UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 126

Docket No. AT-0752-10-0453-B-1

Maria Theresa Boucher,

Appellant,

v.

United States Postal Service,

Agency.

November 15, 2012

Maria Theresa Boucher, Athens, Alabama, pro se.

James M. Allen, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review of the remand initial decision that mitigated the appellant's removal to a 90-day suspension. For the reasons set forth below, we DENY the agency's petition for review and AFFIRM the remand initial decision.

BACKGROUND

¶2 On May 22, 2007, the appellant, a Mail Handler in Huntsville, Alabama, was on her lunch break with a co-worker, Bruce Black, in his car near their worksite when she and Mr. Black were arrested for having cocaine and marijuana

in the car. *Boucher v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-0453-I-1, Initial Appeal File (IAF), Tab 6 at 34, 49, 59. The appellant was charged with possession of cocaine and possession of marijuana. *Id.* at 86.

¶3 Based on the appellant's arrest, the agency placed her on emergency suspension effective May 23, 2007. IAF, Tab 6 at 77. On August 13, 2007, the agency indefinitely suspended the appellant pending resolution of the criminal charges against her. *Id.* at 36-38. The appellant filed a Board appeal of her indefinite suspension, alleging that the penalty was unreasonable because she was treated disparately than Dock McCainey, an agency employee who was indicted in March 2004 for bringing contraband into a correctional facility in November 2003.[1] Indefinite Suspension ID at 5. The agency placed Mr. McCainey on emergency suspension in June 2004, Mr. McCainey filed a grievance of that action, and, as part of the settlement of that grievance, the agency returned Mr. McCainey to work and provided him back pay. *Id.*

¶4 Following a hearing, the administrative judge issued an initial decision that affirmed the appellant's indefinite suspension, finding that the appellant did not show that Mr. McCainey was a valid comparator because she did not establish that he engaged in substantially similar criminal activity as she allegedly committed. Indefinite Suspension ID at 5. In rejecting the appellant's disparate penalty claim, the administrative judge noted that, during the hearing, Plant Manager and deciding official Paul Douglas Miller testified that Mr. McCainey's arrest did not happen near agency premises or while Mr. McCainey was on the clock, and that, to Mr. Miller's knowledge, Mr. McCainey's arrest was not publicized. *Id.* The initial decision became final on February 8, 2008, when neither party filed a petition for review. *Id.* at 7.

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[1] The initial decision in the appellant's indefinite suspension appeal incorrectly states that Mr. McCainey was arrested in November 2004. *Boucher v. U.S. Postal Service*, MSPB Docket No. AT-0752-07-1000-I-1 (Initial Decision (ID), Jan. 4, 2008) (Indefinite Suspension ID) at 5.

¶5 Following a jury trial, on December 16, 2009, the appellant was convicted of unlawful possession of a controlled substance. IAF, Tab 6 at 18. On February 27, 2010, the agency removed the appellant based on the following charges: (1) felony conviction for unlawful possession of a controlled substance; and (2) improper conduct. IAF, Tab 6 at 13-17. The improper conduct charge was supported by two specifications: (1) possession of a controlled substance while on agency property;[2] and (2) participation in the use of a controlled substance.[3] *Id.* at 16-17.

¶6 The appellant filed a Board appeal challenging her removal and she requested a hearing. IAF, Tab 1 at 2. She claimed that she was "blatantly being discriminated against and held to a different standard" than Mr. Black. *Id.* at 8. She also checked the box on the Board appeal form indicating that she was raising a claim of prohibited discrimination. *Id.* at 5. None of the administrative judge's orders notified the appellant of the burdens and elements of proof on her discrimination claims, however. *See* IAF, Tabs 2, 4, 8-9.

¶7 Following a hearing, the administrative judge issued an initial decision that affirmed the appellant's removal. ID. The administrative judge found that, based on the doctrine of collateral estoppel, the agency proved its charges by preponderant evidence, *id.* at 3; that a nexus existed between the appellant's misconduct and the efficiency of the service, *id.*; and that the penalty of removal was reasonable, *id.* at 4-5. The appellant filed a petition for review, to which the agency did not respond. Petition for Review File, Tab 1.

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[2] The agency determined that the appellant had possession of a controlled substance while on agency property based on the following: Mr. Black's vehicle was parked on agency property prior to departing with the appellant; the vehicle did not stop elsewhere before it traveled to the alleyway next to the appellant's work facility, where the appellant and Mr. Black were arrested; and police found cocaine in the appellant's lunch bag. IAF, Tab 6 at 16.

[3] During the prehearing conference in the appellant's removal appeal, the agency withdrew the second specification underlying the improper conduct charge. *See* IAF, Tab 17 (ID) at 2.

¶8 On petition for review, the Board issued a Nonprecedential Order in which it granted the petition, affirmed the initial decision in part, and remanded the appeal to the Regional Office for adjudication of the appellant's discrimination claims. Remand Appeal File (RAF), Tab 1 at 1, 3-4. The Board affirmed the administrative judge's findings that the agency proved its charges, that the removal action promoted the efficiency of the service, and that the penalty of removal was reasonable. *Id.* at 2. The Board found, however, that the administrative judge erred in failing to inform the appellant of the burdens and elements of proof on her discrimination claims, and also in failing to address the affirmative defense in any close of record order or prehearing conference summary and order. *Id.* at 3. The Board directed the administrative judge to: apprise the appellant of the applicable burdens and elements of proof on her claims of discrimination; afford the appellant an opportunity for discovery on her affirmative defense and a supplemental hearing on that affirmative defense if the appellant requested one; and issue a new initial decision with her findings, and a restatement of her findings on the merits if she did not sustain the appellant's affirmative defense. *Id.* at 4 (citing *Guzman v. Department of Veterans Affairs*, 114 M.S.P.R. 566, ¶ 10 (2010)).

¶9 On remand, the appellant asserted that she was raising a claim of sex discrimination based on disparate treatment. RAF, Tab 3. She initially requested a supplemental hearing on her affirmative defense but subsequently withdrew that request. RAF, Tab 4 at 1, 21 at 1, Tab 24 at 1. The administrative judge apprised the appellant of the burdens and elements of proof on her sex discrimination claim and afforded her the opportunity to engage in discovery on her affirmative defense. RAF, Tabs 1, 24.

¶10 During the proceedings on remand, the administrative judge initially ruled that the sole issue on remand was the appellant's affirmative defense. RAF, Tabs 2, 24. In particular, in her April 12, 2011 order, the administrative judge explicitly stated that the reasonableness of the penalty was not before her on

remand because the Board had affirmed her findings regarding that issue. RAF, Tab 2 at 2 n.1. Further, in a July 20, 2011 telephonic status conference, as documented in a written summary of the same date, the administrative judge explained to the parties that, based on the Board's decision remanding this appeal for further proceedings and the appellant's subsequent pleadings, the only issue was the appellant's affirmative defense of sex discrimination. RAF, Tab 24.

¶11 On August 1, 2011, however, the administrative judge conducted an impromptu telephonic conference in which she informed the parties that she had reconsidered her prior ruling as to whether she could reexamine the issue of disparate treatment in regard to the consistency of the penalty in addition to the issue of the appellant's affirmative defense. RAF, Tab 27. In an August 2, 2011 order, the administrative judge stated that she had reconsidered her prior ruling because, during the proceedings on remand, the agency submitted new evidence concerning Mr. McCainey which showed that the agency did not discipline Mr. McCainey based on his guilty plea to the charge of bringing contraband (a marijuana cigarette) into a state prison. *Id.* In the order, the administrative judge provided the parties an opportunity to make a final submission addressing both her authority to reconsider her previous penalty findings and the merits of the penalty issue, i.e., whether Mr. McCainey and the appellant were treated disparately based on the offenses which with they were charged. *Id.* at 2.

¶12 In response, the agency argued that, pursuant to the law of the case doctrine, the administrative judge did not have the authority to reconsider the Board's decision upholding the administrative judge's previous penalty findings. RAF, Tab 29 at 4-7. In the alternative, the agency argued that the administrative judge should not disturb the penalty on the basis of disparate treatment because Mr. McCainey is not a proper comparator. *Id.* at 7-8.

¶13 Based on the parties' written submissions, the administrative judge issued a remand initial decision in which she restated her findings that the agency proved the charges as well as the required nexus between the efficiency of the service

and the appellant's alleged misconduct. RAF, Tab 30, Remand Initial Decision (RID) at 3-4, 8. The administrative judge further found that the appellant did not meet her burden of proving that she was removed based on sex discrimination. *Id.* at 2, 4-7. With respect to the penalty, however, the administrative judge found that, in light of the evidence on remand, the appellant's removal must be mitigated, and that a 90-day suspension is within the bounds of reasonableness. *Id.* at 2, 8-13.

¶14 The agency filed a petition for review. Remand Petition for Review (RPFR) File, Tab 1. The appellant has not filed a response to the petition for review.

ANALYSIS

The administrative judge correctly found that the appellant failed to prove her affirmative defense of sex discrimination.

¶15 The appellant has not filed a submission on review and thus has not challenged the administrative judge's finding in the remand initial decision that she failed to meet her burden of proving that she was removed based on sex discrimination. RID at 2. Based on our review of the record, we see no reason to disturb this finding.

The law of the case doctrine does not preclude the administrative judge from reconsidering the reasonableness of the penalty.

¶16 On review the agency reiterates its argument from below that the law of the case doctrine precluded the administrative judge from reconsidering the reasonableness of the penalty. RPFR File, Tab 1 at 10; RAF, Tab 29 at 5-7. Under the law of the case doctrine, a decision on an issue of law made at one stage of a proceeding becomes a binding precedent to be followed in successive stages of the same litigation. *Pawn v. Department of Agriculture*, 90 M.S.P.R. 473, ¶ 15 (2001). There are three recognized exceptions to the doctrine: (1) the availability of new and substantially different evidence; (2) a contrary decision of law by controlling authority that is applicable to the question at issue; or (3) a

showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *MacLean v. Department of Homeland Security*, 116 M.S.P.R. 562, ¶ 16 (2011); *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 553 (1993).

¶17 The administrative judge found that two exceptions to the law of the case doctrine are applicable here. Specifically, she found that: (1) there is new evidence in this case that the agency did not submit during the initial adjudication of the appellant's removal appeal, i.e., that Mr. McCainey was convicted of a drug-related offense but was not subsequently disciplined, RID at 9; and (2) notwithstanding the Board's remand instructions that she restate her findings regarding the reasonableness of the penalty in the event that she found the appellant failed to prove her affirmative defense of sex discrimination, a manifest injustice would result from a failure to reconsider the appropriateness of the penalty, *id.* at 2 n.2, 9.

¶18 The agency argues on review, as it did below, that the information regarding Mr. McCainey does not constitute new evidence so as to warrant an exception to the law of the case doctrine. RPFR File, Tab 1 at 10-11; RAF, Tab 29 at 5-6. We disagree. On remand, the agency argued that Mr. McCainey was not a valid comparator, in part, because he was not convicted, as was the appellant. RAF, Tab 13 at 4. Because the agency did not present any evidence showing the outcome of the criminal charges against Mr. McCainey, the administrative judge ordered it to do so. RAF, Tab 14 at 1. The agency responded with information showing that Mr. McCainey was, in fact, convicted. RAF, Tab 15, Exhibit B. Therefore, this information is new and substantially different.

¶19 We also agree with the administrative judge's determination that a manifest injustice would result if the reasonableness of the penalty were not reexamined in light of this new information. RID at 2 n.2, 9. If the Board were to refuse to consider this information, it would in effect be rewarding the agency for

incorrectly stating that Mr. McCainey was not a suitable comparator because he had not been convicted, and for failing to produce evidence that is plainly material to the reasonableness of the penalty until late in the proceedings. The Board should not apply the law of the case doctrine under these circumstances.

The administrative judge did not err in mitigating the penalty.

¶20 The agency also argues on review that even if the law of the case doctrine did not bar the administrative judge from reconsidering her penalty determination, the administrative judge nonetheless erred in mitigating the penalty to a 90-day suspension. RPFR File, Tab 1 at 11-13. To establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 15 (2010).[4] If she does so, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Id.*

¶21 The agency argues that the charges and the circumstances surrounding the behavior of Mr. McCainey and the appellant are not substantially similar for several reasons. RPFR File, Tab 1 at 12-13. First, the appellant and Mr.

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[4] We overrule Board cases such as *Reeves v. U.S. Postal Service*, 117 M.S.P.R. 201 (2011) and *Bencomo v. Department of Homeland Security*, 115 M.S.P.R. 621 (2011) to the extent that they cite *Lewis* for the proposition that "there must be a *great deal* of similarity, not only between the offenses committed and the proposed comparator, but as to other factors, such as whether the employees worked in the same unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time." (emphasis added). This quotation from *Lewis* appears in the context of the Board's discussion of its framework for analyzing disparate penalty claims as it existed prior to our reviewing court's decision in *Williams v. Social Security Administration*, 586 F.3d 1365 (Fed. Cir. 2009), discussed below. *See* 113 M.S.P.R. 657, ¶¶ 12-13.

McCainey were charged with possession of different controlled substances, as the appellant was charged with possession of both cocaine and marijuana, whereas Mr. McCainey's misconduct involved only marijuana. Second, the appellant's misconduct occurred while she was still on duty, her arrest took place near agency property, and she possessed illegal drugs while on government property. Mr. McCainey's misconduct and arrest took place while he was off duty and did not occur near the worksite. Third, the appellant's misconduct was publicized, as her arrest was reported on television and in the newspaper. Mr. McCainey's arrest did not garner any publicity. Fourth, the appellant's misconduct took place more than three years after Mr. McCainey's and her conviction occurred more than five years after Mr. McCainey's guilty plea. Fifth, Mr. Hyde was the deciding official in the appellant's removal whereas Mr. Miller decided to bring Mr. McCainey back to work.

¶22 Although the appellant and Mr. McCainey had different first-line supervisors, they worked under the same plant manager at the time of their offenses and worked at the same post office. While the fact that two employees are supervised by different individuals may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties. In this case, the agency has not shown why the different chains of command would justify no penalty for Mr. McCainey, but removal for the appellant. Further, both individuals were charged with comparable offenses. Although the appellant was charged with possession of a more serious drug than Mr. McCainey, his offense was a more serious act, in that he attempted to smuggle marijuana into a prison facility. Although there were several years between the offenses committed by Mr. McCainey and the appellant and there were variances regarding publicity and the type of drug involved, we agree with the administrative judge that the agency has failed to explain, by preponderant evidence, why Mr. McCainey received no discipline, but the appropriate penalty for the appellant was removal.

¶23 In his dissent, the Member states that he would find that the appellant failed to show that the charges and circumstances surrounding her charged behavior are substantially similar to those of Mr. McCainey, and he also questions developments in Board case law on disparate penalties in cases such as *Lewis*, *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶¶ 19-22 (2010), and *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 10 (2010). As the Member recognizes, the impetus for the Board's approach in these cases was our reviewing courts' decision in *Williams*. In *Williams*, the court rejected an administrative judge's determination that a comparator employee was not similarly situated to the appellant for purposes of a disparate penalties claim simply because the employees were supervised under different chains of command. *Id.* at 1368. The court stated that, although a difference in supervisors may sometimes justify different penalties, the administrative judge did not explain, and the record did not reveal, *why* the difference would justify the difference in penalties in that case. 586 F.3d at 1368-69. The court remanded the appeal with instructions to the Board "to develop, as fully as possible," the facts relating to the agency's actions concerning the comparator employee; make findings and conclusions about those issues; and based on that augmented record and those findings and conclusions, reconsider the reasonableness of the penalty. *Id.* at 1369.

¶24 The Board's analytical framework set forth in *Lewis*, *Woebcke* and *Villada* follows from, and is entirely consistent with, the court's direction to the Board in *Williams* to analyze disparate penalty claims on the basis of a fully-developed record. As stated above, under that framework, the agency's burden to prove a legitimate reason for the difference in treatment between employees is triggered by the appellant's initial showing that there is enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. *See, e.g.*, *Lewis*, 113 M.S.P.R. 657, ¶ 15. The appellant clearly made that initial

showing here. Nonetheless, as stated above, the agency has consistently maintained that the circumstances surrounding their charged behavior were not substantially similar, and it has failed to offer any persuasive explanation of *why* Mr. McCainey's conduct did not warrant any discipline at all, whereas the appellant's misconduct warranted removal.

¶25 The approach the Member advocates in his dissent will not, in our opinion, promote full development of the record on disparate penalty claims, and in fact would discourage it. Indeed, the Member's approach would reward agencies for ignoring this *Douglas* factor altogether. For example, the Member notes that the agency placed McCainey on emergency suspension but reinstated him with back pay for the period of the suspension pursuant to the terms of a grievance settlement. He concludes that because it is "not clear" whether the deciding official knew about the McCainey settlement or what the terms of that settlement were, this alone justifies a difference in treatment, as long as the penalty in this case is otherwise reasonable under *Douglas*.[5]

¶26 We disagree. Certainly, whether a deciding official knowingly treated similarly-situated employees differently is a relevant consideration in determining whether a penalty is reasonable, but it is not the only relevant consideration. Further, whether this consideration justifies a difference in penalties depends upon the facts and circumstances, which can only be discerned on the basis of a fully-developed evidentiary record. An agency cannot, however, justify its penalty determination by leaving the record unclear on the question whether the deciding official knew if that penalty was consistent with those imposed on employees for the same or similar offenses. *See Williams*, 586 F.3d at 1368

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[5] The Member also argues that it is inappropriate to ask the agency to explain why it treated McCainey the way it did, because evidence that the agency settled some other case is inadmissible for purposes of assessing the reasonableness of the penalty in this one. Because the agency did not make this contention in the context of this appeal and the appellant has not had the opportunity to address it, we decline to consider it *sua sponte* for the first time on review.

(under *Douglas*, agencies are *required* to consider, in determining an appropriate penalty for employee misconduct, the consistency of the penalty with those imposed upon other employees for the same or similar offenses). Indeed, a deciding official's failure to consider this *Douglas* factor could result in the agency's penalty determination being entitled to no deference at all. *See Bivens v. Tennessee Valley Authority*, 8 M.S.P.R. 458, 461 (1981) (an agency's determination of an appropriate penalty is not entitled to deference when the deciding official does not consider any of the relevant mitigating circumstances). Here, as the Member acknowledges, it is not clear whether the deciding official knew about McCainey, the settlement of his grievance, or what the terms of that settlement were. Further, it is by no means certain that the agency would be required under the Member's approach to present any evidence to clarify these issues. That is, because the Member does not believe the appellant met her burden of showing that she and Mr. McCainey are similarly situated, he implicitly concludes that the agency's burden to prove – or even articulate – a legitimate reason for the difference in treatment was never "triggered."

¶27 The Member also states in his dissent that the *Villada-Woebcke-Lewis* trilogy attempts to promote a universal consistency in penalty setting, whereas, in his view, the Civil Service Reform Act's scheme for employee discipline should tolerate localized or organizational differences, so long as the penalty in any particular case is reasonable and consistent with *Douglas*. The Member also expresses his concern that the foregoing cases might force an agency to "go easy" on an employee who committed serious misconduct because of the unwarranted leniency of some other manager in the past. We disagree with the Member's characterization of the Board's holdings in these cases. Nothing in *Villada*, *Woebcke* or *Lewis* forecloses an agency from proffering evidence that a difference in treatment of employees was attributable to local or organizational differences, or that a penalty for a certain offence was too lenient in the past. In this regard, we note that *Lewis* recognizes as a relevant consideration "whether the agency

began levying a more severe penalty for a certain offense without giving notice of a change in policy." 115 M.S.P.R. ¶ 15, n.4. Because nothing in *Lewis* bars an agency from providing its employees with notice of a change in policy imposing a more severe penalty for a certain offense, nothing in *Lewis* forces an agency to go easy on employees who commit that offense in the future.

¶28 In any event, none of the foregoing concerns are implicated by the facts of this case. The agency makes no attempt here to attribute Mr. McCainey's lack of discipline to unwarranted leniency or to organizational differences. Although the Board may be presented with a future case in which an agency does so, we cannot base our decision on evidence that the agency failed to present or on an argument that it did not make.

¶29 In sum, we find no reason to disturb the administrative judge's conclusion that the agency has not justified a removal for the appellant in light of the lack of penalty for Mr. McCainey, and that a 90-day suspension is the maximum reasonable penalty under the circumstances of this case. Therefore, we DENY the agency's petition for review.

ORDER

¶30 We ORDER the agency to cancel the removal and substitute in its place a 90-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.

¶31 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, 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.

¶32 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).

¶33 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).

¶34 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.

¶35 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 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 Clerk of the Board.

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 Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

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. § 2000e-5(f) and 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 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. 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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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

Maria Theresa Boucher v. United States Postal Service

MSPB Docket No. AT-0752-10-0453-B-1

¶1 For the reasons given below, I do not agree with the majority's decision to mitigate the appellant's removal to a 90-day suspension.

The administrative judge erred in mitigating the penalty because the deciding official considered the relevant factors and evidence of how the agency treated Mr. McCainey is inadmissible for purposes of assessing the reasonableness of the penalty; alternatively, even if the Board can consider how the agency treated Mr. McCainey, there are significant differences between the appellant's situation and Mr. McCainey's.

¶2 Assuming arguendo that the law of the case doctrine does not preclude reexamination of the reasonableness of the penalty, I believe the administrative judge erred in mitigating the appellant's removal to a 90-day suspension. Where, as here, all of the agency's 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. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Singletary*, 94 M.S.P.R. 553, ¶ 9; *see Douglas*, 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Singletary*, 94 M.S.P.R. 553, ¶ 9.

¶3 The February 18, 2010 decision letter and the testimony of the deciding official in the appellant's removal, Plant Manager Roger Hyde, as summarized in both the initial decision and the remand initial decision, show that the deciding official properly considered the *Douglas* factors in imposing a penalty of removal. Initial Appeal File, Tab 6 at 13-14; Initial Decision at 4; Remand Initial Decision at 10. Mr. Hyde testified that due to the notoriety generated by the appellant's arrest for committing a felonious act while at work, the agency could no longer employ the appellant, as the fact that her arrest was publicized on local television news broadcasts and in local newspapers created a negative image for the agency. Initial Decision at 4; Remand Initial Decision at 10. Mr. Hyde stated that he lost confidence in the appellant's ability to perform the duties of a postal employee and her actions had a direct impact on agency efficiency. *Id.* Mr. Hyde also considered mitigating factors, such as the appellant's 13 years of government service and the absence of any past disciplinary record, but found that these mitigating factors did not outweigh the seriousness of the offense. *Id.*

¶4 Further, as the administrative judge correctly found in both the initial decision and the remand initial decision, the appellant committed an extremely serious offense and Mr. Hyde's stated loss of trust in her ability to perform her duties is reasonable. Initial Decision at 4; Remand Initial Decision at 10. I also agree with the administrative judge's finding that there is little potential for rehabilitation because the appellant continued to deny her involvement with drugs even after she was convicted of possession of a controlled substance. Initial Decision at 4.

¶5 Under current law, to establish an impermissible disparity in penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those of at least one comparison employee. *See Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 12 (2010) (citing *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983)). If she does so, "the agency must prove a legitimate reason for the

difference in treatment by a preponderance of the evidence before the penalty can be upheld." *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 10 (2010) (quoting *Lewis*, 113 M.S.P.R. 657, ¶ 6). To trigger the agency's burden, there must be enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the "outcome determinative" nature of these factors. *Lewis*, 113 M.S.P.R. 657, ¶ 15.

¶6 The administrative judge mitigated the appellant's removal to a 90-day suspension in large part because of how the agency treated another employee, Dock McCainey, after he pled guilty to an off-duty drug-related offense. In ¶ 24 of its opinion, the majority criticizes the agency for not explaining "*why* Mr. McCainey's conduct did not warrant any discipline at all" (emphasis in original). In fact, the agency "placed McCainey on emergency suspension" when it learned that he had been criminally charged. *Boucher v. U.S. Postal Service*, MSPB Docket No. AT-0752-07-1000-I-1, initial decision at 5 (Jan. 4, 2008). Mr. McCainey filed a grievance, and after the criminal matter was resolved, the agency reinstated him with back pay for the period of the suspension. These actions were taken pursuant to an agreement that settled the grievance. *Id.* It is inappropriate to ask the agency to explain why it treated Mr. McCainey the way it did, because evidence that the agency settled some other case is inadmissible for purposes of assessing the reasonableness of the penalty in this one. *Herbert v. Department of Transportation*, 17 M.S.P.R. 62, 70 (1983); *see also Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001); *Cocchiara v. Department of Transportation*, 18 M.S.P.R. 281, 283 (1983).

¶7 Alternatively, even assuming that evidence of how the agency treated Mr. McCainey is admissible for purposes of assessing the reasonableness of the penalty, I do not believe the charges and the circumstances surrounding the behavior of Mr. McCainey and the appellant are substantially similar, for several

reasons. First, the appellant and Mr. McCainey were charged with possession of different controlled substances, as the appellant was charged with possession of both cocaine and marijuana, whereas Mr. McCainey's misconduct involved only marijuana. Second, the appellant's misconduct occurred while she was still on duty, her arrest took place near agency property, and she possessed illegal drugs while on government property. Mr. McCainey's misconduct and arrest took place while he was off duty and did not occur near the worksite. Third, the appellant's misconduct was publicized, as her arrest was reported on television and in the newspaper. Mr. McCainey's arrest did not garner any publicity. Fourth, the appellant's misconduct took place more than three years after Mr. McCainey's. Fifth, Mr. McCainey pled guilty to a criminal charge, suggesting a potential for rehabilitation, while the appellant herein continued to dissemble and deny even after she was found guilty by a jury of possession of a controlled substance.

¶8 In light of these significant differences, I believe, as the administrative judge stated in the indefinite suspension initial decision, that the appellant and Mr. McCainey were not similarly situated, and thus, Mr. McCainey is not a proper comparator for disparate penalty analysis. I also note that there is no indication that the official who decided to settle the McCainey grievance was acting in accordance with agency policy or that he had authority to set agency policy. I therefore disagree with the implication in ¶ 26 of the majority opinion that the agency's decision to remove the appellant was inconsistent with agency policy. Since the penalty of removal is otherwise reasonable, the administrative judge should not have disturbed it.[*]

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[*] Assuming arguendo that the McCainey settlement is admissible in support of the appellant's sex discrimination claim, *see Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶¶ 15-24 (2003), her claim still fails. To prevail on her sex discrimination claim, "all relevant aspects of the appellant's employment situation must be 'nearly identical' to that of the comparator employee." *Ly v. Department of the Treasury*, 118 M.S.P.R. 481 ¶ 10 (2012) (citation omitted). To be considered "similarly situated," a comparator "must have reported to the same supervisor, been subjected to the same standards

The 2010 shift in the law should be reconsidered.

¶9 It is well-settled that among the factors an agency should consider in setting the penalty for misconduct is "consistency of the penalty imposed with those imposed upon other employees for the same or similar offenses." *Douglas*, 5 M.S.P.R. at 306. For decades after *Douglas* was decided, for a disparate penalty claim to succeed the Board required close similarity in offenses between the appellant and the comparator(s), and that the appellant and the comparator(s) worked in the same unit and for the same supervisor. *E.g.*, *Jackson v. Department of the Army*, 99 M.S.P.R. 604, ¶ 7 (2005); *Fearon v. Department of Labor*, 99 M.S.P.R. 428, ¶ 11 (2005); *Rasmussen v. Department of Agriculture*, 44 M.S.P.R. 185, 191-92 (1990); *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). All that changed two years ago, when the Board issued a series of decisions that in my opinion relaxed the test for impermissible disparity in penalties. Under current precedent, established before my presence on the Board, broad similarity in misconduct between the appellant and the comparator(s) is sufficient to shift the burden to the agency to explain the difference in treatment, and the universe for potential comparators is worldwide. *See Villada*, 115 M.S.P.R. 268, ¶¶ 10-12; *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶¶ 19-22 (2010); *Lewis*, 113 M.S.P.R. 657, ¶¶ 5-13.

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governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances." *Id.* The appellant, who bears the burden of proving sex discrimination, 5 U.S.C. § 7701(c)(2)(B), has not shown that she had the same supervisor as Mr. McCainey. Furthermore, there are significant differentiating circumstances between the appellant's situation and Mr. McCainey's. As explained above, Mr. McCainey's conduct involved marijuana only, it was off-duty and away from agency premises, and the criminal matter was resolved out of the public eye with a guilty plea suggesting a potential for rehabilitation. The appellant in the present case was arrested near postal premises during the workday for using marijuana and cocaine, her situation was reported in the press, and she continued to deny her involvement with drugs even after she was convicted of possession of a controlled substance. The appellant's case cannot be considered "nearly identical" to Mr. McCainey's.

¶10 I believe there are reasons to question the 2010 shift in the law. The primary basis for the new approach is *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009), where the court questioned the validity of requiring that the appellant and comparator employee(s) worked for the same supervisor. However, an earlier panel of the court explained that 5 U.S.C. ch. 75 is intended to guard against agencies "knowingly" treating similarly-situated employees differently. *Facer v. Department of the Air Force*, 836 F.2d 535, 539 (Fed. Cir. 1988). It is undisputed that the deciding official in the present case was not the official who agreed to settle the McCainey grievance, and it is not clear that the deciding official herein even knew about the McCainey settlement or what the terms of that settlement were. This alone justifies a difference in treatment, as long as the penalty in this case is otherwise reasonable under *Douglas*.

¶11 My concern is that the *Villada-Woebcke-Lewis* trilogy attempts to promote a universal consistency in penalty setting, without identifying any legitimate individual interest or broad value under the Civil Service Reform Act (CSRA) that is being promoted. *See Facer*, 836 F.2d at 539 (an employee does "not have a legally protected interest in the evenness of a misconduct penalty assessed on him, with that of others"); *Schapansky v. Department of Transportation*, 735 F.2d 477, 485 (Fed. Cir. 1984) ("unevenness" in the penalty imposed on employees who committed similar misconduct "is no ground for invalidating" the more severe penalty); *Villela v. Department of the Air Force*, 727 F.2d 1574, 1577 (Fed. Cir. 1984) ("[a] penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases") (*quoting Jones v. United States*, 617 F.2d 233, 238 (Ct. Cl. 1980)).

¶12 Moreover, in any given case, the consistency called for under the *Villada-Woebcke-Lewis* trilogy might be rooted in an earlier disciplinary decision that was unwise, meaning that a manager would be forced to go easy on an employee

who committed serious misconduct because of the *unwarranted* leniency of some other manager in the past. Nothing in the CSRA suggests that Congress intended for those managers who have a high tolerance for misconduct to wield such influence over how their colleagues manage their own subordinates. The trilogy also raises the specter of agencies now needing to maintain massive databases of past adverse actions to consult whenever setting a penalty. Federal and state criminal systems tolerate differences in treatment; for example, a low-level drug case might be prosecuted in Fargo, North Dakota, while a similar case might be passed up in New York. *Cf. United States v. Booker*, 543 U.S. 220, 256 (2005) ("policies of the prosecutor . . . vary from place to place"). I think that the CSRA's scheme for employee discipline should tolerate localized or organizational differences too, as the Board held prior to 2010, so long as the penalty in any particular case is reasonable and consistent with *Douglas*.

Conclusion

¶13 I would reconsider the precedents of *Villada*, *Woebcke*, and *Lewis*. Even under that precedent (and assuming that evidence of the McCainey settlement is admissible), the significant differences between the appellant's misconduct and that of Mr. McCainey justify a difference in treatment.

¶14 I respectfully dissent.

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Mark A. Robbins
Member