UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

91 M.S.P.R. 176

KEVIN WENTZ,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
PH-0752-01-0009-I-1

DATE: March 13, 2002

Joshua F. Bowers, P.C., Washington, D.C., for the appellant.

Lorna S. Lewis, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that sustained an agency removal action. For the reasons set forth below, we GRANT the petition for review only with regard to the penalty. We AFFIRM the initial decision's findings with regard to the charge and AFFIRM as MODIFIED the initial decision's findings with regard to the appellant's affirmative defenses. The penalty of removal is MITIGATED to a five-day suspension.

BACKGROUND

¶2 The agency removed the appellant from his PS-5 City Carrier position in Bridgeport, West Virginia, effective September 9, 2000, based on the charge of

"unsatisfactory performance/failure to perform the duties of your position in a safe manner." Initial Appeal File (IAF), Tab 6, Subtabs 4, 4A. Specifically, the agency alleged that the appellant parked his Postal Service vehicle on a public road while he delivered mail to a nearby house and left the vehicle's motor running with the emergency brake not set. *Id.*, Subtab 4A. The vehicle rolled backwards and hit a guardrail.[1]

¶3 It is undisputed that the appellant immediately reported the incident.[2] It is also undisputed that, at the time of the incident, the appellant was taking a number of medications to treat a long-term medical condition and was also taking a powerful prescription antibiotic because of an infection related to that medical condition. *See* IAF, Tab 13, Exhibit J; HT (Hearing Tape) 2, Side A (testimony of the appellant). The medical condition was first incurred while the appellant was in the Army, and he was discharged from the Army with a ten-percent medical disability. HT 2, Side A (testimony of the appellant); *see* IAF, Tab 6, Subtab 2C, Exhibit 3.

¶4 Before the Board, the appellant stipulated to the factual basis of the charge and that a nexus exists between his conduct and the efficiency of the federal service. IAF, Tab 16. He asserted, however, that: 1) the penalty of removal was excessive and disparate compared to that given to other employees who had committed similar misconduct; 2) the agency engaged in unlawful discrimination based on his disabling condition or the perception that he had a disabling

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[1] The agency stated in the proposal notice that the vehicle rolled approximately 165 feet, but the appellant testified that it rolled 78 feet. IAF, Tab 6, Subtab 4A; Hearing Tape (HT) 2, Side B (testimony of the appellant).

[2] According to the agency's preliminary accident report, the quarter-ton Postal Service Jeep suffered $1,500 in damage. IAF, Tab 12, Exhibit 2.

condition; and 3) the agency committed harmful procedural error and failed to provide him with due process.[3] IAF, Tabs 1, 4, 10, 13.

¶5 In the initial decision, the administrative judge found that the appellant failed to prove his affirmative defenses of disability discrimination and harmful procedural error. Initial Decision (ID) at 6-10. The administrative judge also found that: 1) the deciding official properly considered the appropriate factors in making his penalty determination; 2) the penalty of removal was reasonable; and 3) removal promoted the efficiency of the service. ID at 10-14. In discussing the penalty, the administrative judge found that the appellant did not show that he was the victim of disparate treatment. ID at 12-13.

¶6 The appellant has petitioned for review of the initial decision and argues that the administrative judge erred in his findings, particularly with regard to the penalty. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the petition. *Id*., Tab 3.

ANALYSIS

The agency proved the charge and the existence of a nexus.

¶7 As discussed above, the appellant stipulated to the charge and the existence of a nexus between his misconduct and the efficiency of the federal service. IAF, Tab 16. A stipulation satisfies a party's burden of proving the fact stipulated to; thus, the agency has proven the charged misconduct and the existence of a nexus.[4] 5 C.F.R. § 1201.63; *Swift v. Office of Personnel Management*, 48 M.S.P.R. 441, 445 (1991); ID at 3.

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[3] Although he initially alleged that the agency acted in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4333 (1994 & Supp. II 1996)), the appellant withdrew that allegation at the hearing. HT 3, Side A (statement of the appellant's representative).

[4] The appellant argues on review that an agency mechanic stated that he found a mechanical problem with the vehicle, but the mechanic could not tell if the problem caused, or was caused by, the incident. PFRF, Tab 1 at 15-16; IAF, Tab 6, Subtab 2C,

The appellant failed to prove that he was discriminated against based on his disability.

¶8 To establish a *prima facie* case of disability discrimination, an appellant must show the following: (1) he is a disabled person; (2) the appealed action was based on his disability; and (3) to the extent possible, an articulation of a reasonable accommodation under which he believes he could perform the essential functions of his position or of a vacant position to which he could be assigned. *Patterson v. Department of the Air Force*, 74 M.S.P.R. 648, 659 (1997). An appellant who raises a claim of disability discrimination may establish that he is disabled by showing that he is substantially limited in a major life activity, that he has a record of such limitation, or that he is regarded as having such limitation. *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 78-79 (1997) (citing 29 C.F.R. § 1614.203(a)(1)).

¶9 Here, as found by the administrative judge, the appellant failed to prove that he is a disabled person as that term is defined by statute. ID at 6. Thus, the administrative judge found that the appellant's discrimination claim was "without merit." *Id*. at 7. On review, the appellant does not contest the administrative judge's finding regarding whether he is disabled, and we discern no error in the finding.

The appellant failed to prove that he was discriminated against because the agency regarded him as disabled.

¶10 An individual may also show that he was the victim of disability discrimination if he was regarded as disabled. An individual may qualify as disabled under the "regarded as" definition when: (1) An employer mistakenly

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Exhibit 15. Because the appellant stipulated to the charge that he operated the vehicle in an unsafe manner, we discern no significance to the mechanic's statement. We agree with the deciding official's testimony that the appellant's improper operation of the vehicle created the circumstances that allowed the incident to happen. HT 1, Side A.

believes that a person has an impairment that substantially limits one or more major life activities; or (2) an employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *Justice v. Department of the Navy*, 89 M.S.P.R. 379, ¶ 24 (2001); *Carter v. Department of Justice*, 88 M.S.P.R. 641, ¶ 24 (2001) (citing *Sutton v. United Airlines*, 527 U.S. 471, 489 (1999)). In both cases, it is necessary that the employer entertain misperceptions about the individual – either that the individual has a substantially limiting impairment that he does not have or that he has a substantially limiting impairment when, in fact, the impairment is not so limiting. *Carter v. Department of Justice*, 88 M.S.P.R. 641 at ¶ 24; (quoting *Sutton*, 527 U.S. at 489).

¶11 The appellant raised this argument below, but the administrative judge failed to address it and the appellant raises it again on review. PFRF, Tab 1 at 30-31. According to the appellant, the agency removed him because the proposing and deciding officials perceived him "as an employee who could not regularly work the overtime required by the chronically understaffed office." *Id.* at 30. The appellant observes that, as a result of his medical condition, he frequently took leave, and in the ten months before the vehicle accident, letter carriers in his office were working ten hour days, six days a week. *Id*.

¶12 The record does not support the appellant's allegation that he was regarded as disabled. There is no evidence that the agency officials believed that the appellant was unable to perform the duties of his position and he admitted in his testimony that he frequently worked overtime prior to his removal. HT 2, Side A (testimony of the appellant). Furthermore, while the appellant does not specifically identify any major life activity that his medical condition affects, his arguments focus on work-related problems (absences from work and an inability to work overtime), and thus it appears that his argument is that his medical condition interferes with the major life activity of work. *Id.*

¶13 To establish that an individual was regarded as disabled from performing the major life activity of work, it must be shown that the employer believed that the individual was unable to perform a broad range of jobs compared to the average person having comparable training, skills, and abilities. *Justice*, 89 M.S.P.R. 379, ¶ 25; *Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, ¶ 13 (2001). There is no indication here that the agency regarded the appellant as unable to perform the duties of his Postal Service position, let alone that he was unable to perform a broad range of jobs as compared to the average person having comparable training, skills, and abilities. Accordingly, the appellant has failed to show that the agency regarded him as disabled.

The scope of Board review of an agency's penalty determination

¶14 Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001); *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 12, *review dismissed*, 135 F.3d 773 (Fed.Cir. 1997) (Table); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Fowler*, 77 M.S.P.R. at 12; *Douglas*, 5 M.S.P.R. at 306. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the

agency imposed clearly exceeded the bounds of reasonableness. However, if the deciding official failed to appropriately consider the relevant factors, the Board need not defer to the agency's penalty determination. *Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶¶ 10-11 (2000); *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 134 (1997).

¶15 The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). While not purporting to be exhaustive, the Board identified the following factors:

> 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas, 5 M.S.P.R. 305-06. Not every factor will be present in every appeal and, as noted above, the list is not exhaustive.

Under the circumstances of this appeal, a five-day suspension is the maximum reasonable penalty for the sustained misconduct.

¶16 In the decision letter, the deciding official, Postmaster William Wilson, stated that "[i]n accordance with *Douglas v. Veterans Administration*, I have considered whether the penalty of removing you from the U.S. Postal Service is appropriate." IAF, Tab 6, Subtab 4. He then enumerated the factors he considered and concluded that the appellant should be removed. *Id*. As discussed above, the administrative judge agreed that the deciding official properly considered the appropriate factors in making his penalty determination and concurred that the penalty of removal was reasonable. ID at 10-14. Based on our review of the record, the initial decision, and the appellant's arguments on review, as discussed below, we find that the deciding official failed to consider the appropriate factors in determining the penalty and we therefore decline to afford the agency's penalty determination deference. After proper consideration of the relevant *Douglas* factors, we find that the maximum reasonable penalty is a five-day suspension. *See Stuhlmacher*, 89 M.S.P.R. 272, ¶ 20; *Omites*, 87 M.S.P.R. 223, ¶¶ 10-11; *Wynne*, 75 M.S.P.R. at 134.

¶17 We agree with Wilson that the appellant's conduct was serious, that it could have resulted in serious injury or even death, and that it has a direct relationship to the appellant's performance of his duties as a letter carrier. HT 1, Side A (testimony of Wilson); IAF, Tab 6, Subtab 4 (decision letter); *Omites*, 87 M.S.P.R. 223, ¶ 12 (in evaluating a penalty, the Board looks first and foremost at the nature and seriousness of the misconduct and its relation to the employee's duties and responsibilities); *Wynne*, 75 M.S.P.R. at 135-36 (same). We also agree that the unsafe operation of a Postal Service vehicle adversely affected the agency's confidence in the appellant's ability to perform his assigned duties and that, as stated in the decision letter, if a bystander had been injured, the agency's

public image would have suffered.[5] IAF, Tab 6, Subtab 4 (decision letter); HT 1, Side A (testimony of Wilson); *Hernandez v. Department of Agriculture*, 83 M.S.P.R. 371, ¶ 9 (1999) (loss of trust is a significant aggravating factor). Furthermore, the appellant received training on the safe operation of a vehicle and his conduct was directly contrary to that training. IAF, Tab 6, Subtab 4B; *see* HT 1, Side A (testimony of Wilson).

¶18 Wilson stated in the decision letter that the appellant had "presented no mitigating circumstances." IAF, Tab 6, Subtab 4. The record does not support this statement; the appellant identified several mitigating factors. Moreover, Wilson considered as aggravating factors several things that should have been considered as mitigating factors and considered other things that should not have been considered at all.

¶19 A significant mitigating factor in this appeal is the appellant's 13 years of service with the agency without prior discipline and without a prior motor vehicle accident in which he was at fault. *Sterling v. Department of Defense*, 46 M.S.P.R. 177, 184 n.15 (1990) (longevity of service and a good record are relevant considerations in determining the appropriateness of a penalty), *overruled in part on other grounds, Walsh v. Department of Veterans Affairs*, 46 M.S.P.R. 177 (1990). While employees in the appellant's position do not receive performance evaluations, Wilson testified that he had no problem with the appellant's work ethic, that the appellant received all of the quality step increases he was due, and that other than the incident at issue here, there is no evidence that the appellant ever operated a vehicle improperly. HT 1, Side B; *see* IAF, Tab 13, Exhibit F (supervisory observation of appellant's driving practices).

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[5] There is no evidence that the minor traffic incident actually created any notoriety or caused any adverse effect to the agency's public image. *See O'Keefe v. U.S. Postal Service*, 88 M.S.P.R. 475, ¶ 17 (2001) (considering notoriety in the local community in determining a penalty).

¶20 In the decision letter, however, Wilson stated that the length of the appellant's service was not sufficient to mitigate the penalty and that "[o]n the contrary, it is not unreasonable for the Postal Service to expect an employee of 13 years to work in a safe manner." IAF, Tab 6, Subtab 4. While 13 years of discipline-free service would not justify mitigation of a removal for every act of misconduct, under the circumstances of this appeal, we believe it is a significant mitigating factor. Moreover, it appears that Wilson considered the length of the appellant's service as an aggravating factor since, based on his tenure, the appellant should have known the correct way to operate the vehicle. *Id*. The Board has specifically rejected this approach, noting that such a scheme yields the illogical result that the longer an individual works for the government the more likely that a single misstep would be fatal to his career. *Shelly v. Department of Transportation*, 75 M.S.P.R. 677, 684 (1997).

¶21 The record also shows that, at the time of the incident, the appellant was under the influence of prescription medication to treat an infection that was the result of a chronic illness incurred while in military service. IAF, Tab 13, Exhibit J; HT 2, Side A (testimony of the appellant). It is undisputed that the appellant had just begun taking the medication and had never taken it before. HT 2, Side A (testimony of the appellant). It is also undisputed that the medication, or its interaction with other medications, caused the appellant to be confused and not to think clearly.[6] HT 2, Side B (testimony of the appellant); *see* IAF, Tab 6, Subtab 2C, Exhibit 7 (description of medication). The Board has held that the appellant's use of a prescription drug that played a part in the charged misconduct can be a substantial mitigating factor. *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 427 (1996); *see Bond v Department of Energy*, 82 M.S.P.R. 534, ¶ 29 (1999). Rather than considering as a mitigating factor the appellant's use of

[6] The appellant was taking 11 other medications. IAF, Tab 6, Subtab 2C, Exhibit 6; HT 2, Side B (testimony of the appellant).

a prescription medication, Wilson testified that he considered it a reason to enhance the penalty. HT 1, Side B. He expressed concern that the appellant did not inform the agency that he was on medication but acknowledged that the appellant did not intentionally start his route in an impaired state.[7] *Id.* Wilson also testified that the incident at issue here is the only time the appellant's use of medication adversely influenced the performance of his duties. *Id.*

¶22 Wilson further testified that he considered as an aggravating factor that during the appellant's career he had been injured several times, including being bit by a dog, falling, and slipping on frost. HT 1, Side A; *see* IAF, Tab 6, Subtab 4B at 3. According to Wilson, he considered these past incidents because "accidents can be prevented." HT 1, Side A. He also admitted that he did not know what happened in each of the incidents and was presuming that the appellant was at fault. *Id.* It was error for the deciding official to consider these prior incidents in determining the penalty because the agency did not state in the proposal notice that they would be considered.[8] *See, e.g.*, *Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 505-06 (1995) (it is improper to enhance a penalty based on misconduct that was not cited in the notice of proposed removal), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996) (Table); *Carson v. Veterans Administration*, 29 M.S.P.R. 631, 633 (1986) (an agency should include in the proposal notice any aggravating factors it intends to rely on).

¶23 In addition to the issues set forth above, the appellant also points to the penalty imposed against other employees involved in motor vehicle accidents and

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[7] The agency did not charge the appellant with reporting for duty in an unfit condition or with any similar charge.

[8] While the appellant alleges that Wilson took reprisal against him because he was awarded Office of Workers' Compensation Programs (OWCP) benefits for these work related injuries, PFRF, Tab 1 at 25-28, based on the testimony it appears that Wilson acted because of the actual injury and not the granting of OWCP benefits. HT 1, Side A. Thus, to the extent Wilson considered these factors, there is no basis in the record for finding reprisal for filing an OWCP claim.

observes that they were treated much less harshly. PFRF, Tab 1 at 19-25. To prove a disparate treatment claim with regard to the penalty for an act of misconduct, an appellant must show that a similarly situated employee received a different penalty. *Social Security Administration v. Mills*, 73 M.S.P.R. 463, 472 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997) (Table). The comparitor employee must be in the same work unit, *Brown v Defense Logistics Agency*, 65 M.S.P.R. 436 (1994), *aff'd*, 67 F.3d 319 (Fed. Cir. 1995) (Table), must have the same supervisors, *Thomas v. Department of Defense*, 66 M.S.P.R. 546, 551, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table), and the misconduct must be substantially similar, *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983).

¶24 Here, the appellant has identified other employees of the Bridgeport Post Office that were involved in motor vehicle accidents and received substantially less severe discipline.[9] For example, less than nine months prior to the incident at issue here, Timothy Hill, a Rural Carrier in the same office as the appellant, pulled in front of another vehicle causing an accident. IAF, Tab 13, Exhibit C. Sharon Hall, the proposing official in this appeal and the supervisor of Hill and the appellant, issued Hill a letter of warning. *Id*. A few months after the appellant's incident, Rural Carrier Leslie Vincent, who also worked in the Bridgeport Post Office, received a similar letter of warning from Hall for rear-ending another vehicle. *Id*., Exhibit D. In his hearing testimony, Wilson attempted to distinguish these type of accidents from the appellant's conduct because the appellant allowed his vehicle to roll away with the engine running

[9] The Board has consistently found that allegations of disparate penalties provide no basis for reversal or mitigation where the punishment is appropriate to the seriousness of an employee's offense. *Schoemer v. Department of the Army*, 81 M.S.P.R. 363, ¶ 9 (1999); *Quander v. Department of Justice*, 22 M.S.P.R. 419, 423 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table). Here, the penalty is not appropriate to the seriousness of the appellant's offense.

while the other employees lost control of their vehicles while driving.[10] HT 1, Side A. If there is a difference between the two types of conduct, we find that it is not so significant so as to justify a removal in one instance and a letter of warning in the other.

¶25 Wilson stated in the decision letter that he did not believe that the appellant had any potential for rehabilitation because of his disregard for clearly communicated safety procedures. We disagree. The evidence here shows that if the appellant were returned to duty, he would be unlikely to engage in misconduct and would provide efficient service to the government. The appellant has served the agency for 13 years without prior discipline, Wilson described him as having a "good work ethic," and he immediately reported the incident and took responsibility for his actions. *See Omites*, 87 M.S.P.R. 223, ¶¶ 10, 14 (finding rehabilitative potential based on length of service, good performance record, and prompt acceptance of responsibility). In addition, the misconduct was not intentional and was the result of the use of prescription medication. *See Caronia v. Department of Justice*, 78 M.S.P.R. 201, 216 (1998) (finding a good potential for rehabilitation where, among other things, the misconduct was not intentional and was caused by a medical condition), *overruled on other grounds, Carter v. Department of Justice*, 88 M.S.P.R. 641, ¶ 25 n.5 (2001). Finally, the appellant testified that he would never take the medication again and there is no reason to

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[10] Hill and Vincent were Rural Letter Carriers and the appellant was a City Carrier but, other than the nature of the delivery route, the positions are virtually identical. HT 1, Side A (testimony of Wilson). In comparing the two positions, Wilson testified that Rural Carriers drive a significantly greater number of miles each day. *Id.* We discern no reason why Rural Carriers are not a valid comparitor to the appellant. The appellant identified two other comparitor employees also employed as Bridgeport carriers, Rodney Straight and Michael Parks, who were involved in motor vehicle accidents and, whom Wilson acknowledged, were not removed for accidents. HT 1, Side A; PFRF, Tab 1 at 23-24.

doubt him.[11] HT 2, Side A; *cf. Bond v. Department of Energy*, 82 M.S.P.R. 534, ¶¶ 28-30 (1999) (switching to a medication that should not cause a repeat of the circumstances that led to an act of misconduct demonstrates a potential for rehabilitation); *Hamilton v. U.S. Postal Service*, 84 M.S.P.R. 635, ¶ 19 (1999) (seeking treatment for a medical condition that played a part in the charged misconduct indicates a rehabilitative potential), *review dismissed*, 10 Fed. Appx. 805 (2001). Thus, we believe that the evidence of record indicates that the appellant has an excellent potential for rehabilitation.

¶26 In sum, while the misconduct at issue here is serious and the appellant has been trained on the safe operation of a motor vehicle, there are numerous mitigating factors, many of which the deciding official failed to properly consider. The significant mitigating factors in our opinion include the length of the appellant's service, the lack of prior discipline, the fact that the misconduct was caused in significant part by a medication the appellant was taking for a military-service related medical condition, and the appellant's clear potential for rehabilitation. Also a factor that must be considered is the type of penalty given to other employees who engaged in similar, if not identical, conduct. Based on all of this, we find that a five-day suspension is the maximum reasonable penalty for the sustained misconduct.[12]

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[11] The appellant testified that he stopped taking the medication the day of the incident. HT 2, Side B. He also testified that his doctor told him that there was no reason why he could not drive a Postal Service vehicle. *Id.*

[12] The appellant argues that the agency committed harmful procedural error because the proposing and deciding officials were predisposed to remove him and did not fully consider his response to the proposed removal. PFRF, Tab 1 at 28-29. Because of our finding regarding the agency's penalty determination, we need not address the appellant's claim.

ORDER

¶27 We ORDER the agency to cancel the appellant's removal and substitute in its place a five-day suspension effective September 9, 2000. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶28 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶29 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

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

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

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

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request 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 of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

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

FOR THE BOARD:

_____
Shannon McCarthy
Acting Clerk of the Board

Washington, D.C.