UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

ANTHONY SENECA,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
PH-0752-22-0211-I-2

DATE: February 24, 2023

Daniel P. Meyer, Esquire, Washington, D.C., for the appellant.

Michael R. Goldstein, Washington, D.C., for the appellant.

Christopher Midgley, Fort Lee, Virginia, for the agency.

General Counsel, Fort Lee, Virginia, for the agency.

BEFORE
Mark Syska
Administrative Judge

INITIAL DECISION

The appellant filed this action to challenge his removal. *See* Appeal File-1 (AF-1), Tab 1.[1] The Board has jurisdiction under 5 U.S.C. §§ 7511-7514; 5 C.F.R. Part 752; 5 C.F.R. § 1201.3(a)(1). For the reasons that follow, the agency's decision is REVERSED.

[1] This is the refiling of the appellant's original appeal – MSPB docket no. PH-0752-22-0211-I-1 (appeal one). Citations to the record in appeal one will be in the form "Appeal File-1 (AF-1), Tab X." Citations to the record in the refiled appeal (appeal two) will be in the form "Appeal File-2 (AF-2), Tab X."

Background

The appellant served in the Defense Commissary Agency (DECA or the agency) as a GS-11 Store Manager at McGuire Air Force Base (AFB) in New Jersey. The appellant had worked for the agency for approximately 19-years. Before 2021, the appellant had only one disciplinary action – a five-day suspension for absence without leave (AWOL) (for two days), failure to follow leave procedures, and negligent performance of duties imposed on November 15, 2010. *See* AF-1, Tab 4 at 189.

The appellant began having difficulties at work in 2021. At the outset, the year began with position vacancies and retirements. Notably, the positions of Commissary Officer and Deputy Commissary Officer (or Assistant Commissary Officer) were vacant, and both these positions were of higher rank than (and supervised) the Store Manager position. Nonetheless, in addition to his normal duties, the appellant was also required to serve as Commissary Officer and Deputy Commissary Officer from January 1, 2021 until early June 2021 (when Christopher Spurlock took over as Commissary Officer). The appellant maintains this additional work stress, along with marital troubles, resulted in various health issues (notably depression).

On July 12, 2021, Spurlock sent the appellant a return to work/request for acceptable medical documentation letter, which, *inter alia*, reminded the appellant of the requirements for medical documentation to be acceptable. *See* AF-1, Tab 4 at 115-116. On July 21, 2021, Spurlock prepared a memorandum detailing the appellant's various absences from May 25, 2021 to July 17, 2021, including the various excuses provided. *Id.* at 111-113. On August 3, 2021, Spurlock briefly interviewed the appellant and discussed his incidents of AWOL; the appellant told Spurlock about his "major depression" and personal issues (which were purportedly exacerbated by having to perform the duties of three supervisory positions since January 1, 2021). *Id.* at 109. In an email dated September 21, 2021, Spurlock reminded the appellant that he should specify the

kind of leave he is asking for and that sick leave requires a reason and that annual leave requires prior notice. *Id*. at 107. On September 22, 2021, the appellant sent an apologetic email to Spurlock recounting the serious issues his wife's mental condition was creating (including her attacking him and hiding his wallet and car keys). *Id*. at 105.

On November 5, 2021, Spurlock issued a notice of a proposed 14-day suspension to the appellant listing two charges: (1) AWOL for various days from August 13, 2021 to October 9, 2021 (totaling 152.25 hours); and (2) failure to follow leave requesting procedures. *See* AF-1, Tab 4 at 97. The appellant did not respond to the proposal. On December 6, 2021, the deciding official, Zone Manager John Spaur, sustained the charges and imposed a 14-day suspension (effective December 13, 2021). *Id.* at 92. But the suspension did not end the appellant's difficulties.

On March 15, 2022, Spurlock proposed the appellant's removal on two charges:

> Charge 1: Absence Without Leave (AWOL)
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> Specification 1: On or about November 19, 2021, you were absent, without authority, from the McGuire AFB Commissary; you were required to be at your duty station during this period. Your absence was not authorized.
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> Specification 2: During the period of December 8 through December 11, 2021, you were absent, without authority, from your required duty station at the McGuire AFB Commissary; you were required to be at your duty station during this period. Your absence was not authorized.
>
> Specification 3: On or about January 15, 2022, you were absent, without authority, from the McGuire AFB Commissary; you were required to be at your duty station during this period. Your absence was not authorized.
>
> Charge 2: Failure to Comply with Leave Procedures
>
> Specification 1: On or about November 19, 2021, you were absent, from duty, from the McGuire AFB Commissary, even though scheduled, and failed to contact your supervisor, the undersigned, or the manager on duty, to request leave. This was a violation of agency

> regulations that require requests for leave to be made to a supervisor or manager on duty prior to the start of the employee's tour.
>
> Specification 2: During the period of December 8 through December 11, 2021, you were absent, from duty, from the McGuire AFB Commissary, even though scheduled, and failed to contact your supervisor, the undersigned, or the manager on duty, to request leave. This was a violation of agency regulations that require requests for leave to be made to a supervisor or manager on duty prior to the start of the employee's tour.
>
> Specification 3: On or about January 15, 2022, you were absent, from duty, from the McGuire AFB Commissary, even though scheduled, and failed to contact your supervisor, the undersigned, or the manager on duty, to request leave. This was a violation of agency regulations that require requests for leave to be made to a supervisor or manager on duty prior to the start of the employee's tour.

See AF-1, Tab 64-68. The appellant provided two written responses. *Id*. at 43, 62. The first was in the form of an apology and explanation discussing his depression, while the second was a specific rebuttal to each charged AWOL date. *Id.* On April 27, 2022, the deciding official (Spaur) sustained the charges and ordered the appellant removed. *Id.* at 26-37.

This appeal followed. *See* AF-1, Tab 1. I held the appellant's requested hearing and four witnesses testified: (1) Christopher Spurlock, Commissary Officer, and the appellant's supervisor and proposing official; (2) John Spaur, Zone Manager, and the deciding official; (3) Adriana Beltran, former Human Resources Specialist at DECA; and (4) Anthony Seneca, the appellant. *See* AF-2, Tab 15 (Hearing Recording).

Legal Standards

The Board may uphold an agency decision to take an adverse action against an employee only if the charge is supported by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). Preponderant evidence is the degree of relevant evidence a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be

true than untrue. 5 C.F.R. § 1201.56(c)(2). In addition to proving the charge, the agency also has the burden of establishing that its action promotes the efficiency of the service (the nexus requirement), meaning the removal action relates to either the appellant's ability to accomplish his duties or some other legitimate government interest. 5 U.S.C. § 7513. Finally, the agency must show that its penalty selection was not so excessive as to be an abuse of discretion, and not otherwise arbitrary or unreasonable. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 296-306 (1981).

Absence Without Leave (AWOL)

To prove a charge of AWOL, the agency must establish the appellant was absent from duty; the absence was not authorized; and, if the appellant requested leave, the leave request was properly denied. *See Savage v. Department of Army*, 122 M.S.P.R. 612, ¶ 28 n.5 (2015); *Boscoe v. Department of Agriculture*, 54 M.S.P.R. 315, 325 (1992). Additionally, if an employee requests leave without pay (LWOP) for the periods of time charged as AWOL, the Board will examine the record as a whole to determine if the denial of LWOP was reasonable under the circumstances. *See Savage*, 122 M.S.P.R. 612, ¶ 28; *Robb v. Department of Defense*, 77 M.S.P.R. 130, 136 (1997); *Beasley v. Department of the Navy*, 33 M.S.P.R. 631, 635-36 (1987). Such circumstances include balancing the agency's workload requirements against the legitimacy of the LWOP request; the appellant's history of leave abuse, or potential for such abuse; and the appellant's historical use of leave. *See Beasley*, 33 M.S.P.R. at 635-36; *Wells v. Department of Health & Human Services*, 29 M.S.P.R. 346, 348-49 (1985). In addition, ordinarily, when an incapacitated employee has exhausted all his leave, the agency may only properly deny LWOP were there is no foreseeable end in sight for his absences and those absences are a burden on the agency. *See Savage*, 122 M.S.P.R. 612, ¶ 29.

An AWOL charge, moreover, will not be sustained if an appellant presents administratively acceptable evidence demonstrating he was incapacitated for duty

during the relevant time, if he had sufficient sick leave to cover his absence. *Thom v. Department of the Army*, 114 M.S.P.R. 169, ¶ 5 (2010). An appellant may present such evidence of incapacitation to the Board even if it was not previously presented to the agency. *See id*., ¶6; *Wesley v. U.S. Postal Service*, 94 M.S.P.R. 277, ¶ 18 (2003); *Young v. U.S. Postal Service*, 79 M.S.P.R. 25, 32 (1998). The Board has held that medical documentation which fails to inform the employer of an employee's prognosis, dates of incapacitation, restrictions on performance of his duties, and expected return to duty is administratively insufficient to support a request for sick leave. *See Lawley v. Department of the Treasury*, 84 M.S.P.R. 253, ¶ 22 (1999); *Young v. U.S. Postal Service*, 79 M.S.P.R. 2 5 (1998); *see also Thom*, 114 M.S.P.R. 169, ¶ 6 (medical evidence is not administratively adequate if it fails to indicate how the appellant was incapacitated or why she cannot present adequate medical information).

Disability Discrimination

As a federal employee, the appellant's disability discrimination claim arises under the Section 501 of the Rehabilitation Act of 1973, but the Equal Employment Opportunity Commission's (EEOC's) regulations implementing the Americans with Disabilities Act (ADA) (and subsequent amendments) have been incorporated by reference into the Rehabilitation Act, and the Board applies the EEOC regulations to determine if a violation has occurred. *See Thome v. Department of Homeland Security*, 122 M.S.P.R. 315, ¶ 23 (2015); *see also Pridgen v. Office of Management and Budget*, 2022 MSPB 31, ¶ 35 (2022). In general, an appellant may establish a disability discrimination claim based upon a failure to accommodate by showing that: (1) he is an individual with a disability; (2) he is a qualified individual with a disability; and (3) the agency failed to provide a reasonable accommodation. *See Miller v. Department of Army*, 121 M.S.P.R. 189, ¶ 13 (2014); *White v. Department of Veterans Affairs*, 120 M.S.P.R. 405, ¶ 9 (2013).

An agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its business operations. *See Miller*, 121 M.S.P.R. 189, ¶ 13. The selection of a reasonable accommodation is generally made in an informal interactive process between the employee and the agency, which is typically begun when the employee requests an accommodation. *Id.*, ¶ 15.

A disability discrimination claim will fail if the employee never requested a reasonable accommodation while employed by the agency. *See Clemens v. Department of the Army*, 120 M.S.P.R. 616, ¶ 12 (2014). At bottom, where the existence or nature of the disability or the nature of the necessary reasonable accommodation is not obvious, the agency will not be found to have violated its duty to provide a reasonable accommodation if the appellant fails to respond to the agency's reasonable request for medical information or documentation. *See White*, 120 M.S.P.R. 405, ¶ 12. Lastly, even if the appellant requests an accommodation and the agency fails to engage in the interactive process, the agency's failure, standing alone, is not a violation of the rehabilitation act. *Clemens*, 120 M.S.P.R. 616, ¶ 17. Instead, the appellant must also show that the agency's failure to engage in the interactive process resulted in the failure to provide a reasonable accommodation -- meaning an accommodation that both exists and is reasonable. *Id.*

Beyond this, the standard is the same as for Title VII -- if the appellant can show disability discrimination was a motivating factor, he is entitled to limited forward looking relief; to obtain full-relief, he must show that disability discrimination was a but for cause of the agency action. *Pridgen*, 2022 MSPB 31, ¶¶ 40-41.

As to the witnesses, I had the opportunity to observe each witness, and I carefully considered his/her demeanor. *See Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 27 (2011).[2]

Analysis & Findings

The agency has presented sufficient evidence to prove both charges, albeit only one specification of each charge. The appellant has failed to establish his disability affirmative defense. However, the agency's penalty determination appears to have resulted from a due process violation, so the action must be reversed.

Charges

This AWOL case is unusual in that the appellant had no significant history of leave issues prior to 2021, and he carried over more than a 1000 hours of sick leave. Hearing Recording. Moreover, the appellant has presented no medical documentation to date regarding any condition, and he has presented nothing beyond his own testimony to even suggest medical incapacitation. However, the appellant and agency witnesses all appear to agree that a medical excuse is only necessary for absences of three days or longer.[3] Hearing Recording.

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[2] To resolve any credibility issues, I utilized a *Hillen* analysis. An administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

[3] The witnesses suggest that there could be an exception for an employee on leave restriction, but Spurlock was unsure of the process (if any), and Spaur believed the appellant should have been placed on one, but all witnesses concurred that the appellant had not been placed on leave restriction. Hearing Recording.

a. November 19, 2021

Spurlock's testimony and the accompanying documentation recounting the appellant's absence on November 19, 2021, fully establish that the appellant was AWOL and failed to follow leave procedures by a preponderance of the evidence. Hearing Recording; *see also* AF-2, Tab 5 at 46 (timecard attestation for 11/7-20/21), 47 (employee time card for 11/7-20/21), 53 (Management Schedule for November 14-20, 2021).[4] The only documentation even arguably in the appellant's favor is a text claiming he would be an hour late because he "could not find his clothes." *See* AF-2, Tab 5 at 25. Not only does this text not form a basis for granting sick leave, but it does not provide an explanation for his failure to appear at all.

The appellant also testified that he believed he called in sick for November 19, and it would be strange that he called out on November 20, but failed to call out on November 19. Hearing Recording. He concedes, however, that he does not really remember. *Id*. This testimony falls well-short of undermining the agency's evidence.

Moreover, there are ample reasons for doubting the veracity of the appellant's testimony. First, he testified that he was "told nothing" about having to take over as acting Commissary Officer/Deputy Commissary Officer, and he knew nothing about being responsible for these new duties. Hearing Recording. Second, he claimed that Spaur simply handed him the Commissary Officer's designated cell phone and said that he was now on duty 24 hours a day, seven days a week, with no breaks or days off. *Id*. The appellant elaborated that this was the reason he was hesitant to approach Spurlock or Spaur with his issues, given his new 24-7 duty responsibilities. *Id*. These claims are nonsensical on

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[4] For purposes of the agency timecards and similar documentation, the parties agree that "KC" means AWOL, "LS" mean sick leave, and "KB" means suspension.

their face. To start with, no organization could function by failing to assign required duties (like those of a Commissary Officer) in hopes that someone on the staff will just begin to do them. On that score, Spaur testified that the appellant was certainly aware of the temporary new duties, the appellant could contact Spaur at any time (as they had adjacent offices) to ask questions, and the appellant was "gung ho" about his new responsibilities and the chance to show what he could do. *Id*. The appellant's counter to this testimony was self-contradictory, as he maintained that he was not thrilled with the new duties (suggesting he knew about them), but conceded that anyone would be happy about a promotion (also suggesting that he was well-aware of what was going on). *Id*. As to the cell phone creating 24-7 on duty responsibilities, such an assignment is simply impossible. Furthermore, Spaur testified to the much more limited purpose of the cellphone – so the appellant could be contacted in the event of an emergency. *Id*. The appellant's claim that the cell phone and its purported attendant responsibilities made him reluctant to contact Spurlock or Spaur also makes little sense.

Charge one, specification (a) is SUSTAINED, and charge two, specification (a) is SUSTAINED.

b. December 8-11, 2021

Spurlock testified that the appellant was AWOL and failed to call in from December 8-11, 2021, and the agency provided documents showing the appellant was scheduled to work but failed to appear. Hearing Recording; *see also* AF-2, Tab 5 at 48 (attestation of timecard for 12/5-18/21), 49 (timecard for 12/5-18/21); 54 (Management Schedule for 12/5-11/21). Spurlock also asserted (with evident irritation) that the appellant never provided his covid testing results, and only came into work three weeks later, so his AWOL was never converted to sick leave. Hearing Recording.

The appellant maintains that he was out of the office on the agency's required 5-day covid quarantine because he was unvaccinated and had been closely exposed to his covid-positive wife. Hearing Recording; *see also* AF-2, Tab 9 at 25. On December 7, 2021, the appellant sent Spurlock an email stating that he had just received notice his wife was positive for covid, and he asked to be carried in sick leave until he could be tested. *See* AF-2, Tab 6 at 16. The appellant also asked for further guidance as to what else was needed. *Id*. Spurlock's only response was to ask for the appellant's wife's DoD ID number and wish her a speedy recovery. *Id*. at 15. The appellant followed up with an email on December 11, 2021, which recounted that he was unable to get a testing appointment until the following Monday. *Id*.

The agency opines that the appellant's reliance on the DECA Covid Entry Flowchart, which requires a 5-day quarantine for an unvaccinated employee after close contact with an infected individual, is misplaced because it was not "effective" until January 2022. *See* AF-2, Tab 9 at 25. But there are two serious problems with the agency's theory. First, the flowchart was only "updated" on January 2022 --- neither side has provided a copy of the prior version --- and the agency has presented nothing suggesting the earlier version was substantially different. Second, and more significantly, all the agency witnesses (as well as the appellant) testified that a 5-day quarantine was required in such circumstances. Hearing Recording. In addition, the agency witnesses maintain that because the appellant's wife was tested on December 4, 2021 (and got the results on December 7, 2021), the five-day quarantine would end on <u>December 9, 2021</u> (rather than December 11, 2021). Hearing Recording (Spurlock, Spaur).

There are a host of problems with the agency's presentation. At the outset, even accepting the agency's assessment of the quarantine rules (5 days from the date tested), they have effectively conceded that the appellant was properly out of the office on December 8, 2021—negating part of the specification. Furthermore, the DECA Covid Entry Flowchart states the 5-day quarantine began after the <u>last</u>

exposure to infected individual. *See* AF-2, Tab 9 at 25. Here, it was the appellant's wife, and he was apparently in close contact with her throughout the relevant period. Thus, even if one presumes the appellant and his spouse separated after receiving the test results on December 7, 2021, the 5-day covid quarantine would run through December 12, 2021. Furthermore, the appellant did regularly check in with his supervisor during period by email. I note Spurlock conceded that a doctor's note could alleviate the requirement to call in daily, if it expressly excused the employee for multiple days. Hearing Recording. It is somewhat bizarre the Spurlock would not treat the agency's mandatory 5-day quarantine requirement in a similar manner. Further, Spurlock's irritation at the appellant's failure to appear for a few weeks is also misplaced – the appellant began serving his 14-day suspension shortly after his December 11, 2021 email (December 13, 2021). *Id.*, *see also* AF-1, Tab 4 at 97.

On this score, Spurlock's behavior is far from blameless. Indeed, by his own admission, he applied the leave rules almost robotically, for example requiring an employee to expressly request sick leave even if the employee's stated reason for the absence was obviously due to illness (*e.g.*, by describing symptoms). Hearing Recording. Spurlock also largely conceded the appellant's claims that he never responded to his requests for guidance – generally without explanation. *Id.* Spurlock also admitted that he failed to conduct the (normally) required pre-action investigatory interview before the proposed removal, based on the appellant's unavailability, while conceding he only attempted to call the appellant twice (with no attempts by email). Hearing Recording. Spurlock also openly exaggerated the appellant's circumstances in an email to Human Resources, when he stated the appellant was not being removed for always calling out sick, but "for failing to call in at all." *See* AF-2, Tab 6 at 27.[5]

[5] The Human Resources specialist also inquired why, given the appellant's constant use of sick leave, he was not offered FMLA. *See* AF-2, Tab 6 at 27.

On this record, charge one, specification (b) is NOT SUSTAINED, and charge two, specification (b) is NOT SUSTAINED.

c. January 15, 2022

Spurlock testified that the appellant was AWOL and failed to call in on the relevant date, and the agency presented documents showing he was on the schedule and failed to appear. Hearing Recording; *see also* AF-2, Tab 5 at 50 (attestation of timecard for 1/2 -15/22), 51 (employee timecard for 1/2 - 15/22), 55 (Management Schedule for 1/9-15/22). Spurlock also testified that the appellant conceded that it was "his mistake." Hearing Recording; *see also* AF-2, Tab 5 at 17.

The appellant testified that he properly took January 15, 2022 off as his "in lieu of" day. Hearing Recording. Notably, the appellant's normal off days were Sunday and Monday. *Id*. Martin Luther King Day fell on Monday January 17, 2022, so the appellant was entitled to an "in lieu of" holiday." *See* AF-1, Tab 4 at 156-157. Generally speaking, if a holiday falls on one of an employee's normal "off" days, he is entitled to another day off – typically his closest previous "working" day. *See id.* Thus, based on the agency leave manual, the appellant appears correct that his "in lieu of" day should have been January 15, 2021. The appellant also testified that he brought this to Spurlock's attention repeatedly. Hearing Recording.

Significantly, Spurlock admitted that he erroneously scheduled the appellant's "in lieu of" day on January 18, 2022, when it should have been January 15, 2022. Hearing Recording; *see also* AF-2, Tab 6 at 49. As a result of Spurlock construing the appellant's January 15, 2022 absence as AWOL, the appellant never received an "in lieu of" day for the holiday. Hearing Recording; *see also* AF-2, Tab 5 at 45 (he was charged AWOL on January 15, 2022 and he was charged sick leave on January 18, 2022). Thus, per Spurlock's error, there

was both a finding of AWOL and a denial of a required alternate holiday. This is completely unwarranted.

Charge one, specification (c) is NOT SUSTAINED, and charge two, specification (c) is NOT SUSTAINED.

Because at least one specification for each charge was SUSTAINED, both charges are SUSTAINED.[6]

Nexus

Nexus is readily established -- AWOL by its very nature disrupts the efficiency of the service. *See Thom*, 114 M.S.P.R. 169, ¶ 7. Any sustained charge of AWOL is inherently connected to the efficiency of the service as an essential element of employment is to be on the job when one is expected to be. *See Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 8 (2009).

Affirmative Defense

The appellant has generally failed to establish his affirmative defense. Notably, he has presented no medical documentation regarding any medical condition, let alone a disabling one. This is odd given the appellant maintains that he was finally formally diagnosed with Depression in February 2022, and prescribed new medications[7] that rendered him fully able to work. Hearing Recording. Thus, it appears medical documentation should be available. In addition, the appellant blames the stress of doing three jobs as the cause of his

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[6] It is well-settled that proof of any one specification supporting a charge is sufficient to sustain that charge. *See Payne v. United States Postal Service*, 72 M.S.P.R. 646, 650 (1996).

[7] Somewhat contradictory, the appellant has also stated that his issues were caused by his earlier decision "to go off" his medications. *See* AF-1, Tab 4 at 62. He never specifies what "meds" for what "conditions," or when he was originally diagnosed with the conditions.

issues, yet Spurlock took over two of those jobs in June 2021 (and frequently covered for appellant as Store Manager). *Id*. Moreover, as the record readily shows, the appellant's excuses for not coming to work ran through a full gamut of health conditions (kidney stones, gout, gastro-intestinal distress, inability to sleep, mental distress, and his spouse's illnesses), as well as other factors (marital discord and related issues). In addition, he has not specified an accommodation that would have worked for him. When the Family and Medical Leave Act (FMLA) leave was mentioned at hearing, the appellant angrily retorted, "I didn't say I wanted it." Hearing Recording. In addition, this does not appear to be a typical disability discrimination case, given there were only three scattered incidents of AWOL at issue, and the appellant had plenty of sick leave to cover them.

Notably, the appellant conceded that he was aware of the agency's various policies and procedures (reasonable accommodations, FMLA, LWOP, etc.), and that he enforced these policies and procedures on his own subordinates. Hearing Recording. Moreover, when asked what he would direct an employee to do if the employee complained of a health condition, he said he would direct him "to contact HR [human resources]." *Id*. But when asked why he did not personally contact HR himself, he responded that his "mind was not right" (without specifics) and "he wanted his supervisor to provide him guidance." *Id*. If, as a supervisor, the appellant knew what do to obtain various types of accommodation/leave, it makes little sense to stubbornly insist that his supervisor tell him what to do when he already knows.

Penalty

Where the agency's charge is sustained, the Board will review the penalty imposed by the agency only to determine whether the agency considered all relevant factors and exercised discretion within the tolerable bounds of reasonableness. *See generally Scheffler v. Department of the Army*, 117 M.S.P.R.

499, ¶ 14 (2012). It is not the Board's role to displace the agency management's responsibility to decide upon a penalty, instead the Board only determines whether management's judgment has been properly exercised. *See Penland v. Department of the Interior*, 115 M.S.P.R. 474, ¶ 7 (2010). Where, as here, the Board sustains the charge(s), but not all the specifications within the charge(s), the Board will review the agency imposed penalty to determine whether it is within the parameters of reasonableness. *See Cameron v. Department of Justice*, 100 M.S.P.R. 477, ¶ 9 (2005).

There is no realistic dispute that AWOL is a serious offense that warrants a severe penalty. *See Bowman v. Small Business Administration*, 122 M.S.P.R. 217, ¶ 12 (2015); *Young v. U.S. Postal Service*, 79 M.S.P.R. 25, 39 (1996). Further, removal can be appropriate for even a modest amount of AWOL when the appellant has a record of prior discipline for the offense. *See Alaniz v. U.S. Postal Service*, 100 M.S.P.R. 105, ¶ 16 (2005) (one day). Further, the deciding official testified that the penalty would be the same even if all the specifications were not sustained. Hearing Recording.

However, there are ample reasons to doubt the reasonableness of the agency's penalty determination. I note various infelicities in Spaur's decision letter and *Douglas* factor review. *See* AF-1, Tab 4 at 27-37. Of note, he referred to a third charge – failure to follow instructions – that was not in the proposed removal, he included the return to work letter with prior discipline, he recounted that fellow managers and employees had lost all trust and confidence in the appellant (even though no such evidence was included with the proposed removal), he referred to "grapevine gossip" in assessing the notoriety of the offense (same issue), and he also concluded rehabilitation was highly doubtful even though only one specification post-dated the appellant's service of his 14-day suspension. *Id*.

In addition, Spaur also testified that the appellant should have come to him for help long ago, and they could have resolved the situation. Hearing Recording.

He also suggested that the texts between Spurlock and the appellant, if included in the evidentiary record, could have affected his decision. *Id.* Both these statements suggest a different result was possible, but it is not at all clear why a different result was impossible at the time of the decision.

But there is a larger issue. Spaur expressly testified that he based the conclusion that the other managers and employees had lost confidence in the appellant because he heard such comments directly from the other managers and employees. Hearing Recording. He further conceded that there was nothing in the evidentiary file providing notice to the appellant regarding this issue. *Id.* On a related issue, Spaur placed great emphasis on the appellant's failure to file a response to the proposed 14-day suspension, as, in his view, such an action (or failure to act) was inconceivable. *Id.* While the appellant was obviously aware of his 14-day suspension (as it was specifically listed in the proposed removal), and he was obviously aware of his failure to file a response to it, he certainly had no basis for knowing this failure to respond would be an aggravating factor in a subsequent disciplinary action.

The Board has held that due process requires that a federal employee facing removal be provided "notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Alford v. Department of Defense*, 118 M.S.P.R. 556, ¶ 6 (2012) (*quoting Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)). Because of the right to due process, a deciding official is not allowed to consider, either in connection with the charge or the penalty, new and material information that was not first provided to the appellant for his consideration and response – what is called "*ex parte*" information. This prohibition applies whether the deciding official learns of the new and material information through *ex parte* communication or the deciding official had personal knowledge of the new and material information. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 10 (2011) (discussing *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir.

2011) and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1366, 1377 (Fed. Cir. 1999)). Here the agency appears to have violated the appellant's due process rights in determining the penalty, and the appeal must be reversed.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective April 27, 2022. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final. The agency may reinitiate the removal process, but any such new action must comply with all the appellant's due process rights.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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. I **ORDER** the agency 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.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: /S/
Mark Syska
Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **March 31, 2023**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-

day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in

which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of

authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you

were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). 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.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC 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 a request for review to the EEOC 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, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation

for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

	DEFENSE FINANCE AND ACCOUNTING SERVICE **Civilian Pay Operations**

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

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-50s (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.