UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 33

Docket No. CB-1216-13-0063-T-1

Special Counsel,

Petitioner,

v.

Marcus Lewis,

Respondent.

May 15, 2014

Leslie J. Gogan, Esquire, and Nadia K. Pluta, Esquire, Washington, D.C., for the petitioner.

Marcus Lewis, Matteson, Illinois, pro se.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The respondent has filed a petition for review of the administrative law judge's initial decision finding that he violated the Hatch Act and ordering his removal from federal service. *See* Petition for Review (PFR) File, Tab 1; Complaint File (CF), Tab 6, Initial Decision (ID). For the reasons that follow, the respondent's petition for review is DENIED, and the administrative law judge's initial decision is AFFIRMED as MODIFIED. We ORDER the U.S. Postal Service to REMOVE the respondent from federal service.

BACKGROUND

¶2 The respondent served as a federal employee with the U.S. Postal Service in Carol Stream, Illinois. *See* CF, Tab 1, Complaint, ¶ 1. As an employee of the U.S. Postal Service, the respondent was subject to the provisions and limitations of the Hatch Act, including, inter alia, its prohibition on federal employees running as a candidate for election to partisan political office. *Id.*, ¶ 2; *see* 39 U.S.C. § 410(b)(1); 5 U.S.C. § 7323(a)(3); *Special Counsel v. Simmons*, 90 M.S.P.R. 83, ¶ 12 (2001). The Office of Special Counsel (OSC) filed a complaint with the Clerk of the Board alleging that the respondent ran as an independent candidate for a seat in the U.S. House of Representatives from the State of Illinois on two separate occasions, first in the general election held in November 2012, and a second time during a special election held in April 2013. *See* CF, Tab 1, Complaint, ¶¶ 4-5, 7-8. In both the general and special elections, candidates from the Democratic and Republican parties were candidates on the ballot. *Id.*, ¶¶ 5, 8. During the months preceding both elections, moreover, the respondent maintained a campaign website and a Facebook page soliciting political contributions for his campaigns for office. *Id.*, ¶¶ 10-15. The respondent was unsuccessful in both of his efforts to secure elected office. *See id.*, ¶ 25.

¶3 OSC issued the respondent a letter on September 19, 2012, notifying him that his participation in the general election for a seat in the U.S. House of Representatives violated the Hatch Act. *See* CF, Tab 1, Complaint, Exhibit 6. OSC explained that "this letter serves as notice that your current candidacy in the partisan election for Chicago state representative is in violation of the Hatch Act,"[1] and that "[r]ather than pursue disciplinary action against you at this time,

[1] OSC subsequently clarified that it was referring to the respondent's candidacy for a seat in the U.S. House of Representatives. *See* CF, Tab 1, Complaint, Exhibit 8 n.1.

we are providing you with an opportunity to come into compliance with the law." *Id*. OSC described compliance with the law as either "withdraw[ing] your candidacy or [] no longer [being] employed in a position covered by the Hatch Act." *Id*. A month later, counsel for the respondent replied in writing to OSC by challenging the Hatch Act's limitations on federal employees running for partisan political office under the First and Fourteenth Amendments. *Id*., Exhibit 7. During this time, the respondent continued his campaign for partisan political office while remaining employed with the U.S. Postal Service. CF, Tab 1, Complaint, ¶ 25.

¶4 OSC issued the respondent a second letter on November 2, 2012, again informing him that his candidacy for the U.S. House of Representatives violated the Hatch Act, and again giving him the option of withdrawing from the election or ceasing his federal employment. *See* CF, Tab 1, Complaint, Exhibit 8. On the same day, the U.S. Postal Service provided a mandatory service talk to its employees, which the respondent attended, outlining permitted and prohibited activities under the Hatch Act. CF, Tab 1, Complaint, ¶ 24. The respondent during this time continued to maintain his candidacy for partisan political office while in the employ of the U.S. Postal Service. *Id*., ¶ 25.

¶5 After failing to be elected to the U.S. House of Representatives in the November 2012 general election, the respondent announced his intent to run for the same seat in a special election scheduled for April 2013. *Id*., ¶ 26. The U.S. Postal Service issued the respondent a cease and desist letter on December 4, 2012, warning him that his candidacy for partisan political office in the special election violated the Hatch Act and that he could be subject to disciplinary action initiated by OSC. *Id*., ¶ 27; *see id*., Exhibit 11. Two months later, the respondent filed the necessary paperwork to become an independent candidate in the 2013

The respondent never disputed that he ran for a seat in the U.S. House of Representatives. *Id*.

special election, and OSC subsequently issued him a third written notice again explaining that his candidacy violated the Hatch Act. *See* CF, Tab 1, Complaint, ¶¶ 28-29; *see also id*., Exhibits 12 and 13. The respondent remained a candidate in the special election while continuing his federal employment with the U.S. Postal Service. *See* CF, Tab 1, Complaint, ¶ 25.

¶6 On March 13, 2013, OSC filed a complaint with the Clerk of the Board charging the respondent with three violations of the Hatch Act as it pertains to federal employees and seeking the respondent's removal from federal service. *See* CF, Tab 1, Complaint. In its complaint, OSC alleged that the respondent violated the Hatch Act by running for partisan political office in both the 2012 general election and the 2013 special election and by soliciting political contributions via his campaign website and Facebook page during both of his campaigns for elected office. *Id*., ¶¶ 17-30; *see* 5 U.S.C. § 7323(a)(2), (3). The respondent was served with the complaint both electronically and in writing, and the Clerk of the Board issued an Acknowledgment Order assigning the complaint to an administrative law judge. *See* CF, Tabs 1 and 2. Although the respondent registered as an e-filer on May 22, 2013, *see* CF, Tab 3, he did not file an answer to OSC's complaint within the 35-day response period permitted under the Board's regulations. *See* 5 C.F.R. § 1201.124(c). OSC moved for the entry of a default, which was served in writing and electronically on both the respondent and an attorney believed to be representing the respondent. CF, Tab 4 at 21. The administrative law judge issued an order to show cause giving the respondent an additional period of time to file an answer and show why a default should not be awarded. *See* CF, Tab 5. The respondent did not respond.

¶7 Subsequently, the administrative law judge issued an initial decision entering a default against the respondent, finding that, based upon the facts pled in OSC's complaint, the respondent violated the Hatch Act by running for partisan political office on two separate occasions and by knowingly soliciting political contributions. *See* ID at 1-11; *see also* 5 C.F.R. § 1201.124(c)

(providing that unanswered allegations may form the basis of an administrative law judge's decision). The administrative law judge found that running for a seat in the U.S. House of Representatives in both the general and special elections constituted candidacy in a partisan political election in violation of 5 U.S.C. § 7323(a)(3). ID at 9. The administrative law judge also found that the respondent knowingly solicited political contributions in both elections via his campaign website and Facebook page in violation of 5 U.S.C. § 7323(a)(2). ID at 10.

¶8 Based upon these findings, the administrative law judge ordered the respondent removed from federal service. *Id*. at 11-17. In reaching his decision, the administrative law judge reasoned that the conspicuous and unequivocal nature of the respondent's Hatch Act violations, along with his ignoring the repeated warnings he received from both OSC and the U.S. Postal Service, weighed in favor of his removal. *Id*. at 12-14. The administrative law judge also explained that, while the "[r]espondent sought and obtained advice of counsel regarding the violations alleged in OSC's warning letter of September 19, 2012," *id*. at 14, this factor did not provide a sufficient basis to impose a penalty less than removal, especially given that OSC provided the respondent with several warnings, none of which he heeded, *id*. at 14-15 (citing and discussing *Special Counsel v. Greiner*, 117 M.S.P.R. 117, ¶ 20 (2011)). Lastly, noting that the respondent had received several disciplinary actions of varying severity during his career with the U.S. Postal Service, the administrative law judge found that the respondent's "prior employment record does not mitigate the consequences for [his] Hatch Act violations." ID at 16.

¶9 The respondent has filed a timely petition for review seeking to vacate the administrative law judge's entry of a default and challenging his conclusions that the respondent's conduct violated the Hatch Act and warranted his removal from employment. *See* PFR File, Tab 1 at 1-12. In his petition for review, the respondent argues that his former counsel "did not file Respondents [sic]

Answers to Complaint . . . nor did he do other motions he had originally said to this court." *Id.* at 1. As to the substance of the administrative law judge's initial decision, the respondent argues, inter alia, that OSC's complaint should be transferred "to the Northern District" and states that he believed he was permitted to run for elected office as an independent candidate based upon a story he had reviewed on the internet. *Id.* at 1-2. The respondent has appended an answer to OSC's complaint to his petition for review in which he admits to all of the salient facts forming the basis of the administrative law judge's findings that he violated the Hatch Act, and he argues that any violations of the Hatch Act were unknowing and unintentional. *See id.* at 5-12. OSC has filed an opposition to the respondent's petition for review, and the respondent has filed a reply. *See* PFR File, Tabs 7 and 8.

ANALYSIS

The respondent has not demonstrated good cause for vacating the administrative law judge's entry of a default.

¶10 Pursuant to 5 C.F.R. § 1201.124(c), "[a] party named in a Special Counsel disciplinary action complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint." "If a party fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint, [and] [u]nanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision." *Id.*

¶11 The Federal Circuit has held that a party before the Board ignores a Board order at his own peril. *See Special Counsel v. Fields*, 57 M.S.P.R. 60, 62 (1993) (citing *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650, 653-54 (Fed. Cir. 1992)). Consistent with this principle, and with the plain language of the Board's regulation, a respondent who fails to file an answer to an OSC complaint is deemed to have admitted the facts pled in the complaint. *See Fields*, 57 M.S.P.R. at 62. There is no dispute that the respondent received all of OSC's filings and that he did not respond to the complaint, to OSC's motion for a

default, or to the administrative law judge's order to show cause. *See generally* Complaint File. We therefore agree with the administrative law judge that the respondent's failure to respond constituted a waiver of his right to file an answer and that the facts alleged in OSC's complaint are deemed to be true. *See* ID at 5; *see also* 5 C.F.R. § 1201.124(c).

¶12 We have considered whether the respondent has demonstrated good cause for his failure to respond to OSC's complaint, and we find that he has not. *See, e.g.*, *Department of Health & Human Services v. Underwood*, 68 M.S.P.R. 24, 25 (1995) (citing *Fields*, 57 M.S.P.R. 60); *cf.* 5 C.F.R. § 1201.114(g) (allowing for an untimely petition for review filing upon a showing of good cause). In his petition for review, the respondent argues that he failed to respond to OSC's complaint due to his attorney's negligence. *See* PFR File, Tab 1 at 1. The respondent, however, never submitted a designation of representation identifying a representative, and we find that the respondent cannot establish good cause for his default based upon the acts and omissions of his putative representative. As a general matter, a party is bound by the actions or inactions of his chosen representative, *see Dunbar v. Department of the Navy*, 43 M.S.P.R. 640, 643 (1990), which generally do not excuse the appellant's filing delay, *Boyce v. Department of Veterans Affairs*, 79 M.S.P.R. 402, ¶ 7 (1998). Under these facts, where the respondent never submitted a designation of representation identifying a representative, we find that the respondent cannot prove that his diligent efforts to prosecute his case were thwarted by his attorney's deception and negligence, such that his inactions should be excused. *See Miller v. Department of Homeland Security*, 110 M.S.P.R. 258, ¶ 11 (2008); *see also Rowe v. Merit Systems Protection Board*, 802 F.2d 434, 438 (Fed. Cir. 1986) ("[An appellant] ha[s] a personal duty to monitor the progress of his appeal at all times and not leave it entirely to his attorney."). *But see Jackson v. Department of the Air Force*, 68 M.S.P.R. 235, 238 (1995) (the Board will not apply the general rule that a party is bound by the actions of his representative when, in the interest of justice, a

designated representative misrepresents, either intentionally or through negligence, that an appeal had been filed, and the appellant is otherwise diligent in prosecuting his appeal).

¶13 We note, moreover, that the respondent personally registered as an e-filer, *see* CF, Tab 3, and that the Board's regulations provide that "[r]egistration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the MSPB," 5 C.F.R. § 1201.14(e). Here, where the respondent consented to personally receive electronic submissions under the Board's electronic filing procedures, and where he has offered no explanation for his failure to respond to the complaint, we find that the respondent cannot establish good cause for his failure to answer OSC's complaint. *See McCoy v. U.S. Postal Service*, 112 M.S.P.R. 256, ¶ 8 (2009) (a lack of representation, or an inability to secure representation, fails to establish good cause to excuse an untimely petition for review), *aff'd sub nom. McCoy v. Merit Systems Protection Board*, 360 F. App'x 132 (Fed. Cir. 2010).

¶14 Lastly, the Board has previously considered the effect of a respondent's default when, on petition for review, the respondent has essentially conceded that his actions violated the Hatch Act, and it has concluded that such circumstances weigh against vacating the default. *See Special Counsel v. Briggs*, 110 M.S.P.R. 1, ¶ 5 (2008) (we need not address the respondent's argument that his answer to the complaint should have been considered because, even if that answer were considered, it would be clear that the respondent violated the Hatch Act), *aff'd sub nom. Briggs v. Merit Systems Protection Board*, 322 F. App'x 983 (Fed. Cir. 2009). Consistent with *Briggs*, even if we were to consider the respondent's answer to OSC's complaint filed for the first time on review, we find that, as explained below, the respondent's candidacy for partisan political office on two separate occasions and his knowing solicitation of political contributions are clear and unambiguous violations of the Hatch Act. *See* 5 U.S.C. § 7323(a)(2), (3). Accordingly, because the respondent has admitted to the pertinent facts which

form the basis of the administrative law judge's findings that he violated the Hatch Act, we find no reason to vacate the administrative law judge's entry of a default. *See Briggs*, 110 M.S.P.R. 1, ¶ 5; 5 C.F.R. § 1201.124(c).

The respondent violated the Hatch Act by running as a candidate for election to a partisan political office on two separate occasions and knowingly soliciting political contributions.

¶15 Based upon the admitted facts in OSC's complaint, we agree with the administrative law judge that the respondent violated the Hatch Act by running for partisan political office on two occasions and knowingly soliciting political contributions. ID at 9-11. Pursuant to 5 U.S.C. § 7322(2), "partisan political office" is defined as "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." *See Briggs*, 110 M.S.P.R. 1, ¶ 7. The record reflects that, during the last Presidential election, the Democratic and Republican candidates for Presidential electors received votes and both Democratic and Republican candidates ran for the seat for which the respondent campaigned during the 2012 general election and the 2013 special election. *See* CF, Tab 4 at 8; CF, Tab 1, Complaint, ¶¶ 5-8; ID at 9. Based upon these facts, we agree with the administrative law judge that the office to which the respondent sought election qualifies as a partisan political office under 5 U.S.C. § 7322(2), and that his candidacy for this office violated 5 U.S.C. § 7323(a)(3)'s ban on federal employees "run[ning] for the nomination or as a candidate for election to partisan political office."

¶16 We further concur with the administrative law judge that the respondent knowingly solicited political contributions during both elections via his campaign website and Facebook page in contravention of 5 U.S.C. § 7323(a)(2) when he sought contributions to his campaigns for office from the public at large. *See* ID at 10-11; CF, Tab 1, Complaint, Exhibits 1-4. A political contribution is defined as, inter alia, "any . . . deposit of money or anything of value, made for any

political purpose." 5 U.S.C. § 7322(3)(A). We agree with the administrative law judge that the respondent's requests for political contributions via his campaign website and Facebook page violated 5 U.S.C. § 7323(a)(2). *See Special Counsel v. Mark*, 114 M.S.P.R. 516, ¶¶ 2, 6 (2010) (finding uncontested that respondent's email seeking online contributions violated 5 U.S.C. § 7323(a)(2)).

¶17 The administrative law judge's finding that the respondent violated the Hatch Act by running for partisan political office during the 2012 general election and the 2013 special election and by knowingly soliciting political contributions is AFFIRMED.

The Hatch Act Modernization Act of 2012 applies to this case.

¶18 Upon concluding that the respondent violated the Hatch Act, the administrative law judge determined that the respondent should be removed from federal service. *See* ID at 11-17. As the administrative law judge explained, however, Congress passed the Hatch Act Modernization Act of 2012 (Modernization Act), Pub. L. No. 112-230, 126 Stat. 1616, prior to OSC's filing the instant complaint against the respondent. *See* ID at 12 n.4; *see also* Modernization Act, § 5(a) (providing that "the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act").[2] Among several changes to the Hatch Act, the Modernization Act "provid[es] more flexibility with respect to penalties that may be imposed on federal employees for Hatch Act violations." S. Rep. No. 112-211, at 2 (2012). Specifically, under the Modernization Act, removal from employment is no longer the presumptive penalty for a federal employee's violation of the Hatch Act; rather, amended 5 U.S.C. § 7326 now provides that "[a]n employee or individual who violates

[2] The Modernization Act was signed into law by President Obama on December 28, 2012, and went into effect on January 27, 2013. *See* Pub. L. No. 112-230, 126 Stat. 1616.

section 7323 or 7324 [of Title 5] shall be subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." *See* Modernization Act, § 4 (striking and replacing entirety of 5 U.S.C. § 7326).

¶19 Pursuant to the Modernization Act, "the amendment made [to 5 U.S.C. § 7326] shall apply with respect to any violation occurring before, on, or after the effective date of this Act." *Id.*, § 5(b)(1). "The amendment [to 5 U.S.C. § 7326, however,] shall not apply with respect to an alleged violation if, before the effective date of [the Modernization Act], the Special Counsel has presented a complaint for disciplinary action . . . with respect to the alleged violation." *Id.*, § 5(b)(2)(A). Here, OSC filed the instant Hatch Act complaint with the Clerk of the Board on March 13, 2013, several weeks after the Modernization Act took effect. *See* CF, Tab 1; *see* Modernization Act, § 5(a), (b)(1). We therefore find that the Modernization Act's amendments to the Hatch Act apply in this case. *See* Modernization Act, § 5(b)(1).

The Modernization Act changes the analysis the Board must conduct when considering the appropriate penalty for a federal employee's violation of the Hatch Act, and under the Modernization Act, the Board must conduct an independent Douglas factors analysis.

¶20 Prior to the Modernization Act, the Hatch Act provided that "[a]n employee or individual who violates 7323 or 7324 of this title shall be removed from his position . . . . However, if the [Board] finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board." 5 U.S.C. § 7326 (prior version); *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, ¶ 17 (2006). Noting that the previous version of the Hatch Act provided a presumptive penalty of removal for a violation of the Act, the Board articulated a series of factors to be considered when determining whether the presumptive penalty of removal should be imposed, or whether some lesser penalty, not less than 30 days' suspension, was more appropriate. *See Special Counsel v. Ware*, 114 M.S.P.R. 128, ¶ 20 (2010).

These factors, referred to as the *Purnell* factors, *see Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989), included: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities. *See Ware*, 114 M.S.P.R. 128, ¶ 20. In considering the *Purnell* factors, the Board explained that a respondent who has been found to have violated the Hatch Act has the burden of presenting evidence showing that the Act's presumptive penalty of removal should not be imposed. *Briggs*, 110 M.S.P.R. 1, ¶ 12.

¶21 Pursuant to the Modernization Act, however, removal is no longer the presumptive penalty for a violation of the Hatch Act. *See* Modernization Act, § 4 (striking and replacing the entirety of 5 U.S.C. § 7326). Under the amended version of 5 U.S.C. § 7326, "[a]n employee or individual who violates section 7323 or 7324 shall be subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." The Modernization Act's legislative history, moreover, makes clear that the Board should now consider a "broader range of penalties" when determining the appropriate penalty for a federal employee's violation of the Hatch Act. *See* S. Rep. No. 112-211, at 5. Whereas the Board used to apply the *Purnell* factors to determine whether a respondent presented a sufficient basis to mitigate the presumptive penalty of removal, *see Ware*, 114 M.S.P.R. 128, ¶ 20, pursuant to the Modernization Act, the Board must now independently determine the proper penalty from among a range of permissible penalties, and we conclude that the Board should apply its *Douglas* factors analysis in conducting this analysis under 5 U.S.C. § 7326. As explained in the Modernization Act's legislative history:

> [T]he Hatch Act's penalty provision should be modified to allow the MSPB to impose a broader range of penalties . . . and the [Modernization Act] amends the Hatch Act to authorize the same range of penalties authorized for other disciplinary actions under OSC's jurisdiction. Further, the Committee expects that, in selecting a penalty for a Hatch Act violation, the Board will consider the severity of the violation and other aggravating or mitigating factors, as the Board does with respect to non-Hatch Act violations.

See S. Rep. No. 112-211, at 5; *see also* 78 Fed. Reg. 39543, 39545 (July 2, 2013) (interim regulation for 5 C.F.R. § 1201.126(c)).

¶22 In other disciplinary actions under OSC's jurisdiction brought before the Board, the Board applies the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). *See, e.g., Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶ 37 (2010), *rev'd on other grounds sub nom. Beatrez v. Merit Systems Protection Board*, 413 F. App'x 298 (Fed. Cir. 2011). The *Douglas* factors are a nonexhaustive list of twelve factors the Board considers in reviewing and determining an appropriate penalty in, inter alia, employee-initiated appeals under chapter 75 and disciplinary actions filed with the Board by OSC. *See, e.g., Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 6 (2010) (listing the *Douglas* factors in a chapter 75 appeal); *Lee*, 114 M.S.P.R. 57, ¶ 37 (in determining the penalty in Special Counsel disciplinary actions under 5 U.S.C. § 1215 and 5 C.F.R. §§ 1201.122-1201.127, the Board applies the factors that are set forth in *Douglas*).

¶23 Considering both the changes in the Hatch Act's statutory language and the Modernization Act's legislative history concerning those changes, we find that the Board should now apply the *Douglas* factors in determining the proper penalty for a federal employee's violation of the Hatch Act under 5 U.S.C. § 7326. Accordingly, in conducting this analysis, the Board now should consider: (1) the nature and seriousness of the offense, including whether the offense was intentional or inadvertent, or was frequently repeated; (2) the employee's job level and type of employment, including any fiduciary or

supervisory role; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level; (6) the consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) the consistency of the penalty with any applicable 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 were violated; (10) the potential for the employee's rehabilitation; (11) any mitigating circumstances surrounding the offense, such as unusual job tensions; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *See Villada*, 115 M.S.P.R. 268, ¶ 6; *Douglas*, 5 M.S.P.R. at 305-06. As in all instances where the Board applies the *Douglas* factors, not all of these factors will be pertinent in every case, and the relevant factors must be balanced in each case to arrive at the appropriate penalty. *See Davis v. U.S. Postal Service*, 120 M.S.P.R. 457, ¶ 7 (2013). In reaching this conclusion, we further note that several of the *Douglas* and *Purnell* factors overlap, and we find that the *Purnell* factors continue to provide relevant guidance to our *Douglas* factors analysis insofar as they address the nature and seriousness of the respondent's offense and whether there are any mitigating circumstances, such as the respondent's reliance on the advice of counsel or his change in conduct once notified that his conduct violates the Hatch Act. *See Purnell*, 37 M.S.P.R. at 200; *Douglas*, 5 M.S.P.R. at 305-06.

The Modernization Act does not require a respondent to establish why his removal should not be imposed for a violation of the Hatch Act.

¶24 Under the Board's prior decisions addressing the Hatch Act, once OSC established that a federal employee violated the Hatch Act, the respondent-employee had the burden of establishing why the presumptive penalty of removal should not be imposed. *See Ware*, 114 M.S.P.R. 128, ¶ 20. In other OSC disciplinary proceedings before the Board, however, the Board has

recognized that it possesses an independent obligation to consider the *Douglas* factors and determine for itself the appropriate penalty under the facts of the particular case. *See, e.g.*, *Frederick v. Department of Justice*, 65 M.S.P.R. 517, 535 (1994) (in disciplinary actions brought by OSC itself, moreover, the Board is not bound by OSC's penalty determinations but instead takes into account the relevant factors enumerated in *Douglas*) (citing *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 582 (1993), *aff'd sub nom. Byrd v. Merit Systems Protection Board*, 39 F.3d 1196 (Fed. Cir. 1994) (Table), and *Special Counsel v. Mongan*, 33 M.S.P.R. 392, 398 (1987)), *rev'd on other grounds*, 73 F.3d 349 (Fed. Cir. 1996). Consistent with our approach in other OSC disciplinary proceedings, therefore, we find that, under the Modernization Act, a respondent does not bear the burden of establishing why he should not be removed from federal service once OSC proves a violation of the Hatch Act. Rather, under the Modernization Act, we find that both OSC and the respondent may submit argument and evidence as to the severity of the violation and other aggravating and mitigating factors under *Douglas* pursuant to 5 U.S.C. § 7326. *See* S. Rep. No. 112-211, at 5.

¶25 Accordingly, the Board's prior decisions holding that the respondent bears the burden of establishing why the presumptive penalty of removal should not be imposed are OVERRULED. *See, e.g.*, *Ware*, 114 M.S.P.R. 128, ¶ 20.

Under the Modernization Act, the administrative law judge's initial decision removing the respondent from federal service is AFFIRMED as MODIFIED.

¶26 Although the administrative law judge applied the *Purnell* factors in reaching his decision to order the respondent's removal from federal service, based upon our review of the facts of this case under *Douglas*, we conclude that the administrative law judge reached the correct result. Accordingly, the administrative law judge's initial decision ordering the respondent removed from federal service under 5 U.S.C. § 7326 is AFFIRMED as MODIFIED.

¶27 First, we agree with the administrative law judge that the nature and severity of the respondent's Hatch Act violations are not in dispute. *See* ID at

12-13. The Board has consistently found that a respondent's "active candidacy for partisan political office, [which] was conspicuous and substantial," warrants removal from federal service. *See Greiner*, 117 M.S.P.R. 117, ¶ 19 (the respondent's candidacy for partisan political office carries with it political coloring of the highest order and also weighs in favor of removal). We find no reason to deviate from this precedent under the Modernization Act. Unlike *Greiner*, moreover, the instant respondent participated as a candidate for partisan political office in two separate elections after being informed by both OSC and his employing agency on several occasions that his candidacy ran afoul of the Hatch Act. *See* CF, Tab 1, Complaint, ¶¶ 20-21, 23-24, 27, 29. The repeated, flagrant nature of the respondent's Hatch Act violations weighs heavily in favor of his removal under the first and ninth *Douglas* factors pertaining to the seriousness and frequency of his violations and the clarity with which he was on notice that his actions were unlawful. *See Villada*, 115 M.S.P.R. 268, ¶ 6; *see also Ware*, 114 M.S.P.R. 128, ¶¶ 22, 34, 38 (removing an employee after discussing the *Purnell* factors pertaining to the nature of the employee's offense and the political coloring of the employee's prohibited activities).

¶28 We further agree with the administrative law judge that neither the respondent's intent, nor his mistaken belief that he was not violating the Hatch Act by running as an independent candidate,[3] outweighs the severity of his

[3] The respondent argues on petition for review that his candidacy for partisan political office as an independent candidate did not violate the Hatch Act. *See* PFR File, Tab 1 at 2. Under certain narrow conditions, "[e]mployees who reside in a municipality or political subdivision designated by [the Office of Personnel Management (OPM)] under [5 C.F.R.] § 733.107 may (1) [r]un as independent candidates for election to partisan political office in elections for local office in the municipality or political subdivision." 5 C.F.R. § 733.103(b)(1); *see* 5 U.S.C. § 7325; *see generally Special Counsel v. Campbell*, 58 M.S.P.R. 170, 177-78 (1993), *aff'd sub nom. Campbell v. Merit Systems Protection Board*, 27 F.3d 1560 (Fed. Cir. 1994). This limited exception to the Hatch Act's general prohibition on a federal employee's candidacy for partisan political office is inapplicable to this case where the respondent ran for elected office on the federal

offense. *See* ID at 14-16. An employee's intent may be relevant to the Board's penalty determination, *see Villada*, 115 M.S.P.R. 268, ¶ 6; *Briggs*, 110 M.S.P.R. 1, ¶ 10. *But see Ware*, 114 M.S.P.R. 128, ¶ 27. Here, however, the respondent was notified by OSC on three separate occasions that his conduct violated the Hatch Act, *see* CF, Tab 1, Complaint, ¶¶ 21, 23, 29. Although the respondent may have wrongfully believed at the outset of the 2012 general election that he could run for a seat in the U.S. House of Representatives as an independent candidate while simultaneously serving as a federal employee, *see, e.g.*, PFR File, Tab 1 at 2, any mistaken belief he held should have been corrected after receiving OSC's multiple notices that he was violating the Hatch Act, *see* CF, Tab 1, Complaint, Exhibits 6, 8, and 13. The record reflects, moreover, that the respondent maintained a steadfast campaign for partisan political office despite receiving repeated notices that he should cease his campaign or resign from federal service. *See* CF, Tab 1, Complaint, ¶¶ 25, 30. We further find that the respondent's reliance on the advice of his counsel provides no basis for imposing a penalty less than removal considering that, after being presented with both OSC's notices and his counsel's advice, he "proceeded with his candidacy 'on a calculated risk basis.'" *Greiner*, 117 M.S.P.R. 117, ¶ 20 (citing *In re Lightsey*, 2 P.A.R. 813, 823-24 (1969)). The intentional nature of the respondent's conduct thus weighs in favor of removal and fails to provide an adequate basis for imposing a less severe penalty.

¶29 We also have looked to the Board's earlier Hatch Act cases which sustained employee removals, and we find that the respondent's removal is commensurate with the penalties the Board has previously imposed under similar circumstances. For example, in *Briggs*, the Board ordered a federal employee

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level. We further note that OPM has exempted no municipality or political subdivision in Illinois under 5 C.F.R. § 733.103. *See* 5 C.F.R. § 733.107(c) (listing exempted municipalities).

removed from service after he was put on notice that his candidacy for partisan political office violated the Hatch Act and he refused to either withdraw his candidacy or resign from federal employment. *See* 110 M.S.P.R. 1, ¶¶ 6, 17. Similarly, in *Greiner*, the Board ordered a local police chief removed from his position of employment after OSC informed him that he could not simultaneously maintain his employment and run for the Utah State Senate. *See* 117 M.S.P.R. 117, ¶¶ 3, 27. As did the administrative law judge, we find that *Greiner* and *Briggs* support removing an employee from service after he has been notified that his candidacy for partisan political office violates the Hatch Act and he continues his candidacy for partisan political office unabated. We also have reviewed the Board's prior decisions mitigating employee removals under 5 U.S.C. § 7326, and we find that they are distinguishable from this case because of the respondent's intentional and knowing violations of the Hatch Act. *See Mark*, 114 M.S.P.R. 516, ¶¶ 13, 24 (mitigating removal to a 120-day suspension for forwarding one email in violation of the Hatch Act); *Special Counsel v. DeWitt*, 113 M.S.P.R. 458, ¶ 6 (2010) (finding that "strong mitigating factors," including the respondent's withdrawal of her candidacy, justified accepting a settlement agreement which imposed a 30-day suspension). No such "strong mitigating factors" are present in the instant case.

¶30 Finally, we have considered the respondent's disciplinary history, which is extensive. *See* CF, Tab 4, Exhibit 7.[4] We agree with the administrative law

[4] The record reflects that the respondent was issued three separate notices of removal between September 2008 and July 2009. *See* CF, Tab 4, Exhibit 7. The record, however, does not explain the circumstances surrounding the respondent's return to duty following each notice. To the extent the administrative law judge may have improperly relied upon the respondent's past discipline which has been overturned, *see, e.g.*, *Jones v. U.S. Postal Service*, 110 M.S.P.R. 674, ¶ 7 (2009), we find this reliance does not warrant a different outcome because of the remaining overwhelming evidence in the record in support of the respondent's removal. The respondent, moreover, has not challenged the accuracy of his remaining disciplinary history on petition for review. *See* PFR File, Tab 1.

judge that the respondent's past disciplinary history and employment record do not serve as mitigating factors weighing in favor of a penalty short of removal. *See* ID at 16; *see also Greiner*, 117 M.S.P.R. 117, ¶ 24 (finding employee's positive employment record by far the most significant mitigating factor in the case). We therefore concur with the administrative law judge that the respondent's negative employment history, combined with his unwavering resolve to run for partisan political office, demonstrates a lack of rehabilitative potential which weighs against imposing a penalty other than removal.

¶31 Accordingly, applying the administrative law judge's factual findings to our independent consideration of the appropriate penalty for the respondent's Hatch Act violations under *Douglas*, we ORDER the U.S. Postal Service to REMOVE the respondent from federal service under 5 U.S.C. § 7326. The administrative law judge's initial decision is AFFIRMED as MODIFIED by this Opinion and Order.

ORDER

¶32 The Board ORDERS the U.S. Postal Service to REMOVE the respondent from his position of employment. The Board also ORDERS the Office of Special Counsel to notify the Board within 30 days of the date of this Opinion and Order whether the respondent has been removed as ordered. 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 RESPONDENT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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 Respondents," 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.