriousness of the sustained charge and the appellant's lengthy

service, the AJ found that the maximum reasonable penalty is a reduction-in-grade to the Manager Operations Distribution position that the appellant held prior to his 2002 promotion. I agree with the AJ's analysis, particularly in light of the fact that the misconduct involved here was directly linked to the appellant's duties as Tucson Plant Manager and the appellant had a blameless and excellent record for the many years before he was promoted to the Plant Manager position.

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Barbara J. Sapin
Member

APPENDIX

Relevant portions of the initial decision by Administrative Judge James A. Kasic follow:

With respect to Charge 3:

> Next, I find that the agency has failed to prove charge three – that the appellant created the appearance of impropriety by: 1) making Jennifer Brindley, the Tucson Plant's Quality Improvement Specialist, a direct report to him; and 2) holding an inappropriately large number of telephonic conversations with her over the five-month period from December 25, 2003 through May 25, 2004.[4]
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> Most, if not all, of the facts that are relevant to this charge are undisputed.[5] Brindley had been promoted to the Quality Improvement Specialist position in 2000, prior to the appellant becoming the Tucson Plant Manager. At the start of the appellant's tenure in 2002, Brindley reported to James Martiny, who was the In-Plant Support Manager at the Tucson Plant. Almost immediately, the appellant began assigning projects to Brindley because he viewed her as being underutilized by Martiny. She readily accepted the assignments. Further, the appellant needed help in determining how best to improve the plant's statistics related to mail processing. This direct assignment of projects to Brindley became problematic when Martiny, in his supervisory role, made project-related suggestions to Brindley, which she would reject by indicating that is not how the appellant wanted projects/tasks accomplished. To resolve this problem, Martiny suggested that the appellant have Brindley report directly to him. The appellant readily accepted this suggestion and made Brindley a direct report, admittedly without seeking the approval of Garrison, the Manager of the Arizona District Human

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[4] For clarity, I note that at the hearing I ruled that making Brindley a direct report and holding an inappropriately large number of telephone calls with her from late December 2003 through May 2004 were the only specific instances of impropriety cited in charge three. Thus, I limited the charge to these two matters. *See* February 6, 2006 HT at 25-26; *see also Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981) (the Board will not sustain an adverse action on the basis of charges or specifications that could have been levied, but were not). The agency preserved its objection to this ruling. *Id.*

[5] *See* February 6, 2006 HT at 8-190 (Testimonies of Martiny and Brindley); and March 8, 2006 HT at 13-225 (Testimony of Neuman).

Relations Office, or others. *See* March 8, 2006 HT at 18-21. As the result of Brindley becoming a direct report, the appellant was responsible for assessing her performance and granting her leave requests. *See* February 6, 2006 HT at 135. Additionally, Brindley attended some (but not all) meetings that the appellant scheduled with other plant supervisors who reported directly to him and who held higher-level positions than Brindley. Further, Brindley and the appellant admitted that they had heard rumors/gossip that they had had an affair before the appellant became the Tucson Plant Manager. *See, e.g.*, Agency Exhibit A; and March 8, 2006 HT at 207. Both Brindley and the appellant straightforwardly denied that such an affair took place. Finally, the appellant admitted having several telephone conversations with Brindley during the period from late December 2003 through May 2004, although he estimated only 60 such conversations took place as opposed to the agency's estimate of 257 calls (here, he explained that the agency had double-counted calls and included calls of under one minute that were likely non-connects). *See* Appellant's Exhibit L; and March 8, 2006 HT at 66-67 and 158-59.

In finding that the agency has failed to show that the appellant created the appearance of impropriety or favoritism by making Brindley a direct report, I first note that Davis, the Arizona District Manager and deciding official in this case, admitted that making Brindley a direct report did not violate any agency rules or policies. *See* March 9, 2006 HT at 197-98; *see also* Appellant's Exhibit U7 (Brindley's position description). Rather, Davis viewed the decision as merely evidencing bad judgment by the appellant. *Id.* Indeed, having admitted that no rules were violated, the agency asserts that it has shown that the direct-report relationship created the appearance of impropriety/favoritism for two reasons.

First, no Arizona managers, including Martiny and Davis, were aware of similar situations where a plant manager had made a quality improvement specialist a direct report. *See* February 6, 2006 HT at 137; and March 9, 2006 HT at 178. I find, however, the uniqueness of the situation does not show impermissible favoritism because the appellant set forth a valid reason for making Brindley a direct report. Here, it is undisputed that he needed help in gathering information necessary to improve the various mail-processing statistics used to evaluate all Arizona District plants. Indeed, it is undisputed that, with Brindley's help, those statistics improved. Here, DiPeri (although somewhat unsure if he knew that the appellant had made Brindley a direct report) clearly felt that the appellant was utilizing Brindley effectively to improve mail-processing statistics. *See* March 9, 2006 HT at 86. Similarly,

> Alvarez testified that he knew that the appellant had made Brindley a direct report and felt strongly that she was helping improve plant statistics. Indeed, Alvarez expressed the opinion that making Brindley a direct report shielded her from unwarranted criticism from other Tucson Plant managers. *See* March 9, 2006 HT at 136-39.[6] Thus, I find that rather than creating the appearance of impropriety/favoritism, making Brindley a direct report was an action within the appellant's legitimately-exercised managerial discretion. Further, given the important work being accomplished, I find nothing improper in the number of telephone calls (most accurately represented by the appellant's estimate) from late December 2003 and May 2004 between the appellant and Brindley.
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> Second, I find that the direct-report relationship does not present the appearance of impropriety/favoritism because of: 1) rumors as to a past affair between the appellant and Brindley; or 2) any tasks that Brindley accomplished that went beyond her normally-assigned duties as a Quality Improvement Specialist. As to the alleged past affair, I have already noted that it was denied by both the appellant and Brindley. I have no reason to question their straightforward denial. More importantly, there is no allegation or evidence of a current affair that would lead to the appearance of favoritism. Further, I agree with the statement of Alvarez (who had also heard the rumor) that, unfortunately, there are often workplace rumors and if you respond to every perception, it hinders your ability to manage. *See* March 9, 2006 HT at 167. Similarly, I note that the agency has shown that Brindley performed some tasks that were beyond her normal duties (*e.g.*, helping plan a plant banquet and authoring various memorandum and e-mails for the appellant to sign and issue).[7] I find, however, that the performance of such duties did not create the appearance of impropriety or favoritism. All of the tasks were Postal Service-related and show nothing more than Brindley's willingness and ability to perform assigned tasks and non-mandatory assignments.

ID at 15-19.

With respect to the penalty, the AJ wrote:

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[6] Similarly, Whitmarsh and Dave Carey, a Phoenix-based Senior Manager of Distribution Operations, expressed similar views. *See* March 7, 2006 HT at 13-15; and March 9, 2006 HT at 267.

[7] *See* DE-0752-05-0291-I-3 File, Tab 3 (Agency Closing Brief at 12-13).

Finally, there remains the issue of the appropriateness of the removal penalty imposed by Davis. Here, the Board has long recognized that an employee's failure to follow instructions/procedures warrants discipline and is made more serious if that failure is done knowingly or with disregard as to the rules in effect. *See Thomas v. Department of Defense*, 66 M.S.P.R. 546, 552 (1995) (the deliberate refusal to follow proper supervisory instructions constitutes serious misconduct). Further, the agency is entitled to hold the appellant to a higher standard of conduct given his role as a supervisor. *See Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 476 (1991). Finally, where the agency proves fewer than all of its charges, the Board may not independently determine a reasonable penalty; rather, it may only mitigate to the maximum reasonable penalty. *See Tisdell v. Department of the Air Force*, 94 M.S.P.R. 44, 52 (2003) (and cases cited therein).[8]

Applying the penalty-review rules just cited to the instant case, I find that the two sustained specifications of failing to follow proper procedures represent moderately serious misconduct. *See Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, 343 (2001) (in assessing whether the agency-imposed penalty is within the tolerable limits of reasonableness, the Board considers first and foremost the nature and seriousness of the misconduct and its relation to the appellant's duties, position, and responsibilities), *aff'd*, 30 Fed. Appx. 973 (Fed. Cir. 2002). This is so because the findings that I made in sustaining the specifications show that the appellant either knew the applicable procedures or acted in disregard in failing to seek necessary clarification. Still, the failure to follow the proper procedures for reporting and documenting Brindley's sexual harassment claim is mitigated to some degree by his action of giving DiPeri enough information that the full investigation was only delayed by a week or two. Further, while he failed to properly distribute the PATS funds, the appellant kept an accurate accounting of the undistributed funds and never attempted to hide the fact that the $10,000 had not been distributed. Finally, and most importantly

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[8] *See also Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 651 (1996) (an agency's failure to sustain all of its supporting specifications may require, or contribute to, a finding that the agency's penalty is not reasonable); and *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999) (when the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges).

in assessing the seriousness of the sustained charge, I find that both failures appear uniquely tied to the higher level of responsibilities that the appellant undertook when he became the Tucson Plant Manager in 2002.

Balanced against the moderate severity of the sustained misconduct, I, like Davis, recognize that the appellant was a 27-year agency employee with an excellent performance record and no prior disciplinary record. Where I find that Davis' penalty analysis was unreasonable is in his determination that charge four, standing alone, should warrant the appellant's removal. *See* March 9, 2006 HT at 188. Recognizing the appropriate seriousness of the sustained charge (given the appellant's status as a first-time plant manager) and the appellant's lengthy tenure, I find that the maximum reasonable penalty is a reduction-in-grade to the Manager Operations Distribution position that the appellant held prior to his 2002 promotion.

ID at 27-29.