UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 28

Docket No. CH-0752-11-0497-I-1

James K. Portner,

Appellant,

v.

Department of Justice,

Agency.

April 5, 2013

Joel J. Kirkpatrick, Esquire, Farmington Hills, Michigan, for the appellant.

Jason Laeser, 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.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that affirmed the agency's removal action. For the reasons set forth below, we GRANT the petition for review and AFFIRM the initial decision AS MODIFIED, MITIGATING the agency's removal action to a 45-day suspension.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition for review under the previous version of the regulations, the outcome would be the same.

BACKGROUND

¶2 Effective March 23, 2011, the agency removed the appellant from his GS-14 Supervisory Diversion Group Investigator position with the Drug Enforcement Administration (DEA) based on two charges: (1) unauthorized use of an official government vehicle (OGV); and (2) false statements with three specifications. Initial Appeal File (IAF), Tab 5, Subtab 4C at 1, 3; *see* IAF, Tab 5, Subtabs 4A, 4H. The parties stipulated to the essential facts that gave rise to the agency's charges, IAF, Tab 21 at 3-7, and those facts are set forth below.

¶3 In September 2008, the appellant was staying at a Comfort Suites in Springfield, Illinois, in a temporary duty status. *Id.*, Tab 21 at 3. The Comfort Suites was approximately 50 to 100 yards from an Outback Steakhouse, which was adjacent to a Hooters restaurant. *Id.* at 4. After finishing work on September 9, 2008, the appellant parked his OGV at the Outback Steakhouse, walked to Hooters, and drank two beers with his dinner between approximately 7:30 p.m. and 9:00 p.m. *Id.* Upon leaving Hooters, he discovered that the OGV had been damaged in the parking lot of the Outback Steakhouse, but the appellant drove the OGV from the Outback to the Comfort Suites without reporting the damage. *Id.*

¶4 The following morning, September 10, 2008, the appellant falsely reported to a subordinate employee that the OGV had been damaged overnight in the parking lot of the Comfort Suites, and the two employees searched the hotel parking lot for other vehicles that had incurred damage. *Id.* at 5. Later that same morning, the appellant told officers of the Springfield Police that the OGV had been damaged overnight in the Comfort Suites parking lot. *Id.* at 6. When a police officer informed the appellant that he was going to check the recordings made by the hotel's outside security cameras, the appellant informed the officer that the OGV had not been struck in the hotel parking lot as the appellant had previously stated and, upon further questioning, acknowledged that the vehicle was damaged in the Outback parking lot. *Id.* at 6-7. At some point on the morning of September 10, 2008, the appellant also contacted his first-line

supervisor, Demetra Ashley, about the damage to the OGV and told her that he had discovered the damage when he came out of the hotel that morning. *Id*. at 7. In a subsequent conversation with Ms. Ashley later that morning, the appellant corrected his previous statement to Ms. Ashley. Hearing Transcript (HT) at 50-52 (testimony of Ashley), 146-47 (testimony of the appellant).

¶5 Based on the conduct described above, the agency charged the appellant with unauthorized use of a government vehicle. IAF, Tab 5, Subtabs 4C, 4H. The agency explained in the proposal notice that, under its standards of conduct, the use of an OGV is not authorized "[w]hile under the influence or after the consumption of alcohol." *Id.*, Subtab 4H; *see* IAF, Tab 5, Subtab 7E at 2-3. The parties stipulated that the appellant signed the agency's standards of conduct for the rating period including the time of the incident. IAF, Tab 21 at 4; *see* IAF, Tab 5, Subtab 7E at 4.

¶6 Regarding the false statements charge, the agency's first specification addressed the appellant's statements to his subordinate about where the OGV was damaged. IAF, Tab 5, Subtab 4H. The second specification addressed the appellant's similar statements to Ms. Ashley. *Id*. The third specification under the false statements charge addressed the appellant's statements to the Springfield Police officers. *Id*.

¶7 In his Board appeal, the appellant argued that the penalty of removal was unreasonable and that the agency failed to properly consider the mitigating circumstances. IAF, Tab 1 at 5. After a hearing, based on the stipulations discussed above, the administrative judge found that the agency proved its charges and specifications. IAF, Tab 22, Initial Decision (ID) at 5-9. The administrative judge found a sufficient nexus between the appellant's misconduct and the efficiency of the federal service and found that the deciding official properly weighed the potential mitigating factors in determining to remove the appellant. ID at 10-17.

¶8 The appellant has filed a petition for review challenging the administrative judge's penalty analysis and arguing that the Board should mitigate the removal action. Petition for Review (PFR) File, Tab 3. The agency has responded to the petition for review. *Id*., Tab 5.

ANALYSIS

The agency proved the charged misconduct and the existence of a nexus between the misconduct and the efficiency of the service.

¶9 As noted above, the administrative judge found that the agency proved each of its charges and specifications by preponderant evidence and that a nexus existed between the sustained misconduct and the efficiency of the service. ID at 5-10. The appellant does not challenge those findings on review. *See* PFR File, Tab 3. Moreover, we discern no error in the administrative judge's findings. Accordingly, we conclude that the agency proved that the appellant engaged in the unauthorized use of an OGV and made false statements. We also conclude that a nexus exists between the appellant's misconduct and the efficiency of the service.

The deciding official failed to properly weigh the relevant *Douglas* factors, and the agency's penalty determination is not entitled to deference.

¶10 Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 7 (2010); *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Woebcke*, 114 M.S.P.R. 100, ¶ 7. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to

assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Id.* Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. However, if the deciding official failed to appropriately consider the relevant factors, the Board need not defer to the agency's penalty determination. *Id.*

¶11 After carefully reviewing the record in this case, we find that the deciding official, James Reed, failed to conscientiously consider the relevant *Douglas* factors[2] and that the penalty of removal is excessive under the circumstances present here. Specifically, the record shows that Mr. Reed erred in finding that the appellant lacked rehabilitative potential because he failed to demonstrate remorse for his misconduct. The error is particularly significant because Mr. Reed testified that he considered imposing a lengthy suspension or a demotion but, "because of the employee[']s lack of remorse," he felt that none of the alternative penalties to removal "could guarantee that the employee wouldn't engage in similar misconduct in the future." HT at 88 (testimony of Reed).

¶12 In explaining his finding that the appellant lacked remorse for his misconduct, Mr. Reed testified that when the appellant was interviewed by the agency's Office of Professional Responsibility (OPR) he characterized his actions as a "mistake" and went into "great, great detail to basically spar with the OPR investigators regarding these false statements, and continued to classify them as a mistake. Ultimately, towards the end of the interview, he did agree that they were false statements." HT at 80 (testimony of Reed); *see* IAF, Tab 5, Subtab 7 at 8-83 (transcript of OPR interview with the appellant). In the *Douglas* factors

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[2] In *Douglas*, the Board articulated a nonexhaustive list of twelve factors that are relevant in assessing the penalty to be imposed for an act of misconduct. *Douglas*, 5 M.S.P.R. at 305-06.

analysis prepared by Mr. Reed, he similarly relied on the appellant's interaction with OPR to conclude that the appellant lacked remorse. IAF, Tab 19 at 54.

¶13 In his *Douglas* factors analysis, Mr. Reed mentioned, but significantly downplayed, the statement by Ms. Ashley to OPR that the appellant "kept apologizing over and over again" and stated "I'm sorry, I'm sorry." IAF, Tab 5, Subtab 5 at 45 (transcript of OPR interview with Ashley); IAF, Tab 19 at 55. Ms. Ashley's hearing testimony was consistent with her OPR interview, and she agreed that the appellant showed great remorse and admitted his misconduct. HT at 60-61 (testimony of Ashley).

¶14 The deciding official also significantly downplayed the appellant's oral response to the proposed removal, which was memorialized in handwritten notes in the record. IAF, Tab 19 at 45-50. The first comments indicate that the appellant stated that he was "very[,] very sorry," was "[e]xtremely remorseful," "take[s] responsibility," and was "[e]mbarrassed." IAF, Tab 19 at 45. The appellant's hearing testimony supports this description of his oral reply. HT at 156 (testimony of the appellant).

¶15 Based on this evidence, we cannot agree with the deciding official that the appellant lacked remorse for his misconduct. In fact, despite the appellant's somewhat confrontational tone with OPR, the record shows that the appellant was remorseful. Accordingly, because the deciding official failed to consider the relevant *Douglas* factors, the agency's penalty determination is not entitled to deference. *See Woebcke*, 114 M.S.P.R. 100, ¶ 7; *see Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 21 (stating that the Board may abandon deference to an agency's penalty determination where the deciding official has misjudged the appellant's rehabilitative potential), *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006).

A 45-day suspension is the maximum reasonable penalty for the appellant's misconduct in light of all of the attendant circumstances.

¶16 As a supervisor, the agency can hold the appellant to a higher standard of conduct. *See Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 26 (2012).

Further, we recognize that an agency has the right to expect its employees to be honest and trustworthy and that the making of false statements is a serious act of misconduct. *Lopez v. Department of Justice*, 55 M.S.P.R. 644, 646 (1992). We also recognize that the unauthorized use of an OGV is generally a serious act of misconduct, although the facts here, driving an OGV less than a quarter of a mile after consuming two beers with dinner over an hour and a half period, fall on the lower end of such unauthorized use.[3] *See Els v. Department of the Army*, 82 M.S.P.R. 27, ¶¶ 13-15 (1999) (although the misuse of a government trailer was found to be a serious offense, the attendant circumstances must be considered).

¶17 Balanced against these factors is that the appellant offered undisputed evidence that the incident occurred while he was experiencing extreme stress from various personal and professional matters, including marital problems, child custody issues, being passed over for a promotion, and being the subject of an equal employment opportunity suit by a subordinate employee. HT at 147-51 (testimony of the appellant). In addition, the appellant testified that he suffered a panic attack when he discovered the damaged OGV in the Outback parking lot and "continued to suffer a horrible, horrible panic and anxiety attack, crying all night long." HT at 143-44 (testimony of the appellant). The appellant's condition was such that the Springfield Supervisory Special Agent expressed concern about the appellant's state of mind and was concerned about his driving home to Chicago. HT at 41-42 (testimony of Glenn Haas). The appellant's testimony regarding his panic attack is substantiated by medical documentation showing that shortly after the incident he was diagnosed with a panic disorder and depression. IAF, Tab 5, Subtab 4F, Exhibits K-L. He took a leave of

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[3] There is no contention that the appellant's operation of the motor vehicle violated Illinois law regarding driving under the influence of alcohol, and there is no evidence regarding what his blood alcohol level was at the time he drove the OGV. Because the appellant does not challenge the administrative judge's decision sustaining the charge, we need not address this issue further.

absence to obtain treatment before he successfully returned to work. *Id.*, Exhibits M-N; HT at 153-54 (testimony of the appellant). Evidence that an employee's medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a mitigating factor. *Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, ¶ 17 (2001).

¶18 In addition, the appellant has over 24 years of federal service. IAF, Tab 5, Subtab 4A. His performance ratings during his career, with two exceptions, have been above the successful level. *Id.*, Subtab 4F, Exhibit B at 2-3. Significantly, Ms. Ashley, the appellant's first-level supervisor, expressed confidence in his ability to perform his duties even after the September 10, 2008 incident and the appellant's subsequent absence for medical treatment, stating in the appellant's evaluation for the period from October 1, 2008, to September 30, 2009, that she "personally relied more on [the appellant] this rating period than in previous rating periods with administrative issues and circumstances when [she] was absent from the office"; "[he] demonstrated a rejuvenated interest in his responsibilities as Group Supervisor"; and he was "actively involved in leading, guiding and assisting [i]nvestigators under his supervision in completing regulatory assignments and developing targets for civil, and administrative investigations." *Id.* at 175, 182. The appellant's rating for this period was "excellent," and his mid-year rating in April 2010 was "outstanding." *Id.* at 3, 175. Despite the fact that both of these ratings were a matter of record prior to the issuance of the March 2011 decision, there is no indication that the deciding official considered them. IAF, Tab 5, Subtab 4C; IAF, Tab 19 at 52; HT at 104-05 (testimony of Reed).

¶19 It is also significant to our penalty analysis that, despite the fact that the appellant worked for a law enforcement agency, he was not a law enforcement officer; he did not carry a weapon or a badge and did not have arrest powers. HT at 109-10, 120-21, 125 (testimony of Reed); HT at 139 (testimony of the appellant). Moreover, the deciding official admitted at the hearing that he could

not refute the appellant's claim that during his 24-year career with the agency he was never called upon to testify at a trial. HT at 127-28 (testimony of Reed). This fact is significant because Mr. Reed expressed concern in his *Douglas* factors analysis that the appellant's discipline for making false statements would be subject to disclosure to a criminal defendant under *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (nondisclosure of material evidence affecting a witness's credibility justifies a new trial). *See* IAF, Tab 19 at 56. Mr. Reed indicated in the *Douglas* factors analysis that he rejected an alternative sanction of a demotion because demoting the appellant would likely place him in a position where he would have to testify. *Id.*

¶20 Finally, in considering the appropriate penalty in this case, we must address the appellant's claim that other agency employees who engaged in "much more serious conduct than [the] appellant, were not removed from their position." PFR File, Tab 3 at 18. One of the comparator employees identified by the appellant received a 40-day suspension for unauthorized use of an OGV (making lengthy stops for unofficial purposes), conduct unbecoming a DEA Special Agent (belligerence toward local police officers responding to an off-duty altercation at a bar), and failure to follow written instructions (intoxication and storage of a firearm in an unattended vehicle). IAF, Tab 20 at 48-56 of 65. The second alleged comparator employee received a 42-day suspension for unauthorized use of an OGV (driving to a strip club and consuming 6 to 8 beers after a domestic altercation), conduct unbecoming a DEA Special Agent (brandishing a handgun at a private citizen, arrest for driving an OGV under the influence of alcohol, and being charged with disorderly conduct with a firearm), and failure to follow written instructions (operating an OGV after consuming alcohol). *Id*. at 57-63 of 65. The final alleged comparator employee received a 31-day suspension for unauthorized use of an OGV (driving the vehicle after consuming a substantial number of alcoholic beverages) and conduct unbecoming a DEA Special Agent

(inappropriate conduct with sexual overtones toward an agency investigator).[4] *Id.* at 4-9 of 41.

¶21 In finding the appellant's claim unpersuasive, the administrative judge reasoned that the three alleged comparator employees were law enforcement officers and the appellant was not and that, unlike the appellant, none of the comparator employees was charged with making false statements. ID at 15. Such a view of comparator employees is unduly narrow. The Board has held that, 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."[5] *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 (2012) (quoting *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 15 (2010)). Here, like the appellant, the comparator employees all engaged in unauthorized use of an OGV but also engaged in other misconduct different from that committed by the appellant. *See* IAF, Tab 20 at

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[4] Two additional alleged comparator employees identified by the appellant apparently had proposed removals reduced to suspensions as part of last chance settlement agreements. *See* PFR File, Tab 3 at 19; ID at 13-14. The Board has held that, where another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency will not be required to explain the difference in treatment. *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 42 (1999); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325, *aff'd*, 975 F.2d 869 (Fed. Cir. 1992) (Table). *But see Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 24 (2003) (finding that, where an individual claims unlawful discrimination, she must be allowed to prove that the settlement agreement offered to other employees, but not offered to her, was a pretext for discrimination). Thus, under the circumstances of this case, the employees who entered into settlement agreements with the agency are not valid comparators.

[5] While law enforcement officers are held to a higher standard of conduct, *Reid*, 118 M.S.P.R. 396, ¶ 26, their special status should not be used as a per se basis for declining to find them valid comparators to non-law enforcement officers, *see Lewis*, 113 M.S.P.R. 657, ¶ 15.

48-63 of 65, 4-9 of 41. A reasoned comparison of the totality of the circumstances surrounding the misconduct engaged in by the comparator employees, as contrasted to the totality of the circumstances surrounding the appellant's misconduct, shows that the misconduct engaged in by the comparator employees was as serious as, and arguably more serious than, the misconduct engaged in by the appellant. *Cf. Reid*, 118 M.S.P.R. 396, ¶¶ 22-23 (proffered comparators were not similarly situated for purposes of establishing a disparate penalties claim where the administrative judge sustained three charges against the appellant and the appellant alleged only that the comparators' conduct was similar with respect to one charge). The agency, however, has not offered a sufficient explanation for the significantly harsher penalty given to the appellant. *See Boucher*, 118 M.S.P.R. 640, ¶ 20 (once an employee establishes a disparate penalty, the agency must prove a legitimate reason for the difference in treatment).

¶22 In sum, while the appellant committed serious acts of misconduct, the record shows that they were isolated incidents, he was experiencing significant personal and professional stress, and he was suffering from a medical condition that likely impaired his judgment when confronted with another stressful situation. In addition, his performance record during his more than 24-year federal career, both before and after the incident, has been very good. Little suggests to us that if the appellant were returned to duty that he would not continue to provide efficient service to the federal government. Moreover, the agency has apparently imposed suspensions, and not removals, for misconduct by law enforcement officers that appears at least as serious as the appellant's wrongdoing. Thus, while a significant disciplinary action is necessary to impress upon the appellant the wrongfulness of his conduct, we find that the penalty of removal exceeds the tolerable limits of reasonableness. The agency action is mitigated to a 45-day suspension.

ORDER

¶23 We ORDER the agency to cancel the appellant's removal and substitute in its place a 45-day suspension effective March 23, 2011. *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.

¶24 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.

¶25 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).

¶26 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).

¶27 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.

¶28 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 office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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

James K. Portner v. Department of Justice

MSPB Docket No. CH-0752-11-0497-I-1

¶1 I respectfully dissent. I would have sustained the agency's removal action because the agency properly considered all relevant factors and exercised its management discretion within tolerable limits of reasonableness. I also dissent because of my continuing objection to the way that the Board has construed and applied the *Douglas* factor relating to the consistency of the penalty with those imposed upon other employees for the same or similar offenses.

¶2 The appellant was in a temporary duty status away from his regular post of duty and was using an official government vehicle. After finishing his work duties one day, he parked his government vehicle at an Outback Steakhouse, which was approximately 50 to 100 yards from the hotel where he was staying, and walked to a Hooters restaurant, which was adjacent to the Outback Steakhouse. He drank two beers with his dinner while there. Upon leaving Hooters, he discovered that the government vehicle had been damaged. He drove the vehicle to his hotel without reporting the damage. The following morning, the appellant falsely reported to a subordinate employee, his supervisor, and to a local police officer that the vehicle had been damaged overnight while it was in the hotel parking lot. When the police officer informed the appellant that he was going to check the recordings made by the hotel's security cameras, the appellant admitted that the damage to the vehicle had not happened at the hotel parking lot. He conceded that he made this admission because "I knew at that point that what

I had told, that my false statements were not going to withstand scrutiny."[1] Hearing Transcript (HT) at 145; *see also* HT at 167.

¶3 The gratuitous nature of the appellant's misconduct is worth noting. Up to and including the point in time when he discovered that his government vehicle had been damaged, the appellant had not engaged in any misconduct. As his supervisor testified, agency policy allowed him to drive the government vehicle to a restaurant for dinner. HT at 52. The appellant could and should have promptly reported the damage to his vehicle to appropriate agency officials, as required by agency policy, and walked the short distance back to his hotel. Instead, he drove the vehicle back to his hotel after drinking alcohol, even though he knew this violated agency policy and constituted misuse of an official government vehicle. He lied to three people the next day about what had happened. The only apparent reason for the appellant to have committed this misconduct was to avoid what he must have considered to be the embarrassing admission that he had frequented a Hooters restaurant.[2]

¶4 The general legal principles governing an assessment of the reasonableness of an agency penalty are well established. 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

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[1] The appellant did not at that time admit that he had drunk alcohol the previous evening before driving the government vehicle back to the hotel parking lot. That admission did not come until several months later, during the Office of Professional Responsibility (OPR) interview. The appellant testified that the reason he did not divulge this information earlier is that he knew it was a violation of agency policy. HT at 170-71.

[2] In addition to the fact that he parked at the Outback Steakhouse lot instead of the Hooters lot, I note that, the next day, the appellant told the police officer and his supervisor that he had dined at the Outback Steakhouse. *See* Initial Decision at 15, HT at 52 (Ashley testimony). Although the agency did not charge the appellant with falsification in this regard, these additional false statements do not speak well of the appellant's honesty and integrity and are properly considered in connection with his potential for rehabilitation.

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. *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.

The deciding official properly considered the appellant's lack of remorse as an aggravating factor affecting his potential for rehabilitation.

¶5 Although the majority correctly states (¶ 10) that the Board "will modify a penalty only when it finds that the agency failed to weigh the relevant factors," it then states (¶ 11) that the deciding official "failed to *conscientiously consider* the relevant *Douglas* factors" stating (¶ 15) that "the Board may abandon deference to an agency's penalty determination where the deciding official has misjudged the appellant's rehabilitative potential," and concludes (¶ 15) that, "because the deciding official failed to consider the relevant *Douglas* factors, the agency's penalty determination is not entitled to deference." Lack of deference has typically been applied in situations where the agency failed to consider pertinent *Douglas* factors. *See, e.g., Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 133 (1997) (the Board will independently evaluate the reasonableness of the penalty where the record does not show that the agency's

deciding official considered any relevant mitigating factors); *Daniels v. U.S. Postal Service*, 57 M.S.P.R. 272, 284 (1993) (no deference to agency penalty determination where the record "contains no evidence that the agency considered any of the *Douglas* factors or, if it did, which ones"). The Board has on occasion not given deference to an agency penalty determination where the deciding official's consideration of an important *Douglas* factor was not sufficiently substantive. *See Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 24 (2001) (deciding official's treatment of mitigating factors "not sufficiently substantive"); *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶ 11 (2000) (deciding official's "failure to seriously consider a lesser penalty or the appellant's rehabilitative potential"). I am not aware of any case, however, in which the Board has determined that it will independently evaluate the reasonableness of a penalty merely because it disagrees with the deciding official's judgment as to which facts are most significant in evaluating a particular *Douglas* factor. Such a determination would be inconsistent with the guidelines set out by the Board in *Douglas*:

> The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness.

Douglas, 5 M.S.P.R. at 306.

¶6 Here, the majority opinion elevates what amounts to a different perspective between its view of events and that of the deciding official into an error of law. But the record shows that the deciding official did conscientiously consider the appellant's remorse—or lack thereof—as that relates to the *Douglas* factor of the appellant's potential for rehabilitation. Although the deciding official acknowledged that the appellant expressed remorse for his misconduct, HT

at 106, he gave good and persuasive reasons for concluding that, on balance, the appellant's expression of remorse did not indicate a good potential for rehabilitation:

> One of the factors regarding rehabilitation is whether an employee shows remorse, issues an apology, something to show that they have determined what the gravity of their actions actually are. When Mr. Portner was actually interviewed by the office of professional responsibility, when he was first asked about his false statements, he characterized those as a mistake. He went, he went to great, great detail to basically spar with the OPR investigators regarding these false statements, and continued to classify them as a mistake. Ultimately, towards the end of the interview, he did agree that they were false statements. But it was very difficult for the OPR investigators to actually draw out of him the fact that he did, he did make these false statements. Furthermore, it wasn't until the, the OPR investigation when he was interviewed, when it was actually determined that he had consumed alcohol prior to driving his OGV. So, because of the fact that he didn't readily admit the misconduct, and he actually sparred with the OPR investigators regarding admitting his misconduct, I felt that it demonstrated that he really wasn't remorseful.

HT at 80-81.[3]

¶7 While the majority may disagree with the deciding official's assessment of the appellant's expressions of remorse as they relate to the appellant's potential for rehabilitation, it cannot be said that the deciding official failed to give the matter conscientious consideration. In my view, the majority opinion is doing precisely what the Board said in *Douglas* should not be done, i.e., assess the

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[3] The appellant's testimony on cross-examination included more instances in which he "sparred" with the questioner and went to significant lengths to avoid a simple straightforward admission. For example, the agency representative tried to get the appellant to admit that he reinforced his subordinate's belief in the appellant's false story the morning after the accident by walking around the hotel parking lot looking for the vehicle that may have damaged the appellant's government vehicle, even though the appellant knew that the search was futile. The appellant repeated several times that he was "freaking out" at that point in time, he pointed out that the subordinate was the one who suggested the search, and said he "didn't know" whether the subordinate knew that the accident had not happened at the hotel parking lot. HT at 165-66.

penalty as if "the Board were in the agency's shoes in the first instance." *Douglas*, 5 M.S.P.R. at 306. The Board has stated that an employee's admission of his misconduct and his expression of remorse are indicative of his rehabilitative potential and constitute a significant mitigating factor when the employee notifies an agency of his wrongdoing of his own volition, prior to the agency's initiating an investigation into the misconduct. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 15 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004). The converse of that proposition is equally true. Where, as here, the employee only admits his wrongdoing when it is clear that it will be discovered independently by the agency, and even then does not acknowledge all of his wrongdoing, his expressions of remorse do not indicate a good potential for rehabilitation and are not a mitigating factor. Here, the Board is bound to give deference to the deciding official's judgment that the appellant's initial, minimizing attitude was more significant than his subsequent expressions of remorse, and that this factor reflected negatively on the appellant's potential for rehabilitation.

The majority errs in considering the appellant's panic disorder as a mitigating factor.

¶8 The majority cites the appellant's panic attack as a significant mitigating factor in assessing the reasonableness of the penalty. Majority Opinion, ¶ 17. In doing so, the majority credits the appellant's testimony that his panic attack started as soon as he discovered the damaged vehicle in the Outback parking lot. But, the administrative judge made explicit findings on this matter, concluding that "[a]lthough the appellant has shown he received treatment for a psychiatric condition, he has not shown that his condition played a part in his conduct . . . ." Initial Decision at 17.

¶9 The Board must give deference to an administrative judge's factual findings and credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board

may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The record supports the judge's findings in this regard, which were implicitly based on the observation of the demeanor of the witnesses testifying at the hearing. The subordinate employee whom the appellant contacted the morning after the vehicle was damaged testified that, when the appellant contacted him that morning, the appellant sounded "matter of fact," "normal," and "calm." HT at 9-10; 26-27. The subordinate testified that the appellant's demeanor changed markedly once it became clear that the local police officer intended to review the hotel's surveillance video. At that point the appellant became "upset" and "agitated." HT at 23, 27. The appellant's supervisor similarly testified that, during their first telephone conversation when the appellant told her the damage to the vehicle had occurred while it was parked in the hotel parking lot, the appellant did not seem nervous; she characterized his attitude as "more irritated." HT at 50. During the second telephone conversation, when the appellant admitted that his original statement had been untrue, which occurred after the appellant admitted to his subordinate and the police officer that the damage was done in the Outback parking lot, the supervisor described the appellant's demeanor as "pretty panicked" and "pretty frantic." HT at 51, 59.

¶10 It is hard to avoid the conclusion that it was having been caught telling lies that precipitated the appellant's panic attack, not the discovery that his government vehicle had been slightly damaged, and the judge's finding that the appellant's panic attack did not play a role in the appellant's misconduct is entitled to deference.[4]

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[4] I note that the majority also cites as a mitigating factor the fact that the appellant was the subject of an equal employment opportunity (EEO) suit brought by a subordinate employee. Majority Opinion, ¶ 17. The appellant conceded at the hearing that he was one of several officials named in this EEO complaint and that the complaint was

The majority opinion errs in its consideration of the consistency of the penalty with that imposed on three comparators.

¶11 I will not reiterate in detail my objections to the Board's recent treatment of this *Douglas* factor as expressed in my dissent in *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012), but I stand by those objections: (1) The Board's new approach is based on the Federal Circuit's decision in *Williams v. Social Security Administration*, 586 F.3d 1365 (Fed. Cir. 2009), which is inconsistent with an earlier panel decision, *Facer v. Department of the Air Force*, 836 F.2d 535 (Fed. Cir. 1988), which indicated that this factor is limited to situations in which agencies knowingly treat similarly-situated employees differently; (2) the new approach attempts to promote a universal consistency in penalty setting, without identifying any legitimate individual interest or broad value under the Civil Service Reform Act that is being promoted; (3) the consistency called for under the new approach might be rooted in an earlier disciplinary decision that was unwise, meaning that a manager might be forced to go easy on an employee who committed serious misconduct because of the unwarranted leniency of some other manager in the past; and (4) the new approach raises the specter of agencies needing to maintain massive databases of past adverse actions to consult whenever setting a penalty.

¶12 In addition to the objections I raised in the *Boucher* dissent, the "consistency of the penalty with those imposed upon other employees for the same or similar offenses" is simply one of a non-exhaustive list of twelve factors that are relevant for consideration in determining the appropriateness of a penalty, *Douglas*, 5 M.S.P.R. at 305-06, and the Board has frequently stated that the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibility, is the most important factor in assessing the

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dismissed the month before the misconduct in this case. HT at 150. In my view, this EEO complaint should be viewed as a neutral factor in evaluating the reasonableness of the removal penalty, i.e., it is neither an aggravating nor a mitigating factor in this case.

reasonableness of a penalty. *E.g.*, *Spencer v. U.S. Postal Service*, 112 M.S.P.R. 132, ¶ 7 (2009); *Douglas*, 5 M.S.P.R. at 305. Under the new approach, the consistency of the penalty with that imposed in other disciplinary actions has become more important than the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibility; indeed, it has become outcome-determinative in assessing the reasonableness of the penalty.

¶13 I believe that it was inappropriate to consider any of the three comparison employees in this case as reflecting the "consistency of the penalty with those imposed upon other employees for the same or similar offenses" because none of the comparators engaged in the "same or similar offenses." The only misconduct that these comparators have in common with the appellant is misuse of an official government vehicle. *None* of the three comparison employees had committed falsification. As the majority acknowledges, the appellant's misuse of the government vehicle was a relatively minor offense under the circumstances[5]; the falsification charge was by far the more serious of the two charges. By considering the penalties imposed on the three comparators, the majority has converted an analysis of the "consistency of the penalty with those imposed upon other employees for the *same or similar offenses*" into an analysis of the consistency of the penalty with those imposed upon other employees for what the majority considers to be *comparable offenses*. There is no support in case law or public policy for such an approach.

¶14 To summarize, the appellant was guilty of three specifications of falsification, which is "a serious offense, reflecting adversely on the employee's reliability, veracity, trustworthiness, and ethical conduct." *Dogar v. Department*

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[5] As the administrative judge noted, Initial Decision at 11, the appellant was guilty of the willful misuse of an official government vehicle, which, under 31 U.S.C. § 1349(b), carries a mandatory minimum penalty of a 30-day suspension. In effect, the majority has determined that the more serious falsification offense warrants a maximum reasonable penalty of a suspension of only an additional 15 days.

of Defense, 95 M.S.P.R. 52, ¶ 19 (2003), *aff'd*, 128 F. App'x 156 (Fed. Cir. 2005). As a supervisor, he can be held to a higher standard of behavior than other employees. Although the appellant is not a law enforcement officer, he works for a law enforcement *agency* and he lied to a law enforcement officer. It is hard to imagine an offense that more directly goes to the heart of a law enforcement agency's trust and confidence in a supervisor than lying to a law enforcement officer. The appellant only admitted his lies when he was faced with the certainty that they would be revealed by extrinsic evidence and, even then, he sought to minimize the conduct, and did not admit his misuse of an official government vehicle until months later when he was questioned by the agency's Office of Professional Responsibility. Overall, his conduct does not reflect a good potential for rehabilitation and the agency's selection of the removal penalty was well within the bounds of reasonableness.

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Mark A. Robbins
Member