The agency petitions for review of an initial decision that mitigated the appellant’s removal to a twenty-day suspension. For the following reasons, we GRANT the agency’s petition for review, AFFIRM the initial decision’s findings relating to the charged misconduct AS MODIFIED by this Opinion and Order, and REVERSE the initial decision’s mitigation of the penalty. The agency’s action removing the appellant is SUSTAINED.
BACKGROUND

The agency removed the appellant, effective January 21, 2005, from his GS-4 Mail Clerk position based on “continued misconduct.” Appeal File (AF), Tab 3, Subtabs 4a, 4b. The agency set forth the following incidents in support of its action: (1) On August 16, 2004, a supervisor observed the appellant sitting at his computer surfing the web while he had a stack of mail for “redirect” that he had not processed; (2) on August 20, 2004, the appellant did not either assist a customer with mail that had been delivered to the customer erroneously, or process other mail, but remained at his computer surfing the Internet and ignoring the waiting customer, while a co-worker was assisting another customer and the lead mail clerk had to stop what she was doing to assist the waiting customer; and (3) on August 18, 2004, the appellant failed to report back to his place of duty in a timely manner following a 9:00 AM meeting with the Equal Employment Office, he was seen at 10:40 AM in “Strength Management” conversing with an employee, and he did not return to his worksite until 11:13 AM when he proceeded to take his lunch and smoke breaks. *Id.*, Subtab 4g.

After a hearing on appeal, a Board administrative judge (AJ) found that the agency did not prove the second “charge,” but did prove the “charges” of internet surfing on August 16, 2004, and failure to timely return to duty on August 18, 2004. AF, Tab 9, Initial Decision (ID) at 5. The AJ found that the appellant did not prove his claim of disability discrimination. ID at 6. Finally, the AJ held that he would determine the maximum reasonable penalty, giving due consideration to the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), because he had sustained fewer than all of the agency’s charges. ID at 6. The AJ found that the two sustained “charges” were not serious “at first blush,” and were not frequently repeated. ID at 7. The AJ also found that, although the agency relied upon a letter of reprimand, a five-day suspension, a “Positive Action Contract” (PAC), and a fourteen-day suspension (that had been held in abeyance under the PAC), the agency should not have relied upon the
letter of reprimand, dated April 5, 2002, because it indicated that it would remain in the appellant’s record for only two years. *Id.* The AJ further found that, although the fourteen-day suspension was appropriate for consideration, “adding the ‘violation’ of the PAC as an additional consideration was inappropriate under the circumstances.” *Id.* The AJ concluded that the appellant had not been a model employee, and his failure to timely provide the agency with relevant medical evidence may have “aggravated the situation.” *Id.* Nevertheless, the AJ found that a twenty-day suspension was the maximum reasonable penalty in this case. *Id.*

¶4 The agency asserts on review that, among other things, the proper issue in this case is whether the deciding official exercised management discretion within tolerable limits. Petition for Review File, Tab 1 at 5-7. The agency also contends that the AJ erred when he considered the incidents of August 16 and August 20, 2004, as separate “charges.” *Id.* at 7.*

ANALYSIS

¶5 In determining how charges are to be construed, the Board will examine the structure and language of the proposal notice. *Tom v. Department of the Interior,* 97 M.S.P.R. 395, ¶ 17 (2004). In this regard, an adverse action charge usually has two parts: (1) A name or label that generally characterizes the misconduct; and (2) a narrative description of the actions that constitute the misconduct. *Otero v. U.S. Postal Service,* 73 M.S.P.R. 198, 203 (1997). An agency may use a broad label such as “improper misconduct,” rather than a more specific label, as

* The appellant has submitted, with his response to the agency’s petition for review, signed statements from two co-workers. Because the appellant has not shown that these statements were unavailable before the record closed below despite his due diligence, they have not been considered. *See Avansino v. U.S. Postal Service,* 3 M.S.P.R. 211, 214 (1980) (under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party’s due diligence).
long as the reasons for the proposed action are described in sufficient detail to allow the employee to make an informed reply. *Id.* at 202-03.

¶6 Based on the structure and language of the proposal notice, we find that the agency set forth a single charge in this case, namely, “continued misconduct.” The first paragraph of the proposal notice provides that the appellant’s involuntary separation from his position is necessary “due to [his] continued misconduct.” AF, Tab 3, Subtab 4g. Paragraphs 2, 3, and 4 of the proposal notice then set forth three narrative descriptions of the “continued misconduct.” *Id.* The decision notice similarly provides that the appellant’s removal was proposed “for continued misconduct.” *Id.*, Subtab 4b. The decision official states, “In deciding this action, I have taken into account not only the charges above, but I have carefully considered your reply and reasons and specifications contained in the Notice of Proposed Removal fully and impartially . . . .” *Id.* (emphasis added). Although this sentence refers to the plural “charges,” there is only one charge set forth above, namely, “continued misconduct.” The reference to “charges,” therefore, appears to be a typographical error. Moreover, the sentence clearly indicates that there are “specifications” contained in the notice of proposed removal. The decision notice further provides, “[Y]our *continued misconduct* interferes with mission accomplishment and your removal[,] therefore, will promote the efficiency of the service.” *Id.* (emphasis added). Finally, a Standard Form 50 lists the “[r]eason(s) for removal” as “[c]ontinued misconduct.” *Id.*, Subtab 4a. Thus, we find that the proposal notice included a single charge, “continued misconduct,” with three specifications. *Cf. Royster v. Department of Justice*, 58 M.S.P.R. 495, 498-99 (1993) (where the notice of proposed removal and the final decision letter referred to a single charge of “Off Duty Misconduct,” the AJ erred in finding that the agency based its action on three separate charges corresponding to three narrative descriptions). Because we find that the AJ correctly held that the agency proved two of the three specifications, ID at 4-6, the agency’s sole charge is sustained, *see Burroughs v.*
Department of the Army, 918 F.2d 170, 172 (Fed. Cir. 1990) (when more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge).

¶7 The AJ cited to Gill v. Department of Defense, 92 M.S.P.R. 23, ¶ 26 (2002), for the principle that, when the Board does not sustain all of the charges on which an action is based, it may mitigate the penalty to the maximum penalty that is reasonable in light of the sustained charges. As explained above, however, the agency’s sole charge in this case has been sustained. When all of an agency’s charges are sustained, but some of the underlying specifications are not sustained, the agency’s penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness. Payne v. U.S. Postal Service, 72 M.S.P.R. 646, 650 (1996). In applying this standard, the Board must take into consideration the failure of the agency to sustain all of its supporting specifications. Id. at 651. Nevertheless, the Board’s function is not to displace management’s responsibility or to decide what penalty it would impose, but to assure that management’s judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. Alberto v. Department of Veterans Affairs, 98 M.S.P.R. 50, ¶ 7 (2004).

¶8 We have considered the agency’s failure to sustain all of its specifications, and we agree with the AJ that the agency should not have relied in its proposal notice on the appellant’s April 5, 2002 letter of reprimand. See Lewis v. Department of the Air Force, 51 M.S.P.R. 475, 485 (1991) (the Board will discount a prior action when a law, rule, or regulation prohibits the consideration of such actions after a period of time). We also agree that the appellant’s mere violation of the PAC does not rise to the level of prior discipline under Douglas. Nevertheless, as set forth below, we find that the agency’s penalty determination is within the parameters of reasonableness under the circumstances of this case.
Despite the AJ’s finding that the sustained misconduct is not serious “at first blush,” we find that such misconduct is indeed serious. The incidents described in the first and third specifications show that the appellant repeatedly neglected to perform his work duties by surfing the internet and absenting himself from his work area. We note the appellant’s approximately thirty-two years of service, AF, Tab 1, but also observe that his disciplinary record includes a November 3, 2003 five-day suspension for discourtesy and creating a disturbance (throwing mail and using profanity toward a Lead Mail Clerk), and an October 3, 2004 fourteen-day suspension for sleeping on duty on five occasions, AF, Tab 3, Subtabs 4j, 4u-4x, 4dd. We also note that the sustained misconduct in this case was intentional and not inadvertent, and that the appellant had frequent contact with the agency’s mail customers. AF, Tab 3, Subtabs 4l, 4m, 4q, 4bb, 4gg. The deciding official testified that she considered and discussed the Douglas factors with a personnel specialist, and that the appellant’s supervisor tried to get him to improve his behavior, but no improvement occurred. Hearing Tape 1, Side A. Thus, we find that the appellant lacks potential for rehabilitation.

It also appears that the appellant was clearly on notice, through quarterly counseling sessions, that he was only entitled to two fifteen-minute breaks (work permitting) and a thirty-minute lunch break, that he should avoid excessive breaks, and that he should avoid “loafing” on the job. AF, Tab 3, Subtab 4q (memorandum of an August 16, 2004 counseling session that references an April 14, 2003 memorandum in which the appellant acknowledged understanding his working hours and work breaks). In addition, an August 5, 2004 memorandum notes that the appellant’s supervisor had approached him on several occasions regarding his non-productive work performance, that the supervisor had to monitor the appellant’s work performance at times because “he will sit at the computer or stand outside and do nothing while everyone else is working,” and that the appellant was reminded on July 1, 2004, that he was taking too many breaks. Id., Subtab 4s. On July 27, 2004, the appellant’s supervisor noticed the
appellant surfing the web when his “redirect” mail from the prior day was not complete, and informed him at that time that he had not finished his “redirect.” *Id.* The supervisor also informed the appellant at that time that he was the only person she had to ask to do his job, and that she did not like having to constantly remind him of what he had to do. *Id.* The supervisor noted that she had received several complaints from other mail clerks regarding the appellant’s failure to “carry[] his load.” *Id.; see Douglas, 5 M.S.P.R.* at 305 (one factor for penalty consideration is the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability). It is clear from this evidence and the testimony at the hearing that the appellant’s supervisors lacked confidence in the appellant’s ability to perform his assigned duties. *See Douglas, 5 M.S.P.R.* at 305.

¶11 Finally, although the AJ found that the appellant’s failure to timely provide the agency with relevant medical evidence may have “aggravated the situation,” this is not a mitigating factor because the appellant did not claim that a medical condition caused the charged misconduct. Although a medical condition may have affected the appellant’s sleeping on duty, AF, Tab 3, Subtab 4cc, the Board’s review of a prior disciplinary action, such as the fourteen-day suspension for that misconduct, is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling v. Department of the Air Force,* 9 M.S.P.R. 335, 339-40 (1981). There has been no showing in this case that the fourteen-day suspension was clearly erroneous. In fact, the appellant agreed as part of the PAC that he was caught sleeping on the job on more than one occasion and that, “given the number of times he was caught sleeping and his prior disciplinary record[, . . .] a fourteen-day suspension without pay would normally be issued.” AF, Tab 3, Subtab 4x. The other *Bolling*
criteria also have been met for the fourteen-day suspension. AF, Tab 3, Subtab 4j.

¶12 In sum, we find that the agency’s chosen penalty is within the tolerable limits of reasonableness. Accordingly, the agency’s removal action is SUSTAINED.

ORDER

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your
discrimination claims and your other claims in an appropriate United States
district court. See 5 U.S.C. § 7703(b)(2). You must file your civil action with
the district court no later than 30 calendar days after your receipt of this order. If
you have a representative in this case, and your representative receives this order
before you do, then you must file with the district court no later than 30 calendar
days after receipt by your representative. If you choose to file, be very careful to
file on time. If the action involves a claim of discrimination based on race, color,
religion, sex, national origin, or a disabling condition, you may be entitled to
representation by a court-appointed lawyer and to waiver of any requirement of

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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board’s regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

____________________________
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.