UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

96 M.S.P.R. 179

DARYL C. THOMAS,
Appellant,

DOCKET NUMBER
CH-0752-03-0559-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: May 25, 2004

Justice W. Vinson, Detroit, Michigan, for the appellant.

David F. Wightman, Esquire, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision dated September 29, 2003, that mitigated the appellant's removal to a 120-day suspension. For the reasons set forth below, we GRANT the petition, REVERSE the initial decision, and SUSTAIN the removal.

BACKGROUND

¶2 The agency removed the appellant from his position as a PS-6 General Expediter for "unauthorized absence from assignment/outside the building without official authorization," gaining remuneration for work he failed to perform, use of marijuana while on the clock in an official capacity, and illegal

drug use. Initial Appeal File (IAF), Tab 4, Subtabs 4C, 4E. The appellant filed an appeal of that action. IAF, Tab 1.

¶3 After holding the requested hearing, the administrative judge sustained the charges. Initial Decision (ID) at 2. However, she mitigated the removal to a 120-day suspension, concluding that the appellant showed potential for rehabilitation and that the case law supported mitigation. ID at 5-6. The agency has filed a petition for review of that decision, alleging that the administrative judge erred by mitigating the removal. Petition for Review File (PFRF), Tab 1.

ANALYSIS

The agency properly considered the relevant *Douglas* factors, and the penalty of removal was appropriate.

¶4 On petition for review, the agency argues that the administrative judge improperly substituted her judgment for that of the deciding official regarding the reasonableness of the penalty. PFRF, Tab 1. The Board will give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987); *see Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001). The Board will not displace management's responsibility in this respect, but will instead ensure that managerial judgment has been properly exercised. *Id.*

¶5 The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the

employee's ability to perform his assigned duties, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities. *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). All of the factors will not be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306.

¶6 Mitigation of a penalty by the Board is only appropriate where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness. *Id*. The deciding official need not show that she considered all the mitigating factors in determining the penalty. *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 135 (1997). The Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that she considered any specific, relevant mitigating factors before deciding upon a penalty. *Id.* If the penalty is unreasonable, the Board will mitigate it to the maximum reasonable penalty. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 651 (1996).

¶7 Here, the deciding official considered the record evidence, the appellant's oral reply to the proposed removal notice, and his approximately 18 years of service with the agency. IAF, Tab 4, Subtab 4C; Hearing Tape 1, Side 2. She determined that the appellant was in a position of trust as an Expediter, which is a highly graded position with little supervision. Hearing Tape 1, Side 2. She further found that the appellant violated that trust, and that his conduct had an adverse impact on the reputation of the agency because he left the building where he worked while on duty to purchase and smoke marijuana in a vehicle on agency premises. Hearing Tape 1, Side 2. The deciding official concluded that the

severity of the appellant's misconduct outweighed any mitigating factors, including the appellant's lack of a disciplinary record.[1] *Id.*; IAF, Tab 4, Subtab 4C.

¶8 The evidence reveals that on January 9, 2003, Postal Inspectors conducting surveillance of agency employee Antonio Harris saw the appellant enter Harris's vehicle and smoke what appeared to be a marijuana cigarette. IAF, Tab 4, Subtab 4I. The Postal Inspectors detained and interviewed the occupants of the vehicle, including the appellant. *Id.* During the interview, the appellant admitted that he had been smoking marijuana and had purchased a $20 bag of marijuana from Harris while in the vehicle. *Id.* The preponderance of the evidence indicates that the appellant also admitted that both he and Harris were on official duty when the drug transaction occurred, and that he had purchased marijuana from Harris on at least three different occasions in the prior 6 months while inside Harris's vehicle, outside his place of work, while on duty. *Id.*; Hearing Tape 2, Side 1. The appellant surrendered the bag of marijuana he had purchased from Harris, and the Inspectors found a second bag of marijuana during a search of the appellant's vehicle. IAF, Tab 4, Subtab 4I. Later laboratory tests showed that the contents of both bags were marijuana. IAF, Tab 4, Subtab 4G. The appellant also admitted to the deciding official that he had purchased and smoked marijuana at least three times while on duty. Hearing Tape 1, Side 2.

¶9 The administrative judge apparently concluded that the deciding official improperly relied upon the appellant's uncharged misconduct of purchasing marijuana on duty more than once in determining that removal was the correct

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[1] While the removal decision letter indicated that the deciding official considered the appellant's lack of a prior disciplinary record, she testified that she did not look into the appellant's disciplinary record because his misconduct was so severe, one incident "was enough." IAF, Tab 4, Subtab 4C; Hearing Tape 1, Side 2. She later testified that, in rendering her decision, she assumed the appellant had no prior discipline. Hearing Tape 2, Side 1.

penalty. ID at 4. This seems to have been the primary basis for the administrative judge's lack of deference to the agency's choice of penalty. However, a deciding official may consider uncharged similar misconduct in determining a penalty where the agency gave the appellant clear notice that it was relying upon that uncharged misconduct. *See Vargas v. U.S. Postal Service*, 83 M.S.P.R. 695, ¶ 4 (1999) (when reviewing the penalty, the administrative judge properly considered uncharged misconduct the agency relied upon in deciding the penalty where the employee had clear notice that the agency relied on this misconduct in setting the penalty); *see also Brown v. Department of the Treasury*, 91 M.S.P.R. 60, ¶ 14 (2002) (the agency may properly consider nondisciplinary counselings when determining a penalty if the employee is on notice that it intends to do so). Here, the notice of proposed removal advised the appellant that the agency was considering his admission that he had previously purchased and used marijuana on duty on agency premises. IAF, Tab 4, Subtab 4E. The appellant had the opportunity to respond to this allegation, and the deciding official testified that the appellant admitted to her that he had purchased and smoked marijuana three times while on the clock. Hearing Tape 1, Side 2. It was not improper for the deciding official to consider this uncharged misconduct in removing the appellant.

¶10 The administrative judge appears to have found reliance on the uncharged misconduct was improper in part because there was conflicting evidence regarding whether the appellant's previous purchases and use of marijuana occurred while he was on duty. ID at 4, n.1. The administrative judge should have resolved this conflict by making a credibility determination, but she found that she did not need to make a determination regarding the appellant's credibility because he never denied the charges against him. ID at 5. That is inaccurate. During the hearing, the appellant recanted several of his prior statements. He denied smoking marijuana on January 9, 2003, and initially denied buying marijuana from Harris at any time before January 9, 2003. Hearing Tape 1, Side

1. He then refused to answer when asked whether he had purchased marijuana from Harris before, claiming the question was irrelevant. *Id.* After the administrative judge ordered him to respond, the appellant changed his testimony and claimed that, while he had purchased marijuana from and smoked marijuana with Harris before January 9, 2003, he had not been on duty at those times. *Id.* He never denied purchasing marijuana on January 9, 2003, however.

¶11 During the hearing, Postal Inspector Robert Lane testified that the appellant admitted to him in interviews on January 9 and 13, 2003, that he had repeatedly purchased marijuana from Harris while on duty. Hearing Tape 2, Side 1. Lane further testified that the appellant admitted that, on those occasions, he would leave the General Mail Facility (GMF) and purchase the marijuana from Harris in Harris's car outside the GMF. *Id.* On cross-examination, Lane stated that the appellant did not say he was on duty when he made the prior purchases. *Id.* But, on redirect examination, he testified that the appellant admitted that the prior marijuana purchases were at the GMF in Harris's car, and that he believed the appellant stated that the prior purchases occurred while the appellant was on duty. *Id.*

¶12 The administrative judge erred by not resolving the issue of the appellant's credibility. *See Spithaler v. Office of Personnel Management,* 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). However, remand is unnecessary because the record contains sufficient evidence to make that determination. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied,* 516 U.S. 1056 (1996).

¶13 To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen

version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

¶14 Here, the Postal Inspectors, including Lane, were present at and took notes during the appellant's interviews on January 9 and 13, 2003. Hearing Tape 2, Side 1; IAF, Tab 4, Subtab 4I. Lane was the only Postal Inspector who testified at the hearing. His character was not in question, his version of events was not improbable, and he had no reason to be untruthful. There was no indication in the record of Lane's demeanor, but he was contradicted by the appellant's testimony. Additionally, Lane's single statement that the appellant did not specifically say he was on duty when he previously purchased marijuana was not necessarily inconsistent with the remainder of Lane's testimony. As mentioned previously, Lane testified that the appellant admitted he would leave the GMF and purchase marijuana from Harris in Harris's car. Hearing Tape 2, Side 1. This strongly implies that the appellant was on duty at the time. Furthermore, Lane's testimony that the appellant admitted the prior drug purchases occurred while the appellant was on duty comports with the Postal Inspectors' report and with the deciding official's testimony that the appellant admitted as much to her as well. *See* IAF, Tab 4, Subtab 4I; Hearing Tape 1, Side 2.

¶15 The appellant was also present at the interviews in question. IAF, Tab 4, Subtab 4I. However, his testimony was inconsistent with his prior statements as transcribed by the Postal Inspectors, his testimony was contradicted by Lane and the deciding official, his testimony during the hearing was internally inconsistent, and he had a reason to be untruthful – namely, retaining his job. Further, despite the administrative judge's determination that a credibility finding was

unnecessary, she recognized that the appellant lied during the hearing. ID at 5. On balance, the Postal Inspectors' version of events is the most credible.

¶16 Accordingly, the preponderance of the evidence indicates that the appellant's prior purchases and use of marijuana occurred while he was on duty on agency premises. Even if that were not the case, however, the deciding official testified that, if the appellant had only purchased and smoked marijuana on duty and returned to the building impaired on *one* occasion, she would have removed him. Hearing Tape 2, Side 1.

¶17 When balancing the *Douglas* factors, the administrative judge found that the appellant showed potential for rehabilitation because he enrolled in a drug rehabilitation program. ID at 5. However, she neglected to consider that the appellant only enrolled in the program after the agency caught him using illegal drugs on duty and that he failed to complete the program. Hearing Tape 1, Side 1; *see* IAF, Tab 4, Subtab 4I at 12. Moreover, because the deciding official considered mitigating factors, it was improper for the administrative judge to independently weigh them. *See Wynne*, 75 M.S.P.R. at 135.

¶18 The Board has consistently upheld removals as promoting the efficiency of the service for both the purchase and use of illegal drugs at work, especially where the work performed under the influence of such substances could endanger the safety of others. *See*, *e.g.*, *Savage v. Department of the Air Force*, 49 M.S.P.R. 77, 80-81 (1991) (removal of a Pneudraulic Systems Mechanic was appropriate where he had possessed, used, and transferred illegal drugs on and off government premises during work hours); *Spotti v. Department of the Air Force*, 49 M.S.P.R. 27, 34 (1991) (removal was reasonable where an Instrument Worker used marijuana on his lunch breaks), *overruled on other grounds by Scott v. Department of Justice*, 69 M.S.P.R. 211, 228-29 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table); *Best v. U.S. Postal Service*, 41 M.S.P.R. 124, 130 (1989) (the agency properly removed a Mail Handler for purchasing illegal drugs on postal property); *Sweeney v. General Services Administration*, 23 M.S.P.R. 471, 473-74

(1984) (removal of a custodial worker for using marijuana on duty and on government property was proper); *see Edwards v. Department of the Army*, 87 M.S.P.R. 27, ¶ 11 (2000) (the administrative judge erred in mitigating removals to 120-day suspensions where helicopter mechanics tested positive for alcohol while on duty, despite the appellants' long tenure and spotless disciplinary records), *aff'd sub nom. Rodriguez v. Department of the Army*, 25 Fed. Appx. 848 (Fed. Cir. 2001). Conversely, the case upon which the administrative judge relied for mitigating the penalty did not involve an appellant in a position of trust or any risk to the safety of others. *See Schaffer v. U.S. Postal Service*, 39 M.S.P.R. 153, 157-59 (1988). Furthermore, in *Schaffer*, the appellant had been repeatedly enticed into wrongdoing by an informant acting on the agency's behalf. *Id.* In this case, the agency played no role in instigating the appellant's misconduct.

¶19 In this matter, the deciding official testified that the appellant was in a position of trust because Expediters worked on their own with little supervision and were responsible for ensuring that the mail was directed to the proper destinations. Hearing Tape 1, Side 2. Furthermore, the appellant worked with heavy equipment in a mechanized and automated industrial environment. *Id.* He was responsible for moving equipment that weighed between 245 and 600 pounds on a floor crowded with other employees and equipment. Hearing Tape 1, Side 1. If he were impaired by drug use, he could injure himself or other employees. Hearing Tape 1, Side 2. Under all of these circumstances, removal was a reasonable penalty.

ORDER

¶20 For the foregoing reasons, the initial decision is REVERSED and the agency's removal of the appellant is SUSTAINED. 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 the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, *http://www.mspb.gov/mspb_library.html*.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.