

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

BRUCE W. OSTERHAGEN,
Appellant,

DOCKET NUMBER
CH-0752-11-0255-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 20, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Thomas G. Roth, Esquire, Mountain Lakes, New Jersey, for the appellant.

Carol A. Joffe, Esquire, Tamara H. Kassabian, Esquire, and Lasagne A. Wilhite, Esquire, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

Member Robbins issues a separate dissenting opinion.

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The agency removed the appellant, a GS-13 Special Agent with the agency's Drug Enforcement Administration (DEA), on 3 charges: (1) Conduct Unbecoming a DEA Special Agent (2 specifications); (2) False Statements; and (3) Failure to Follow Written Instructions. Initial Appeal File (IAF), Tab 9, Subtabs 5D, 5M. The agency alleged that during the course of a surveillance operation conducted in cooperation with local police officers, the appellant accidentally discharged his firearm, colluded to conceal the discharge, disposed of the shell casing evidence, made false statements to agency personnel investigating the incident, and failed to report the accidental discharge in accordance with written instructions. IAF, Tab 9, Subtab 5M at 3-6. The appellant appealed, but did not dispute the charges. IAF, Tab 1, Tab 21 at 1. After holding a hearing, the administrative judge sustained all the agency's charges and specifications. IAF, Tab 28, Initial Decision (ID) at 2-5. She also found that the agency established a nexus between the appellant's discipline and the efficiency of the service. ID at 5-6.

Nevertheless, with regard to the penalty, the administrative judge found that the deciding official had disregarded the availability of alternative sanctions based on the appellant's successful performance in his position subsequent to the sustained misconduct. ID at 8-9. She also found that the deciding official had disregarded "compelling evidence" of the appellant's "enhanced potential for rehabilitation" as evidenced in the statements and testimony of the appellant's former manager, former first-line supervisor, and a recently retired Chief of the Narcotics Division of the U.S. Attorney's Office for the Eastern District of Michigan, all of whom attested to the appellant's outstanding performance, character, and integrity despite the sustained misconduct. ID at 8-11. The

administrative judge then re-weighed the relevant *Douglas* factors, reversed the appellant's removal, and substituted a 60-day suspension as the maximum penalty within the bounds of reasonableness. ID at 10-11; see *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981).

In its petition for review, the agency asserts that because the administrative judge sustained all the charges, it was improper for her to re-weigh the *Douglas* factors. Petition for Review File (PFR File), Tab 1 at 10-11. The agency further asserts that its reasonable choice of penalty is entitled to deference and that the administrative judge erred in concluding that it failed to consider all the relevant *Douglas* factors and in substituting her judgment for that of the agency. *Id.* at 11-33. The appellant responds in opposition to the agency's petition for review.² PFR File, Tab 3.

The Board will modify a penalty only when it finds that the agency failed to weigh the relevant *Douglas* factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 53 (2007). In such a case, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999).

As noted above, the administrative judge credited the testimony of several of the appellant's former supervisors and considered the appellant's admitted misconduct in the context of his otherwise exemplary career. Although discipline

² The appellant also argues on review that the agency has not complied with the administrative judge's interim relief order. PFR File, Tab 3 at 56-59. To establish compliance with an interim relief order, all that an agency must accomplish by the petition for review filing deadline is to take appropriate administrative action, such as executing a Standard Form (SF) 50 or SF-52, that will result in the issuance of a paycheck for the interim relief period. *Salazar v. Department of Transportation*, [60 M.S.P.R. 633](#), 639 (1994). We find that the agency has demonstrated that it has complied with the interim relief order. See PFR File, Tab 1 at 48 (SF-52 requesting the appellant's return to duty).

is clearly warranted, the administrative judge determined based on the evidence before her that, under the unique circumstances of this case, removal exceeds the maximum reasonable penalty. Because we agree with the administrative judge that a 60-day suspension is the maximum reasonable penalty, *see, e.g., Blake v. Department of Justice*, [81 M.S.P.R. 394](#), ¶ 48 (1999) (removal for first disciplinary offense involving dishonesty was excessive); *see also Robertson v. Department of Justice*, [81 M.S.P.R. 658](#), ¶ 14 (1999) (penalty of demotion mitigated to suspension of 15 days for making false statements), we AFFIRM the administrative judge's mitigation of the agency's action.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

ORDER

We ORDER the agency to CANCEL the appellant's removal effective December 10, 2010, and substitute in its place a 60-day suspension without pay. *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.

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.

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 of 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\(b\)](#).

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 on 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\(a\)](#).

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.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees

WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Bruce W. Osterhagen v. Department of Justice

MSPB Docket No. CH-0752-11-0255-I-1

¶1 For the reasons given below, I disagree with my colleagues' decision to mitigate the appellant's removal.

¶2 Where, as in this appeal, all of the charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 53 (2007); *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). In reviewing the agency's choice of penalty under such circumstances, the Board's function is not to displace management's responsibility, but instead to give due weight to the agency's primary role in maintaining employee discipline and efficiency and ensure that the agency has properly exercised its managerial discretion. *Id.* The Board will modify a penalty only when it finds that the agency failed to weigh the relevant *Douglas* factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Id.* In such a case, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). Nevertheless, it is not the Board's role to decide what penalty it would impose, but, rather, to decide whether the penalty selected by the agency exceeds the maximum reasonable penalty. *Pinegar*, [105 M.S.P.R. 677](#), ¶ 53.

¶3 The administrative judge re-weighed the relevant *Douglas* factors because she found that the deciding official had disregarded whether alternative sanctions were available to deter the appellant's behavior. Initial Decision at 8-9. The administrative judge also found that the deciding official had disregarded

“compelling” character evidence that indicated removal was an excessive penalty under the circumstances. *Id.* at 9-11. In doing so, the administrative judge noted the Board’s guidance that the most important factor in assessing whether a particular penalty is within the tolerable limits of reasonableness is the nature and seriousness of the misconduct and its relation to the employee’s duties, position, and responsibilities. *Id.* at 7. She further noted the deciding official’s testimony on that very point that “the misconduct in this case was incompatible with the character and conduct that’s expected of agents.” *Id.* Nevertheless, the administrative judge’s penalty analysis focused on the two *Douglas* factors she found that the deciding official had disregarded, i.e., the potential for the employee’s rehabilitation and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future. *Id.* at 8-11.

¶4 However, the record does not confirm the administrative judge’s finding that the deciding official disregarded those factors. Indeed, in evaluating the appellant’s potential for rehabilitation, the deciding official specifically discussed in his written *Douglas* factors analysis the very evidence that the administrative judge found that the agency had disregarded, i.e., the appellant’s performance subsequent to the sustained misconduct, as well as the support of his supervisors and two of the federal prosecutors with whom the appellant had worked. Initial Appeal File (IAF), Tab 9, Subtab 5F at 10-12. The deciding official also noted this evidence in his discussion of the effect of the offense on the appellant’s ability to perform his job, commenting that the appellant’s misconduct would be disclosed to defense attorneys every time the appellant is a potential witness in a civil or criminal proceeding.* *Id.* at 8-9.

* Under *Giglio v. United States*, [405 U.S. 150](#) (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, potential impeachment evidence with respect to the agents involved in the case. A “*Giglio*-impaired” agent is one against whom there is potential impeachment evidence that would render the agent’s testimony of marginal value in a case, which means, of course, that a case that depends primarily

¶5 The deciding official found the prosecutors' claim that they had no hesitation in trusting the appellant despite their knowledge of the facts underlying the misconduct charged in this matter was "highly commendable and mitigating." *Id.* at 11. However, he afforded the prosecutors' statements in support of the appellant limited weight in part because the statements reflected those individuals' personal opinions and did not purport to represent the view of the U.S. Attorney's Office. *Id.* Thus, the deciding official wrote, such an opinion was not binding on other prosecutors in other judicial districts in which the appellant may be called to testify and who may not wish to use him as a witness, fearing "that his involvement in cases will tarnish evidence and unnecessarily hamper investigations." *Id.* Regarding the adequacy and effectiveness of alternative sanctions, the deciding official found that a substantial suspension would not be adequate or effective in addressing the seriousness of the appellant's misconduct. *Id.* at 12. The deciding official also commented that the mitigating factors, i.e., the appellant's work record, lack of prior discipline, and the confidence of his superiors did not outweigh the aggravating factors, and that the seriousness of the offense as it related to the appellant's position supported removal. *Id.*

¶6 Despite the administrative judge's observation that the deciding official did not testify on direct examination regarding rehabilitation, the deciding official's *Douglas* factors analysis makes clear that he considered both the appellant's potential for rehabilitation and whether an alternative sanction would be either adequate or effective. Initial Decision at 8-9; IAF, Tab 9, Subtab 5F at 10-13; *see, e.g., Adams v. Department of Labor*, [112 M.S.P.R. 288](#), ¶ 20 (2009) (the agency's written penalty analysis showed that the agency considered the relevant mitigating factors); *Gray v. General Services Administration*, [109 M.S.P.R. 285](#),

on the testimony of a *Giglio*-impaired witness is at risk. *See Hathaway v. Department of Justice*, [384 F.3d 1342](#), 1349 (Fed. Cir. 2004)

¶ 16 (2008) (the agency's decision notice reflected that the deciding official conscientiously weighed the relevant *Douglas* factors). Thus, I would find that the deciding official considered the relevant *Douglas* factors in arriving at his penalty determination.

¶ 7 Moreover, the Board has long held that removal is a reasonable penalty in the case of a law enforcement officer found to have engaged in comparable misconduct. *See, e.g., Rezza v. Department of Justice*, [35 M.S.P.R. 40](#), 43-45 (1987) (sustaining the removal of a law enforcement officer for misappropriation of government funds, misuse of a government vehicle, and making false statements to his supervisor). Additionally, the deciding official in this matter found the appellant's false statement that he did not discharge his firearm especially egregious because agency management relied upon it to unjustly threaten the private citizen who initially reported hearing the gunshot with lying to a federal agent. IAF, Tab 9, Subtab 5F at 6-7. When considered along with the appellant's admission that he destroyed evidence of the accidental discharge of his firearm by disposing of the shell casing, and the fact that the appellant did not admit that the accidental discharge even occurred until after he was told that there could be a recorded 911 tape of the discharge, *id.*, Subtab 5P at 8, I would not find that, considering the totality of the circumstances, the agency's choice of penalty is clearly unreasonable.

¶ 8 Thus, I would find that the deciding official considered the relevant *Douglas* factors and that the penalty of removal was not clearly unreasonable under the circumstances. Although the administrative judge clearly assigned a different weight to individual *Douglas* factors than the deciding official, the issue presented is not whether the administrative judge would have weighed the factors differently, but "whether the agency considered the relevant *Douglas* factors and reasonably exercised management discretion in making its penalty determination." *Pinegar*, [105 M.S.P.R. 677](#), ¶ 54. Because the record reflects that the agency considered the relevant *Douglas* factors and that removal is

within the bounds of reasonableness, the agency's penalty determination is entitled to deference.

¶9 I respectfully dissent.

Mark A. Robbins
Member