UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 3

Docket No. CB-7121-12-0003-V-1

Charmayne M. Kirkland,

Appellant,

v.

Department of Homeland Security,

Agency.

January 14, 2013

Gerald L. Gilliard, Esquire, Washington, D.C., for the appellant.

Elizabeth A. Kay, Esquire, and Megan Z. Snyder, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has requested review of an arbitrator's decision that denied her grievance concerning her removal. For the reasons set forth below, we AFFIRM the arbitrator's decision.

BACKGROUND

¶2 The agency removed the appellant from her Management Program Specialist position, effective September 5, 2008, on the basis of a charge of "Failure to Perform" with one underlying specification, and a charge of "Lack

of Candor" with two sustained specifications.[1] Request for Review (RFR) File, Tab 1, Exhibits (Exs.) B, F. The removal decision informed the appellant of her options for contesting the agency's action. *Id.*, Tab 1, Ex. B at 4. The appellant elected to contest the removal through arbitration in accordance with Article 32 of the National Agreement between the National Treasury Employees Union (the appellant's union) and the agency. *Id.*, Tab 1. Following the arbitration hearing held on February 23-24, 2009, April 17, 2009, and May 1, 2009, the arbitrator issued an Opinion and Award on September 29, 2009, denying the appellant's grievance in which he found that the agency had proven by preponderant evidence the two charges supporting the appellant's removal and that the appellant's union failed to prove that the agency had engaged in disability discrimination or retaliation for prior protected activity. *Id.*, Tab 1, Ex. A at 1, 45.

¶3 On November 17, 2011, the appellant filed this request for review of the arbitrator's decision and filed a motion to set aside the filing deadline. RFR File, Tab 1. On November 18, 2011, the appellant filed an amended motion to set aside the deadline and an amended request for review. RFR File, Tab 3. On December 3, 2011, the appellant filed a supplement to her amended request for review of the arbitrator's decision, in which she also supplemented her request to set aside the filing deadline. RFR File, Tab 6. The agency filed a response in opposition to the appellant's request to set aside the filing deadline and her amended request for review of the arbitrator's decision. RFR File, Tab 7 (two separate volumes).

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[1] The deciding official sustained specifications 1 and 3 of the "Lack of Candor" charge, but he did not sustain specification 2 of the charge. Request for Review File, Tab 1, Exhibit B.

ANALYSIS

The appellant has established good cause for the untimely filing of the request for review.

¶4 A request for review of an arbitrator's decision must be filed within 35 days after the date of issuance of the decision, or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the appellant received the decision. *Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 13 (2005); 5 C.F.R. § 1201.154(d). Since the appellant does not claim that she received the arbitration decision more than 5 days after the September 29, 2009 date the decision was issued, she should have filed a review request with the Board by November 3, 2009; thus, her request for review was untimely by more than 2 years. RFR File, Tab 1, Ex. A at 45.

¶5 An appellant bears the burden of proving through preponderant evidence that her appeal has been timely filed with the Board. *Mauldin v. U.S. Postal Service*, 115 M.S.P.R. 513, ¶ 5 (2011); 5 C.F.R. § 1201.56(a)(2)(ii). The Board will dismiss an untimely appeal unless the appellant establishes good cause for the delayed filing. *Mauldin*, 115 M.S.P.R. 513, ¶ 5. In order to establish good cause for the untimely filing of an appeal, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The *Alonzo* standard also governs the late filing of a request for review of an arbitration decision. *Hutchinson v. Department of Labor*, 91 M.S.P.R. 31, ¶ 7 (2001); *Simpson v. Department of Defense*, 53 M.S.P.R. 518, 520-21 (1992). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of the excuse and the showing of due diligence, whether the appellant is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to timely file her request for review. *Mauldin*, 115 M.S.P.R.

513, ¶ 7; *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62–63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶6 However, an agency's failure to notify an employee of his or her Board appeal rights when such notification is required generally constitutes good cause for late filing. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 673 (Fed. Cir. 1988); *McClendon v. Office of Personnel Management*, 92 M.S.P.R. 250, 254 (2002). Nor is such dereliction cured by attaching a copy of the Board regulations to the agency decision letter. *See McClendon*, 92 M.S.P.R. at 254; *see also Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1583-84 (Fed. Cir. 1994). Thus, when an agency provides inadequate notice of Board appeal rights, the appellant is not required to show that she exercised due diligence in attempting to discover her appeal rights, but rather must show diligence in filing the appeal after learning that she could. *Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995).

¶7 On review, the appellant contends that the Board should excuse her delay in filing the request for review because neither the agency's removal decision nor the arbitrator's decision informed her of the right to file a request for review within 35 days from the date of the arbitrator's decision in accordance with the Board's regulation at 5 C.F.R. § 1201.154(d). She also asserts that she exercised due diligence in filing her request for review within 30 days of the date that she became aware of her right to file a request with the Board. RFR File, Tab 1 at 1-3; Tab 3 at 1-2; Tab 6 at 2-3. The agency contends that we should not waive the appellant's deadline for filing the request for review because the decision letter informed the appellant that she could have appealed her removal to the Board in lieu of filing a grievance with the agency and included a copy of the Board's regulations, and because the appellant was represented by union counsel throughout the arbitration process. *Id.*, Tab 7 at 7-8.

¶8 Here, the agency's removal decision did contain information regarding the appellant's immediate options to file a grievance, a Board appeal, or a discrimination claim in the Equal Employment Opportunity (EEO) process. RFR File, Tab 1, Ex. 3 at 4. However, it did not inform the appellant, as explicitly required by 5 C.F.R. § 1201.21(a)(4)(iii) (2008),[2] of her right to request Board review of an arbitral decision within 35 days from the date of issuance.[3] RFR, Tab 1, Ex. 3 at 4. The fact that the agency attached a copy of Board regulations to the decision letter is not sufficient to find that the appellant received clear information about her Board appeal rights as required by our regulations. *McClendon*, 92 M.S.P.R. at 254. Accordingly, this case comes squarely within the rule that an agency's failure to provide requisite notice of appeal rights constitutes good cause for excusing an untimely appeal.

¶9 The agency also argues that the appellant has not established good cause for her delay because she was represented by a union attorney in pursuing her grievance. It is, of course, axiomatic that, when an appellant is represented by counsel, a failure by the appellant's attorney to timely file a request for review does not constitute good cause for waiving a filing deadline. *See Miller v. Department of Homeland Security*, 110 M.S.P.R. 258 (2008); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). However, in *Shiflett*, the Court of Appeals for the Federal Circuit specifically rejected the agency's argument that the appellant should be held responsible for the omissions of duty by her union representative because the critical omission was not that the representative failed to inform the appellant of her appeal rights, but that the agency failed to give the

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[2] This regulation is presently set forth at 5 C.F.R. § 1201.21(d)(3).

[3] Although Board regulations do not impose a similar notification of appeal rights requirement on arbitrators in matters subject to further Board review, we note that the arbitral award in this case likewise did not include any information with regard to the appellant's rights to further review.

appellant notice of her appeal rights as required by law.[4] 839 F.2d at 673-74. The critical and controlling fact in this case is not the failure of the appellant's union attorney to inform her of her Board appeal rights, but the agency's violation in failing to give the appellant notice of her appeal rights as prescribed by the regulations. *See Shiflett*, 839 F.2d at 673-74. Accordingly, we find that the appellant has shown good cause for her untimely filing of the request for review.

The appellant has not shown that the arbitrator erred in interpreting a civil service law, rule, or regulation.

¶10 The Board has jurisdiction to review an arbitrator's decision under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 5 (2006). Each of these conditions has been satisfied in this case. First, the appellant's grievance concerns her removal, a subject matter over which the Board has jurisdiction. RFR File, Tab 3; *see* 5 U.S.C. § 7512(1). Second, the appellant alleged in her grievance and in this request for review that the agency's action was based on disability discrimination and was taken in retaliation for filing prior EEO complaints. *See* RFR File, Tab 3. Finally, the arbitrator has issued a final decision. *See* RFR File, Tab 3, Ex. A.

¶11 In her request for review, the appellant makes the following claims: (1) new and material evidence shows that the agency failed to meet its burden of proving that her removal promoted the efficiency of the service; (2) the arbitrator erred as a matter of law by applying an incorrect analytical framework in

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[4] The principle that union representatives cannot be held personally liable to employees for acts performed on behalf of the union in the collective bargaining process is deeply embedded in labor jurisprudence and includes the actions of attorneys who represent a union. *Montplaisir v. Leighton*, 875 F.2d 1, 4, 6 (1st Cir. 1989).

determining whether she met her burden of proving disability discrimination; (3) the arbitrator failed to consider the lack of underlying evidence and the staleness of the specification 3 of the "Lack of Candor" charge; (4) the arbitrator and the deciding official did not properly apply the standards under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), for determining the reasonableness of the penalty; and (5) the agency committed harmful error in failing to afford the appellant her full union rights during the removal process. RFR File, Tabs 3, 6.

¶12 The Board's standard of review of an arbitration decision is deferential. *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 9 (2008). The Board will modify or set aside an arbitration decision only when the arbitrator has erred in interpreting a civil service law, rule, or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, an arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for instance, by misallocating the burdens of proof or employing the wrong analytical framework. *See id.*

The appellant has not shown that new and material evidence supports reversal of the arbitrator's award.

¶13 The agency charged the appellant with "Failure to Perform" assigned work between March 5, 2007, and September 26, 2007. Specifically, this charge alleged that, in spite of the agency's provision of assistance and special equipment to accommodate her medical conditions, the appellant failed to fulfill the responsibilities of her position, which required her to administer the agency's WebTELE system, a computer-based employee telephone directory. RFR File, Tab 3, Exs. B, E. The deciding official sustained this charge and its single specification. He also sustained two of the three specifications underlying the "Lack of Candor" charge. In specification 1, the agency charged that the appellant made statements to management regarding her physical abilities, i.e., that she was unable to use a computer keyboard without risking injury, which

were misleading and less than candid. In specification 3, the agency charged that the appellant made incorrect statements to the District of Columbia Department of Employment Services on February 27, 2007, regarding her placement in nonpay status and the agency's alleged failure to respond to her request to return to duty. *Id.*

¶14 The appellant now asserts that new and material evidence supports her argument that the agency failed to meet its burden of proving that her removal promoted the efficiency of the service. Specifically, she presents evidence that, subsequent to the arbitrator's award, the Department of Labor's Office of Workers' Compensation Programs (OWCP), on September 13, 2011, vacated its earlier denial of her claim for an occupational disease and accepted her claim for bilateral carpal tunnel syndrome as a work-related injury. RFR File, Tab 3, Amended Request at 3-5; Ex. C. The appellant argues that, if the arbitrator had been aware of this evidence, he would not have affirmed the "Failure to Perform" charge and specification 1 of the "Lack of Candor" charge because both charges were predicated on the conclusion that the appellant was capable of performing her duties and that her claims to the contrary were false. *Id.*, Amended Request at 3-4. The appellant further contends that the agency did not prove the inherent intent of insubordination underlying the "Failure to Perform" charge because an employee, who is too ill to work, cannot be found insubordinate if she refuses to work. *Id.*

¶15 With the exception of discrimination claims, the Board will not review arguments that were not raised before the arbitrator. *See Dixon v. Department of Commerce*, 109 M.S.P.R. 314, ¶ 13 (2008); *Means v. Department of Labor*, 60 M.S.P.R. 108, 115-16 (1993). Therefore, except to the extent that this new evidence is relevant to the issue of the appellant's disability discrimination claims, it cannot be considered as a basis for finding error in the arbitrator's review of this case. Accordingly, we find that the arbitrator properly considered the evidence before him and committed no errors in interpreting a civil service

law, rule, or regulation. We, therefore, must give deference to his factual determinations that the agency proved its charges.

¶16 Furthermore, to the extent that OWCP's September 13, 2011 decision should now be considered as new and material evidence in support of the appellant's discrimination claims, we find that it is not of sufficient weight to warrant an outcome different from the arbitrator's decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). Before the arbitrator, the agency did not dispute the appellant's evidence that she had been diagnosed with bilateral carpal tunnel syndrome, and the arbitrator found that the appellant had this medical condition in his analysis of the evidence. The primary issue in dispute concerned whether the agency had provided sufficient reasonable accommodation for this condition to allow her to successfully perform her duties requiring keyboarding on a computer. In resolving this factual conflict, the arbitrator made credibility determinations that the appellant had overstated her medical restrictions and the volume, complexity, and amount of keyboarding required for her WebTELE duties. RFR File, Tab 1, Ex. A at 36-39. Specifically, the arbitrator found that the appellant was not credible because evidence showed that she regularly performed other computer activities that required the same abilities as her computer duties, and, therefore, he concluded that she was not truthful at hearing when she described her physical capabilities and limitations. *Id.*

¶17 The new evidence presented by the appellant on review shows that the OWCP has now determined that the appellant's carpal tunnel syndrome is a work-related injury, which was not disputed below. More importantly, OWCP's decision does not prove the appellant's medical condition was of such severity that she was disabled from working during the timeframes relevant to the charges. An OWCP determination that an employee is entitled to receive medical benefits for a work-related injury does not necessarily mean that the Department of Labor has found that the employee is disabled and cannot perform gainful employment.

See 20 C.F.R. §§ 10.0(b); 10.5(f); 10.310(a); 10.400(b). Therefore, this new evidence is insufficient to materially affect the arbitrator's factual and credibility determination that the appellant was more capable at performing computer keyboarding than she contended and that the accommodations provided by the agency for the appellant's medical conditions were reasonable accommodations and sufficient to allow her to perform the essential functions of her position.

The arbitrator used the correct standard of law to adjudicate the appellant's reasonable accommodation claim.

¶18 The appellant also argues that the arbitrator erred by applying an incorrect analytical framework in determining whether she met her burden of proving disability discrimination by denial of a reasonable accommodation. An appellant may establish a disability discrimination claim based on failure to accommodate by showing that: (1) She is a disabled person; (2) the action appealed was based on her disability; and (3), to the extent possible, that there was a reasonable accommodation under which the appellant believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned.[5] *White v. U.S. Postal Service*, 117 M.S.P.R. 244, ¶ 16 (2012). In

[5] As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973, but the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act and are applied to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Further, the Equal Employment Opportunity Commission's (EEOC) regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7–8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulations at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b). We recognize that the ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009, and that the EEOC subsequently issued amended regulations and guidance concerning it. *See Southerland v. Department of Defense*, 117 M.S.P.R. 56, ¶ 25 (2011). The ADAAA, however, did not change the statutory provision regarding reasonable accommodation. *Id.*, ¶ 33 n.9. Thus, to the extent that the ADAAA should

addition, once an employee informs the agency that she requires an accommodation, the agency must engage in an interactive process to determine an appropriate accommodation. *Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006). As the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance explains, the exact nature of the interactive process that a request for accommodation triggers will vary between employees because the dialogue itself is intended to help the parties understand the employee's needs and what changes to working conditions might be possible. EEOC, Enforcement Guidance: *Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, Question* 5, http://www.eeoc.gov/policy/docs/accommodation.html. The arbitrator applied this analytical framework in analyzing the appellant's disability discrimination claim.

¶19 The appellant argues that the arbitrator erred because he did not focus on how her medical conditions substantially limited a major life activity and because he had a faulty understanding of what constitutes a reasonable accommodation. RFR File, Tab 3 at 6-8. The appellant's argument is that the fact that she endured pain in performing personal typing does not justify the agency's argument that she also could have endured pain in performing work. *Id.* at 7. Therefore, the appellant asserts that the agency's actions to accommodate the appellant's conditions, which required her to work in pain, were not reasonable accommodations. *Id.* at 8. The record shows, however, that the arbitrator made reasoned factual determinations regarding whether the appellant's medical conditions substantially limited her ability to perform her duties and whether the agency appropriately engaged in the interactive process to find a reasonable accommodation for the appellant's medical conditions. *Id.*, Tab 1, Ex. A at

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be retroactively applied here, the ADAAA and its implementing regulations do not affect the outcome of this case.

36-42. In asserting these arguments, the appellant is merely disputing the arbitrator's factual findings and credibility determinations that she had overstated the degree to which her carpal tunnel syndrome limited her ability to use a computer keyboard. Since we must give great deference to the arbitrator's findings, we cannot substitute our judgment for the arbitrator's on this factual issue. She has not shown that the arbitrator applied an incorrect standard of law in adjudicating these issues.

The arbitrator did not err in affirming specification 3 of the "Lack of Candor" charge.

¶20 In specification 3 of the "Lack of Candor" charge, the agency alleged that the appellant gave incorrect information to the District of Columbia Department of Employment Services on February 27, 2007, that her employer had kept her in a nonpay status after she was unable to relocate to Indianapolis, Indiana. RFR File, Tab 1, Ex. F. The appellant also allegedly stated that she had asked to be allowed to work from home or in Washington, D.C., and that there had been no response from her employer. *Id.* The proposing official asserted that these statements were incorrect or misleading because the appellant had received the offer to become a Management Analyst in Washington, D.C., on February 22, 2007, less than one week before making the statements to the Department of Employment Services. *Id.*

¶21 The appellant contends that the arbitrator failed to consider the lack of underlying evidence and the staleness of this specification. RFR File Tab 3 at 9-13. Specifically, on review, the appellant reiterates her factual contentions before the arbitrator where she acknowledged that she had received the agency's February 22, 2007 letter, but she asserted that it was not a job offer because it did not provide a start date or identify the specific work location in the Washington, D.C., area where she would be assigned. *Id.* The appellant, therefore, contends that her response to the Department of Employment Services was truthful because she had not received sufficient information from the agency to conclude that they

had made her a job offer. In making this argument, the appellant disputes the arbitrator's decision, but she fails to explain how the arbitrator misapplied the burden of proof or made any other legal error with respect to this charge. Thus, we see no error in the arbitrator's analysis.

¶22 The appellant also asserts that this charge was stale because the agency was aware of her alleged misconduct for more than 1 year before it brought the charges against her. *Id.* at 13. The agency contends that the appellant did not argue staleness before the arbitrator, RFR File, Tab 7 at 20, and the record appears to support this argument. As noted above, the Board will not review arguments that were not raised before the arbitrator. *Dixon*, 109 M.S.P.R. 314, ¶ 13; *Means*, 60 M.S.P.R. at 115-16. Therefore, this argument cannot be considered as a basis for finding error in the arbitrator's review of this case.

¶23 In any event, the defense of staleness falls under the equitable doctrine of laches, and the appellant has not shown that this specification was stale. To establish the defense of laches, an appellant must prove both that the delay in bringing the action was unreasonable and that she was materially prejudiced by the delay. *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 19 (2003). In this case, the agency's delay was 14 months, which was not unreasonable under all of the circumstances of this case, and the appellant has made no showing that her ability to defend against the specification was prejudiced in any manner, much less materially prejudiced. Therefore, the appellant has not shown that this specification should be barred by the doctrine of laches.

The agency and the arbitrator did not err in making their penalty determinations.

¶24 The appellant contends that the arbitrator and the agency misapplied the *Douglas* factors and that a proper weighing of the *Douglas* factors leads to the conclusion that the penalty of removal is unreasonable under the circumstances of this case. RFR File, Tab 3 at 13-19. 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 tolerable limits of reasonableness. *Pinegar v. Federal Communications Commission*, 105 M.S.P.R. 677, ¶ 53 (2007); *Adam v. U.S. Postal Service*, 96 M.S.P.R. 492, ¶ 5 (2004), *aff'd*, 137 F. App'x. 352 (Fed. Cir. 2005); *Wentz v. U.S. Postal Service*, 91 M.S.P.R. 176, ¶ 13 (2002). In doing so, 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. *Adam*, 96 M.S.P.R. 492, ¶ 5; *Wentz*, 91 M.S.P.R. 176, ¶ 13. The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Adam*, 96 M.S.P.R. 492, ¶ 5; *Wentz*, 91 M.S.P.R. 176, ¶ 13. It is not the Board's role to decide what penalty it would impose, but, rather, whether the penalty selected by the agency exceeds the maximum reasonable penalty. *Adam*, 96 M.S.P.R. 492, ¶ 7; *Lewis v. General Services Administration*, 82 M.S.P.R. 259, ¶ 5 (1999).

¶25 The appellant extensively reargues on review her views concerning how the *Douglas* factors should have been weighed in this case, and she asserts that, because the agency and the arbitrator weighed the *Douglas* factors differently than she would, the arbitrator's decision must be set aside. RFR File, Tab 5 at 13-19. However, whether the arbitrator or the Board would have weighed the *Douglas* factors differently than the agency is not the issue in deciding whether to mitigate a penalty. *Adam*, 96 M.S.P.R. 492, ¶ 7. The issue in determining whether the Board should exercise its mitigation authority is whether the agency considered the relevant *Douglas* factors and reasonably exercised management discretion in making its penalty determination. *Id.*

¶26 The arbitrator found that the agency properly considered the relevant *Douglas* factors in arriving at the penalty of removal, and he declined to substitute his judgment for that of the agency. RFR File, Tab 1, Ex. A at 43-45. He specifically noted that the agency primarily relied upon the seriousness of the

misconduct, the knowing and willful nature of the misconduct, the extended nature of the misconduct, the appellant's lack of potential for rehabilitation, and the lack of alternative sanctions. *Id.* The appellant argues on review that the arbitrator failed to afford sufficient weight to the mitigating factors. RFR File, Tab 3 at 15. However, the arbitrator's failure to mention all of the evidence of record does not mean he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table).

¶27 Moreover, the issue was whether the agency considered the relevant *Douglas* factors. The record shows that the deciding official explained his *Douglas* factor analysis in the decision letter, RFR, Tab 3, Ex. B, and he also testified in detail about his decision-making process and went through each of the *Douglas* factors, *id.*, Tab 7, Hearing Transcript at 159-65. The deciding official explicitly mentioned in the decision letter and in his testimony that he considered the mitigating factors presented in this appeal, such as the appellant's 25 years of service, the lack of prior disciplinary actions, and the mitigating circumstances surrounding the offense such as unusual job tensions. *Id.* Under the circumstances of this case, we find that the arbitrator properly considered whether the agency had evaluated the relevant *Douglas* factors and correctly applied the Board's law in declining to substitute his judgment for that of the agency. Regardless of whether we would have imposed the same penalty, we cannot find that the agency's determination that the penalty of removal was within the bounds of reasonableness is incorrect as a matter of civil service law, rule, or regulation.

The Board is precluded from deciding the appellant's claim of harmful error because it was not raised during arbitration.

¶28 Finally, the appellant argues that the agency committed harmful error when it failed to afford the appellant her full union rights under the collective bargaining agreement during the removal action. The arbitrator did not make any

findings concerning this claim, and it appears from the record below that this issue was not raised as an affirmative defense before the arbitrator. In adjudicating a request for review of an arbitrator's decision under 5 U.S.C. § 7121(d), the Board lacks the authority to hear claims other than prohibited discrimination under 5 U.S.C. § 2302(b)(1) that were not first raised before the arbitrator. *Dixon*, 109 M.S.P.R. 314, ¶ 13; *Means*, 60 M.S.P.R. at 115–16. Because the appellant did not raise her harmful error claims before the arbitrator, we are precluded from considering them.

ORDER

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States 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 the date of this order. 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.