

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 117**

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Docket No. AT-0752-09-0108-I-1

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**Linda A. Parker,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

June 23, 2009

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Lorenzo Cobb, Esquire, Sugarhill, Georgia, for the appellant.

Randle Smith, Esquire, Atlanta, Georgia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 This case is before the Board on the agency's petition for review (PFR) of the initial decision in which the administrative judge sustained the agency's charges against the appellant but mitigated the demotion penalty to a 30-day suspension. For the reasons set forth below, we GRANT the agency's PFR and AFFIRM the initial decision as modified by this Opinion and Order, SUSTAINING the demotion.

**BACKGROUND**

¶2 The agency demoted the appellant from the position of Supervisor, Customer Services, EAS-17, to the position of PTF Clerk, PS-05, effective

October 25, 2008. Initial Appeal File (IAF), Tab 3, Subtab 4A at 1-2; *id.*, Subtab 4B at 1. The appellant was charged with unsatisfactory performance and failure to follow instructions with respect to two specifications. *Id.*, Subtab 4B at 1. The first concerned instructions from the appellant's supervisor to "perform a full office proficiency and street count on one route weekly starting March 24, 2008." *Id.*; *see id.*, Subtab 4C at 4-7. The other concerned the appellant's alleged continuing failure to "clear" clock ring errors on a daily basis. *Id.*, Subtab 4B at 1; *see id.*, Subtab 4C at 3. The deciding official sustained the charges, including both specifications, and found that demotion was warranted to promote the efficiency of the service, taking into account the appellant's oral response and past disciplinary record. IAF, Tab 3, Subtab 4A. The appellant filed an appeal with the Board. IAF, Tab 1.

¶3 During the hearing, the administrative judge ruled that the agency failed to meet its burden of proof regarding the specification involving the clock rings because the specification did not provide any detail. IAF, Tab 10, Initial Decision (ID) at 2. The administrative judge sustained the charges regarding the route count specification and rejected the appellant's assertion that her menstrual cycle and acid reflux prevented her from completing her duties, noting that she failed to provide medical evidence showing that she was medically unable to perform. *Id.* at 3. He also rejected the appellant's claim that the agency's action was taken in reprisal for her prior Equal Employment Opportunity (EEO) activity, finding that the supervisor whom the appellant claimed directed the action against her as a result of her EEO activity was actually not involved in the agency's instant action. *Id.* at 3-4. The administrative judge, however, accorded no deference to the agency's penalty determination, citing *Byers v. Department of Veterans Affairs*, [89 M.S.P.R. 655](#) (2001), and instead imposed a 30-day suspension as the maximum reasonable penalty. ID at 4.

¶4 The agency filed a timely PFR, Petition for Review File (PFRF), Tab 1, and the appellant filed a response in opposition, *id.*, Tab 3.

### ANALYSIS

¶5 In its PFR, the agency does not dispute the administrative judge's findings of fact with respect to the charges; rather, the agency disputes only the administrative judge's decision to mitigate the penalty to a 30-day suspension. *See, e.g.*, PFRF, Tab 1 at 1-2. Nonetheless, we affirm the administrative judge's factual determinations, as well as his findings that the agency proved only one of its two specifications relating to both charges. The initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility in sustaining both charges with respect to the specification involving the route counts. *See ID* at 2-4; IAF, Tab 3, Subtab 4C at 4-5; *id.*, Tab 5, Subtab B. Furthermore, we discern no error in the administrative judge's finding that the appellant failed to meet her burden of proof as to her claim of retaliation for prior protected activity. *See ID* at 4. Accordingly, we will not disturb this aspect of the initial decision. *See Dunn v. Department of the Air Force*, [96 M.S.P.R. 166](#), ¶ 9 (2004), *aff'd*, 139 F. App'x 280 (Fed. Cir. 2005). Nevertheless, for the reasons set forth below, we find that the administrative judge's penalty determination cannot be sustained. Thus, we grant the agency's PFR for the purpose of addressing the administrative judge's penalty determination.

¶6 The agency argues that the administrative judge erred in mitigating the demotion penalty to a 30-day suspension. We agree. The administrative judge erred in finding that the agency's penalty determination is not entitled to deference. *See ID* at 4. In so finding, the AJ improperly relied on *Byers v. Department of Veterans Affairs*, [89 M.S.P.R. 655](#), ¶ 20 (2001). *See ID* at 4. *Byers* involved an appeal in which only one of two agency charges were sustained. *Byers*, [89 M.S.P.R. 655](#), ¶ 20. The Board in *Byers*, in finding that the agency determination was not entitled to deference, cited *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). *See Byers*, [89 M.S.P.R. 655](#), ¶ 20. It noted that *Devall* held that "where the agency proves fewer than all of its charges, the

Board may not independently determine a reasonable penalty; rather, unless the agency has indicated that it desires a lesser penalty to be imposed on fewer charges, the Board may mitigate to the maximum reasonable penalty if a careful balancing of the mitigating factors warrants, or the Board may impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing those factors.” *Byers*, [89 M.S.P.R. 655](#), ¶ 20.

¶7 The rule applied in *Byers* does not apply to the instant appeal. The notice of proposed adverse action at issue here set forth two separate charges, i.e., unsatisfactory performance and failure to follow instructions. IAF, Tab 3, Subtab 4B at 1. The proposal notice then described two specifications, i.e., the route count specification and the clock rings specification, both of which the agency claimed demonstrated the appellant’s unsatisfactory performance and failure to follow instructions. *Id.* at 1. Unlike in *Byers*, the administrative judge here sustained both charges but simply did not sustain one of the two specifications—i.e., the specification involving the clock rings—under each of the two charges. *See* ID at 2-3. Accordingly, the administrative judge’s finding that the agency’s penalty determination is not entitled to deference based on *Byers* was in error. *See* ID at 4.

¶8 In a situation where the Board sustains all of the agency’s charges, *Devall* provides that the Board may mitigate the agency’s original penalty to the maximum reasonable penalty when it finds the agency’s original penalty too severe. *Devall*, 178 F.3d at 1260. Moreover, when all of the 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. *Groeber v. U.S. Postal Service*, [84 M.S.P.R. 646](#), ¶ 14 (2000), *aff’d*, 13 F. App’x 973 (Fed. Cir. 2001); *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. *Payne*, 72 M.S.P.R. at 651. That failure may require, or contribute to, a finding that the agency's penalty is not reasonable. *Laniewicz v. Department of Veterans Affairs*, [83 M.S.P.R. 477](#), ¶ 9 (1999). In such a case, the Board will look for evidence showing that the agency would have imposed the same penalty for the sustained specification. *Id.*

¶9 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), *aff'd*, No. 05-3090, 2005 WL 1368150 (Fed. Cir. June 10, 2005). 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. *Dunn*, [96 M.S.P.R. 166](#), ¶ 10. If the agency's penalty is beyond the bounds of reasonableness, the Board will mitigate only to the extent necessary to bring it within the parameters of reasonableness. *Id.*; *Groeber*, [84 M.S.P.R. 646](#), ¶ 14; *Payne*, 72 M.S.P.R. at 650-51.

¶10 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 on other employees for the same or similar offenses. *Gmitro v. Department of the Army*, [95 M.S.P.R. 89](#), ¶ 7 (2003) (citing *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981)), *aff'd*, 111 F. App'x 610 (Fed. Cir. 2004). 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.

¶11 Based on his “assumption” that the charges were correct,\* the deciding official testified that he considered the relevant *Douglas* factors in making his penalty determination. Hearing Transcript (HT) at 12-13. The decision notice and his testimony show that he considered the nature and seriousness of the offense in relation to the supervisory position held by the appellant; the appellant’s length of service; the appellant’s past disciplinary record, including three letters of warning over the course of the previous year; the potential effectiveness of a lesser penalty; and the appellant’s lack of potential for rehabilitation based on her prior disciplinary record. See IAF, Tab 3, Subtab 4A at 1; HT at 12-13. Further, while the administrative judge properly sustained only one of the two agency specifications, the deciding official testified that his decision to impose the penalty of demotion “would have still been the same” even absent the specification concerning the clock ring errors. HT at 8; ID at 2; see *Laniewicz*, [83 M.S.P.R. 477](#), ¶ 9.

¶12 Moreover, the Board has previously sustained the penalty of demotion in similar cases. See *Lavette v. U.S. Postal Service*, [96 M.S.P.R. 239](#), ¶¶ 23-24 (2004); *Doe v. U.S. Postal Service*, [95 M.S.P.R. 493](#), ¶¶ 15-17 (2004). In *Lavette*

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\* The record reflects, as the administrative judge recognized, that the deciding official did not fully consider the evidence relating to the charges, but rather, in sustaining the charges against the appellant, he “just relied on the supervisors” and reviewed only the appellant’s previous disciplinary letters. See Hearing Transcript (HT) at 20-21; ID at 4. However, the administrative judge sustained the agency’s charges of unsatisfactory performance and failure to follow instructions with respect to the route count specification based upon the evidence presented by the agency. ID at 3. Moreover, this is a de novo proceeding, and, as noted above, we discern no error in the administrative judge’s decision to sustain the agency’s charges with respect to this specification, and the appellant did not file a cross PFR. Accordingly, we still review the deciding official’s penalty determination, which was apparently conducted on the basis of his “assumption” that the charges were correct, to determine whether it is within the bounds of reasonableness. See *Groeber*, [84 M.S.P.R. 646](#), ¶ 14; *Payne*, 72 M.S.P.R. at 650; HT at 20.

and *Doe*, the Board sustained charges of unsatisfactory performance and failure to follow instructions/improper conduct, respectively, against supervisory postal employees who had many years of service as well as prior disciplinary records for similar charges. *See Lavette*, [96 M.S.P.R. 239](#), ¶¶ 2, 9 n.1, 20; *Doe*, [95 M.S.P.R. 493](#), ¶¶ 2, 15-16. In both cases, the Board found that “the agency may have reasonably determined that the appellant was unsuitable for any supervisory position.” *Lavette*, [96 M.S.P.R. 239](#), ¶ 23; *Doe*, 95 M.S.P.R. 493, ¶ 16.

¶13 In short, the agency’s penalty determination was entitled to deference, and the agency has provided a reasoned explanation of its penalty determination. The administrative judge should not have disturbed it. Accordingly, we SUSTAIN the appellant’s demotion.

#### ORDER

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

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

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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