12752
N3
2009312
15 Dec 09

From: Director of Operations, Naval Support Activity - Washington (NSA-W)
To: John E. Gray, Office Automation Assistant, GS-0326-06

Subj: PROPOSED FOURTEEN DAY SUSPENSION

Ref: (a) DON Civilian Human Resources Manual Subchapter 752
(b) 5 U.S.C. 752
(c) Negotiated Agreement between Commander, Navy Region Naval District Washington and AFGE Local 1923
(d) Statement from Daryl Colter, dated 20 Oct 09
(e) Statement from Robin Prestonsoto, dated 19 Oct 09
(f) Letter of Reprimand, issued 19 May 09
(g) Letter of Requirement, issued 29 Oct 09

1. I am proposing your suspension for fourteen calendar days in accordance with references (a), (b) and (c) for failure to follow instruction. This proposed action is based on the following reason and specifications and is necessary to correct your misconduct and promote the efficiency of the service.

Reason: Failure to Follow Instruction.

Specification 1: Daryl Colter, Acting Welcome Center Manager, states in reference (d) that on 24 Aug 09 he received an email from Alice Evans stating that the back door to building 126 was unlocked and thus unsecure. Reference (d) also states that when Mr. Colter received the email from Ms. Evans he counseled his staff, including you, on the severity of making sure building 126 was secure at the end of the day. Statements from Mr. Colter, reference (d), and Robin Prestonsoto, reference (e), indicate that on 19 Oct 09 you were the last employee to leave building 126 and you did not lock building 126 when you left. On 20 Oct 09 Mr. Colter had a meeting with you and your Union representative, Ms. Evans, to discuss your leaving building 126 unsecure on 19 Oct 09. Per reference (d) you stated, during the meeting on 20 Oct 09, that you were completely baffled that NSA-W was making such a big deal about your leaving building 126 unsecure on 19 Oct 09. References (d) and (e) states that you were instructed to ensure building 126 was secure at the end of the day; however, on 19 Oct 09 you left building 126 unlocked

and thus unsecure when you left work. Therefore you failed to follow instructions.

Specification 2: Daryl Colter, Acting Welcome Center Manager, states in reference (d) that on 24 Aug 09 he received an email from Alice Evans stating that the back door to building 126 was unlocked and thus unsecure. Reference (d) also states that when Mr. Colter received the email from Ms. Evans he counseled his staff, including you, on the severity of making sure building 126 was secure at the end of the day; and Mr. Colter directed his staff, including you, to contact him, Cynthia Brown, the Police Department or me when there was a security issue at building 126. Statements from Mr. Colter, reference (d), and Robin Prestonsoto, reference (e), indicate that on 19 Oct 09 you were the last employee to leave building 126; you did not lock building 126 when you left; and you did not notify Mr. Colter, Ms. Brown, the Police Department or me that there was a security issue at building 126. On 20 Oct 09 Mr. Colter had a meeting with you and your union representative, Ms. Evans, to discuss your leaving building 126 unsecure on 19 Oct 09. Per reference (d) you stated, during the meeting on 20 Oct 09, that you were completely baffled that NSA-W was making such a big deal about your leaving building 126 unsecure on 19 Oct 09 and that you contacted Ms. Prestonsoto when the building was unsecure. You were instructed, per reference (d), to contact Mr. Colter, Ms. Brown, the Police Department or me when there was a security issue at building 126. However, on 19 Oct 09 you contacted Ms. Prestonsoto. Therefore you failed to follow instructions.

2. The range of remedies for similar offenses for a second offense is a five (5) day suspension to removal. Aggravating and mitigating factors were considered in determining that nothing less than your suspension for fourteen calendar days, if upheld, is warranted to promote the efficiency of the service and to correct your misconduct. Following instructions is crucial to maintaining the employee-employer relationship. Therefore failure to follow instructions inherently affects the agency's ability to carry out its mission. Thus your proposed suspension for fourteen calendar days, if upheld, promotes the efficiency of the service.

3. The aggravating factors considered are the seriousness of the offenses, your clear notice of instruction, my lack of confidence in you and your disciplinary history. Your failure to follow instruction jeopardized agency security as building 126 contains Department of Defense (DoD) Motor Vehicle Decals, Common Access Cards (CACs) and DoD information systems. DoD

Motor Vehicle Decals, if stolen, can provide non-employees access to DoD installations. CACs contain smart card technology that, if stolen, can provide non-employees the information necessary to replicate CACs. Additionally, DoD information systems contain personally identifiable information and certificates that, if stolen, can provide non-employees access to DoD information systems, the ability to encrypt and decrypt DoD information and the ability to digitally sign DoD e-mails and documents. In addition, stolen personally identifiable information places the agency's employees at risk of identity left. Therefore, your failure to secure building 126 and your failure to report the subsequent security issue at building 126 put the agency's information systems, the agency's facilities, and employees' personally identifiable information at risk in a post 9/11 world. Reference (d) shows that you were clearly informed of the importance of securing building 126 at the end of the day and of your order to report security issues to Mr. Colter, Ms. Brown, the Police Department or me. However, despite being on clear notice you failed to follow instructions. Furthermore reference (d) indicates that after speaking to Mr. Colter about your misconduct on 19 Oct 09 you minimized the security risk your actions posed and the importance of following instructions, and failed to take responsibility for your actions. Therefore, I have diminished confidence in your ability to consistently follow instructions and safeguard agency security. I also have diminished confidence in your rehabilitation potential, and find nothing less than your suspension for fourteen days, if upheld, will impress upon you the importance of correction your misconduct.

4. I also considered your disciplinary record as an aggravating factor. You received a letter of reprimand, reference (f), on 19 May 09 for failure to follow instructions and absent without leave. Although not a part of your disciplinary record, I have noted that on 29 Oct 09 you received a Letter of Requirement, reference (g), in order to impress upon you the importance of timely adhering to standards of proper time and attendance.

5. In addition, your length of federal service (your service computation date is 26 Sep 92) and your acceptable performance ratings of record were considered as mitigating factors. However, I do not find the mitigating factors warrant proposing a lesser remedy. Therefore, I find that proposing nothing less than your suspension for fourteen calendar days is necessary to promote the efficiency of the service and to influence you to correct your misconduct. This suspension, if upheld, will offer you the ability to rehabilitate your misconduct.

6. You have the right to reply orally, in writing, or both and to submit affidavits and other documentary evidence in support of your reply, showing why your suspension should not be effected. You and your representative, if you choose to obtain one, are entitled to review the material relied upon to support proposing your removal and to prepare an answer. You will be granted, if requested, a reasonable amount of duty time to review the material and prepare a reply. A request for time must be made directly to me. You are entitled to be represented by a representative of your choice. Please note that the Navy may disallow your choice of representative if such representation would result in a conflict of interest or position, conflict with priority needs of the Navy or would give rise to unreasonable cost to the Navy. Before a representative may act on your behalf, that person must be designated by you in writing to

CDR Philip Raimondo
Executive Officer, NSA-W
202.433.3689
philip.raimondo@navy.mil

the designated deciding official (DDO) on this proposed suspension.

7. Your reply must be received by the DDO within seven (7) calendar days from the date you receive this letter to be considered timely. If you encounter difficulty in preparing your reply by that date, you may request additional time from the DDO in writing, in advance of the expiration of that deadline. If you desire to reply in person, contact the DDO to schedule an appointment. Your reply must be made before the expiration of the reply period. Due consideration will be given to any explanation(s), fact(s), affidavit(s), or rebuttal you furnish in a timely manner. In preparing and presenting a reply, you are assured freedom from restraint, interference, coercion, discrimination, or reprisal.

8. The final decision to effect the action proposed has not been made. The DDO, who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted. If it is the decision of the DDO that you will be suspended, your suspension will be effective not less than seven (7) calendar days from the date you receive this notice. You will be given a written decision as soon as possible after your reply has had full consideration, or after your opportunity to reply expires, if you do not reply. You will be retained in

an active duty, paid status during the period of advanced notice and are required to report to duty as scheduled.

9. Copies of applicable regulations as well as the official case file are available to you and/or your representative through the Labor and Employee Relations Department, Human Resources Office, Washington, Building 101, Suite 100, Washington Navy Yard, Washington, D.C. 20374-5041. If you require assistance or additional information, you may consult with Sarah Torres Ferrick, Labor and Employee Relations Specialist, at (202) 685-0078 or sarah.torres@navy.mil.

R. A. TUCKER

My signature below indicates that I received and have read this notice. In signing this notice I am in no way indicating that I agree or disagree with the contents of this notice.

12/15/09 John E. Mary
Date Employee's Signature

Totally disagree more continued Harassment

Copy to:
DDO
HROW-LMR

From: Gray, John E. CIV NDW WNYD, N35
Date: Tuesday June 22, 2010 8:42
Subject: Continue hostile work environment/reprisals

On my first day back to work from surgery approximately 21 June 10, 1316 Ms. Evans my Union Rep and I met with my first line supervisor, Ms. Cynthia Brown, we both were unaware of the subject matter, and Ms. Brown stated that my workmen compensation was denied. Ms. Brown also stated that I have been AWOL since 7 June 10 from my suspension and should have return to work. Ms. Brown also stated that she was not aware of my situation since she's my first line supervisor. Mr. Gray how would you like to be charged for your physical therapy sessions? I was waiting for Ms. Brown to finish her statement.

I stated ma'am can I say something to you; Ms Brown stated no you can't! I stated ma'am you have stated what you wanted to say can I now speak Ms. Brown stated again no you can't I don't want to hear what you have to say, this went on for several times. Then my Union Rep. Ms. Evans stated to Ms. Brown you have to let Mr. Gray speak, Ms. Brown stated that no I don't have to let him speak. Ms. Evans repeated her statement: Ms. Brown you have to let Mr. Gray speak. I stated to Ms. Brown how am I AWOL. Ms. Flannigan and I have been communicating through this whole ordeal since my injury. Ms. Flannigan is the intake person that handles workmen compensation for our agency and I am quite sure that she has informed you or that you have been quite aware of my status ma'am.

Ms. Brown stated that she was not aware of anything, I stated ma'am how can you not be aware of my status when Ms. Flannigan stated that everything was fine all the paper work was submitted and she spoke with you on several occasions. Ms. Brown stated that, what makes you think that I was informed about anything. I Mr. Gray stated ma'am come on don't sit up there and say that you were not aware of my status, ma'am you knew. Ms. Brown stated no I did not know anything, I Mr. Gray stated ma'am you are lying I would like to be charge 100 hours of annual leave and the remaining hours of sick leave should be charge for my physical therapy sessions until the Department of Labor Workmen Compensation work out this issue.

Ms. Brown stated that you are still going to be charged 'AWOL, that's when I turned toward Ms. Brown and stated ma'am that's not true. Ms Brown escalated the situation by jumping out of her seat and coming around from her desk and stated "are you threatening me'? I stated ma'am you are in my personal space you're the threat that's when Ms. Evans directed me outside of Ms. Brown's office and Cpt. McKinney directed me into his office and asked me what's going on? I stated to Cpt. McKinney that Ms. Brown and Comd. Tucker have been harassing me quite sometime and this has got to stop, this has been going on far too long "SIR" and I am tired of it. Cpt. McKinney stated don't let them get you upset just relax; you're been in

the government to long. I stated that I know "SIR" but this is too much I don't know why they continue to harass me. Cpt. McKinney stated just relax, you're right that workmen compensation person does supposed to handle the situation but they will over turn the decision and you will get everything back. Ms. Evans and I walked back to our building.

Sincerely,

John E. Gray

22 Jun 10

From: Director, Security, Naval Support Activity - Washington (NSA-W)
To: John Gray, Security Assistant (OA), GS-0086-06

Subj: ADMINISTRATIVE LEAVE

You are hereby notified that you are not to report to work until further notice. You will be sustained in a non-duty status with pay during this period. Upon request you will relinquish your building keys, CAC card and other NSA-W identification. You are instructed to call me, Dr. Cynthia Brown every morning by ~~0600~~ 0700 hours at (202) 685-0517 for further instructions. If you need to be aboard the base for any reason you are instructed to call me so that an escort can be arranged.

Dr Cynthia Brown
DR. CYNTHIA BROWN

Employee Signature as Receiving This Notice

6/23/10 John E. Gray
Date Employee Signature

no explanation as to why I'am Place on administra Reave, continued harrassment unaue stress. This has got to Stop

cc: HRO-W

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CDR Richard A. Tucker
June 21, 2010
Statement concerning events occurring approximately 1330 on Monday June 21, 2010 during an informal meeting with John E. Gray to discuss his previously issued Letter Of Requirement (LOR).

Dr. Brown relayed to me that she was having a meeting with John Gray to reiterate his responsibilities of his LOR. He had been AWOL for several days following a suspension. Due to Mr. Gray's previous behavior, she asked me to be present.

At approximately 1315 Mr. Gray and Ms. Evans entered Dr. Brown's office. Ms. Evans exchanged pleasantries and sat down. Ms. Evans told Mr. Gray he could sit down and he refused. At this time he commenced tapping a metal cane on the floor.

Dr. Brown told Mr. Gray that he had been carried AWOL for the time he had been away from work and he responded that he had had surgery and wanted leave. Dr. Brown reiterated that his DOL claim had been disapproved and he had to abide by the LOR. She told him she had received no medical documentation from him prior to this morning and it was a list of physical therapy appointments. She provided Mr. Gray a copy of his Letter of Requirement dated October 2009 and told him that he had signed it and received it last year in October. She further explained to Mr. Gray that she had had no contact with him since he went on suspension.

At this time Mr. Gray began screaming, calling her a liar, evil and a thief and screaming to her that Nikkia Flanigan and Alice Evans knew where he was at. Dr, Brown interrupted him and told him that made no difference they were not his supervisor.

Mrs. Evans told Dr, Brown she had to let him speak and she responded no, she did not he was being belligerent. Mr. Gray then continued yelling and made a lurch toward Dr. Brown. She came out of her chair and I think asked him if he trying to anger her or words to that effect.

At this time CPL Liverette and Chief of Police Mike McKinney came through the door to investigate the argument. Dr. Brown told Mr. Gray this meeting is over asked the Chief to remove Mr. Gray from her office. Throughout this entire tirade Mr. Gray was continually bouncing his cane on the floor.

Dr. Brown then asked Mrs. Evans to ensure that Mr. Gray had the LOR with her business card attached showing all her phone numbers.

END OF STATEMENT.

Richard A. Tucker, CDR, USN

Tab 49

Dr. Cynthia Brown
June 21, 2010
RE: Incident involving John E. Gray at approximately 1315-1340 on Monday June 21, 2010.

DEPICTION OF EVENTS:

At approximately 1036am I was going through documents I had printed and found a fax from Mr. John Gray that was sent from the NSAW Welcome Center. The subject noted was Physical Therapy and contained a document with several items marked out and a list of appointments. Mr. Gray had no-called, no-showed for the previous two week period from Monday June 7, 2010 through Friday June 18, 2010. However, Mr. Gray had been seen on the base and in the Welcome Center during this time, but had not attempted to contact me as his first line supervisor nor did he report to work. When I noticed the fax, I immediately called Ms. Evans the Welcome Center lead and inquired if Mr. Gray had returned to work. She told me that he had, but he was gone to physical therapy. Ms. Evans is also Mr. Gray's Union Steward. I told Ms. Evans that I was unaware of Mr. Gray's return and had not heard from him in the previous two weeks of his absence and needed to speak to him. I told her that I would contact Mr. Gray when I returned to the office. Mr. Gray called my cell phone at approximately 1200 and stated that "Ms. Evans said you are looking for me." I told Mr. Gray that I would get with him when I returned to my office. I returned to my office and called Ms. Evans at 1300 and told her that I needed to see Mr. Gray, she asked if she could come with him I told her that this was brief and informal meeting and said she would come.

Mr. Gray and Ms. Evans entered my office at approximately 1315-1320. Ms. Evans said good afternoon and sat down. Ms. Evans told Mr. Gray he could sit down and he refused. CDR Tucker was present as well.

I began by providing Mr. Gray a copy of his Letter of Requirement dated October 2009. I stated to Mr. Gray that he had signed it and received it last year in October and I was providing him a copy again for his reference. I explained to Mr. Gray that I had not heard from him since I issued his suspension letter on May 25, 2010. I went on to explain to Mr. Gray that he had no-called and no-showed for the past two weeks and reminded him that he was, per his suspension letter issued on May 25th to return to work on June 7, 2010. I then asked Mr. Gray what type of leave he wanted to use for his physical therapy appointments listed on the document that he faxed to me. He proceeded to state that he wanted to use 100 hrs of annual leave since his surgery and I reminded him that he was AWOL and had no-called and no-showed for two weeks.

Mr. Gray began yelling that no one told him he had to return to work on the 7th. I reminded him that his suspension letter stated that he was to return to work on the 7th and that I reiterated this to him when I issued the suspension. Mr. Gray started raising his cane and forcefully slamming it into the floor repeatedly. He stated that I needed to quit lying. I went on to tell Mr. Gray that this was the same behavior and actions that he had

Tab 4 h(1)

in April when he was also held AWOL for failure to call in and no showed following his initial serving of the 10 day suspension. From this point on Mr. Gray was yelling loudly that Ms. Nikkia Flanigan knew about his knee surgery and so did Ms. Evans and that they should have notified me. Mr. Gray repeated this at least 4 more times as I tried to tell him over and over that it was not their responsibility to notify me, but his and the Letter of Requirement is in place and he was required to adhere to it. By this point I had to raise my voice to be heard and he refused to quit yelling while he continued to pick his cane up and repeatedly slam it into the floor. He continued throughout his tirade to call me a liar, evil, and tell me to quit lying. I interrupted him and attempted to reiterate again Mr. Gray's responsibility. Ms. Evans then stated "you have to let him talk", and I stated "no I do not, this is informal, and he is being belligerent". Mr. Gray was exceptionally angry in face and body language when he bowed up and lurched toward me. At this point, I came from around my desk to address Mr. Gray. I asked him three times, "did you just take a step toward me in anger?" and then the Chief of Police and Officer Liverette came to my office and I asked Chief McKinney to take Mr. Gray out of my office.

Dr. Cynthia A Bo

Director of Security

Tab 4(a)

Joseph Inaldo's statement for 4/1/2010

On 4/1/2010 around 10 a.m., Mr. John Gray stood up from his chair to help a customer. When he attempted to walk over to help the customer, he tripped over the bottom drawer from his table. I then walked over to help him back into his chair while Drew Howell called Ms. Alice Evans for further assistance. Ms Evans contacted the EMT to come and directed Drew, Brian, and I to finish helping our customers. The EMT came and helped Mr. Gray and carried him out into a stretcher.

- Joseph Inaldo

Brian Prescott's statement

On Thursday April 1, 2010 while in the reception area of the Pass & ID office, Mr. Gray was sitting at his computer as a customer approached him for assistance. As he stood up to help the guest the last draw on the desk was sticking out and he tripped and fell to the ground, hurting his back and his knee. One of the fellow employees gave him assistance with getting up as the supervising site lead Ms. Alice Evans came out and called the ambulance.

Brian Prescott

Drew Howell

Today April 1, 2010 at approximately 10:00 o'clock Mr. Gray fell down while working in building 126 Pass and ID. He was sitting at his desk on the front line when a customer approached him. Mr. grey went to assist the customer, but when he stood up and walked towards the guest he tripped over his open desk drawer. As he was falling he maneuvered himself away from a corner which his head was falling towards, in doing so it appeared that he twisted his back. He landed sideways half on his back half on his side. He appeared to be in excruciating pain. I immediately went to get Mrs. Alice Evans who is in charge of the Pass and ID building she rushed to his side and immediately contacted emergency officials and an ambulance was on its way immediately. Mr. Gray's leg had pretty severe knot and a gash and he stated that he hurt his back. He was placed into the EMT's care and was removed from the building on a stretcher hospital bound.

Drew Howell

From: John Gray

To: CDR. Richard Tucker

On 19 May 2009 I received a Letter of Reprimand from Ms. C. Brown Director of Security NSAW pertaining to my usage of leave. The charges were as follows:

A. Reason 1: Failure to Follow Instructions: On 21 April 2009 I did request sick leave, however when Daryl Colter called me on or about 1300 hours telling me I need to come in to work was with out merit.
   (1) I was never given a letter of caution
   (2) I have not nor was I given any letter of requirement.

B. I gave Ms. Tobias the leave slip for 7/8 May 2009 because of Daryl Colters absences we were informed that Ms. Tobias (NAVSEA) is the person in charge and we are to give her all paper work. I submitted the proper paper work for the 7th & 8th one is from the VA hospital and the other is from Southern Maryland Hospital for a medical procedure done at that hospital.

C. Reason 2: AWOL, Regardless of what I wrote on my leave slip (21 May 09) I did state on my leave slip that I had a serious head ache and I was feeling stressed. You also state that I did not call on 22 May 2009. I attempted several times to call Daryl Colter to inform him however he never returned my call.

D. As for the 21 May 2009 on or about 0300 I called Ms. Brown and left a message that I was in the VA hospital, Ms. Brown never returned my call.

E. As for being 20 minutes late on the 11th of May 2009 I have no control over traffic movement nor the unavailability of parking, however I am open to any suggestions as to what an employee is suppose to do when a supervisor fails to answer his phone much less return phone calls.

I am requesting that this letter of reprimand be removed base on the facts that I do have medical documentation that I was seen by a Doctor and

that I voluntarily turned in this information even though I am not on a letter requiring that I do so.

Based on CCPOWASHDCINST 12752.2E (chapter IV section B Step 3) Meet with the employee with documentation to hear his/her side of the incident (s).

I was never afforded this opportunity I was given a letter with out any questions, accused of being guilty before stating my side.

I am requesting that the letter be with drawn from my record at once and that as long as I present medical documentation I be left alone.

28 September 2009

From: John Gray, Office Automation Assistant, GS-0326-06

To: Director of Security, NSA Washington

Subj: PROPOSED SEVEN DAY SUSPENSION

In response to your letter I am requesting that the requested seven day suspension be dismissed based of the following facts:

- The Letter of Reprimand (May 19 2009) makes no mention of my having a letter of requirement for any future leave request.
- Statement from Mr. Colter dated 14 August 2009 stating that I had not called him I not only called him I also gave him a letter from Dr. Jackson with a date that I was to be re checked.
- Statement of Mr. Colter on 3 September 2009 stating that I had called in sick on 1 September 2009 and he called me back and I did not respond, I was sick I had no idea that I was suppose to answer my phone when I am home sick, no where in the HROWASHDCINST 12630.1F chapter 11 Sick Leave does it say I need to answer my phone once I call in sick, in paragraph 3 in this instruction is states that I am required to contact my supervisor or other designated official with in two hours of my normal starting time, I do believe calling on or about 0541 hours is well before my 0800 starting time, no where is it written that I need to answer my phone. I find that my supervisors calling me back and expecting me to answer and then making a statement that I did not answer to be boarder line harassment.
- I was out for one (1) day and because I have not received a letter of requirement I did not think a note from my Dr. was required, again in the HROWASHDCINST 1230.1F chapter 11 paragraph 3 I am not required to bring in a Dr. certification unless the absence extends beyond the anticipated time and to request additional leave. I did give Mr. Colter a note from my Dr. for this day.

- In section (4) it states that management will prescribe the kind of evidence to be furnished to support sick leave charges:
- No request was asked of me until after my return to duty the next day (2 September 2009) however Mr. Colter failed in his statement to mention that I did not refuse to get him the requested document I asked him when he expected me to get a note because I get off at 1630 and the office would be closed before I could get there.
- In paragraph 4 (c) it states that if there is reason to believe that sick leave is being abused the employee should be counseled concerning the questionable sick leave record:
- In his (Mr. Colter) letter dated 3 September 2009 he states that due to my past history of leave abuse; however I have never been counseled nor am I on a letter of requirement for leave usage. So making the statement of "leave abuse" I find to be derogatory and a false statement made by Mr. Colter.

On or about 1409 November 14th 2008 Ms. Brown came to bldg 126 and requested that I step into Ms. Hunt's office to meet with her and Mr. Colter in regards to my duty status and how long I have been working in the visitor center I explained to Ms. Brown that I was assigned to the Visitor center on or about March of 2006. She then inquired about had any one from the Police Department contacted me about my status or had I received an SF50.

I stated to Ms. Brown that the only person who has inquired about my status and that boarder's on harassment is CDR Tucker, I told her (Ms. Brown) that just as I explained to CDR. Tucker I am on limited light duty due to a "on the job" injury and will remain in such a status until DOL/OWCP approves the required surgery and I am released from the Doctor in a full duty status, and there is nothing I can do until that happens, I have been here for almost four (4) years.

Ms. Brown then stated "I admit that is a long time for anyone to be waiting for surgery, let me make some calls and contact some people that I know in the Labor Department to help speed up your surgery date."

On or about 1 December 2008 Mr. Colter gave me a copy of a SF50 that changed my duty status from an 0083 Police Officer to an 0326 Office Automation it had an approval date of July 2008, I had no knowledge of this until it was given to me.

After the meeting on or about November 14th 2009 Ms. Brown never spoke to me nor met with me about my status.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JOHN E. GRAY,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-0752-11-0022-I-1

DATE: April 25, 2011

Gary T. Brown, Esquire, Washington, D.C., for the appellant.

Sarah Luisa Torres-Ferrick, Washington Navy Yard, D.C., for the agency.

BEFORE
Andrew Niedrick
Administrative Judge

INITIAL DECISION

On October 6, 2010, the appellant timely filed an appeal with the Merit Systems Protection Board (Board) from the agency's decision to remove him from his Security Assistant position effective September 6, 2010. The Board has jurisdiction over this appeal because the appellant was an employee within the meaning of 5 U.S.C. § 7511(a)(1) at the time of the removal action. 5 U.S.C. §§ 7511-13, 7701. I held the appellant's requested hearing on December 10, 2010 at the Board's Washington Regional Office in Alexandria, Virginia. For the reasons explained below, the agency's removal action is AFFIRMED.

Enclosure (2)

ANALYSIS AND FINDINGS

Background

The following facts are not in dispute. The appellant was employed in the position of Security Assistant (Office Automation), GS-0086-06, at the Washington Navy Yard in Washington, D.C. Appeal File (AF), Tab 4, Subtab 4a.

On May 18, 2009, the agency issued the appellant an official written reprimand for his failure to follow instructions and for being absent without leave (AWOL). AF, Tab 4, Subtab 4n. In support of the reprimand, the agency found the appellant had failed to follow his supervisor's instructions with regard to leave procedures on two occasions and was AWOL on four separate occasions. *Id.*

On September 24, 2009, the agency proposed a seven-day suspension based on the appellant's failure to comply with leave procedures. AF, Tab 4, Subtab 4m. However, the agency subsequently issued the appellant a Letter of Requirement (LOR) in "lieu" of the decision from the action on October 28, 2009.[1] *Id.*, Subtab 4m. In pertinent part, the LOR "directed" the appellant to contact his supervisor, "Ms. Cynthia Brown, Director of Security, NSA-W, at (202) 685-0517 whenever" he anticipated being tardy or when he was unable to "report for duty." *Id.* The LOR further provided that he was to contact and speak to Ms. Brown directly "before 0600 hours on the date of [his] absence or tardiness," noting that he was not permitted to leave a voicemail or have a friend or family member contact Ms. Brown on his behalf. *Id.* In addition, the LOR provided that if the appellant was "unable to contact Ms. Brown," he was "directed to contact CDR Richard A. Tucker, Director of Operations, NSA-W, at

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[1] The file does not include a copy of the proposed action. In addition, although the LOR refers to a decision from the proposed action dated October 21, 2009 (AF, Tab 4, Subtab 4m), there is no record of this letter in the file.

(202) 433-2123."[2] AF, Tab 4, Subtab 4m. Finally, the LOR notified the appellant that his "failure to adhere to the procedures outlined in this letter will result in disciplinary action up to and including [his] removal from the Federal service." *Id.*

On March 29, 2010, the agency suspended the appellant for 10 calendar days for failing to follow instructions. AF, Tab 4, Subtab 4l. The agency ordered him to serve the suspension from April 5 through April 14, 2010. *Id.* However, on April 1, 2010, the appellant suffered a work-related injury and the Office of Worker's Compensation Program (OWCP) granted him Continuation of Pay (COP) for the entire month of April 2010.[3] *Id.*, Subtab 4j. Accordingly, the agency rescheduled the suspension dates and notified the appellant as follows: "[y]ou are suspended from duty from 26 May 10 through 04 Jun 10" and "[y]ou are directed to report to work on 07 Jun 10, your next scheduled duty day." *Id.*

Although the appellant was scheduled to work from June 7 through June 11, 2010 and from June 14 through June 18, 2010, he did not report to work on these dates. AF, Tab 14 (Stipulated facts). In addition, the appellant did not contact Ms. Brown or CDR Tucker on the dates of his absences as required by the terms of the LOR. *Id.*

In a letter dated July 13, 2010, the agency proposed the appellant's removal because he failed to follow instructions and engaged in disrespectful conduct toward his supervisor. AF, Tab 4, Subtab 4d. Although the agency granted the appellant's two requests for additional time to respond to the proposed action, the

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[2] The LOR also required that the appellant contact "Mr. Daryl Colter, Acting Welcome Center Manager, Pass and Identification Office, NSA-W" whenever he anticipated being tardy or absent. AF, Tab 4, Subtab 4m.

[3] The appellant filed an OWCP claim the same day alleging he suffered an injury when he was helping a customer at work, tripped over an open drawer, suffered a torn meniscus, and "almost had a serious injury" because he "almost hit his head on the corner of a desk." AF, Tab 20 (Hearing Compact Disc (HCD)-appellant's testimony).

appellant did not submit a response and, in a letter dated August 30, 2010, the agency removed him from his position effective September 6, 2010 after sustaining the reasons and specifications supporting the proposed action. *Id.*, Subtabs 4b-4c.

On October 6, 2010, the appellant filed this Board appeal and, during the processing of this appeal, I determined that the following are the material issues to be decided in this case: (1) Whether the agency has proven by preponderant evidence the reasons and supporting specifications as alleged in the July 13, 2010 Notice of Proposed Removal; (2) whether the agency has proven by preponderant evidence that its choice of penalty was within the bounds of reasonableness; (3) whether the appellant has proven by preponderant evidence that the removal action was the product of race (African American) and/or age discrimination; and (4) whether the appellant has proven by preponderant evidence that the removal action was taken in retaliation for protected Equal Employment Opportunity (EEO) activity. *Id.*, Tabs 14 and 19.[4]

The agency has proven the charged misconduct by a preponderance of the evidence.

The agency must prove its charged misconduct by a preponderance of the evidence. A preponderance of the evidence is that degree of relevant evidence that 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).

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[4] The appellant failed to timely file prehearing submissions without good cause. AF, Tabs 14-19. Nevertheless, I granted his request to consider his untimely prehearing submissions and allowed him to raise all of his affirmative defenses over the agency's objection. *Id.* The appellant, however, did not offer any proposed exhibits.

Reason 1: Failure to Follow Instructions

To support a failure to follow instructions charge, the agency must prove by preponderant evidence the appellant was given a proper instruction and failed to comply, without regard to whether his failure was intentional or unintentional. *Haebe v. Department of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002); *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555-56 (1996). Notably, "proof of intent is not required" and "there is no 'de minimis' exception for a charge of failing to follow [] instructions." *Haebe*, 288 F.3d at 1298, citing *Ceja v. Defense Logistics Agency*, 27 M.S.P.R. 531, 533 (1985) and *Pepper v. Veterans Administration*, 8 M.S.P.R. 524, 526-28 (1981).

In Reason 1, the agency offered 10 separate specifications to support the Failure to Follow Instructions charge. AF, Tab 4, Subtab 4d. All of the specifications are identical, with the exception of the date of the infraction. *Id.* Thus, the agency alleged, in pertinent part, as follows:

> On May 25, 2010 you received a Suspension Date Change notice [], which directed you to report to work starting June 7, 2010. On October 29, 2009 you received a Letter of Requirement [], which directed you to contact me whenever you are unable to report to duty.
>
> . . . .
>
> [Y]ou were not at work on June [7, 8, 9, 10, 11, 14, 15, 16, 17, and 18] 2010. You failed to report to work on June [7, 8, 9, 10, 11, 14, 15, 16, 17, and 18], 2010, as directed, and you failed to contact me to report your absence, as directed and scheduled. Therefore you failed to follow [] instructions.

Id.

As discussed above, the unrefuted record demonstrates the agency issued the appellant the LOR on October 29, 2009 which required him to contact Ms. Brown and/or CDR Tucker by "0600" on the day of any absence. AF, Tab 4, Subtab 4m. The appellant was scheduled to report to work on June 7 through 11, 2010 and June 14 through 18 as alleged in Specifications 1 through 10.

Nevertheless, the appellant failed to contact Ms. Brown and/or CDR Tucker on the days at issue as directed.

At the hearing, the appellant offered a variety of arguments to support his claim that Reason 1 should not be sustained. AF, Tab 20 (HCD-appellant's testimony). First, he suggested that the agency should not have issued the LOR in the first place and, as such, he was not bound by the directives therein. *Id.* Specifically, he noted that in mid 2009, the agency had proposed a seven-day suspension based on its allegation that he was absent without leave (AWOL) because he failed to provide the requisite medical documentation for an absence in excess of three days. *Id.* The appellant further alleged that he had timely provided the necessary documentation but it was lost or misplaced by his supervisor at the time, Daryl Colter. *Id.* In response to the proposed suspension action, the appellant provided agency officials with another copy of the medical documentation and, based on this documentation, the appellant alleged the deciding official issued the LOR in lieu of a decision on the action. *Id.* Based on these facts, he suggests he was somehow exonerated of the misconduct as alleged in the proposed suspension and therefore contends the agency improperly issued the LOR. *Id.*

The record demonstrates the agency issued the LOR in lieu of its October 28, 2009 decision from the proposed action. AF, Tab 4, Subtab 4m. However, there is nothing to suggest the agency exonerated the appellant from the misconduct as alleged or that it issued the LOR because it was incapable of sustaining the proposed action. *Id.* Moreover, the appellant has failed to introduce any evidence to corroborate this claim and, for the reasons discussed below, I find his testimony to be incredible.

Moreover, even assuming he could establish the LOR should not have been issued or that it was issued in error, it is well settled that an employee is not entitled to disobey an instruction because they disagree with the agency's reasons for issuing the instruction or because they believe the instruction is improper or

otherwise unwarranted. *See generally Pedeleose v. Department of Defense*,[5] 110 M.S.P.R. 508, ¶¶ 16-17 (2009) (except in extreme or unusual circumstances, an employee must "comply with an agency order, even where the employee may have substantial reason to question it, while taking steps to challenge its validity through whatever channels are appropriate."); *Dias v. Department of Veterans Affairs*, 102 M.S.P.R. 53, ¶ 14 (2006) ("Simply put, the appellant was not entitled to disobey the order because she disagreed with it."), citing *Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08 (1995), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); *Redschlag v. Department of Army*, 89 M.S.P.R. 589, ¶ 19 (2001) ("the appellant was not justified in disobeying [her supervisor's] instructions based solely on her belief that the instructions were improper."). Consequently, the appellant's contention does nothing to advance his claim because he was still obligated to comply with the directives at issue.

In the alternative, the appellant suggested he had no obligation to comply with the LOR directives because the absences at issue were related to his April 1, 2010 injury and, therefore, he was "no longer under the scrutiny of the supervisor." AF, Tab 20 (HCD-appellant's testimony). In support of this claim, he testified that he was scheduled for orthopedic knee surgery on June 2, 2010 to repair an injury he suffered at work on April 1, 2010. *Id.* He noted that his doctors had advised that he would be unable to return to work until July 29, 2010 because he would need to recover from the surgery. *Id.* As a result, the appellant testified that in April or May 2010, he submitted the relevant medical documentation for the surgery to Nikkia Flannigan, a Human Resources Assistant that assisted him with his OWCP claims. *Id.*

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[5] An employee may be justified in refusing to follow an order that places him or her in a dangerous situation or could cause the employee irreparable harm. *See Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470, 474 (1994) and *Gragg v. United States Air Force*, 13 M.S.P.R. 296, 299 (1982).

The appellant further testified that prior to his surgery, Ms. Flannigan had specifically assured him that he was under no obligation to contact Ms. Brown to request leave, because "everything looked fine" and "there should be no problem with anything." AF, Tab 20 (HCD-appellant's testimony). Thereafter, on June 2, 2010, he called Ms. Flannigan right before his surgery in order to confirm that he had satisfied all of his obligations with regard to requesting leave. *Id.* During the call, he asked her again if he needed to contact Ms. Brown for any reason and explained that he "did not want to have any problems." *Id.* In response, Ms. Flannigan told the appellant that Ms. Brown was aware of his surgery and confirmed that there was nothing further he needed to do with regard to his absence. *Id.*

Finally, he testified that, after his surgery, he met with Ms. Flannigan on June 14, 2010 to discuss his leave and OWCP claim. AF, Tab 20 (HCD-appellant's testimony). At this meeting, Ms. Flannigan informed him that his OWCP claim had been denied and he asked her for the details relating to the denial. *Id.* Ms. Flannigan suggested he contact Michael Mills at the Department of Labor (DOL) for more information as to why the claim had been denied. *Id.* On June 19, 2010, he returned to work because he knew he was not being paid for his absences. *Id.*

At the hearing, Ms. Flannigan provided a very different version of events. AF, Tab 20 (HCD-Flannigan testimony). She testified that she had worked with the appellant to process his first OWCP claim stemming from the April 1, 2010 injury and that DOL had approved him for COP through April 29, 2010. *Id.* She also noted that shortly thereafter, the appellant stopped by her cubicle to drop off some additional medical documentation and that Ms. Brown happened to pass by. *Id.* When Ms. Brown saw the appellant, she stopped and told him that he needed to provide her with the medical documentation to support any of his leave requests. *Id.* The appellant objected and Ms. Brown and the appellant engaged in a heated discussion wherein they both raised their voices. *Id.* During the

discussion, Ms. Brown repeatedly told the appellant he needed to provide her with any leave-related requests and supporting documents. *Id.*

Thereafter, on or about May 2010, Ms. Flannigan testified the appellant provided her with some additional medical records to support his OWCP claim, including documentation indicating he was scheduled for knee surgery in June 2010. AF, Tab 20 (HCD-Flannigan testimony). She noted that she repeatedly reminded him he needed to process all of his leave requests relating to his OWCP claim through his normal supervisory channels.[6] *Id.* The appellant told her that he did not want to contact Ms. Brown to request leave and Ms. Flannigan stressed that it was his obligation to do so. *Id.* She further testified that she did not recall the appellant contacting her on June 2, 2010 and noted that the conversation she had with him on June 14, 2010, took place telephonically rather than in person. *Id.* Moreover, she stated that she did not provide the appellant with a contact person at DOL, noting that she would have no way of knowing, under the circumstances, who at DOL had handled the appellant's claim. *Id.*

Where, as here, I am faced with a significant factual dispute, I must examine the credibility of the witnesses in order to resolve the dispute.[7] During

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[6] Ms. Flannigan testified that, as an HR Assistant, she has no authority to consider or approve an employee's leave request and always advises employees that they must process leave related to any OWCP claim through their normal channels. AF, Tab 20 (HCD-Flannigan testimony). She also testified that, as a matter of privacy, she may not provide or share medical documents or information provided by the employee in the context of an OWCP claim with a supervisor in order to support a leave request. *Id.* She will, however, notify an employee's supervisor as to whether an OWCP claim has been approved or denied so that any pending leave requests may be properly processed by the supervisor. *Id.*; *see also id.*, Tab 4, Subtab 4i. As such, she also routinely reminds employees that they must provide their supervisors all of the medical records necessary to support leave requests. *Id.* Finally, she stated she did not discuss the appellant's surgery or his related absences with Ms. Brown.

[7] A judge must resolve credibility issues consistent with the Board's decision in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). *See Luten v. Office of Personnel Management*, 110 M.S.P.R. 667, ¶ 11 (2009) (to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the

the hearing, I observed Ms. Flannigan's demeanor closely and I found her testimony to be open, sincere, straightforward, responsive, articulate and consistent. Moreover, I find she had no apparent motive for bias and she understood the gravity and significance of her participation in this case. As such, I find her testimony extremely credible. On the other hand, I found the appellant's testimony incredible. I observed his demeanor closely at the hearing and his testimony appeared contrived and exaggerated, and I found his version of events inherently implausible.

Accordingly, I find that preponderant evidence demonstrates that, contrary to his claim, Ms. Flannigan specifically informed him that she would not and could not process and/or request leave on his behalf for any absences related to his OWCP claim.[8] In addition, the record plainly reveals that both Ms. Brown and Ms. Flannigan informed the appellant that he needed to process his leave requests through Ms. Brown for the relevant period and the appellant failed to comply. For these reasons, I find the appellant's suggestion that he believed he was under no obligation to comply with the terms of LOR because his absences were related to his OWCP claim to be incredible.

The appellant also suggested that he was under no obligation to comply with the LOR directives because Ms. Brown had failed to orally remind him of his obligations under the LOR, noting that she rarely provided him with any

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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).

[8] Moreover, there is no evidence to suggest Ms. Flannigan had any knowledge of the LOR or the specific directives therein. Consequently, even assuming she did tell the appellant that she would work with his supervisor to process his leave request, this would not have satisfied the appellant's obligations under the LOR.

work-related instructions. AF, Tab 20 (HCD-appellant's testimony). The appellant's suggestion, however, is unavailing in light of the explicit and detailed instruction as provided in the LOR. In addition, the record demonstrates, as discussed above, that Ms. Brown clearly notified the appellant that she expected him to provide her with any leave-related requests and related documentary support for his absences. As such, the appellant was clearly on notice that he was expected to comply with leave protocol, which would have necessarily included the instructions provided in the LOR. *See also id.*, Tab 4, Subtab 4n (Reprimand).

In a related claim, he contends that Ms. Brown did not require him to comply with the terms of the LOR with regard to his initial absence stemming from his April 1, 2010 injury. AF, Tab 20 (HCD-appellant's testimony). As such, he appears to suggest he was under no obligation to comply thereafter. *Id.* The terms of the LOR make clear, however, that the directives therein "remain in effect for one (1) year" or until October 27, 2011. AF, Tab 4, Subtab 4m. Moreover, even assuming the appellant suspected that he was not obligated to comply with the terms of the LOR based on his earlier COP leave, he should have contacted Ms. Brown to confirm his suspicion rather than simply ignoring the relevant LOR directives.[9] For all of these reasons, the appellant's contention does nothing to excuse the misconduct as alleged Specifications 1 through 10.

Accordingly, based on this evidence, I find the agency proved by preponderant evidence the allegations and supporting specifications in Reason 1.

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[9] During her testimony, Dr. Brown stated that she did not become aware of the appellant's obligations under the LOR until June 2010. AF, Tab 20 (HCD-Brown testimony). She stated that she was out of the office on extended medical leave when the LOR was issued. *Id.*

Reason 2: Disrespectful Conduct to a Supervisor

To sustain a charge of Disrespectful Conduct, the agency must prove by preponderant evidence the employee committed the conduct as alleged and the conduct was disrespectful. *Miles v. Department of the Army*, 55 M.S.P.R. 633, 637 (1992). In support of Reason 2, the proposing official, Ms. Brown, alleged as follows:

> On June 21, 2010 I called you into my office to discuss your absence from June 7, 2010 through June 18, 2010 and your Letter of Requirement []. When I began to discuss your absence you yelled at me and slammed your cane on the floor. I wrote a statement, reference (f), immediately after this incident:
>
> > Mr. Gray started raising his cane and forcefully slamming it into the floor repeatedly. He stated that I need to quit lying. I went on to tell Mr. Gray that this was the same behavior and actions that he had in April when he was also held AWOL for failure to call in and no showed following his initial serving of the 10 days suspension ... Mr. Gray was exceptionally angry in face and body language when he bowed up and lurched towards me ... I asked Chief [of Police Michael] McKinney to take Mr. Gray out of my office.
>
> CDR Richard Tucker, your second level supervisor, was present during this incident. CDR Tucker wrote a statement, reference (g), immediately after this incident:
>
> > Mr. Gray began screaming, calling her [me] a liar, evil and a thief... Mr. Gray then continued yelling and made a lurch toward Dr. Brown... Throughout the entire tirade Mr. Gray was continually bouncing his cane on the floor.
>
> Additionally Cpl. James Liverette wrote in reference (h) that he heard you be verbally argumentative to me and called me a liar. Your actions on June 21, 2010 were disrespectful to me, your first level supervisor. The incident was also witnessed by your second level supervisor, CDR Tucker, and your co-worker, Cpl. Liverette. You yelled at me while slamming your cane on the floor and you lunged towards me in an aggressive manner. Therefore, you were disrespectful to a supervisor.

AF, Tab 4, Subtab 4d.

At the hearing, I listened to the testimony of Ms. Brown, CDR Tucker, Cpl. Liverette, Chief McKinney, Alice Evans, and the appellant, all of whom testified as to their observations relating to the incident as described above.

Ms. Brown testified that on June 21, 2010, she received notice that the appellant had returned to work after an extended absence. AF, Tab 20 (HCD-Brown testimony). That same afternoon, she met with the appellant and the Union Shop Steward, Alice Evans, in her office to discuss his unexcused absences. *Id.* CDR Tucker was also present during the meeting. *Id.* When Ms. Evans and the appellant arrived, the appellant was carrying a walking cane. *Id.* Ms. Evans sat down in a chair and invited the appellant to sit down. *Id.* Ms. Brown was seated behind her desk. *Id.* The appellant, however, did not want to sit and remained standing throughout the meeting in front of Ms. Brown's desk. *Id.*

Ms. Brown advised the appellant that he had been a "no show" for the past two weeks and provided the appellant with a copy of the LOR. AF, Tab 20 (HCD-Brown testimony). She also noted that it appeared he needed to request additional leave for upcoming physical therapy appointments and asked him what type of leave he would be requesting. *Id.* The appellant did not respond to her question but stated that he wanted to use Annual Leave for the period June 7 through June 18, 2010. *Id.* Ms. Brown told him he would be charged AWOL and, as the conversation continued, the appellant became extremely agitated. *Id.* He began to yell loudly at Ms. Brown and called her "evil" and a "liar." *Id.* He also began to slam his cane down forcefully on the ground. *Id.* The appellant continued to rant and yell at Ms. Brown and, after several minutes, lunged toward her as she sat behind her desk. *Id.* She stood up and attempted to move out from behind her desk because she felt trapped. *Id.* At that point, the appellant stepped in front of her. *Id.* She stopped and asked the appellant if he "had just lunged toward" her in anger. *Id.* The appellant continued to yell but did not answer her

question. *Id.* She asked him several more times whether he had moved towards her in anger but he did not answer. *Id.*

At that point, Chief McKinney and James Liverette came into Ms. Brown's office and removed the appellant. AF, Tab 20 (HCD-Brown testimony). Ms. Brown looked at Ms. Evans and said, "You saw what he just did." *Id.* According to Ms. Brown, Ms. Evans responded, "I sure did . . . he was out of control and he just needed to go." *Id.* Shortly thereafter, Ms. Brown prepared a written statement documenting the above-described incident and placed the appellant on administrative leave. *Id.*, Tab 4, Subtabs 4e and 4h. Her written statement is consistent with her testimony as described above. *Id.*

CDR Tucker, Cpl. Liverette, and Chief McKinney also testified at the hearing and their testimony was consistent in relevant part with Ms. Brown's. AF, Tab 20 (HCD-Tucker testimony). CDR Tucker and Cpl. Liverette also prepared written statements shortly after the incident documenting their observations and these written statements are consistent with their testimony. *Id.*, Tab 4, Subtabs 4f and 4g.

Contrary to the testimony described above, the appellant stated that during the discussion, he attempted to explain the circumstances relating to his absences to Ms. Brown and told him she did not want to hear about it. AF, Tab 20 (HCD-appellant's testimony). Ms. Evans told Ms. Brown she need to let him speak, and the appellant continued, "Mam, you are quite aware . . . Ms. Flannigan has assured me that she kept you [informed and] . . . had conversations with you about my status on several occasions." *Id.* Ms. Brown responded, "I don't know anything about it" and the appellant replied, "Why are you lying?" *Id.* Ms. Brown told him that she was going to carry him AWOL and appellant responded, "Mam, that is not true." *Id.* At that point, Ms. Brown "jumped up from out of her chair" and "came and got into [the appellant's] face" so that he could "feel her breath breathing upon [his] face." *Id.* Ms. Evans stepped between them and pushed the appellant toward the door. *Id.*

The appellant testified that contrary to agency's allegations, he did not raise his voice during this incident and he never called Ms. Brown evil, a thief, or anything of that sort. AF, Tab 20 (HCD-appellant's testimony). Instead, he simply asked her "why are you lying," after she denied that she had any knowledge of his OWCP claim relating to the June 2, 2010 surgery. *Id.* The appellant further testified that after Chief McKinney escorted him out of Ms. Brown's office, he asked the appellant, "What is going on?" *Id.* The appellant replied, "Sir, you've been quite aware of the fact that Cynthia Brown and Commander Tucker have been harassing me and I'm tired of it, it's been going on too long and I'm tired of it." *Id.* The appellant subsequently filed a temporary restraining order against Ms. Brown to keep her from harassing and provoking him in the future. *Id.*

Ms. Evans testified that she witnessed the entire incident and the appellant never yelled at Ms. Brown but rather Ms. Brown yelled at the appellant. AF, Tab 20 (HCD-Evan's testimony). She stated that the appellant never lifted or tapped his cane during the discussion because he would have "fallen on his face" because he just had knee surgery. *Id.* In addition, she noted that at one point, Ms. Brown refused to let the appellant speak and the appellant said, "Why are you lying on me." *Id.* Although she heard the appellant call Ms. Brown "an evil doer," he did not call her a thief and he never lunged or moved towards her as alleged. *Id.* In fact, she stated that the only movement the appellant made toward Ms. Brown during the discussion was when he turned his head in her direction. *Id.*

Once again, I am faced with a factual dispute and I have resolved this dispute based on my credibility determinations. At the hearing, I observed the demeanor of Ms. Brown, CDR. Tucker, Cpl. Liverette, and Chief McKinney and I find that their testimony was open, sincere, believable and unbiased. In addition, I note that their testimonial statements were consistent with their written

statements of record, which were prepared by Ms. Brown, CDR. Tucker, and Cpl. Liverette, on June 21, 2010, shortly after the incident.

On the other hand, I found the appellant's and Ms. Evans' testimony incredible. In addition to the observations relating to the appellant's testimony as it relates to Charge 1 as discussed above, I found his version of events as they relate to this charge inherently implausible and totally unbelievable. In addition, I find that Ms. Evans was not at all a credible witness. During her testimony, I observed her demeanor closely. She initially noted that she had trouble with her short term memory as a result of a head injury. AF, Tab 20 (HCD-Evan's testimony). In addition, on several occasions, she testified that she had witnessed events that she later admitted she never saw. *Id.* She appeared confused at times and repeatedly smiled, nodded, and gestured at the appellant during her testimony in a manner that suggested she had been coached. To that end, I found that much of her testimony appeared rehearsed and contrived. On the whole, I found her version of events completely incredible.

Based on this record, I find the agency demonstrated by preponderant evidence the misconduct as alleged in Reason 2.

Age Discrimination

The appellant alleged the agency's action was the product of prohibited age discrimination. AF, Tabs 1 and 19 (appellant's date of birth: September 10, 1961). Where, as here, the record is complete and the agency has articulated a legitimate, nondiscriminatory reason for the appellant's removal, the question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that agency intentionally discriminated against him. *Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 8 (2010). In order to prevail on an age discrimination claim under the Age Discrimination and Employment Act of 1967, the appellant must prove, by a preponderant evidence, that age was the "but-for" cause of the

challenged adverse action. *Bowman*, 113 M.S.P.R. 214, ¶ 8, citing *Gross v. FBL Financial Services Inc.*, --- U.S. ---, 129 S.Ct. 2343, 2352 (2009).

In support of his claim, the appellant testified that on two occasions in 2009, Ms. Brown made comments about his age that led him to believe his age may have played a role in the proposed removal action. AF, Tab 20 (HCD-appellant's testimony). First, he noted that in early 2009, one of his colleagues was involved in a dispute with an irate customer. *Id.* The appellant was present but did not intervene. *Id.* After the incident, Ms. Brown stated, "you're the oldest person, why didn't you diffuse the situation." *Id.* In a second incident two months later, Ms. Brown made a statement to the effect that the appellant was "the oldest one there." *Id.* The appellant testified that Ms. Brown "looked to him for leadership" because he was the oldest and most experienced employee but, on the other hand, "held these things against" him. *Id.*

I find that this evidence fails to demonstrate the appellant's age was the "but for" cause of the removal action. Moreover, Ms. Brown credibly testified that she did not know the appellant's age and that his age played absolutely no role in her decision to propose his removal. AF, Tab 20 (HCD-Brown testimony). Similarly, the deciding official in this action, Captain (CAPT) John Sears III, credibly testified that he had never met the appellant and did not know his age prior to issuing his decision. *Id.*, (HCD-Sears testimony). The appellant offered no evidence to refute this testimony.

Thus, based on this record, I find the appellant has failed to prove the agency's removal action was the product of age discrimination.

Race Discrimination

The appellant also contends the removal action was the product of race discrimination. AF, Tabs 1 and 19. The appellant is African American. *Id.* Because the agency has articulated a legitimate, nondiscriminatory reason for the appellant's removal, the question to be resolved is whether the appellant has

produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that the agency intentionally discriminated against him based on his race. *Burton v. U.S. Postal Service*, 112 M.S.P.R. 115, ¶ 9 (2009), citing *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983).

The appellant did not introduce any evidence to support his race discrimination claim. Instead, he suggested that his 10-day suspension which had preceded the removal action was the product of race discrimination and noted that he had filed an EEO complaint from the suspension action. AF, Tab 20 (HCD-appellant's testimony). At the hearing, Ms. Brown credibly testified that the appellant's race played no role in her decision to propose his removal. *Id.*, (HCD-Brown testimony). In addition, CAPT Sears credibly testified that he had never met the appellant and did not know his race prior to issuing his decision. *Id.*, (HCD-Sears testimony). Thus, after considering the entire record, I find no evidence to support a finding that the appellant's race played any role whatsoever in the agency's removal action.

Retaliation

The appellant also alleged the agency retaliated against him for filing an EEO complaint. AF, Tab 1 and 19. For an appellant to prevail on a claim of illegal retaliation, he has the burden of showing by preponderant evidence that: (1) he engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *See Agbaniyaka v. Department of the Treasury*, 115 M.S.P.R. 130, ¶ 15 (2010); *Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010); *Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, ¶ 15 (2001). In determining whether the appellant has established a nexus between the alleged retaliation and the adverse action, the

Board must weigh the intensity of the motive to retaliate against the gravity of the misconduct. *Jefferson v. U.S. Postal Service*, 81 M.S.P.R. 607, 610 (1999), citing *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

The Board has held that, to show retaliation through circumstantial evidence, an appellant must demonstrate a "convincing mosaic" of retaliation against him. *Agbaniyaka*, 115 M.S.P.R. 130, ¶ 16. Such a mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Id.*

Here, the appellant has alleged, apparently based solely on the timing of the removal action, that the agency's removed him in retaliation for his prior EEO activity. He testified that he filed an EEO complaint in October 2009[10] and the agency proposed his removal on July 13, 2010. AF, Tab 20 (appellant's testimony). The evidentiary record, however, provides no support for the appellant's allegations. As a preliminary matter, the record fails to demonstrate that Ms. Brown knew the appellant had been involved in any EEO activity at the time she proposed his removal and CAPT Sears credibly testified that he had no knowledge of this fact. *Id.*, Tab 20 (HCD-Brown and Sears testimony).

Even assuming retaliation could have been a motivating factor in the removal action,[11] the appellant has failed to establish that there is a genuine nexus

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[10] The appellant did not introduce a copy of his EEO complaint.

[11] *See Warren*, 804 F.2d at 658 (if agency officials have knowledge of or involvement in prior protected activity, and are also involved in the process of removing the employee, then an inference is raised of retaliatory motive sufficient to meet the third prong of the test).

between the alleged retaliation and the removal action. In determining whether the appellant has established such a nexus, the Board must weigh the intensity of the motive to retaliate against the gravity of the misconduct. *Jefferson v. U.S. Postal Service*, 81 M.S.P.R. 607, 610 (1999), citing *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). The proper perspective for this determination is the gravity of the misconduct as it appeared to the deciding official at the time he took the action. *Jefferson*, 81 M.S.P.R. at 612.

Here, I find the penalty imposed for the misconduct was reasonable in light of the relevant *Douglas* factors as discussed below. There is no evidence in this record to support or even suggest the relevant agency officials believed the alleged misconduct was unsubstantiated or that a lesser penalty was warranted under the circumstances. Moreover, the appellant failed to introduce any evidence to suggest the relevant officials possessed an intense motivation to retaliate based on the fact he had filed an EEO complaint in October 2009 and, as discussed above, I have concluded that Ms. Brown and CAPT Sears were credible witnesses that showed no sign of retaliatory animus toward the appellant.

Finally, the appellant failed to introduce any direct or circumstantial evidence to support a finding that the agency's stated reason for its action was pretextual. *See e.g., Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 18 (2008) (such evidence could include suspicious timing of the action at issue, ambiguous oral or written statements by the relevant officials, behavior towards or comments directed at other employees in the protected group, and evidence that employees similarly situated to the appellant have been treated better). In short, the appellant has failed to introduce evidence to show a "convincing mosaic" of retaliation (*Marshall*, 111 M.S.P.R. 5, ¶ 18), and I find no merit to his retaliation claim.

The agency properly considered all of the relevant aggravating and mitigating factors with regard to the penalty imposed and the penalty of removal does not exceed the tolerable limits of reasonableness.

Where, as here, all of the agency's reasons 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); *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 12, *review dismissed*, 135 F.3d 773 (Fed. Cir. 1997) (Table); *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 the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Id.*

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas*, 5 M.S.P.R. at 306. While not purporting to be exhaustive, the Board identified the following factors: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence

of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id.*, at 305-06.

In this case, the record demonstrates CAPT Sears properly and thoroughly considered all of the relevant *Douglas* factors when he concluded that removal was an appropriate and reasonable penalty for the misconduct at issue. *See* AF, Tab 4, Subtab 4b (Decision Letter); *id.*, Tab 20 (HCD-Sears testimony). In addition to his Decision Letter, wherein he discussed his considerations in this regard, he credibly testified that prior to making his decision to remove the appellant, he had carefully considered the relevant *Douglas* factors. *Id.*, Tab 20, (HCD-Sears testimony). Although he considered the appellant's federal service and satisfactory performance history in mitigation, he noted that the misconduct at issue was very serious,[12] particularly in light of the appellant's official duties.

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[12] The Board has held that disrespectful conduct to a supervisor is serious charge. *See e.g., Suggs v. Department of Veterans Affairs*, 113 M.S.P.R. 671, ¶ 8 (2010) (the Board held "[t]here can be no dispute that disrespectful conduct is a serious offense."), citing

Id.; *see also Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶ 10 ("The Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities."), citing *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999).

Further, he considered that the appellant had recently suffered a 10-day suspension for failure to follow instructions as well as a 3-day suspension for disrespectful conduct toward a supervisor in 1998.[13] *See* AF, Tab 4, Subtab 4b (Decision Letter); *id.*, Tab 20 (HCD-Sears testimony). Finally, he considered that the appellant had failed to demonstrate any remorse for his misconduct and therefore concluded, based on the totality of the evidence, that his potential for rehabilitation was lacking and his removal promoted the efficiency of the service. *Id.*

I find the facts upon which CAPT Sears relied in the context of his penalty analysis to be supported by the record and I conclude the agency demonstrated by preponderant evidence that it properly considered all of the relevant aggravating

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Ray v. Department of the Army, 97 M.S.P.R. 101, ¶ 58 (2004) ("[D]isrespectful conduct is unacceptable and not conducive to a stable working atmosphere, and ... agencies are entitled to expect employees to conduct themselves in conformance with accepted standards.") (internal citations omitted), *aff'd*, 176 Fed.Appx. 110 (Fed. Cir. 2006); *Lewis v. Department of Veterans Affairs*, 80 M.S.P.R. 472, ¶ 8 (1998) ("[I]nsolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once.").

[13] The undisputed record shows the agency issued the appellant a notice of proposed suspension identifying the facts supporting the charged misconduct and the appellant was permitted to dispute the action before a higher level of authority than the one that imposed the discipline. AF, Tab 4, Subtab 4l. I thus find the prior discipline was properly considered by the agency, and now by the Board, in determining the reasonableness of the removal penalty. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981).

and mitigating circumstances in the context of this action and that the penalty imposed does not exceed the bounds of reasonableness.

Conclusion

Accordingly, for the reasons discussed above, I find the agency demonstrated by preponderant evidence that the appellant engaged in the misconduct as alleged and I find that the penalty imposed was properly considered and does not exceed the bounds of reasonableness. In addition, I find the appellant failed to prove that the removal action was the product of race and/or age discrimination, or that it was taken in retaliation for his protected EEO activity. Therefore, the agency's action must be AFFIRMED.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Andrew Niedrick
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 30, 2011**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 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 the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. 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. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review 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).

If you file a 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. Your petition 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).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act,

42 U.S.C. § 2000e-16(c), must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

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.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

John E. Gray,
Petitioner,

v.

Ray Mabus,
Secretary,
Department of the Navy,
Agency.

Petition No. 0320110039

MSPB No. DC-0752-110022-I-1

DECISION

On July 1, 2011, Petitioner filed a timely petition with the Equal Employment Opportunity Commission asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning his claim of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons we Concur with the MSPB's finding that Petitioner failed to show that discriminatory animus was considered with regard to the Agency's decision to remove him from federal employment.

BACKGROUND

At the time of events giving rise to this mater, Petitioner worked as a Security Assistant at the Agency's Office Automation facility at the Navy Yard, in Washington, D.C. Petitioner was issued an official written reprimand on May 18, 2009, for his failure to follow instructions and for being absent without leave (AWOL). To support the reprimand, it was noted that Petitioner on two occasions had failed to follow his supervisor's instructions with regard to leave procedures and had been AWOL on four separate occasions. On September 24, 2009, a seven-day suspension was proposed for Petitioner's failure to again comply with leave procedures. In lieu of a suspension, Petitioner was issued a Letter of Requirement (LOR). In pertinent part, the LOR "directed" the Petitioner to contact his supervisor whenever he anticipated being tardy or when he was unable to report for duty. The LOR further provided that he was to contact and speak directly to his supervisor before 0600 hours on the date of his absence or tardiness, it was noted that he was not permitted to leave a voicemail or have a friend or family member contact the supervisor on his behalf. If Petitioner was unable to reach his supervisor he was to call the Director of Operations. Petitioner was notified that his failure

Enclosure (1)

to adhere to the procedures outlined in the letter would result in disciplinary action up to and including his removal from Federal service.

On March 29, 2010, Petitioner was issued a suspension for 10 days for failing to follow instructions. Before he could serve the suspension, Petitioner suffered a work-related injury to his knee. He was granted continuation of pay by the Office of Worker's Compensation Program (OWCP) for the entire month of April 2010. As such, his suspension dates were rescheduled. Thereafter, he was scheduled to be suspended from duty from May 26, 2010 through June 4, 2010. Petitioner was directed to return to work on June 7, 2010. Petitioner failed to return to work and was absent through June 18, 2010. He also failed to contact his supervisor regarding his absence as was required by the terms of the LOR. The record reveals that during this period of time Petitioner was absent because he had knee surgery for a torn meniscus. Petitioner provided medical documentation regarding this absence to the Human Resources Specialist who was handling his OWCP claim but failed to provide this information to his supervisor. Petitioner argued that he believed that the Human Resources Specialist would pass this information along to his supervisor. The Human Resources Specialist maintained that she told Petitioner that she was not allowed to divulge this information and therefore he needed to contact his supervisor.

When Petitioner returned to work his supervisor asked to meet him in her office. Petitioner's supervisor questioned him and asked him for an explanation for his absence, voices were raised and the supervisor indicated that Petitioner called her a liar and other names and she believed that Petitioner lurched at her while she was sitting behind her desk.

In a letter dated July 13, 2010, the Agency proposed Petitioner's removal because he failed to follow instructions and engaged in disrespectful conduct toward his supervisor. Petitioner did not submit a letter in response. Therefore, in a letter dated August 30, 2010, the Agency removed him from his position effective September 6, 2010.

Thereafter, Petitioner filed an appeal with the MSPB for wrongful termination. He also alleged that the Agency discriminated against him on the bases of age (49), race (African American), and in reprisal for prior EEO activity when on September 6, 2010, he was removed. Petitioner maintained that his age was considered in the decision to remove him because on two occasions in 2009, his supervisor made comments about his age. In the first instance, in early 2009, one of Petitioner's colleagues was involved in a dispute with an irate customer and Petitioner did not intervene. Following the incident, his supervisor asked Petitioner why he had not intervened and she stated, "you're the oldest person, why didn't you diffuse the situation." Two months later, the second incident occurred. Petitioner's supervisor again mentioned that he was the "oldest one there." Petitioner testified that his supervisor "looked to him for leadership" because he was the oldest and most experienced employee but, on the other hand she "held these things against" him.

Petitioner also maintained that the removal action was the product of race discrimination. He did not however, introduce any evidence to support his race discrimination claim. He

mentioned however that he believed the 10-day suspension which preceded the removal action was the product of race discrimination but again he did not elaborate.

An MSPB Administrative Judge (AJ) held a hearing and issued an initial decision affirming the Agency's removal action. The AJ found that the Agency had articulated legitimate, nondiscriminatory reasons for its actions, namely, that the removal was proposed because Petitioner failed to comply with leave procedures and the LOR directives. Further, with regard to Petitioner's allegation of age discrimination, the AJ found that Petitioner had not shown that his age was considered or that the Agency's articulated legitimate, nondiscriminatory reasons were pretext for discrimination. Furthermore, with regard to Petitioner's claim of race discrimination, the AJ determined that the Petitioner failed to provide any evidence that his race was considered with regard to the removal decision. In fact, the AJ noted that the management official that ultimately signed-off on Petitioner's removal was not aware of Petitioner's race.

Finally, with regard to Petitioner's claim of retaliation, the AJ found that Petitioner apparently based his reprisal claim solely on the timing of the removal action. Petitioner filed an EEO complaint in October 2009, and the Agency proposed his removal on July 13, 2010. The AJ found that Petitioner failed to show the necessary nexus between these events, as no testimony was entered which showed that his supervisor or the concurring official had knowledge of Petitioner's EEO complaint. The AJ found that there was no evidence in the record to support or even suggest that the relevant Agency officials believed the alleged misconduct was unsubstantiated or that a lesser penalty was warranted under the circumstances. The AJ found that Petitioner failed to introduce any direct or circumstantial evidence to support a finding that the Agency's stated reason for its action was pretextual.

Accordingly, the AJ found that the Agency demonstrated by preponderant evidence that the Petitioner engaged in misconduct and that the penalty imposed was properly considered and did not exceed the bounds of reasonableness. The AJ also found that Petitioner failed to prove that the removal action was the product of race, age and/or reprisal.

Petitioner did not seek review by the full Board. He appealed directly to the EEOC. On appeal, Petitioner makes no new arguments.

ANALYSIS AND FINDINGS

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

In the instant case, the Commission finds that even if we assume arguendo that Petitioner established a prima facie case of race and age discrimination and retaliation for prior EEO activity, we find that the Agency has articulated a legitimate, nondiscriminatory reason for its action, namely, that Petitioner was removed from his position because he failed to follow the LOR directives, the leave requirements of the office and the instructions of his supervisor. We find that Petitioner has provided no evidence and the record does not show that the Agency's articulated reason was pretext for prohibited discriminatory animus. We find that Petitioner failed to demonstrate that his race, age, and/or prior EEO activity were considered with regard to the Agency's decision to remove him. Accordingly, we Concur with the MSPB's decision finding no discrimination.

CONCLUSION

Based upon a thorough review of the record, it is the decision of the Commission to CONCUR with the final decision of the MSPB finding no discrimination. The Commission finds that the MSPB's decision constitutes a correct interpretation of the laws, rules, regulations, and policies governing this matter and is supported by the evidence in the record as a whole.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney

with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden

Carlton M. Hadden, Director
Office of Federal Operations

FEB - 8 2012

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

John E. Gray
2604 Ryder Ave
Forestville, MD 20747

Lathal Ponder, Esq.
1111 - 14th St NW
Washington, DC 20005

William A. Navas Jr., Asst. Secretary, MRA/EEO
(NAVOECMA) OCHR Code 015
Department of the Navy
614 Sicard St., SE #100
Washington Navy Yard, DC 20374-5072

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

FEB - 8 2012
Date

Equal Opportunity Assistant