UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 100

Docket No. NY-0752-09-0118-I-2

Jeffrey R. Prather,

Appellant,

v.

Department of Justice,

Agency.

December 7, 2011

Thomas G. Roth, Esquire, Mountain Lakes, New Jersey, for the appellant.

Ellen L. Harrison, Esquire, and Carol A. Joffe, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has timely filed a petition for review of the initial decision that affirmed his removal for misconduct. The Board has jurisdiction over the appeal pursuant to 5 U.S.C. §§ 7511-13, 7701. For the reasons explained below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order, still AFFIRMING the appellant's removal.

BACKGROUND

¶2 On January 28, 2009, the appellant appealed his removal from the position of Criminal Investigator, GS-13, with the New York Field Division of Drug Enforcement Administration, U.S. Department of Justice, based on charges of (1) Unauthorized Outside Employment; (2) Unauthorized Use of Official Government Vehicle; (3) Misuse of Government Property; (4) Providing False, Misleading or Inaccurate Information; and (5) Conduct Unbecoming a Drug Enforcement Administration (DEA) Special Agent. I-1 Appeal File (AF), Tab 1, Tab 9, Subtab 4d, Tab 10, Subtab 4i. He asserted as an affirmative defense that his removal was the result of religious discrimination. I-2 AF, Tab 13 at 3 (Order and Summary of Telephonic Prehearing Conference).

¶3 In June 2009, the appeal was dismissed without prejudice to refiling, and it was timely refiled on August 31, 2009. The appellant stipulated that the agency proved Charge 2 concerning unauthorized use of an official government vehicle, as well as both specifications underlying Charge 3 concerning misuse of government property. I-2 AF, Tab 22, Joint Stipulations (JS), ¶¶ 101-102. Because the appellant waived a hearing, I-2 AF, Tab 24 at 1, the administrative judge adjudicated the appeal based upon the written record, I-2 AF, Tab 36, Initial Decision (ID) at 2. In a detailed initial decision, the administrative judge sustained the agency's action, finding that it had proved all of the underlying charges and specifications, there was a nexus between the appellant's misconduct and the efficiency of the service, and that the penalty of removal was within the bounds of reasonableness. ID at 2-21, 24-26. The administrative judge also determined that the appellant failed to prove his affirmative defense of religious discrimination. ID at 21-24.

¶4 The appellant, who is represented by counsel, has filed a 94-page petition for review. Petition for Review (PFR) File, Tab 1. Although he "does not challenge all of the AJ's findings with respect to the[] charges, he does challenge that portion of the Conduct Unbecoming charge which relates to his purported

sexual misconduct with two women (Charge 5, Specification 2), as well as all of the Falsification (Charge 4) and outside Employment (Charge 1) charges." *Id.*, Tab 1 at 13-14. He also contends that the administrative judge erred in failing to mitigate the penalty, and in failing to find that the agency discriminated against him based on his religion. *Id.* at 94. The agency has filed an extensive submission in opposition to the appellant's petition for review. PFR File, Tab 3.[1]

ANALYSIS

Charge 1: Unauthorized Outside Employment.

¶5 The agency's first charge is supported by seven specifications of alleged unauthorized outside employment, which it contended violated its Standards of Conduct. I-1 AF, Tab 10, Subtab 4i at 3-5; *see* I-2 AF, Tab 10 at 61. The agency's Standards of Conduct are set forth at Section 2735.15(E)(6)(a) of its personnel manual, and provide, inter alia, that "[a]ll DEA employees must have received the appropriate approvals prior to engaging in outside employment." I-2 AF, Tab 10 at 61. The Standards of Conduct define "outside employment" as "any type of employment exclusive of DEA employment, including self-employment, employment by a third party, hobby-income, or participation in any business venture, whether or not there is any profit to the employee." *Id*. at 59. "Self-employment" is defined as "any participation or interest in a business, corporation or franchised operation." *Id.* The Standards of Conduct further

[1] For reasons that are not entirely clear, portions of the record below were apparently reorganized and re-"tabbed" at the Board's regional level after the initial decision was drafted. As a result, some citations to the record in the initial decision are no longer accurate. For example, the record citations at page 9 of the initial decision to Attachments B, C and D of Tab 16 of the I-1 Appeal File refer to documents that are now located at pages 544, 547 and 549 of Tab 20. This does not affect the outcome of the appeal. As we discuss below, the administrative judge's findings of fact and conclusions of law are fully supported by the documentary evidence in the record below. Citations to the record in this Opinion and Order are to the record as currently tabbed.

specify that "outside employment" does not include investment activity, such as ownership of stocks and bonds, or income producing real estate, and excludes "[c]ertain volunteer activities," such as "coaching and leading youth activities, donating time to nonprofit activities, helping senior citizens or disadvantaged persons, community programs, or religious activities." *Id.* at 60.

Specifications 1-5

¶6 As discussed below, the administrative judge's findings with respect to specifications 1-5 are fully supported by the record. The appellant states on review that he is challenging the administrative judge's determination that the agency met its burden of proof with respect to the charge of Unauthorized Outside Employment. Petition for Review (PFR) File, Tab 1 at 14, *see* I-2 AF, Tab 36, Initial Decision (ID) at 2-7. He offers no specific challenges to the administrative judge's findings with respect to the outside activities cited by the agency in specifications 1-5, however, other than to repeat his contentions from below that the agency's definition of outside employment in its Standards of Conduct is too broad and is inconsistent with a "common sense" definition of outside employment. PFR File, Tab 1 at 79-80. His personal disagreement with the agency's standards, however, does not provide a basis for granting review of the initial decision.

¶7 The agency's first specification concerns the appellant's operation of a martial arts school, the Yamaneko Dojo. I-1 AF, Tab 10, Subtab 4i at 3. The appellant admittedly founded the school in 1990 and was its "chief instructor" while working at the agency. I-2 AF, Tab 22, JS, ¶¶ 72, 74. The appellant stated to the agency's Office of Professional Responsibility (OPR) that he never sought approval to engage in outside employment with the school. I-1 AF, Tab 18, Subtab 37 at 48. The administrative judge therefore properly sustained this specification. ID at 4-5.

¶8 The agency's second specification concerns a business called "Executive Terrorism Awareness Courses" (EXTAC). I-1 AF, Tab 10, Subtab 4i at 3-4. The

appellant stipulated that he founded EXTAC, that it is an instruction course in personal defense for business executives, and that he received compensation for his services to EXTAC. I-2 AF, Tab 22, JS, ¶ 75. EXTAC existed as a separate corporate entity for approximately 6 years, after which it merged into "the Warrior School," *id.*, discussed below. The appellant stated to the agency's OPR that he never sought approval to engage in outside employment with EXTAC. I-1 AF, Tab 18, Subtab 37 at 53. Therefore, the administrative judge properly sustained this specification. ID at 4-5.

¶9 The agency's third specification arose out of "Life Case LLC," a company which the appellant stipulated he had founded in or about 2002 to market a bullet-proof briefcase that he had invented and patented. I-2 AF, Tab 22, JS, ¶ 76; I-1 AF, Tab 10, Subtab 4i at 4. The appellant stated to the agency's OPR that he never sought approval to engage in outside employment with Life Case LLC. I-1 AF, Tab 18, Subtab 37 at 56. In his petition for review, the appellant contended that he should not have been required to obtain approval for outside employment with respect to Life Case LLC "at the initial development stage where it is not known whether a single unit of the product would ever be produced or sold." PFR, Tab 1 at 80. The administrative judge correctly found that Life Case LLC generated fees and profits at various times during the relevant time period. ID at 5. Specifically, the appellant's income tax returns indicate that Life Case LLC reported profits of $9,800 in 2004. I-1 AF, Tab 21, Subtab 7 at 140. Therefore, the administrative judge properly sustained this specification. ID at 4-5.

¶10 The administrative judge also correctly sustained specification four, which arose out of the appellant's work as President of "Answer to the Crisis," a non-profit corporation founded in 2000 or 2001. ID at 5; *see* I-1 AF, Tab 10, Subtab 4i at 4. Answer to the Crisis existed to raise tuition funds for individuals to attend "Initiation Camp," which was a course through Warrior School LLC. I-2 AF, Tab 22, JS, ¶ 77. The appellant was the sole owner of Warrior School, *see*

id., ¶¶ 79-83, and argues on review that, when he belatedly first applied for approval to engage in outside employment with his "Warrior School" in October 2003, that request "should have included not only his Warrior School business interests going forward but also those businesses which he pursued in the past, which were, in reality, no more than the predecessors of the Warrior School." PFR File, Tab 1 at 84. The appellant cites no factual or legal support for this argument. Moreover, as the administrative judge recognized, the agency's Standards of Conduct expressly require approval "prior to engaging in outside employment." ID at 3, *see* I-2 AF, Tab 10 at 61.

¶11 The appellant does not offer any specific argument on review concerning the administrative judge's determination that the agency proved specification five, which concerned his "material participation in a business named 'Jeffrey Prather,' [resulting] in a net income for 2003 of $18,701.00." ID at 4; *see* I-1 AF, Tab 10, Subtab 4i at 4. The administrative judge's determination that the agency proved this specification is supported by the record. *See* I-1 AF, Tab 21, Subtab 7 at 125.

Specification 6

¶12 Specification 6 arose out of the appellant's conduct in teaching courses and conducting business as President of Warrior School LLC from November 2003 to 2006. I-1 AF, Tab 10, Subtab 4i at 4-5. As stated above, the appellant began submitting written requests for approval to engage in outside employment with Warrior School in 2003. I-1 AF, Tab 20 at 544-50. In two such requests, the appellant represented to the agency that he intended to "teach and supervise the teaching of classes and seminars, to the general public and particularly disadvantaged youth, on self defense and personal, spiritual development. I see this as another way to fight illegal drug use." *Id.* at 544, 547. He also represented to the agency that the teaching "will occur on weekends, weeknights and on annual leave," and acknowledged that "the use of Government facilities,

equipment, or transportation services to further my outside employment is forbidden." *Id*.

¶13 In sustaining this specification, the administrative judge determined that "the outside employment for which the appellant received prior agency authorization differed in significant and material respects from that which he actually performed." ID at 6. We agree. The appellant admitted that the Warrior School actually operated, inter alia, as a government contractor, providing federal firearms training and other courses to a variety of federal agencies and federal contractors, including the National Security Agency, for fees as high as $20,000 a class. I-2 AF, Tab 22, JS, ¶¶ 94-100. He also admitted that he participated in Warrior School courses while on duty. I-1 AF, Tab 18 at 186-88. He also admittedly repeatedly used his assigned official government vehicle (OGV) to further Warrior School business and, as the administrative judge noted, he "provided a variety of DEA equipment, including vests, shields, and weapons, for use by participants in these classes." ID at 6; I-2 AF, Tab 22, JS, ¶¶ 101, 102 (stipulating that DEA had proved Charge 2, Unauthorized Use of an OGV and Charge 3, Misuse of Government Property). In light of the appellant's failure to advise the agency in his requests for outside employment that it would be conducted in part on government time and would involve use of his OGV and government equipment, the administrative judge correctly determined that those requests differed in significant and material respects from that which he actually performed. ID at 6.

¶14 On review, the appellant does not contest the administrative judge's factual findings, but argues that he should not have been disciplined for his failure to request approval to run a for-profit company which did business with the federal government because Warrior School's activities benefited society. PFR File, Tab 1 at 81-84. This contention does not provide any basis for disturbing the administrative judge's findings and conclusions concerning this specification.

Specification 7

¶15 The final specification underlying the first charge arose out of the appellant's admitted participation in 2004-2005 as an actor and/or stunt coordinator in two movies and a documentary. I-1 AF, Tab 10, Subtab 4i at 5; *see* I-2 AF, Tab 22, JS, ¶¶ 70-71. On review, the appellant does not dispute that he failed to obtain approval from the agency for this activity; rather, he suggests that advanced approval was not required because he was not paid for his work on the films, but only received credit. PFR File, Tab 1 at 80. In sustaining this specification, the administrative judge found, and the appellant does not contest, that he had invested $25,000 of his own money in one of the movies. ID at 7. Moreover, the agency's Standards of Conduct unambiguously defined outside employment to include "participation in any business venture, whether or not there is any profit to the employee." I-2 AF, Tab 10 at 59. The appellant's petition for review provides no basis for disturbing the administrative judge's findings and conclusions concerning this specification.

¶16 Accordingly, the administrative judge correctly determined that the agency proved all of the specifications underlying the charge of Unauthorized Outside Employment.

Charge 4: Providing False, Misleading or Inaccurate Information.[2]

Specifications 1-3

¶*17* The first three specifications underlying the fourth charge arose out of representations that the appellant made to the agency in three written requests for permission to engage in outside employment, discussed above. I-1 AF, Tab 10, Subtab 4i at 8-9. To sustain a falsification charge, an agency must prove by preponderant evidence that the appellant knowingly supplied incorrect

[2] As stated above, the appellant stipulated below that the agency had proven Charge Two, Unauthorized Use of an OGV, and Charge Three, Misuse of Government Property. I-2 AF, Tab 22, JS, ¶¶ 101-102.

information with the intention of defrauding, deceiving or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed. Cir. 2002); *Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 427 (1997). The requisite intent may be established by direct or circumstantial evidence. *Deskin v. U.S. Postal Service*, 76 M.S.P.R. 505, 510-11 (1997). The issue of intent must be resolved based on the totality of the circumstances. *Id.* at 511. As discussed below, the administrative judge correctly determined that the agency met its burden of proof with respect to each of these specifications. ID at 8-10.

¶18 Specifications 1 and 2 concern the appellant's written statements in support of his requests dated October 20, 2003, and January 7, 2005, for authorization to engage in outside employment in connection with Warrior School LLC. I-1 AF, Tab 10, Subtab 4i at 8. In each, he represented that the "nature" of his involvement with the Warrior School was "more vocational than business, in that the primary purpose is philanthopical [sic] and has evolved from volunteerism." I-1 AF, Tab 20 at 544, 547. The appellant also certified that "[his] services in connection with this outside employment [would] not conflict with [his] duties as an employee of the DEA." *Id.* Specification 3 concerned the appellant's memorandum dated December 23, 2006, again requesting authorization for outside employment with Warrior School. I-1 AF, Tab 10, Subtab 4i at 4-5. In it, the appellant stated: "I understand that the use of Government facilities, equipment, or transportation services to further my outside employment is forbidden." I-1 AF, Tab 20 at 549.

¶19 On review, the appellant contends, as he did below, that in describing Warrior School as primarily philanthropic and failing to disclose that it was a for-profit corporation, he did not intend to deceive the agency. PFR File, Tab 1 at 72. In support of his position, he contends that Warrior School was primarily philanthropic because it allegedly was serving mankind and had benefited the war effort in Iraq and Afghanistan by training service members in firearms use. PFR File, Tab 1 at 65-71. We agree with the administrative judge's determination that

the appellant's involvement with the Warrior School was "no more objectively philanthropic . . . than if he had instead operated a for-profit dental practice, cleaning the teeth and filling the cavities of departing servicemen and women." ID at 10. The appellant's petition for review offers no basis for disturbing that determination.

¶20 Moreover, the appellant stipulated that he had repeatedly used his assigned OGV, as well as agency weapons and other equipment, on Warrior School business. I-2 AF, Tab 22, JS, ¶¶ 101-102. Citing the appellant's own testimony that his chain of command would not have approved his request if they had known it would involve the use of government equipment, I-1 AF, Tab 18 at 251, the administrative judge correctly determined that these representations were "plainly false, raising the inescapable inference that they were intended to deceive the agency regarding material aspects of this proposed activity," ID at 10. Furthermore, as the administrative judge noted, the appellant repeatedly certified to the agency that his duties with Warrior School would not conflict with his duties as a DEA employee and expressly stated: "I understand that the use of Government facilities, equipment, or transportation services to further my outside employment is forbidden." ID at 9; *see* I-1 AF, Tab 20 at 544-50.

¶21 The appellant also claims that he could not have intended to deceive the agency because his first and second-line supervisors had allegedly accessed the Warrior School website. PFR File, Tab 1 at 72. He offers no citation to the record for this proposition, and we find no evidence therein to support it. The administrative judge therefore properly sustained the first three specifications of this charge.

Specification 4

¶22 The agency alleged in the fourth specification underlying this charge that the appellant submitted biweekly activity reports and time and attendance reports in which he represented either that he was on duty, conducting agency business, or on sick leave, on eleven different dates and times when he was actually

participating in training courses at the Warrior School. I-1 AF, Tab 10, Subtab 4i at 9-10. The record evidence below supports the administrative judge's determination that the biweekly and time and attendance reports that the appellant submitted were factually incorrect, as demonstrated by the sworn testimony of former Warrior School students and instructors. *See, e.g.*, I-1 AF, Tab 11, Subtabs 2-8, 10-12; *see* I-2 AF, Tab 22, JS, ¶ 59; *see also* I-1 AF, Tab 17 at 258-301.

¶23 Although the appellant claims on review that he merely made mistakes, PFR File, Tab 1 at 74, intent can be inferred when a representation is made with reckless disregard for the truth or the totality of the circumstances supports a finding of the specific intent to deceive. *See, e.g.*, *Christopher v. Department of the Army*, 107 M.S.P.R. 580, ¶ 12, *aff'd*, 299 F. App'x 964 (Fed. Cir. 2008); *Haebe v. Department of Justice*, 81 M.S.P.R. 167, 181-82 (1999), *rev'd on other grounds*, 288 F.3d 1288 (Fed. Cir. 2002). Here, eleven incorrect reports argue against mere mistake. We find no basis in the appellant's petition for review to disturb the administrative judge's conclusion that "it strains credulity to suppose that the appellant was other than fully conscious of his repeated failure to indicate his actual activities and whereabouts on the reports in question." ID at 12. The administrative judge explained "the appellant could hardly have acted otherwise without revealing the obvious impropriety of his conduct." *Id.*

¶24 Finally, the appellant also argues that this specification is actually an allegation that he "committed fraud" in his biweekly and time and attendance reports, and asserts that the agency "can only successfully prove an intent to defraud if it can demonstrate that Special Agent (SA) Prather over-reported the hours that he actually worked with the intention of defrauding or cheating the Agency out of pay that was not properly due and owing to him." PFR File, Tab 1 at 74-75. The agency, however, did not charge the appellant with fraud, but with providing false, misleading or inaccurate information in violation of its Standards of Conduct. I-1 AF, Tab 10, Subtab 4(i) at 9-10. Moreover, as stated above, a

falsification charge can be sustained if the appellant knowingly supplied incorrect information with the intention of defrauding, deceiving *or* misleading the agency, and intent can be established by reckless disregard for the truth. Because ample record evidence supports the administrative judge's conclusion that the appellant supplied incorrect information to avoid revealing to the agency the impropriety of his conduct, ID at 12, he therefore properly sustained this specification.

Charge 5: Conduct Unbecoming a DEA Special Agent.

¶25 As stated above, the appellant does not challenge the administrative judge's determination that the agency met its burden of proof with respect to the first specification underlying Charge 5. ID at 12. In it, the agency alleged that the appellant, a firearms instructor with access to and responsibility for maintaining custody and control of DEA fully-automatic weapons, provided those fully automatic weapons to civilian Warrior School students, even though he was not present during much of the training. I-1 AF, Tab 10, Subtab 4i at 3-5. Because we find no error in the administrative judge's determination, we will only examine the second specification of Charge 5.

¶26 Much of the appellant's petition for review concerns the second specification underlying Charge 5. In the proposal, the agency alleged that, under the pretense of helping individuals through a practice the appellant developed and called "sexual healing," he took advantage of vulnerable and struggling women. I-1 AF, Tab 10, Subtab 4i at 11. Specifically, the agency alleged that he persuaded women to engage in sexual acts with him by telling them that they would be "healed" if they had sexual relations with him. *Id.* The agency further alleged that, in their sworn statements, two women described their "sexual healings" as "violent and/or a rape, and [he has] been accused of sexual assault by at least one of the women." *Id.* In addition, the agency alleged that, in his leadership role at the Connection Institute, he advised a member that her husband had become a homosexual and that the way to bring him back to their marriage was for her to engage in "'sexual healing' with [him]." *Id.* The agency alleged

that the appellant's conduct violated its Standards of Conduct, which, inter alia, provide that "DEA personnel are prohibited from engaging in any criminal, infamous, dishonest, or notoriously disgraceful conduct," that they "shall always conduct themselves in a professional manner," that they shall "refrain from omissions or commissions of conduct in their off-duty hours which will impact, influence, impede or in any way effect their DEA responsibilities," and that they will not "act in a manner which will bring disgrace or disfavor upon DEA or act in a manner that will cause the general public to question, ridicule or attack the efforts of this Agency or its personnel." *Id.; see* I-2 AF, Tab 10 at 57.

¶27 In his petition for review, the appellant claims that the agency's specification amounts to a charge of rape, but that the administrative judge altered the charge "from a rape theory to something substantially less than that." PFR File, Tab 1 at 49. The administrative judge properly rejected this contention below. ID at 15. Although the agency cited to testimony from the two women which described their encounters with the appellant as "violent and/or a rape," the administrative judge correctly determined that the question of whether the appellant's conduct amounted to rape or sexual assault is not part of the essence of this charge. *Id.*; *see Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994) (an agency is required to prove only the essence of its charge, and need not prove each factual specification supporting the charge), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table).

¶28 This specification arose out of the appellant's admitted sexual relations with two women, identified in the initial decision by the initials LW and MM. ID at 15-18; *see* I-1 AF, Tab 19 at 447-48, 475-76. The appellant confirmed to OPR that LW had contacted him about a problem in her marriage. I-1 AF, Tab 19 at 443-44. He also admitted that he had engaged in "sexual healing" with her and that he "possibly" had told her not to tell her husband (another group member) about the sexual contact. ID at 18; *see* I-1 AF Tab 19 at 447-48. He also admitted that oral sex had occurred and that he stopped intercourse because LW

was not submitting. *Id.* at 471, 475-77. Moreover, on review, the appellant confirms that MM actively pursued a "sexual healing" because she believed that she was a "mess" and was "damaged by her relationship with her husband and other men." PFR File, Tab 1 at 58; *see also* I-1 AF, Tab 15, Subtab 27 at 22-23. Further, the administrative judge found, and the appellant does not dispute that he had a leadership role in the "Warrior School" and in his "Connectionism Institute." ID at 18. The appellant agreed that "there is somewhat of an implied power" in his role as founder of the organization and benefactor to junior members, I-1 AF, Tab 19 at 411; and he agreed that officers of the Connection Institute ultimately came to believe that his sexual conduct with female followers constituted an "abuse" of his authority, leading to his suspension from the leadership position and a mass defection of members, *see id.* at 385-90, 415-19. The record below contains the testimony of witnesses who confirmed to the agency's OPR that they had demanded that the appellant stop conducting "sexual healings" because they believed that his actions constituted an abuse of power. *See* I-1 AF, Tab 14, Subtab 24 at 48-49; Tab 12, Subtab 17 at 95-98.

¶29 Thus, the record below, including the appellant's own testimony, supports the administrative judge's conclusion that the agency established the essence of this specification, i.e., that the appellant misused his leadership role in the institutions he founded to take sexual advantage of vulnerable female followers. ID at 18. The administrative judge therefore correctly determined that the agency met its burden of proof with respect to both specifications underlying Charge 5.

The administrative judge properly found nexus between the appellant's off-duty misconduct and the efficiency of service.

¶30 An agency may take an adverse action against an employee only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a); *Doe v. Department of Justice*, 113 M.S.P.R. 128, ¶ 20 (2010); 5 C.F.R. § 752.403(a). In *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987), the Board held that an agency may show a nexus between off-duty misconduct and the efficiency of

the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *See Doe*, 113 M.S.P.R. 128, ¶ 20.

¶31 As the agency stated in its proposal notice, the appellant's ability to testify in criminal trials has been significantly impaired as a result of his misconduct in providing false, misleading or inaccurate information concerning his activities. I-1 AF, Tab 10, Subtab 4i at 13.[3] We also conclude that the agency established by preponderant evidence a nexus between the proven charges of unauthorized outside employment, unauthorized use of a government vehicle and misuse of government property, and the efficiency of the service. The agency clearly established nexus for these proven offenses.

¶32 The appellant asserts on review, though, as he did below, that there is no nexus between his off-duty sexual conduct unless such conduct constituted rape or forcible assault. PFR File, Tab 1 at 53-57. The agency, however, presented sufficient grounds for finding a nexus between the appellant's off-duty sexual conduct and the efficiency of the service. *See* I-1 AF, Tab 9, Subtab 4e at 5; Tab 10, Subtab 4i at 11-14. The administrative judge correctly determined that the appellant's duties as Special Agent included potential contact with female informants. He thus also correctly concluded that the appellant's off-duty sexual

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[3] Under *Giglio v. United States*, 405 U.S. 150 (1972), investigative agencies must turn over to prosecutors potential impeachment evidence with respect to the agents involved in the case. The prosecutor then exercises his discretion as to whether the impeachment evidence must be turned over to the defense. *See Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76, ¶ 29 n.3 (2008), *aff'd*, 314 F. App'x 318 (Fed. Cir. 2009), *overruled on other grounds by Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453 (2011). A "*Giglio* impaired" agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case. *Id.*

conduct with vulnerable women, while misusing his position of authority, reasonably caused the agency to lose trust in the appellant's ability to independently work with such individuals. ID at 18-21; *see Royster v. Department of Justice*, 58 M.S.P.R. 495, 500 (1993) (off-duty behavior toward women had nexus to employee's position as correctional officer in women's prison); *Barnhill v. Department of Justice*, 10 M.S.P.R. 378, 380-81 (1982) (off-duty behavior toward women had nexus to employee's position as border patrol agent whose duties involved contact with female aliens).

¶33 The appellant contends that "the handling of informants had not been part of his job description as a DEA federal agent for many years." PFR File, Tab 1 at 57. However, by statute DEA Agents are authorized to make arrests. 21 U.S.C. § 878(a)(3). Moreover, the appellant cited his meritorious service as a criminal investigator in arguing against the penalty of removal. *See, e.g.*, I-1 AF, Tab 9, Subtab 4(g), Ex. Z at 1 (award recommendation for the appellant's 1992 role in a criminal investigation in which DEA received information "from an informant under the control of SI A Prather"); *id.* at 4 (commendation for the appellant's 2002 initiation of criminal investigations which led to several arrests). We therefore find by preponderant evidence that the appellant's off-duty sexual conduct adversely affected the agency's trust and confidence in the appellant's ability to perform his job as a DEA criminal investigator.

The penalty of removal does not exceed the bounds of reasonableness.

¶34 The appellant contends that the agency failed to give proper weight to the *Douglas* factors in deciding to remove him. PFR File, Tab 1 at 84-94. The Board generally will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Where, as here, the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too

severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The record indicates that the deciding official considered the relevant *Douglas* factors. *See* I-1 AF, Tab 10, Subtab 4e.

¶35 As noted in the initial decision, the agency conceded that it erroneously relied upon the appellant's prior discipline in contravention of its own regulations, which provide that letters of reprimand are removed from an employee's Official Personnel Folder after two years. A-2 AF, Tab 32 at 47-48. Where, as here, an agency errs in consideration of prior discipline, the Board determines whether the agency's penalty selection may be affirmed without regard to the improperly considered discipline. *See Stoddard v. Department of the Army*, 109 M.S.P.R. 199, ¶ 10 n.3 (2008); *Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶¶ 22-23 (2007).

¶36 We agree with the administrative judge that the agency's original penalty of removal is well within the tolerable limits of reasonableness for the sustained charges of misconduct. As the administrative judge recognized, law enforcement officers are held to a higher standard of honesty and integrity. ID at 25; *see e.g.*, *Phillips v. Department of the Interior*, 95 M.S.P.R. 21, ¶ 16 (2003) (a law enforcement officer was removed for falsifying information on her pre-employment documents), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 243-44 (1995) (same), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). The administrative judge correctly determined that, even absent consideration of the "sexual healing" practices that are the basis for Specification 2 of Charge 5, the agency's remaining charges, alone or in combination, provide a reasonable basis for the agency's removal penalty under the circumstances of this case. ID at 24; *see Schoeffler v. Department of Agriculture*, 47 M.S.P.R. 80, 86 (removal for falsification and engaging in dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the employee's reliability, veracity and

trustworthiness); *vacated in part*, 50 M.S.P.R. 143 (1991). The appellant's contentions on review concerning the penalty of removal thus lack merit.

The administrative judge correctly determined that the appellant failed to establish his religious discrimination claim.

¶37 The appellant also contends on review that the administrative judge "failed to properly apply the relevant decisional authority concerning appellant's affirmative defense of religious discrimination." PFR File, Tab 1 at 94. We conclude that the administrative judge properly considered and rejected the appellant's affirmative defense under the relevant legal framework.[4]

The appellant stated below that he was not relying upon theories of disparate impact or accommodation, but was raising a claim that he was "disparately treated by DEA's OPR based on a comparison of the manner in which it handled his case before and after it learned of his religious beliefs. I-1 AF, Tab 27 at 1, 3. To establish a prima facie case of prohibited employment discrimination based on disparate treatment, an appellant must show that he (1) is a member of a protected class; (2) suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. *Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 40 (2010). Where, as here, the agency has already articulated a nondiscriminatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *Id.* Thus, the inquiry proceeds directly to the ultimate question

[4] The appellant established that he is the head of "the Connectionism movement." Although the agency questions on review whether Connectionism is a bona fide religion, *see* PFR File, Tab 3 at 28 n.7, because the administrative judge correctly determined that the agency would have removed the appellant regardless of his religious beliefs, it is not necessary for the Board to reach that issue in deciding this appeal.

of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *Id.*

The question to be resolved is whether the appellant produced sufficient evidence to show that the agency's proffered basis for removing him was not the actual reason for its action, and that the agency intentionally discriminated against him based on his religious beliefs. *Gregory*, 114 M.S.P.R. 607, ¶ 41. The evidence to be considered may include the elements of the appellant's prima facie case; any evidence produced by the appellant to attack the agency's proffered explanation for its action; and any further evidence of discrimination available to the appellant, such as independent evidence of discriminatory statements or attitudes on the part of the agency, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Id.* Relevant evidence may also include proof that the agency treated similarly situated employees differently than the appellant; that the agency lied about its reason for taking the action; any inconsistency in the agency's explanation for its action; the agency's failure to follow its own established procedures; the agency's general treatment of members of the appellant's protected class; and incriminating statements by agency officials. *Id.*

¶38 The initial decision correctly summarizes and applies this settled precedent, concluding that the appellant failed to establish that the agency's proffered basis for removing him was not the actual reason for its action, and that the agency intentionally discriminated against him based on his religious beliefs. ID at 22-24. In his petition for review, the appellant did not dispute that the charged conduct actually occurred. He did not contend that the agency manufactured false evidence in order to convict him of offenses he never committed. He also failed to identify any similarly-situated employee who received more favorable treatment - that is, any other Special Agent who made multiple false statements and engaged in unauthorized outside employment over a period of years, but who was not removed. *See Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 13

(2009) (rejecting discrimination defense where employee did not dispute that the violations occurred and failed to identify similarly-situated comparator employees). As the administrative judge correctly determined, the agency provided convincing evidence that he engaged in a variety of serious misconduct, including making false statements, misusing government property, and engaging in unauthorized outside employment. ID at 24. Because we find that he engaged in the charged misconduct, much of which he does not dispute, he has failed to establish that the agency's proffered reasons were not the actual reasons for its action.

ORDER

¶39 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 77960
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. § 2000e-5(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, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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