

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

2010 MSPB 99

Docket No. SF-0752-09-0734-I-1

**Dwight A. Suggs,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

June 1, 2010

Phillip T. Haynes, Loma Linda, California, for the appellant.

Evan Stein, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's petition for review (PFR) of an initial decision that sustained a single charge of disrespectful conduct and affirmed the removal penalty. For the reasons set forth below, we DENY the appellant's PFR under [5 C.F.R. § 1201.115\(d\)](#). We REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), MODIFY the initial decision with respect to the penalty determination, and MITIGATE the penalty to a 30-day suspension.

BACKGROUND

¶2 The agency removed the appellant from his position as a WG-3 Housekeeping Aide based on three charges of misconduct: disrespectful conduct, delay in carrying out a proper order, and disruptive conduct. *See* Initial Appeal File (IAF), Tab 3, Subtabs 4e (Letter of Removal), 4i (Proposed Removal); *id.*, Tab 8, Subtab 4b-1, 2 (removal SF-50). The appellant filed this appeal and alleged that the agency’s action was in retaliation for protected whistleblowing activity. *See* IAF, Tab 1.

¶3 The administrative judge held a hearing over two days. *See* Hearing CDs (HCDs). She later issued an initial decision that sustained only the disrespectful conduct charge, rejected the appellant’s affirmative defense, and affirmed the removal penalty. *See* IAF, Tab 15. The appellant filed a timely PFR. Petition for Review (PFR) File, Tab 2. The Office of the Clerk of the Board (OCB) issued an Acknowledgment Order, noting that the agency had until December 20, 2009, to file a cross-PFR or a response to the appellant’s PFR. PFR File, Tab 1 at 1. OCB also informed the parties that “[t]he record closes when the time period ends for filing a response to the [PFR] or to the [cross-PFR],” and that after the record closes, the Board “may consider an additional submission only if the submission includes a statement that convinces the Board why the submission was not available earlier.” *Id.*, citing [5 C.F.R. § 1201.114\(i\)](#). The agency filed a timely response to the appellant’s PFR.¹ PFR File, Tab 4. On January 10, 2010, the appellant filed a document, entitled “Submission of New Evidence.” PFR File, Tab 5.

ANALYSIS

¶4 In his original PFR submission, the appellant does not specifically challenge any of the administrative judge’s conclusions regarding the charges,

¹ The agency did not file a cross-PFR regarding the administrative judge’s decision not to sustain the other two charges and we need not address them further.

nexus or penalty; rather, he states only that he needs assistance to submit further evidence. *See* PFR File, Tab 2 at 3. We have considered the appellant's January 10, 2010 PFR submission, even though it was filed 3 weeks after the close of the record. In this submission, the appellant claims that the agency committed perjury during the hearing and reiterates that he has new evidence to support this contention. PFR File, Tab 5 at 3-4. However, he does not include this "new evidence" in his January 10, 2010 submission. Moreover, the appellant does not identify or describe his evidence in either of his submissions, nor does he explain how such evidence would show that the agency committed perjury. In the absence of such new and material evidence, we deny his PFR for failure to meet the review criteria. *See* [5 C.F.R. § 1201.115](#)(d).

¶5 However, we reopen this matter on our own motion under [5 C.F.R. § 1201.118](#) to address the reasonableness of the penalty. The Proposed Removal described the disrespectful conduct charge and single specification as follows: "On or about January 7, 2009, during a regular [Environmental Management Service] staff meeting, in the presence of employees, supervisors and union officials[,] you loudly stated that your Service Chief was incompetent." IAF, Tab 3, Subtab 4i at 1. In the initial decision, the administrative judge concluded that the appellant used the word "incompetent" during this meeting to describe his supervisor, Charles Lemle, and she sustained this charge and specification. IAF, Tab 15 at 5-6.

¶6 When not all of the charges are sustained, as here, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 308 (1981). Indeed, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on

fewer charges.² *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). However, in doing so, the Board may not disconnect its penalty determination from the agency’s managerial will and primary discretion in disciplining employees. *Id.* at 1258.

¶7 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, and the consistency of the penalty with the agency’s table of penalties. *Gmitro v. Department of the Army*, [95 M.S.P.R. 89](#), ¶ 7 (2003), *aff’d*, 111 F. App’x 610 (Fed. Cir. 2004); *Douglas*, 5 M.S.P.R. at 305-06. Not all of the factors will 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.

¶8 There can be no dispute that disrespectful conduct is a serious offense. *See Ray v. Department of the Army*, [97 M.S.P.R. 101](#), ¶ 58 (2004) (“[D]isrespectful conduct is unacceptable and not conducive to a stable working atmosphere, and . . . agencies are entitled to expect employees to conduct themselves in conformance with accepted standards.”) (internal citations omitted), *aff’d*, 176 F. App’x 110 (Fed. Cir. 2006); *Lewis v. Department of Veterans Affairs*, [80 M.S.P.R. 472](#), ¶ 8 (1998) (“[I]nsolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once.”).

¶9 The agency’s Table of Penalties is in the record at IAF, Tab 3, Subtab 4j. The sustained charge can be considered either “[d]isrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel” (category

² The deciding official, Lynn S. Carrier, Associate Director, Administration and Support Services, did not testify that she desired a lesser penalty if fewer charges were sustained. HCD (Carrier).

number 16) or “insolent, abusive, or obscene language toward immediate or other supervisor having responsibility for the work of the employee” (category number 17). *Id.* at 2. The Table of Penalties states that, for either category, the penalty for a first offense ranges from reprimand to removal. *See id.*

¶10 The appellant also has prior disciplinary history. In October 2008, the agency proposed a 7-day suspension for failure to follow instructions and inappropriate conduct, and Ms. Carrier reduced the penalty to a 3-day suspension. *See* IAF, Tab 8, Subtab AE-1 (decision on suspension); *id.*, Tab 7, Subtab GGG (decision on Step 3 Grievance). The appellant requested arbitration regarding the discipline, *see* IAF, Tab 7, Subtabs HHH, MMM, but he was removed before the arbitration occurred.

¶11 An agency may consider an employee’s past disciplinary record when setting a penalty for misconduct, even if it is the subject of a pending grievance. *U.S. Postal Service v. Gregory*, [534 U.S. 1 \(2001\)](#). Further, the Board's review of a prior disciplinary action 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). As the administrative judge properly noted, the appellant was informed of the suspension in writing, the action was a matter of record, and he was permitted to dispute the charges to a higher authority, and it does not appear that the agency’s action was clearly erroneous. *See* IAF, Tab 15 at 19-20, *citing* IAF, Tab 7, Subtabs SS, UU, YY, ZZ, AAA-III; Tab 8, Subtab AE-1. Therefore, we may consider the appellant’s 3-day suspension as part of our penalty determination.

¶12 However, there are some significant mitigating factors. For instance, on June 29, 2009, after the effective date of the appellant’s removal, the agency informed him that he was selected for the position of “Housekeeping Aid[e], WG-3566-3,” and that his promotion was effective July 5, 2009. *See* IAF, Tab 7,

Subtab RRR (emphasis omitted). Moreover, the appellant's last performance appraisal, dated October 23, 2008, was "outstanding," and his prior evaluations were "successful" or "fully successful." IAF, Tab 7, Subtabs A, C, D, I, M, XX. Additionally, the agency's *Douglas* factors analysis sheet was inaccurate, in that it stated that the appellant had only 16 months of service. See IAF, Tab 3, Subtab 4d at 2. In actuality, the appellant had almost 8 years of service with the agency. HCD (appellant).

¶13 In most cases where removal was upheld based on a single charge of disrespectful conduct (or similarly titled misconduct), the misconduct involved either multiple specifications, an allegation of abusive or obscene language and/or physical action. For instance, in *Gaines v. Department of the Air Force*, [94 M.S.P.R. 527](#), ¶¶ 6, 9 (2003), the Board concluded that the administrative judge properly sustained the charge of inappropriate behavior towards his supervisor, explaining that the appellant's actions were serious, because, in response to an order for mandatory overtime, he "became very loud, physically confronted his supervisor in view of other employees, and then ridiculed his supervisor when he tried to summon security police to the workplace. . . ." In *Kirkland-Zuck v. Department of Housing & Urban Development*, [90 M.S.P.R. 12](#), ¶ 19 (2001), *aff'd*, 48 F. App'x 749 (Fed. Cir. 2002), the Board noted that the appellant's disrespectful conduct was "intentional, repeated, and serious," and it was directed "toward supervisors, coworkers, and non-agency personnel over a several-month period." Similarly, in *Lewis*, [80 M.S.P.R. 472](#), ¶¶ 6, 11, the Board determined that the appellant's actions, including "interrupting her supervisor's meeting with a non-agency sales representative at least twice, yelling at her supervisor in the presence of co-workers, and advancing towards her menacingly constituted disrespectful conduct." Finally, in *Wilson v. Department of Justice*, [68 M.S.P.R. 303](#), 309-11 (1995), the agency alleged that, during a telephone conversation, the appellant "became irate and responded in a loud voice using obscene language," and in a meeting later that day, the appellant "failed to

comport himself in a rational manner, made derogatory remarks, questioned the authority of his supervisors, ridiculed the service, and made several threatening and intimidating remarks using obscene and insulting language.”

¶14 At the other end of the penalty spectrum is *Gill v. Department of Defense*, [92 M.S.P.R. 23](#), ¶¶ 2-3 (2002), where the administrative judge sustained all three charges (disrespectful conduct, failure to follow instructions and unauthorized disclosure of information) and mitigated the agency’s demotion penalty to a 5-day suspension. The Board, however, found that the agency only proved the disrespectful conduct charge. *Id.*, ¶¶ 5-24. In discussing the penalty, the Board noted that there were significant mitigating factors, namely that the supervisor “contributed to the conflict by raising his voice and failing to conduct himself in an appropriate manner,” the appellant suffered from anxiety and depression, which was known by the supervisor, as well as the appellant’s 20 years of service and her recent performance evaluations, which were “excellent” or “outstanding.” *Id.*, ¶ 27. Due to the “numerous mitigating factors” in *Gill*, the Board further mitigated the penalty to a letter of reprimand. *Id.*

¶15 Having considered this precedent, the fact that the administrative judge only sustained a single charge and specification of disrespectful conduct, and the numerous mitigating factors that are present in this appeal, we conclude that a 30-day suspension is the maximum reasonable penalty.

ORDER

¶16 We ORDER the agency to cancel the appellant’s removal and substitute in its place a 30-day suspension, effective June 16, 2009. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management’s regulations, no later than 60 calendar days after the date of this

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

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

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

¶20 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶21 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 website, <http://www.mspb.gov>. 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 Appellants," 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.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.