2018-2195

In The
United States Court of Appeals
For The Federal Circuit

JEFFREY F. SAYERS,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

PETITION FOR REVIEW OF THE MERIT SYSTEMS PROTECTION BOARD IN NO. SF-0714-18-0067-I-1.

BRIEF OF PETITIONER

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CERTIFICATE OF INTEREST

Petitioner, Jeffrey F. Sayers, by and through his undersigned attorney, states his Certificate of Interest as follows:

1. The full name of the party represented by the attorney in the case.

Response. Jeffrey F. Sayers.

2. The name of the real party in interest.

Response. The party named in the caption is the real party in interest.

3. The corporate disclosure statement prescribed in Rule 26.1.

Response. The Petitioner is not a corporate entity interest.

4. The names of the law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Response. From Whistleblower Law Firm, P.A., Mr. James Solomon and Mr. Daniel Maharaj. From Hill Ward Henderson, Mr. Matthew Hall.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

Response. This is an appeal from Sayers v. DVA, MSPB case no. SF-0714-18-0067-I-1. Petitioner has a pending case before the EEOC, No. 200P-0691-2018100356, that is not directly related to this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

U.S. Courts of Appeals Cases

D.C. Circuit Court of Appeals

Merit Systems Protection Board Cases

Constitutional Provision

United States Code

Code of Federal Regulations

Administrative Materials

Other Authorities

RULE 47.5 STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for Petitioner is unaware of any related matters currently pending before it.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that oral argument is not necessary as the facts and legal arguments will be adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the United States Circuit Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703(b)(1)(A). *See also* 38 U.S.C. § 714(d)(5). This Court may hear a petition for review of a final decision of the Merit Systems Protection Board (the "Board" or the "MSPB") that is received within 60 days from the day that the Board's decision become final. Petitioner, Jeffrey F. Sayers, Pharm.D., timely filed this appeal on July 23, 2018.

STATEMENT OF THE ISSUES

1. Whether the Respondent, the Department of Veterans Affairs, lacked statutory authority to apply 38 U.S.C. § 714 retroactively to remove Dr. Sayers and whether the Board lacked subject matter jurisdiction to review such a decision.

2. Whether the deciding official, Director Ann R. Brown, erred in applying substantial evidence—traditionally and practically an appellate standard of review—in reaching the initial decision to remove Dr. Sayers.

3. Whether Administrative Judge Samantha J. Black erred in determining the Board lacks authority to scrutinize the reasonableness of the Agency's penalty.

4. Whether Director Brown's choice to remove Dr. Sayers, as well as her underlying penalty analysis, was arbitrary and capricious. Specifically whether it was arbitrary and capricious to weigh specifications that were not sustained as aggravating factors to justify removal.

5. Whether Director Brown erred in weighing alleged misconduct, which was not included in the specifications, as an aggravating factor justifying removal.

6. Whether Director Brown erred in weighing an admonishment that was either successfully grieved back in 2012, or otherwise had been removed from Dr. Sayers's Official Personnel File in 2014, as an aggravating factor justifying removal.

7. Whether the Agency complied with Merit Systems Principles when it (i) failed to provide Dr. Sayers with a performance plan, (ii) provided Dr. Sayers with excellent and outstanding performance reviews through fiscal year 2015, (iii) failed to provide Dr. Sayers with a performance appraisal in FY 2016 and 2017, and (iv) and then removed Dr. Sayers without attempting to train Dr. Sayers and/or correct alleged deficiencies.

8. Whether the lack of statutory authority to extend deadlines to reply to 38 U.S.C. § 714 actions impermissibly restricts due process.

9. Whether Dr. Sayers was afforded a meaningful opportunity to respond, as required by the Due Process clause, after (i) Director Brown and AJ Black reviewed the proposal for substantial evidence; and (ii) AJ Black held that the Board lacked authority to scrutinize the deciding official's penalty analysis.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the "Act") expands the ability of the Secretary of Veterans Affairs (the "Secretary") to remove, demote, or suspend certain employees of the

Department of Veterans Affairs for performance or misconduct. *See* P.L. 115–41, June 23, 2017, 131 Stat. 862; 38 U.S.C. §§ 713, 714, 7462 (2017). The Act is silent as to retroactive effect. *Id.*

The Act does not supersede the existing removal procedures found at 5 U.S.C. §§ 4303 (performance) or 7513 (misconduct), but adds alternative procedures that the Agency may elect to utilize for *both* performance and misconduct. 38 U.S.C. § 714. Most notably, when compared to the existing procedures for misconduct charges, the removal procedures found at 38 U.S.C. § 714:

(i) Reduce the standard of review from preponderance of the evidence to substantial evidence. *Compare* 38 U.S.C. §§ 714(d)(2)(A), (3)(B), *with* 5 U.S.C. § 7701(c)(1)(b).

(ii) Prohibit the MSPB from mitigating the Agency's penalty if it finds the decision is supported by substantial evidence. *Compare* 38 U.S.C. §§ 714(d)(2)(B), (d)(3)(C), *with Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 304 (1981); and

(iii) Sets strict timelines for (A) an employee to reply to the proposed action without providing any statutory authority to extend deadlines for cause; (B) the Agency to decide on the proposed action; and (C) the MSPB to review the Agency's decision. *Compare* 38 U.S.C. §§ 714(c)(1), (2), (d)(4), *with* 5 U.S.C. § 7513(b)(2), (4).

Rather than use the existing the existing Title 5 procedures to remove Dr. Sayers, the Agency elected to utilize the alternative procedures provided by the Act. However,

all alleged misconduct occurred entirely before the Act was signed, meaning the Agency impermissibly applied the Act retroactively. Appx55–58, Appx84.

Further, both the Agency's and the Board's application of the new procedures are plagued by abuses resulting from erroneous interpretations of the statute. Director Brown applied the substantial evidence standard to her initial decision. Appx51 ¶1. AJ Black held that the Board lacked authority to evaluate the reasonableness of Director Brown's penalty and penalty analysis. Appx42. The deciding official chose a penalty based on aggravating factors that are contrary to her own findings and the Agency's table of penalties. *See infra* Part VIII; Appx51.

Finally, the Act has fundamentally deprived Dr. Sayers of any meaningful opportunity to respond required by the Due Process clause. *See infra* Part IX.

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW.

1. Dr. Sayers was employed with the Department of Veteran Affairs as a Pharmacist for 37 years and was made the Chief of Pharmacy Service for the Greater Los Angeles Healthcare System (VAGLAHCS) on or about 2003. Appx64–70.

2. Throughout his tenure with the Agency, Dr. Sayers was a model employee. He received all excellent or outstanding ratings on his annual performance reviews and he has never had any reported performance issues. *See*, *e.g.*, Appx92–118, Appx139–147. With the exception of the instant removal and possibly an admonishment, as discussed below, Dr. Sayers has never been disciplined. Appx64–70.

3. On July 8, 2016, Dr. Sayers was detailed from his role as Chief of Pharmacy Service to the Quality Management Office, at which point he was no longer responsible for the pharmacy service. Appx84.

4. On October 6, 2017, Dr. Scotte R. Hartronft, Chief of Staff for VAGLAHCS, issued Dr. Sayers a proposed removal under the authority of 38 U.S.C. § 714. Appx55-59. The proposal consisted of two charges, Charge A was for failure to perform assigned duties and was supported by 12 specifications. Appx55–58. Charge B was for failure to follow instructions and supported by a single specification. Appx58. All specifications arose while Dr. Sayers was the Chief of Pharmacy (*i.e.*, on or before July 8, 2016). Appx55–58, Appx84.

5. On November 1, 2017, VAGLAHCS Director Brown issued the decision to remove Dr. Sayers, effective November 7, 2017. Appx51–53.

6. In her decision letter, Director Brown "found that the charges and all of the specifications, except Charge A, Specifications 1,2 [sic] & 8 . . . were supported by substantial evidence." Appx51.

7. Regarding Specification 2, Director Brown testified that the alleged conduct was not sustained because "there had already been an admonishment." Appx150:21–151:4. She goes on to specifically reference Dr. Sayers's response, which explained that a proposed admonishment had been issued, but that he had replied and never received a final Agency decision. Appx151:7–10; *see also* Appx78–79 ("Dr. Sayers' [sic] received a proposed admonishment to which a response was also provided to,

however, Dr. Sayers never received any final decision regarding his response to the proposed admonishment—showing management acquiescing to his defense to the proposed admonishment.").

8. The admonishment was provided to Dr. Sayers on August 1, 2012, and Dr. Sayers grieved the admonishment on August 2, 2012. Appx86–87, Appx89–90. There was never a response to the grievance and it was Dr. Sayers's understanding that his grievance had been successful. Appx79. Regardless, the admonishment was to be removed from Dr. Sayers's Official Personnel Folder after July 3, 2014. Appx87.

9. In her decision letter, Director Brown wrote, "[t]his decision also takes into consideration the aggravating factors considered by the proposing official in determining an appropriate penalty, as stated in paragraph 2 of the proposed removal letter, and attachments, including your past disciplinary record." Appx51 ¶3.

10. On November 9, 2017, Dr. Sayers appealed the Agency's removal decision to the Board and the appeal was assigned to AJ Black. Appx72.

11. AJ Black found that Charge A, Specification 7 was not supported by substantial evidence and could not be sustained, but found that Specifications 3–6 and 9–12 were sufficient to uphold Charge A. Appx23-29. AJ Black also found that the Agency "proved the gravamen of [Charge B] by substantial evidence." Appx31.

12. On May 23, 2018, AJ Black's decision became the final decision of the Board. Appx42.

III. SUMMARY OF THE ARGUMENT.

Dr. Sayers was detailed from his position as Chief of Pharmacy on July 8, 2016, but no proposed removal action was brought in the year to follow because it would fail under existing Title 5 procedures. Only after the passage of the Act did the Agency put together the proposed removal; the clear intent was to use the new procedures found at 38 U.S.C. § 714 to fire Dr. Sayers, despite the fact that the Act is not retroactive and the Agency lacked the statutory authority to bring the instant action for conduct that arose exclusively before the Act was passed.

Director Brown made the initial decision using the substantial evidence standard—an appellate standard of review—as a substitute for a burden of proof. This clearly erroneous interpretation of the Act has been adopted by the Agency and is being utilized to rubber stamp proposed disciplinary actions. Applying a lesser burden of proof is an error that cannot be remedied through the harmful error analysis and requires remand.

Administrative Judge Black has taken the position that the Act precludes the Board from scrutinizing excessive penalties. This is contradictory to the Board's guidance in *Douglas*, which is still partially guiding, as well as Administrative Law Judge McLaughlin's recent and in depth analysis in *Walls*. The Board should have accessed the reasonableness of the penalty, especially given that Director Brown's penalty analysis is arbitrary and capricious on its face. Director Brown considered specifications that she herself did not sustain as aggravating factors justifying removal. She further

considered an admonishment that was either successfully grieved or otherwise expired. She also considered an allegation of misconduct that was not actually a specification in the proposed disciplinary action. To issue such a harsh penalty without any attempt to correct Dr. Sayers's alleged deficiencies, despite his excellent and outstanding appraisals, is contrary to the Merit Systems Principles.

The Act, as well as the Agency's application, has completely undermined constitutional Due Process as Dr. Sayers was deprived a meaningful opportunity to respond.

Unlike the Title 5 procedures, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the history of American jurisprudence generally, the Act gives no statutory authority to grant an extension when responding to an action seeking to deprive an individual of life, liberty, or property. The Agency granted an extension without statutory authority because it knew the timeline to respond was far too short for the complexity of the proposal and evidence file. This made the Agency late in issuing their decision. The cure would be to simply apply the existing Title 5 procedures, which the Agency may elect to use at their discretion.

The reduced burden of substantial evidence, as applied by both the deciding official and the administrative judge, means nobody applied true discretion and/or objective reasonableness at any point before or after removing Dr. Sayers. AJ Black's position that the Board cannot scrutinize an unreasonable penalty Director Brown to disregard any mitigating circumstances presented in Dr. Sayers's response.

IV. ARGUMENT.

V. STANDARD OF REVIEW.

This Court "shall review the record and hold unlawful and set aside any action, finding, or conclusion found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) obtained without procedures required by law, rule, or regulation having been followed; or (C) unsupported by substantial evidence." 38 U.S.C. § 7462(f)(2); *see also* 38 U.S.C. § 714(d)(5)(B); *Curtin v. Office of Pers. Mgmt.*, 846 F.2d 1373, 1376 (Fed. Cir. 1988).

An Agency's decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law if it lacks a "rational connection between the facts found and the choice made." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992); *see also Sierra Pacific Indus. v. Lyng*, 866 F.2d 1099, 1105 (9th Cir. 1989) (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A decision is not supported by substantial evidence "if it is not supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002); *see also* 5 C.F.R. § 1201.4(p).

The Court reviews the Board's determinations of law for correctness without deference to the Board's decision. *McEntee v. MSPB*, 404 F.3d 1320, 1325 (Fed. Cir. 2005). Whether the Board has jurisdiction over an appeal is a question of law that the court reviews *de novo*. *See, e.g., Forest v. MSPB*, 47 F.3d 409 (Fed. Cir. 1995).

If an agency breaches a constitutional requirement, then the disciplinary action cannot stand as the employee must be afforded a constitutionally correct proceeding. *See Ward v. U.S. Postal Service*, 634 F.3d 1274, 1281–82 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375–77 (Fed. Cir. 1999).

VI. THE AGENCY LACKED STATUTORY AUTHORITY TO REMOVE DR. SAYERS UNDER THE ACT BECAUSE IT IS NOT RETROACTIVE; THE BOARD LACKED SUBJECT MATTER JURISDICTION TO ENFORCE SUCH A DECISION.

The Act is not retroactive and therefore the Agency lacked the requisite statutory authority to remove Dr. Sayers under 38 U.S.C. § 714 for conduct that occurred entirely prior to June 23, 2017, the day the Act was signed. *See* P.L. 115–41, June 23, 2017, 131 Stat. 862; 38 U.S.C. § 714 (2017).

When determining whether a law is retroactive, the Merit Systems Protection Board relies upon the Court's guidance in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *See Day v. Department of Homeland Security*, 119 M.S.P.R. 589 ¶7-9 (2013) ("[T]he proper analytical framework for determining whether a new statute should be given retroactive effect was set forth by the Supreme Court in *Landgraf*.").

As the Court explained, "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Landgraf*, 511 U.S. at 270. The presumption against retroactivity is especially strong where the new law affects property rights. *See id.* at 271. ("The largest category of cases in which we have applied the presumption against statutory

retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

Employment with the Agency is a property right. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538–39 (1985); *Stone*, 179 F.3d at 1374 ("If the government gives a public employee assurances of continued employment or conditions dismissal only for specific reasons, the public employee has a property interest in continued employment.").

If the Act "'impair[s] rights a party possessed when he acted, increases a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed,' it should not be applied retroactively." *Walls v. Dep't of Veterans Affairs*, PH-0714-17-0444-I-1, 2018 WL 1467188 (Mar. 19, 2018) (*quoting Landgraf*, 511 U.S. at 280).

The Act, which is silent on retroactivity, provides removal procedures that may be used as an alternative to the procedures found at 5 U.S.C. Ch. 75, but does not preclude the continued use of those preexisting procedures. *See* 5 U.S.C. § 7513; 5 C.F.R. § 752 Subpart D; *see also* 5 U.S.C. §§ 7511(a)(1)(A), (b)(10); 38 U.S.C. § 7401(3); 5 C.F.R. §§ 752.401(c)(8), (d)(8).

The legal argument as it relates specifically to the Act has already been articulated by Administrative Law Judge McLaughlin, who explained:

> If the VA Accountability Act was applied to this period of performance, which predated its enactment, then the appellant's rights would be detrimentally impacted. That is because under the VA Accountability Act the agency is only required to prove the alleged misconduct by substantial

> evidence, whereas, under Chapter 75, the agency used to have to prove misconduct by the higher preponderance of the evidence standard. Moreover, unlike removals taken under Chapter 75, the VA Accountability Act prohibits administrative judges from being able to mitigate the penalty chosen by the Deciding Official. 38 U.S.C. § 714(d)(2)(B). Given the VA Accountability Act significantly impairs the appellant's rights, and also increases her liability for her conduct, I find the presumption against retroactivity applies in this case. Therefore, I will not consider any performance the agency alleges to be unsatisfactory if it predates June 23, 2017.

Walls, 2018 WL 1467188; *see also Patton v. Dep't of Veterans Affairs*, No. DC-0432-17-0363-I-1, 2017 WL 3476935, at n.1 (2017).

Regarding the instant removal action, all specifications under Charge A specifically relate to Dr. Sayers's performance as the Chief of Pharmacy. Appx55–57 (all specifications occurred "under [Dr. Sayers's] oversight as Chief of Pharmacy"). Charge B makes it clear that the underlying conduct occurred sometime before June 29, 2016. Appx57. Dr. Sayers was detailed from his position of the Chief of Pharmacy on July 8, 2016. Appx84.

Unlike the matter before ALJ McLaughlin, where a portion of the charges arose after the date the Act was signed, here *all* of the conduct giving rise to the removal action occurred on or before July 8, 2016. *See Walls*, 2018 WL 1467188. For the forgoing reasons, the Agency lacked statutory authority to remove Dr. Sayers under 38 U.S.C. § 714. Consequentially, the Merit Systems Protection Board lacked the requisite subject matter jurisdiction to enforce the removal decision under 38 U.S.C. § 714.

VII. THE AGENCY AND THE BOARD HAVE MISINTERPRETED AND MISAPPLIED THE BURDEN OF PROOF IN INITIAL DECISIONS UNDER THE ACT.

The Agency has taken the position that the Secretary's burden under 38 U.S.C. § 714(a)(1) is substantial evidence. *See* VA Handbook 5021/26 (June 4, 2018) ("When taking a disciplinary action against an employee covered by this part, the [Agency] bears the burden of proving by substantial evidence the charges that form the basis for the action."). In her decision letter, Director Brown specifically states that she found the charges supported by substantial evidence. Appx51 ¶1.

The Act clearly states that the Agency's decision will be reviewed by the administrative judge under the substantial evidence standard, but in no way does it suggest that the Secretary or their designee may issue a decision under a substantial evidence standard. 38. U.S.C. § 714(d)(2)(B). The statute is clear that "[t]he Secretary may remove, demote, or suspend a covered individual who is an employee of the Department **if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension**." *Id.* at § 714(a)(1) (emphasis added). The Agency's interpretation is contrary to the plain meaning of the statute.

A. The Agency's interpretation is inconsistent with the clear intent of Congress and the plain meaning of the statute.

As defined, substantial evidence means, "[t]he degree of relevant evidence that a reasonable person . . . might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than

As the Board explains, absent an authority to mitigate, the Board must still evaluate whether a penalty is unreasonably excessive. *Id.* at 286. However, an employee's recourse for an unreasonably excessive penalty would be remand rather than mitigation. *Id.* ("If we were to conclude that the Board must remand cases involving excessive penalties to the employing agency for selection and imposition of a new penalty by that agency, then a renewed appeal to the Board to review the new penalty must be allowed, as OPM, the agencies, and AFGE concede.").

As the Board explains, "an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction." *Id.* at 297 (*citing Doe v. Hampton*, 566 F.2d 265, 271–72 n. 15 (D.C. Cir. 1977); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974)). Though the new standards in § 714 may alter the Board's standard of review, this Court must still overturn a Board decision that is arbitrary, capricious, or otherwise not in accordance with law. *See* 38 U.S.C. §§ 714(d)(5)(B), 7462(f)(2).

The Board continues, "[a]t all events the Board must exercise a scope of review adequate to produce results which will not be found 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' when reviewed by appellate courts[.] . . . To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges

sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty 'was based on a consideration of the relevant factors and [that] ... there has [not] been a clear error of judgment.'" *Douglas*, 5 M.S.P.R. 301–02 (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971)).

The Board further explains that the Office of Personnel Management's mandate that, "[a]ny disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense" and that, "Agencies should give consideration to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such other matters as mitigating circumstances, the frequency of the offense, and whether the action accords with justice in the particular situation." *Douglas*, 5 M.S.P.R. at 303–04 (citation omitted).

Following these explanations regarding the need for fair and lawfully supported penalties—and not found within the Board's discussion on their authority to mitigate—the Board introduced the non-exhaustive list of twelve factors to be considered when selecting an appropriate and legally supported penalty, now constituting the well-known *Douglas* Factors. *Id.* at 305. The Board plainly states that, "[t]he Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes", but rather, "the Board's review of an agency-imposed penalty is essentially to assure that the agency did

conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." *Id. at* 306.

Further, the Agency's and Board's interpretation is unconstitutional. *See Stone*, 179 F.3d at 1376 ("[T]he Supreme Court expressly recognized that the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate."). If the deciding official is free to issue an excessive penalty that is outside the "tolerable limits of reasonableness," even after the employee is able to articulate why such a severe penalty is excessive, then the employee is without a meaningful opportunity to respond. *Cf. id.*

Though statute has clearly superseded the Board's ability to mitigate penalties in 38 U.S.C. § 714 actions, the Act neither altered the Board's duty to consider whether the Agency's penalty is unlawfully excessive in light of *Douglas*, nor alleviated the deciding official's duty to apply the *Douglas* Factor analysis to determine the appropriateness of the penalty. An appropriate reading of *Douglas* in conjunction with § 714 is that, if the Board finds that the deciding official did not consider the *Douglas* Factors or finds that the deciding official's penalty analysis is unreasonable on a substantial evidence standard and/or arbitrary and capricious, then the Board must remand rather than mitigate.

IX. REGARDLESS OF WHETHER THE AGENCY AND THE BOARD ERRED IN FAILING TO APPLY THE *DOUGLAS* FACTORS, DIRECTOR BROWN'S REMOVAL DECISION IS ARBITRARY AND CAPRICIOUS.

In her decision letter, Director Brown wrote, "[t]his decision also takes into consideration the aggravating factors considered by the proposing official in determining an appropriate penalty, as stated in paragraph 2 of the proposed removal letter, and attachments, including your past disciplinary record." "Appx51 ¶3."

Substituting in language from Dr. Hartronft's proposal, Director Brown's discipline analysis, on its face, lacks a "rational connection between the facts found and the choice made." *Cf. Nat. Res. Def. Council, Inc.*, 966 F.2d at 1297. The following is a list of each proffered aggravating factor, followed by a statement as to whether the corresponding specification was actually sustained; proffered aggravating factors that were not sustained or that are otherwise objectively erroneous are italicized:

i. "R*emoval is appropriate in your case because your actions resulted in wasted resources including a $7,000,000 loss due to over-purchasing.*" Appx58 ¶2. This mirrors Charge A, Specification 1, which Director Brown did not sustain. Appx51, Appx55.

ii. "*Additionally, four Veterans were harmed due to lack of training and oversight of the Pharmacy Service.*" Appx58 ¶2. This mirrors Charge A, Specification 2, which Director Brown did not sustain. Appx51, Appx55.

iii. "Further, Security of pharmaceuticals and narcotics were compromised under your oversight, *and outdated drugs were kept in inventory posing potential danger to patients.*" Appx58 ¶2. The security of pharmaceuticals and narcotics is addressed in

Charge A, Specifications 3 and 4, which Director Brown did sustain, however the fact that outdated drugs were kept in inventory and that this posed potential danger to patients is entirely unrelated to any allegations contained in the proposed charges. Appx51, Appx55–56.

iv. "Your failure to follow instructions led to patients having medications discontinued[.]" Appx58 ¶2. This mirrors Charge B, which Director Brown sustained. Appx51, Appx58.

v. "*[Y]our failure to train supervisors properly on the process of reporting controlled substance losses created a greater risk of un-noticed narcotic diversion.*" Appx58 ¶2. This mirrors Charge A, Specification 7, which Director Brown sustained but Administrative Judge Black found to be unsupported by substantial evidence. Appx23, Appx51, Appx57.

vi. "*[Y]our past disciplinary record.*" Appx51 ¶3. As discussed previously, the proposed admonishment Director Brown is referencing was either successfully grieved or expired.

A. Director Brown erred in considering a successfully grieved and/or expired admonishment.

Director Brown committed incurable error when she considered an admonishment that was, at best, expired and, at worst, set aside following a successful grievance. "When an agency intends to rely on aggravating factors, such as prior discipline, as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action[.]" *Lopes v. Dep't of the Navy*, 116 M.S.P.R. 470,

473 ¶5 (2011) (citing *Vena v. Department of Labor*, 111 M.S.P.R. 165, ¶ 9 (2009); *Douglas*, 5 M.S.P.R. at 304).

"Similarly, it is improper for a deciding official to rely on an employee's alleged negative past work record in determining the penalty when the employee was not disciplined for the purported misconduct[.]" *Lopes*, 116 M.S.P.R. at 473 ¶5; *see also Merten v. USPS* (Fed. Cir. 1998 NP No. 98–3284)[3].

Director Brown should never have been presented with the allegations found at Charge A, Specification 2. *Cf. Transclean Corp. v. Jiffy Lube Int'l, Inc.*, 474 F.3d 1298, 1304-05 (Fed. Cir. 2007) (A disciplinary action is barred if "it [arose] out of the same nucleus of operative facts as the previous [disciplinary action]."). To rely on the overturned or expired admonishment as an aggravating factor justifying removal is incurable error. *Cf. Merten v. USPS* (Fed. Cir. 1998 NP No. 98–3284).

Director Brown clearly erred in considering a past admonishment—that Dr. Sayers either successfully grieved or had expired and that was never included as an aggravating factor in the proposal letter—as an aggravating factor justifying removal in her decision letter. Appx51, Appx55–59. For this reason alone, "the [A]gency's

[3] In *Merten v. USPS* (Fed. Cir. 1998 NP No. 98–3284), the Federal Circuit explained that, "If Mr. Merten is correct on the facts [that the proposal letter listed an expunged disciplinary action as an aggravating factor] . . . then the agency's decision to remove him cannot stand, because it would be infected with the harmful error of a false allegation of prior discipline. . . . [T]he error, if proven by the facts, would compel the agency to retreat to square one, to decide as a matter of first impression whether the facts concerning Mr. Merten's accident—a single incident for the occasion of discipline—warrant a recommendation and decision of removal."

decision to remove him cannot stand, because it would be infected with the harmful error of a false allegation of prior discipline." *Merten v. USPS* (Fed. Cir. 1998 NP No. 98–3284); *see also Lopes*, 116 M.S.P.R. at 473 ¶5.

B. Director Brown's penalty analysis was arbitrary and capricious.

Director Brown stated that removal was appropriate, largely for reasons that she herself found were not substantiated. Appx51. Further, Director Brown erred when she considered the alleged existence of out of date medications as an aggravating factor, as this allegation was not a specification in the proposed removal.

The Director's completely contradictory logic is inconsistent with the Agency's own table of penalties. Appx61–62. Both Charges closely mirror the penalty of "[d]eliberate failure or unreasonable delay carrying out instructions." Appx61. A first offense ranges from an admonishment to a reprimand, but it appears that Director Brown accelerated this to a third offense—or otherwise ignored the table altogether—despite no applicable first offence. The Agency's guidance provides that "[u]sually progressively more severe penalties will be administered before discharge action is initiated, unless the offense is so serious that it warrants discharge action." Appx61.

C. Removal is inconsistent with Merit Systems Principles.

Even when brought as misconduct, a charge that relates to performance must conform to the Merit Systems Principles found at 5 U.S.C. §§ 2301(b)(6) and (7). *See Lovshin v. Dept. of Navy*, 767 F.2d 826, 842 (Fed. Cir. 1985).

Employees must not be removed before the agency makes a sufficient effort to fix performance related issues. *See* 5 U.S.C. §§ 2301(b)(6), (7). *Lovshin* specifically prohibits disciplinary action where the employee is held to a standard that is higher than the standard in their performance plan. 767 F.2d at 842 ("It would, for example, be inconsistent with the merit principles set out in § 2301(b)(6) and (7) for an agency to bring an action 'for cause' . . . based solely on performance that is governed by and meets the critical elements set forth for the employee's position.").

Here the Agency stopped issuing Dr. Sayers a performance plan after Fiscal Year 2013. Appx120–138. Dr. Sayers's performance plan was extremely detailed, addressing things like employee training, pending orders, and a host of other metrics. Appx120–138. Based on these standards, Dr. Sayers consistently achieved outstanding performance appraisals. Appx92–118, Appx140–147. Dr. Sayers was ultimately removed for alleged deficiencies that were directly contemplated in his performance plan. Appx51, Appx55–58, Appx120–138. It is unlawful in light of the Merit Systems Principles, and inconsistent with fairness or decency, for the Agency to claim Dr. Sayers performed his job duties so well as to consistently earn a rating of Outstanding, but then remove him for largely the same conduct. *See Lovshin*, 767 F.2d at 842.

X. THE ACT FAILS TO AFFORD DUE PROCESS.

38 U.S.C. § 714 does not afford Due Process because the Agency lacks statutory authority to provide the employee with a meaningful opportunity to respond to a proposed adverse action. *See* U.S. Const. amend. V; *see also* 38 U.S.C. § 714.

Employment with the Agency is a property right subject to constitutional protections. *See, e.g., Loudermill*, 470 U.S. 532, 538–39 (1985); *Stone*, 179 F.3d at 1374. Due process requires notice of the proposed adverse action and a meaningful opportunity to respond. *See*, *e.g.*, *Loudermill*, 470 U.S. at 542, 546; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

An opportunity to be heard is only meaningful if the employee's reply is given meaningful consideration by the deciding official. *See, e.g., Ryan v. Illinois Dep't of Children & Family Servs.*, 185 F.3d 751, 762 (7th Cir. 1999) ("Due process requires that, prior to termination, an employee be given the chance to tell her side of the story, and that the agency be willing to listen. Otherwise, the opportunity to respond required by *Loudermill* is no opportunity at all.") (citations and internal quotations omitted); *Levenstein v. Salafsky*, 164 F.3d 345, 352 (7th Cir. 1998) (emphasizing "the commonsense notion that fundamentally biased process is not due process"); *Ciechon v. City of Chicago*, 686 F.2d 511, 517 (7th Cir. 1982) ("Due Process requires that a hearing must be a real one, not a sham or a pretense.") (citations and internal quotations omitted).

The procedural protections required to satisfy Due Process are flexible and require the application of a three-factor test, as provided by the Court:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative

> burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335 (citation omitted).

The Act has been used to streamline removal actions with minimal procedural safeguards and must be looked at critically in light of *Matthews*, *Loudermill*, and *Ryan*. *See, Mathews*, 424 U.S. at 334–35; *Loudermill*, 470 U.S. at 542, 546; *Ryan*, 185 F.3d at 762.

Removal implicates an especially high private interest and enhances due process requirements. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 928–32 (1997); *Ryan*, 185 F.3d at 762. In *Gilbert*, the Court held that even with substantial justification to terminate an employee, the constitutionally correct approach is to hold the employee in unpaid status until all pre-termination due process may be afforded. *See* 520 U.S. at 926–28.

38 U.S.C. § 714 creates an unreasonably high likelihood of causing an erroneous deprivation of employment interests. *Cf. Mathews*, 424 U.S. at 334–35. Under the Act, there is no statutory authority to extend deadlines to reply and to issue decisions. *See* 38 U.S.C. §§ 714(c)(1), (2), (d)(4).

Here, the Agency granted an extension without statutory authority to do so, precisely because they knew that Dr. Sayers would not be able to put together a meaningful response to the 13-specification proposed disciplinary action in only seven business days. Appx81–82. This resulted in taking longer than 15 business days to issue the response. Appx53. Given that the strict deadlines were a primary focus when

introducing the Act, this is harmful procedural error as the cure is to utilize the far more appropriate procedures found under Title 5.

Further, even when the Agency employee is able to draft a comprehensive reply within the statutory timeframe, that reply is not meaningful unless the deciding official actually gives full consideration. *See, e.g., Ryan*, 185 F.3d at 762; *Ciechon*, 686 F.2d at 517. The rubber stamping, including the Agency's position that any level of penalty may be sustained regardless of the underlying charge, underpins just how meaningless the employee's response has become. *Cf. Stone*, 179 F.3d at 1376.

In the instant action, many of the specifications relate to alleged deficiencies of employees operating under Dr. Sayers's direct or indirect supervision. *E.g.,* Appx57 (Charge A, Specification 10 states that pharmacy employees were not fully aware of procurement policies). If the Court adopts AJ Black's position that the Agency may bring excessive penalties without scrutiny, then virtually any supervisor may be removed as long as someone, somewhere in their chain of command is deficient in some area. This slippery slope is lauded by President Trump, who said that under the Title 5 procedures, "[employees] could steal money, and you couldn't do anything about it. **Now [under the Act] you can do whatever you want**." REMARKS BY PRESIDENT TRUMP AT THE SIGNING OF H.R. 5895, 2018 WL 4520473, at *2. The President is correct; unless this Circuit Court of Appeals forces the Agency to reign in their application of the Act, a deciding official can do virtually whatever they want.

In this respect, the existing Title 5 procedures are an objectively superior substitute. Seeing as the Agency may, when constitutionally appropriate, impose the exact same deadlines, the only difference is that they need to limit disciplinary action to instances where their actions are rational and defensible on *de novo* review.

Though the Agency has an interest in removing employees for misconduct or unsatisfactory performance, they also have an interest in arriving at accurate decisions that do not erroneously remove model employees. *Cf. Mathews*, 424 U.S. at 334–35.

Shifting away from the analysis under *Matthews*, the unforgiving deadlines are impermissible in light of our history of jurisprudence. Notwithstanding the procedures set forth in the Act, the laws of the United States allow for extensions to procedural deadlines;[4] it is a staple of due process for the law to extend any deadline that would otherwise deprive an individual of their right to provide a meaningful response to a charge that would divest them of a constitutionally protected property right.

Though the majority did not reach the constitutional analysis on other grounds, Justice Breyer, with whom Justice Sotomayor and Justice Ginsburg joined, explained

[4] *See, e.g.,* 5 U.S.C. § 7513(c)(1) (authorizing the agency to set a reasonable time for an employee to reply to notice of an Adverse Action); 5 U.S.C. § 4303(b)(1)(C) (same); Fed. R. Civ. P. 4(4) (the courts may generally extend any deadline ". . . for good cause . . . with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or . . . on motion made after the time has expired if the party failed to act because of excusable neglect"); Fed. R. Crim. P. 45(b) ("In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act because of excusable neglect.").

the historical approach to due process in his dissent in *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting) ("The Due Process Clause, among other things, protects 'those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors,' and which were brought by them to this country.") (*quoting Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856)).

Even before the courts codified rules of civil procedures, the ability to grant extensions for cause was inherent in American and English jurisprudence. *See, e.g., Hunter's Lessee v. Kennedy*, 1 U.S. 81, 1 L. Ed. 46 (Pa. Com. Pl. 1784) (granting postponement); *The Princess of Wales v. The Earl of Liverpool and Count Munster*, SC 1 Swans. 114, 118 (March 7, 10, & 17, 1818) (explaining that the affidavit was insufficient for the common injunction to stay trial); *Dipper v. Durant*, 3 MER. 465 (Nov. 28, 1817) (explaining that a common injunction to stay proceedings at law had been obtained).

The notion that one should be able to request an extension when responding to a lengthy charge attacking one's life, liberty, or property is sensible. Even for relatively simple charges, the strict deadlines under the Act offend the employees right to counsel of her choosing[5], the ability to seek critical information,[6] or even tend to a family or medical emergency.

[5] If the employee is dissatisfied with her counsel, there is no time for an employee to seek and obtain new counsel.

[6] For example a FOIA request could not be considered because such requests take longer than 7 days for compliance.

As the Court explained, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334. The Act attempts to narrow the sliding scale of due process to a fixed point. Though Congressional mandate may supersede an agency's authority to apply discretion, this Court's role is to protect the people when Congress runs afoul of the Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Board's decision, reinstitute Dr. Sayers as the Chief of Pharmacy, and order the Agency to pay back wages pursuant to 5 U.S.C. § 5596, as well as all other monetary recovery applicable therein, including reasonable attorney's fees, and any other recovery deemed just and equitable by this Court.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

Pages

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JEFFREY F. SAYERS,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
SF-0714-18-0067-I-1

DATE: April 18, 2018

Daniel Maharaj, J.D., Tampa, Florida, for the appellant.

Loretta Poston, Esquire, Tampa, Florida, for the appellant.

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Chung H. Han, Los Angeles, California, for the agency.

BEFORE
Samantha J. Black
Administrative Judge

INITIAL DECISION

On November 9, 2017, the appellant filed an appeal challenging the agency's October 30, 2017 removal from his position as Chief of the Pharmacy Service at the agency's Greater Los Angeles (GLA) Healthcare System. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction pursuant to 38 U.S.C. § 714. I held a hearing by videoconference on February 21, 2018, March 22, 2018, March 23, 2018, and April 4, 2018. IAF, Tabs 31, 37, 38, 39. The record closed on April 4, 2018. For the reasons below, I AFFIRM the agency's action.

findings and analysis

Background

Until his removal, the agency employed the appellant as the Chief of Pharmacy Service at the agency's GLA Healthcare System. HCD, appellant testimony. In that role, the appellant was responsible for overseeing four outpatient pharmacies, one inpatient pharmacy, and three opiod treatment facilities, which included approximately 175 full time employees. *Id.*

In 2015, a whistleblower lodged a complaint with the Office of Special Counsel concerning the agency's GLA Healthcare System. IAF, Tab 25, pp. 4-25. The agency's Office of Medical Inspector (OMI) investigated the allegations, and made several recommendations pertaining to GLA pharmacies. *Id.*

In June 2016, the agency's Central Office (referred to as VACO) sent a site visit team to the GLA Healthcare System to follow up on the prior findings. IAF, Tab 1, pp. 31-36. During that visit, the appellant met with the site visit team, who expressed concerns regarding the pharmacies' use of a template in the agency's Computerized Patient Record System (CPRS) that permitted a pharmacy order to be discontinued under certain circumstances. HCD, appellant testimony.

The appellant then held a meeting with the pharmacy managers who reported to him regarding the template and the practice of discontinuing pending orders. HCD, appellant testimony. The appellant raised the issue of ceasing use of the template, but ultimately elected not to do so after a manager said pharmacists still need a note to discontinue if requested by a physician. *Id.* That day, the appellant emailed pharmacy supervisors, Subject: Immediate Modification to Pending Order SOP, as follows:

> To All:
>
> Immediately, staff are **NOT** to discontinue a flagged pending order after the allotted days and attempts to clarify. That is no "Disposition Note…" Managers will be responsible for this function. My expectation is that the manager will work with the care line

> supervisor to resolve the issue. The onus needs to be placed on the provider and their supervisor.
>
> You can escalate if care line strategy does not work.
>
> Please communicate to staff immediately.
>
> Thanks.

IAF, Tab 25, p. 285.

Later that day, the VACO site visit team presented an exit interview of the team's findings to several GLA leaders, including Ann Brown, GLA Healthcare Director. HCD, Brown testimony. Dr. Thomas Emmendorfer raised the pharmacies' use of a template again during this exit interview, and ordered the appellant to discontinue use of the template immediately. HCD, Brown, Marshall, Doelling, Hartroft testimony.

Approximately one week later, Brown received a phone call from her supervisor at the Veterans Integrated Service Network (VISN)[1], who told her the template was still being used, even after the appellant was cease to discontinue its use. HCD, Brown, Hartronft testimony. Brown immediately called together a meeting with the appellant and his then supervisors Nurse Executive James Doelling and Chief of Staff Scotte Hartronft.[2] *Id.* During the meeting, Brown

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1 VISNs are essentially regional offices within the agency. HCD, Evans testimony.

2 At the time, and unrelated to the issues involving the appellant, the agency was undergoing a structural change. HCD, Doelling, Hartronft testimony. Prior to approximately July 1, 2016, the pharmacy service reported to the Nurse Executive and, in this structure, Doelling was the appellant's supervisor. *Id.* Starting approximately July 1, 2016, the pharmacy service reported to the Chief of Staff and, in this structure, Hartronft was the appellant's supervisor. *Id.* Both Doelling and Hartronft were present at the July 8, 2016 meetings with the appellant and signed the eventual letter detailing the appellant, likely because the organization was in the middle of a transition at the time. *Id.*

told the appellant about the continued use of the template and ordered him to discontinue its use. HCD, Brown testimony, appellant testimony. That day, the agency disabled the template.[3] HCD, Marshall testimony, appellant testimony; IAF, Tab 25, pp. 279-283.

Later that day, Doelling and Hartronft called the appellant into a meeting, and informed him that he would be detailed to a position in Quality Management "pending a review initiated by the Chief of Staff." HCD, appellant testimony, Doelling testimony, Hartronft testimony; IAF, Tab 5, p. 53. Marshall was named the acting Chief of Pharmacy that day. HCD, Marshall testimony, Hartronft testimony. The appellant began working as a Quality Management Specialist working on the patient safety advisory team the next workday. HCD, Hartronft testimony, appellant testimony.

In early 2017, Marshall informed Hartronft she overwhelmed with performing both the acting Chief of Pharmacy role and her role of Associate Chief of Pharmacy, and preferred to return solely to her prior role. HCD, Hartronft testimony. Hartronft turned to the VISN Pharmacy Executive, Dr. Frank Evans, for assistance in locating a new acting Chief of Pharmacy. HCD, Hartronft testimony, Evans testimony. Evans sent an email to all VISN Pharmacy Executives to determine if there were individuals interested in taking the acting role. *Id.* Two individuals expressed interest, but one of the candidate's current management would not allow her to pursue the detail opportunity. *Id.* Dr. Yusuf Dawoodbhai, then Formulating Program Manager at the agency's Portland

3 The appellant testified that he directed his subordinates to discontinue the template. HCD, appellant testimony. Marshall testified that she took the steps to have the template disabled without direction from the appellant, and followed up to ensure that the template was indeed disabled. HCD, Marshall testimony. I find Marshall's testimony on this issue to be more credible, in part because it was corroborated by documents in the record. *See* IAF, Tab 1, p. 40; Tab 25, pp. 279-283.

facility, was the sole remaining candidate. *Id.* He interviewed with Hartronft for the detail and was ultimately selected to be detailed into the Chief of Pharmacy position. *Id.*

Dawoodbhai began his detail in March 2017, but was only present at the facility a few days in March before taking leave. HCD, Hartronft testimony, Dawoodbhai testimony. Almost immediately after Dawoodbhai assumed the detail, he and Hartronft decided that a site visit would be a beneficial mechanism to determine the current state of affairs within the pharmacy service. *Id.* They requested the VISN conduct such a visit. *Id.*

In April 2017, Evans, VISN Pharmacy Executive, and two members of his VISN team began a site visit to the GLA pharmacy service. HCD, Evans testimony. Dawoodbhai accompanied the VISN team throughout their visit to four of the five pharmacies within the GLA pharmacy service.[4] HCD, Evans testimony, Dawoodbhai testimony. Evans had decided to focus the site visit on internal control systems for pharmacy purchases in advance of a systemwide review of financial controls. HCD, Evans testimony. However, Evans explained that, upon beginning the visit, he and his team were struck by such obvious violations in certain areas (*e.g.,* security violations) that the team was not able to conduct the detailed review of the anticipated areas as intended. *Id.* On May 8, 2017, Evans issued a report that he authored with the input of the two other site visit team members, summarizing their findings and recommendations. IAF, Tab 1, pp. 22-29.

On September 29, 2017, Hartronft proposed the appellant's removal based on charges of failure to perform assigned duties and failure to follow instructions

4 The VISN team did not visit the agency's Bakersfield pharmacy, which is physically distant from the other pharmacies and has only a few employees. HCD, Evans testimony.

under the authority of 38 U.S.C. § 714. IAF, Tab 1, pp. 8-12. He provided the appellant a copy of the proposal on October 6, 2017. *Id.* The appellant's counsel requested an extension of time to respond to the proposal, and was granted until October 20, 2017 to reply. IAF, Tab 5, pp. 51-52. The appellant timely submitted a written reply to Ann Brown, deciding official. IAF, Tab 5.

On October 30, 2017, Brown decided to remove the appellant, sustaining both charges against the appellant. IAF, Tab 1, pp. 93-95. The appellant received a copy of the decision on November 1, 2017. *Id.* The agency removed the appellant, effective November 7, 2017. *Id.*

This appeal timely followed. IAF, Tab 1. The appellant requested a hearing, which I held on February 21, 2018, March 22, 2018, March 23, 2018, and April 4, 2018.[5] IAF, Tabs 31, 37, 38, 39. The record closed on April 4, 2018. IAF, Tab 39.

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5 During the hearing on February 21, 2018, the appellant's representatives objected to the agency representative's behavior and alleged potential witness coaching or obstruction. I have considered the appellant's objections, but find no inappropriate behavior by the agency representative. The appellant's claim relies on two main allegations regarding the agency representative: coaching Marshall during her testimony, and speaking with witnesses during breaks in their testimony.

I observed Marshall's testimony via videoconference. During her testimony, I was only able to partially view the agency representative because I focused the video on the witness who was testifying. However, I could see Marshall turning to the agency representative often after hearing a question posed by the appellant's representative. To the extent that the agency representative offered any instructions to Marshall during this time period, she did so verbally, telling the witness that, if she didn't understand a question, she should say that. HCD, Marshall testimony. Through the majority of her testimony, Marshall was relatively tentative; however, when questions implied she was responsible for certain problems in the pharmacy, Marshall was no longer tentative, instead responding forcefully. I viewed Marshall's tentative nature during her testimony as part of her general demeanor and her discomfort with the hearing process, and not the result of inappropriate coaching by the agency representative. I have taken Marshall's tentative nature into account in how I credited the credibility of her testimony.

Applicable law

The agency took the action under the authority of 38 U.S.C. § 714. Under this authority, the administrative judge shall uphold the decision to remove an employee if the decision is supported by substantial evidence. 38 U.S.C. § 714 (d)(2)(A). Substantial evidence is "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. § 1201.4(p). If the decision is supported by substantial evidence, the administrative judge shall not mitigate the penalty. 38 U.S.C. § 714(d)(2)(B).

The appellant bears the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C); *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, 356 (2007). Preponderant evidence is the "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. § 1201.4(q).

The agency proved the charge of failure to perform assigned duties by substantial evidence.

The agency's first charge against the appellant is for failure to perform assigned duties with nine sustained specifications. IAF, Tab 1, pp. 8-11. The agency had originally proposed discipline based on 12 specifications under this

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After the appellant raised the concern, I set the camera to view both sets of counsel as well as the witness during the remainder of the hearing. I saw no behavior by either counsel I found inappropriate.

The appellant's representatives also raised concerns that the agency representative was speaking with the witnesses during breaks in the course of their testimony. The agency representative did so, but I don't find this behavior inherently inappropriate. All in all, I found nothing that led me to believe that the agency representative acted in any manner reflecting she tampered with the witness testimony or otherwise acted inappropriately.

charge. *Id.* However, in her decision, Brown did not sustain three of the specifications: specifications one, two, and eight. IAF, Tab 1, pp. 93-95; HCD, Brown testimony. I address each of the sustained specifications below. However, the appellant raised several arguments regarding the charge as a whole, and I address these arguments first.

Each of the sustained specifications was supported by the findings of a site visit that occurred nearly ten months after the appellant was no longer performing the day to day functions of the Chief of Pharmacy job. IAF, Tab 1, pp. 8-17; HCD, Brown testimony. The appellant was detailed to a position in Quality Management in July 2016 and the VISN site visit occurred in April 2017. IAF, Tab 1, pp. 22-29; Tab 5, p. 53. The appellant implies that this renders the evidence not indicative of any failure by the appellant. After July 8, 2016, managing the pharmacy service was not the appellant's assigned duties and any failures with regard to pharmacy service management were not the appellant's failure to perform assigned duties. However, the fact that the site visit and its findings occurred after the appellant was no longer in the role does not, by itself, demonstrate that the evidence obtained in the site visit is not reflective of the time period when the appellant was responsible for pharmacy operations. Accordingly, I see no reason to summarily devalue that evidence. Nonetheless, when assessing each specification, I consider whether or not the agency demonstrated by substantial evidence that any failing by the pharmacy service related to *the appellant's* failure to perform assigned duties.

The appellant also implied that the VISN site visit was not an appropriate source of evidence for a disciplinary action because it was intended to be consultative in nature and, as a result, did not have the level of detail necessary or appropriate for a disciplinary action. It is undisputed that Hartronft and Dawoodbhai did not intend the site visit as a mechanism to obtain evidence for a

disciplinary action against the appellant or any other individuals. HCD, Hartronft testimony, Dawoodbhai testimony. Evans specifically structured the site visit to be consultative in nature, explaining that his team tested technician and pharmacist knowledge without asking for or noting an individual's name to ensure that people provided honest information without fear of disciplinary action. HCD, Evans testimony. However, regardless of the intent of an investigation, inquiry, or audit – which is what the site visit was as a practical matter – evidence of misconduct obtained during such an inquiry may be used to take disciplinary action against an individual, in the absence of a policy prohibiting it. The appellant has not identified such a policy here and I am not aware of one. And, to the extent that the appellant is arguing that the lack of specificity in the site visit findings provided insufficient evidence to support disciplinary action, I address the sufficiency of the agency's evidence in assessing whether they have proven each specification below.

The appellant next argues he should not be held responsible for many of the matters alleged to be failures to perform his assigned duties because these areas were the responsibility of supervisors and technicians subordinate to him who did not face discipline for these matters. Neither the appellant's supervisors nor his subordinates were disciplined for the failure to perform assigned duties for which the appellant was removed. HCD, Brown testimony. However, the appellant, as Chief of Pharmacy, was ultimately responsible for the effective functioning of the pharmacies within his authority. HCD, Brown testimony, Hartronft testimony, Evans testimony. Certain of the failures to perform assigned duties are relatively minimal; however, when considered as a whole, the identified performance failures reflect systemic problems for which the Chief bears responsibility.

The appellant described his own philosophy of management as one of "shared responsibility", which recognizes that he himself has some responsibility for these matters. HCD, appellant testimony. He elected to provide subordinate managers with significant freedom to manage their own pharmacies, and expected that they would bring issues or concerns to him if they arose. *Id.* At least as far back as January 2015, the appellant assessed that he had a strong team of subordinate managers who could handle their responsibilities. *Id.* At that time, the appellant elected to take on, as a collateral duty, the responsibilities of the VISN Pharmacy Executive position even though he did not have the full staffing at the Associate Chief of Pharmacy level that he perceived was appropriate. *Id.* He explained that, at the time, he felt that the management team had to get used to functioning without him because he was retirement eligible. *Id.* As a whole, the evidence reflects that the appellant voluntarily approached his management of the pharmacy service in a manner that permitted local decision-making and problem solving without the involvement of the Chief of Pharmacy's office unless local management deemed it necessary. This is a perfectly permissible management approach, but it does not absolve the appellant of his overall responsibility to ensure that the pharmacy service was being properly managed and that individual pharmacies were performing their required function within law, rule, and regulation. To the extent systemic problems arose within the pharmacy service during his tenure, the appellant was uniquely in a position to address those problems, and bears unique responsibility for resolving them.

Finally, the appellant argued that, with respect to most of the issues raised in sustained specifications, he simply was not aware of the issues at all until he received the notice of proposed removal, and thus never had a meaningful opportunity to address and resolve the issues. Provided that an employee is made aware of his assigned duties, he is not entitled to advance notice of a failure to

perform those duties before disciplinary action follows based on that failure. The appellant broadly argued that others had been given an opportunity to address such failures before facing disciplinary action, but did not identify any individuals who received this preferential treatment. The appellant introduced evidence of two other pharmacy site visits at two other agency sites where significant issues in the management of the pharmacy service were identified, but, in both instances, the Chief of Pharmacy had stepped down prior to the site visits. HCD, Evans testimony; IAF, Tab 24, pp. 96-127.

Having considered the appellant's general arguments regarding this charge, I now turn to considering whether the agency proved the sustained specifications by substantial evidence.

> SPECIFICATION 3: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that the narcotic vault related security was found to be lax or had been non-existent for many years per staff contrary to VA requirements (VA Handbook 0730 and VHA Handbook 1108.01) for narcotic vault security procedures. Vault entry logs for any previous year could not be found by the pharmacy supervisors who said they had not been used for many years. One egregious example was the staff at one of the pharmacies had for many years been using issued keys to access the narcotics vault unaccompanied. Although not witnessed during the survey, pharmacy staff members did admit that keys had been left in the vault gate which would have allowed access to the vault by any persons in the area. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, pp. 8-9.

During the site visit conducted in April 2017, Evans and his team identified the following problems with vault security at the Los Angeles Ambulatory Care Center (LAACC):

> Pharmacy staff accessing vault using keys, not electronic access control system. In accordance with VHA Handbook 1108.01 and VHA Handbook 0730 access to vaults must be monitored through the use of electronic access control systems. Pharmacy staff reported the electronic access control system had not been functional for "10

> years." Pharmacy supervisor did not have a key log showing staff with keys to vault. Video catchment in vault had blind spots.

IAF, Tab 1, p. 29; HCD, Evans testimony. The appellant introduced evidence that, about three to four years before 2017, the agency's locksmith installed manual keys to the vault because the card key pad access was inoperable and several attempts to fix it failed. IAF, Tab 5, p. 82. The pharmacy was waiting for the installation of a new card key access system from MCM. *Id.*

After the VISN site visit, Dawoodbhai had the manual lock system disabled. HCD, Dawoodbhai testimony. At that time, the pharmacists learned that the card key system "had been activated for a long time apparently," but the card keys themselves were defective. IAF, Tab 5, p. 82. The pharmacists were issued new card keys, and were able to use the already installed electronic access control system. *Id.*

The evidence reflects that the agency's policy requires vault security that includes dual factor authentication. HCD, Evans testimony. Using manual keys as a method of routine vault access[6] is not consistent with agency policy and Evans considered it alarming when he saw it. *Id.* A manual key system allows for any individual with a key to enter the vault, and does not provide a mechanism to know who entered. *Id.* Manual keys can also easily be shared among individuals, and such sharing is not tracked. *Id.* On the other hand, when an electronic keypad system is used, the agency can track who accessed the pharmacy at any given time. *Id.*

The VISN site visit team also found the following with respect to the Methadone Clinic pharmacy at the LAACC:

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6 Vaults routinely have a manual lock that can be used if the electronic mechanisms fails (*e.g.,* during a power outage, etc.). HCD, Evans testimony. However, the manual keys are not intended to be used as a primary access method.

> Vault day gate was ajar at time of visit. Gate was hard to close (had to slam closed).
>
> Pharmacy staff accessing vault using keys, not electronic access control system.

IAF, Tab 1, p. 29. Finally, the VISN team noted that, while they did not observe it, they were informed that staff had previously left their manual keys in the vault door to facilitate quicker access to the vault. IAF, Tab 1, p. 23; HCD, Marshall testimony.

The appellant did not deny that any of these security failings occurred, but instead explained that he was not previously aware of them. HCD, appellant testimony. The appellant apparently was not aware that manual keys were being used at the LAACC pharmacy during this time period. HCD, appellant testimony. However, at the hearing, the appellant testified that he considered it an appropriate practice under the circumstances given that the electronic system was not working. *Id.*

At the agency, the police service conducted annual security surveys of agency facilities. HCD, appellant testimony. However, according to the appellant, none of these security surveys raised these security issues with him. *Id.* And, in the absence of the police service identifying these failures, the appellant had no reason to know that there were security problems at the vaults. *Id.* It is unclear why the police service failed to identify these glaring and obvious security failures in their annual inspections, but their failure does not absolve the appellant of his responsibilities. None of the identified vault security failures required special training or equipment to detect. Instead, the appellant would have been aware that manual keys – and not the electronic keypad system – were being used to access the vault if he had visited the location or otherwise observed it during the final two years he was performing the Chief of Pharmacy position.

The appellant also countered that, during his tenure as Chief of Pharmacy, each of the pharmacies had vault security. HCD, appellant testimony. Most of the pharmacies had electronic access systems, and many had cameras installed. *Id.* He also explained that, for several years before he was detailed, he was working on the long-term project to install dual factor authentication security access to the vaults through a contract with MCM. *Id.* Several factors beyond the appellant's control – including a Congressional change to approved lock systems and software incompatibility – impeded the agency's ability to have this up to date system installed and implemented during his tenure. *Id.* It is clear from the record that the vaults had some security measures, and that the appellant was working toward a better system to be installed in the future. However, that does not tend to disprove that, during the appellant's tenure as Chief of Pharmacy, vault security was lax at at least two of the pharmacies within his authority. I also find that the appellant's commitment to a long term change to the security system for all pharmacies did not absolve him from ensuring that the pharmacies had adequate and compliant security in the interim, particularly where, as here, the long term solution was years in the making.

I also find that ensuring adequate pharmacy security was within the appellant's assigned duties. He implicitly acknowledges his responsibly for this matter through his arguments (*e.g.,* if the police service had identified security issues, the appellant would have been responsible for addressing them; describing his efforts at obtaining dual factor authentication security through the MCM contract). And I find that the agency has established by substantial evidence that the GLA pharmacies had in at least some respects lax vault security during the appellant's tenure as Chief of Pharmacy.

The agency has not proven one portion of the specification by substantial evidence: that vault entry logs for any previous year could not be found by the

pharmacy supervisors who said they had not been used for many years. The VISN site visit team noted that LAACC did not have a log showing which staff had been issued manual keys. IAF, Tab 1, p. 29. The site visit team did not identify any pharmacy at which the vault entry logs – as opposed to key logs – could not be found or had not been used for years. HCD, Evans testimony. It appears that, in preparing the proposed removal, the proposing official and human resources personnel misread a portion of the site visit report.

The agency need not prove the entire specification; instead, the agency need only prove as much of the specification as necessary to prove the charge. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 204 (1997). Here, I find that the agency proves enough of the specification to prove the charge of failure to perform assigned duties by substantial evidence. Thus, I sustain the specification.

> SPECIFICATION 4: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that one of the narcotic vaults included a working "Dutch" door which allowed staff to have the open upper half of the door open and reach into the vault to freely access the narcotic vault. Narcotic vaults are required to have secure doors and security systems to include a Physical Access Control System (PACS) which was not working for many years per local pharmacy staff members. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 9. The VISN site visit team identified a "Dutch" door at the Sepulveda Ambulatory Care Center pharmacy, which is not compliant with VA Handbook 0730. IAF, Tab 1, p. 28; HCD, Evans testimony. A "Dutch" door is a two part door where either the top or the bottom of the door can be opened independently of the other part. While the "Dutch" door at issue had electronic access control, the site visit team actually observed a pharmacy employee bypassing that access control to enter and exit the vault. *Id.* "Dutch" doors pose a particular risk of bypassing security because one half of the door can remain open and allow an individual to reach into the pharmacy (or enter through an

open bottom panel) without scanning their keycard on the electronic access panel; as explained above, permitting access without use of an electronic access panel increases the likelihood of access to the vault by persons who cannot be later identified. HCD, Evans testimony.

The appellant does not dispute that the Sepulveda ACC had a "Dutch" door on its vault. Instead, he explains that the pharmacy at that location opened in 1996 or 1997, and the "Dutch" door would have been present on the vault for the twenty years between construction and the VISN site visit. HCD, appellant testimony. However, during that time period, the agency's police security surveys never identified the "Dutch" door as a security issue. *Id.*

Despite the "Dutch" door not being identified on a police security service, I find that substantial evidence reflects that the appellant should have been aware of the security issues that such a door posed and that the appellant should have noted the existence of the "Dutch" vault door in the 20 years since it was installed. The appellant explained in his testimony that, at one point during his tenure as a Chief of Pharmacy, staff at one of his pharmacies requested to remove keypad security on a door that did not lead directly to a vault; after the appellant was alerted, he considered whether it was appropriate to remove the security. HCD, appellant testimony. One of his considerations was whether the employees would prop open the secure door to give themselves easier access. *Id.* That same analysis – when applied to a "Dutch" door on a vault – would lead to a conclusion that the door was insufficiently secure under agency policies. Further, the evidence reflects that, within one month after the VISN site visit, the agency was able to add the necessary additional security to the vault by "creating a new single metal cage door with a locked pass through box to replace the existing dutch door." IAF, Tab 24, p. 48.

I find that the agency demonstrated by substantial evidence that, during the appellant's tenure as the Chief of Pharmacy, one of the narcotic vaults under his authority had a "Dutch" door that was not in compliance with agency vault security requirements. As explained above, I find that ensuring appropriate vault security at pharmacies within his area of responsibility was one of the appellant's assigned duties. Thus, I find that the agency proved by substantial evidence that the appellant's conduct in this regard was a failure to perform assigned duties, and I sustain this specification.

> SPECIFICATION 5: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that many pharmacy managers who had been at VAGLAHCS for many years did not fully understand the Reverse Distribution process and were unable to verbalize or produce any paperwork that showed the full accountability of controlled substance through the reverse distribution/destruction. Reverse distribution processes at all pharmacies did not comply with VHA Directive 1087 for many years. Pharmacy staff were unaware the VHA Directive 1087 existed. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 9. The VISN site visit team found the following:

> Reverse Distributor processes at all pharmacies did not comply with VHA Directive 1087. Pharmacy staff were unaware the Directive existed. Returns were not physically secured with a running list of medication held for credit.

IAF, Tab 1, p. 12.

The appellant testified that, during his tenure as Chief of Pharmacy, from fiscal year 2010 to fiscal year 2013, the pharmacy service tracked its use of the reverse distribution system. HCD, appellant testimony; IAF, Tab 5, p. 116. In looking at that data, the pharmacy service was consistently "perfect," so he ceased tracking the reverse distribution metric. *Id.* However, the evidence reflects the tracking was limited to five items each month.[7] *See* IAF, Tab 5,

7 It is unclear whether the agency tracked the same five items each month or varied the tracked items.

pp. 120, 124. This audit does not reflect that each pharmacy understood the reverse distribution process and were unable to verbalize or produce any paperwork that showed the full accountability of controlled substance through the reverse distribution/destruction.

I found credible Evans testimony regarding his assessment, based on questioning of employees at four GLA pharmacies, that nobody he spoke with was aware of the reverse distribution process and that there was a directive that explained the process. HCD, Evans testimony. This is corroborated by the appellant's admission that, until he received the notice of proposed removal, he was unaware of this directive. IAF, Tab 5, p. 116. If he was unaware of the directive, it seems unlikely that he has ensured that pharmacy employees at GLA pharmacies were aware of the directive and were operating consistently therewith.

Nonetheless, the evidence reflects that the overall management of the pharmacy's reverse distribution process was within the appellant's area of responsibility. The appellant implicitly admitted to this when he explained his attempts at oversight of the reverse distribution process from fiscal year 2010 to fiscal year 2013.

Accordingly, I find that the agency has demonstrated by substantial evidence the content of the specification, and I find that this reflects a failure to perform assigned duties by the appellant. I sustain this specification.

> SPECIFICATION 6: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that VAGLAHCS has incurred financial losses over many years related to returns that should have occurred via the reverse distribution process if VHA Directive 1087 had been followed. Returns were not physically secured with a running list of medication held for a return of credit to VAGLAHCS. Open bottles were defaced routinely marked with an "X" and defaced bottles cannot be returned for credit through the Reverse Distributor

> upon expiration. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 9. During its site visit, the VISN team found the following with respect to this matter:

> Open bottles routinely marked with an "X." Defaced bottles cannot be returned for credit through the Reverse Distributor upon expiration.
>
> * * * *
>
> Returns were not physically secured with a running list of medication held for return for credit.

IAF, Tab 1, pp. 24, 27. Evans testified that he saw open bottles marked with an "X," which he described as an "older process in pharmacy." HCD, Evans testimony. He further explained that, as the VISN Pharmacy Executive, he recommends putting a sticker on an open bottle or using a whiteboard type marker that can be wiped off to mark the bottle. *Id.* He testified that he would expect that pharmacists would know about this process. *Id.*

In response to this specification, the appellant introduced evidence that whether or not a bottle marked with an "X" can be returned "depends on the manufacturer policy and each product has its own policy." IAF, Tab 5, p. 143. As a result, the agency's reverse distribution vendor recommends the following: "For best practice, I would always tell my customers to NOT make any marks on the products and use stickers to write X on them." *Id.*

With his response to the notice of proposed removal, the appellant indicated that he did not recall ever being told about the recommended best practice or not to deface open bottles with an "X"; he explained that, if it was told to him, he "would certainly have intervened." IAF, Tab 5, p. 142. At the hearing, the appellant testified that he has been marking open bottles with "X" since he was an intern with the agency in the 1980s. HCD, appellant testimony. He

explained that it is standard practice at the agency, and he never heard someone say the practice was no longer appropriate. *Id.*

I find that the agency proved by substantial evidence that, to maximize the agency's ability to recoup costs through the reverse distribution process, the appropriate practice is for pharmacists not to deface open bottles with an "X." I also find that the agency proved by substantial evidence that, under the appellant's supervision as Chief of Pharmacy, the pharmacies within his area of responsibility were defacing bottles with an "X," which resulted in the agency being unable to return at least some expired medications. I have no reason to doubt the appellant's statements he was not aware of this best practice or its implications. However, as the Chief of Pharmacy, the appellant was responsible for overseeing the pharmacy services' reverse distribution process, and was thus responsible for maintaining a current knowledge of the directives associated with that process and the standards applicable to it. Thus, I find that the fact that no one specifically informed the appellant that the pharmacies were inappropriately defacing open bottles with an "X" and impeding their ability to recoup costs is not dispositive of whether the pharmacies' failure amounted to a failure to perform assigned duties.

I find it a closer case as to whether the agency has proven by substantial evidence that the agency incurred financial losses over many years related to returns that should have occurred via the reverse distribution process if VHA Directive 1087 had been followed. The agency has no specific evidence regarding financial loss because, given the lack of a running list of medications to be returned through the reverse distribution process, the agency has no records about what was returned or not. HCD, Evans testimony. However, given the clear evidence that the agency was routinely engaging in a practice that would disqualify returns with some manufacturers, I find that the agency established this

portion of the specification by substantial evidence. The appellant argued that the reports that one of his staff members ran in fiscal year 2013 reflect that he was monitoring the agency's revenues through the reverse distribution process and the agency was recouping costs at the target. *See* IAF, Tab 5, pp. 116-141. However, upon closer review, while the reports contained a metric for pharmaceutical returns credits, the reports contain no data collected with respect to this metric. *Id.*

Thus, after considering all of the evidence in the record, I find that the agency proved this specification by substantial evidence, and I sustain it.

> SPECIFICATION 7: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that regardless of tenure the pharmacy supervisors did not understand the process to report local controlled substances losses in accordance with VHA Directive 1108.01. This allowed VAGLAHCS to be at a greater risk of unnoticed narcotic diversion. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 10. The VISN site visit team specifically noted that the "process to report local controlled substances losses not understood by pharmacy supervisors." IAF, Tab 1, p. 23.

The appellant argued that, during his tenure as Chief of Pharmacy, the agency had a clear process with regard to how to account for controlled substances, which was consistently followed. HCD, appellant testimony. In April 2016, Marshall emailed the pharmacy managers with an excerpt of the handbook pertaining to lost or stolen controlled substance procedures. IAF, Tab 5, p. 147. The appellant noted that controlled substance losses were rare, occurring only

about three times a year[8], and were appropriately handled during his tenure. HCD, appellant testimony; IAF, Tab 5, pp. 144-145.

I recognize that the loss of controlled substances was a relatively rare occurrence, but controlled substance losses are significant when they occur. And, when the appellant was the Chief of Pharmacy, he was responsible for ensuring that such losses were detected and properly reported. During that time, Marshall sent pharmacy managers a copy of the applicable policy. IAF, Tab 5, p. 147. Even though the agency has clear evidence that pharmacy managers were unaware of the processes in April 2017, I do not find that the agency has demonstrated by substantial evidence that these managers were unaware of these processes nine months before that when the appellant was the Chief of Pharmacy. Accordingly, I do not sustain this specification.

> SPECIFICATION 9: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that automation equipment inside pharmacy are outdated, not functioning, or non-existent in some areas. This has resulted in multiple unnecessary staff to be working in pharmacy to manually dispense medications at a great inefficiency to VAGLAHCS. Those unnecessary employees created a waste of resources since they could have been used for other important patient care and safety related purposes. Automations such as ScriptPro machines that has been used at other VA's for many years are not present at VAGLAHCS. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 10. The VISN site visit report summarized its findings on this issue as follows:

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8 The email that the appellant relied on to demonstrate that controlled substances losses occur about three times a year actually referred to only one of the pharmacies within the appellant's area of responsibility. IAF, Tab 5, pp. 144-145. Accordingly, it logically follows that controlled substance losses occur more often than that when all of the pharmacies within the appellant's area of responsibility are considered.

> Automation equipment inside pharmacy is outdated, not functioning, or non-existent in some areas. One ACC has no automation equipment and fills all prescriptions manually. The inpatient pharmacy had a new medication carousel that was installed, but not operational. Unit dose packing machines are outdated and unsupported. Outpatient pharmacies that have automation use Parata. GLA received three ScriptPro machines from Las Vegas VA, however, only the machines were requested, not the workstations (which are still in Las Vegas) ScriptPro machines not in use.

IAF, Tab 1, p. 24. Automation equipment is standard in agency pharmacies, and a key part of the agency's ability to minimize labor costs while focusing the efforts of its pharmacy employees on the most complex matters. HCD, appellant testimony, Evans testimony.

The appellant does not contest the gravamen of these findings, nor does he argue that it was not true during his tenure as Chief of Pharmacy.[9] However, the evidence reflects that, as far back at 2015, the appellant was seeking to order updated automation equipment for the pharmacies in his area of responsibility. HCD, appellant testimony; IAF, Tab 24, p. 241. However, the expense of these machines rendered them purchases beyond the appellant's immediate authority, and he was required to work through a multi-step process to obtain the equipment. HCD, appellant testimony. After the VISN site visit, the acting Chief of Pharmacy followed up on the prior pharmacy requests for automation, and had updated automation equipment installed and operating by the end of 2017. HCD, Dawoodbhai testimony.

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9 The appellant testified that, while he was Chief of Pharmacy, all of the automation machines had maintenance contracts. HCD, appellant testimony. For at least one machine, the supplier no longer supported the unit, but the agency was able to find another contractor that would provide continued maintenance. *Id.* The VISN team's findings are consistent with this, saying only that the machine is unsupported.

The appellant also testified that, when he was Chief of Pharmacy, the LAACC pharmacy had no automation equipment because the pharmacy filled only about 250 prescriptions and had sufficient pharmacy employees to meet that need. HCD, appellant testimony. In essence, the appellant made a conscious decision not to seek (or press harder for) automation equipment at the LAACC pharmacy. At the same time, the appellant perceived that the pharmacies underneath his authority as a whole were understaffed. *Id.* It is possible that, if LAACC had automation equipment, the pharmacy employees there could be freed up to perform other, higher-level duties, or perhaps work at other pharmacies with greater volume and need.

I find that the agency proved by substantial evidence the gravamen of the specification (*i.e.,* that automation equipment were outdated, not functioning, or non-existent in some areas, resulting in multiple unnecessary staff working in pharmacy to manually dispense medications and creating a waste of resources since they could have been used for other important patient care and safety related purposes). I also find that, under the circumstances, this constituted a failure by the appellant to perform his assigned duties as a Chief of Pharmacy. Accordingly, I sustain the specification.

> SPECIFICATION 10: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that pharmacy have been unaware of and not practicing the necessary separation of duties for many years in regards to procurement. Some staff were both placing and receiving card purchases. VA Policy requires different pharmacy staff members place and receive orders. It was also found that the invoices in some pharmacies did not have notation that each line item had been received. This places VAGLAHCS out of compliance and increases the potential for unnoticed diversion. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 10. Under agency policy, the pharmacy employee who orders a particular item is not permitted to receive that same item. HCD, appellant testimony. The appellant indicated that he thought pharmacy technicians knew

the policy, but this issue had not been raised with him prior to the notice of proposed removal.[10] *Id.*

> During its visit in April 2017, the VISN site team found the following:
>
> Separation of Duty was not observed in all areas, with some procurement staff placing and receiving purchase card orders. VA policy requires different pharmacy staff members place and receive an order.

IAF, Tab 1, p. 24. In support of his appeal, the appellant provided the affidavit of a pharmacy technician at the West Los Angeles pharmacy, wherein she explained that she had been both the ordering and receiving technician on orders as part of "an ongoing practice for many years at all VA Greater Los Angeles pharmacies." IAF, Tab 26, pp. 89-90.

I find that the agency proved by substantial evidence that, during the appellant's tenure as Chief of Pharmacy, pharmacy employees have been unaware of and not practicing the necessary separation of duties for many years in regards to procurement. I also find that ensuring pharmacy compliance with agency policy was one of the appellant's duties. Accordingly, I find that the agency proved that the appellant failed to perform assigned duties in this regard, and I sustain the specification.

> SPECIFICATION 11: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that important High Alert/NIOSH drug lists were outdated for many years in multiple

10 In reply to the proposed removal, the appellant provided a copy of an email from a clinical pharmacy specialist in May 2017 confirming that the Bakersfield pharmacy had two signatures on all controlled substance invoices for the month of April 2017. IAF, Tab 5, p. 160; *see also* IAF, Tab 25, pp. 290-293. The appellant commented that "[w]e received monthly confirmations from ordering sites, confirming separation of duties when ordering controlled substances. We did not audit for other drugs." *Id.* This specification pertains to ordering beyond controlled substances, and the record contains no evidence of any mechanism to ensure compliance with separation of duties on orders not related to controlled substances.

> pharmacy areas with one pharmacy having their most recent High Alert/NIOSH drug list being from 2010. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, pp. 10-11. The evidence reflects that the GLA Pharmacy and Therapeutics (P&T) Committee was responsible for approving updates to the High Alert drug lists.[11] HCD, appellant testimony, Glassman testimony. After the P&T Committee approves an updated list, the agency's Quality Management service prints updated copies of the lists for posting. HCD, appellant testimony. The pharmacy service is then responsible for ensuring that the updated posters are posted in pharmacies. HCD, Glassman testimony; Marshall testimony.

The VISN site visit team found the following as of April 2017:

> National Institute for Occupational Safety and Health (NIOSH) List of Antineoplastic and Other Hazardous Drugs in Healthcare Settings not current or prominently displayed consistently access all pharmacies. This is especially important in workplace settings with women of child bearing age.
>
> High Alert Drug List from 2010 posted in one pharmacy.

IAF, Tab 1, p. 24. The appellant testified that he was not aware that the lists were outdated. HCD, appellant testimony. However, he noted that the posters are worthless; instead, under his supervision, the pharmacy service implemented what was on the poster in practice. *Id.* Nonetheless, the appellant admits that the poster needs to be updated in print when it is updated by the P&T committee. *Id.*

I find the agency proved by substantial evidence that the identified posters were outdated during the appellant's tenure as Chief of Pharmacy and, as Chief of Pharmacy, the appellant was responsible for ensuring that pharmacies complied with agency policy. I understand that the appellant was not the individual who had primary responsibility for posting the updated lists in pharmacies himself,

11 It appears that NIOSH drug lists are prepared by the National Institute for Occupational Safety and Health.

but, as Chief of Pharmacy, the appellant had responsibility nonetheless. Accordingly, I find that the agency proved this specification by substantial evidence, and I sustain it.

> SPECIFICATION 12: It was discovered during an external survey of the VAGLAHCS in April/May 2017, that many pharmacy managers, supervisors and staff were unaware of many local and national pharmacy related policies. The GLA Pharmacy Intranet site lists expired and outdated policies as old as 2005. This occurred under your oversight as Chief of Pharmacy.

IAF, Tab 1, p. 11. The pharmacy service maintained an intranet where local and national pharmacy related policies were posted and available to pharmacy employees. HCD, appellant testimony. The appellant explained that, until December 2015, no one brought to his attention that the intranet had out of date policies on it. *Id.* In December 2015, the pharmacy service could not post updated policies online because the program used to update them was not compliant. *Id.* During the time when the appellant was detailed to Quality Management, he continued to work on pharmacy policies and the service considered paying for the program required to update the policies out of its own budget. *Id.*

However, in April 2017, the VISN site visit team found that "[p]harmacy staff [were] not familiar with many national policies" and the "GLA Pharmacy Intranet site lists policies from 2005." IAF, Tab 1, p. 24. Given that the appellant testified that GLA pharmacy service policies were themselves updated, I find that this establishes by substantial evidence that the service's intranet site did not contain updated versions of the policies even through December 2015 when the service lost the ability to update the intranet using existing resources. I also find that, as Chief of Pharmacy, the appellant was responsible for ensuring that employees in the pharmacy service were aware of applicable policy and the resources used to communicate those policies – including the intranet – were

updated with the applicable information. Accordingly, I find that the agency proved this specification by substantial evidence, and I sustain it.

Proof of one specification is sufficient to support a charge. *Christopher v. Department of the Army*, 107 M.S.P.R. 580, 590 (2007). Having sustained eight specifications under this charge, I sustain the charge.

The agency proved the charge of failure to follow instructions by substantial evidence.

The agency's second charge against the appellant was failure to follow instructions with a single specification as follows:

> During VACO site visit during June 27-29, 2016 , it was discovered that VAGLAHCS pharmacy staff had been using a CPRS templated pharmacy disposition note that allowed staff to inappropriately discontinue pending medication orders. Although you had been instructed at least twice to remove the note, you did not remove the CPRS templated pharmacy note immediately as expected, and Veterans continued to have their pending orders inappropriately discontinued by pharmacy staff, and in some cases, this resulted in serious patient safety issues.

IAF, Tab 1, p. 11. To prove a charge of failure to follow instruction, an agency must show that a proper instruction was given and that the employee failed to follow it, without regard to whether the failure was intentional or unintentional. *See, e.g., Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555-57 (1996).

On June 29, 2016, during a meeting with the appellant, the VACO site visit team expressed concerns regarding the pharmacies' use of a template in the agency's CPRS system that permitted a pharmacy order to be discontinued before it reached the seven day mark. HCD, appellant testimony. When the meeting ended, the appellant understood that the pharmacy was to cease its practice. *Id.* He later held a meeting with the managers within the pharmacy service, after which he explicitly decided not to disable the template, but instead to preclude

pharmacy staff from discontinuing prescription orders. *Id.* The appellant sent an email to pharmacy supervisors, stating, in relevant part, as follows:

> Immediately, staff are **NOT** to discontinue a flagged pending order after the allotted days and attempts to clarify. That is no "Disposition Note…" Managers will be responsible for this function.
>
> * * * * *
>
> Please communicate to staff immediately.

IAF, Tab 25, p. 285. During an exit meeting with the VACO team and GLA's executive leadership later that day, Dr. Emmendorfer ordered the appellant to discontinue use of the template immediately. HCD, Brown, Marshall, Doelling testimony; HCD-2, Hartroft testimony. The appellant took no further actions to discontinue the template after Emmendorfer's order.

Between June 29, 2016 and July 8, 2016, the template at issue was used at least 50 times by GLA pharmacy employees. HCD, Marshall testimony, Evans testimony. Following the July 8, 2016 discovery that the template continued to be used following the instruction to discontinues its use, the agency conducted a review of patient records to determine if any patients had been harmed as a result of the discontinuation of a prescription order based on the template. HCD, Evans testimony, Cortez testimony. The agency identified two patients who experienced harm as a result of the template use. IAF, Tab 1, p. 39; HCD, Cortez testimony. The agency attempted to make disclosures to both patients, but were only able to make the necessary disclosure to one of the patients. HCD, Cortez testimony.

The appellant first argues that he was not twice instructed to discontinue the template, but instead to cease discontinuing orders, which he promptly did.[12]

12 The appellant proffered detailed evidence regarding the derivation of the template and how he believes that the VISN and VACO misunderstood the use of the template when it instructed the appellant to cease its use. HCD, Marshall testimony, appellant testimony. The appellant was instructed to discontinue the use of the template, and any misunderstanding that led to that instruction did not relieve the appellant of his obligation to follow it.

However, the appellant's own testimony regarding his discussion with the pharmacy managers following his morning discussion with the VACO site visit team on June 29, 2016 reflects that he discussed discontinuing the template, but elected not to after one of his managers asked him not to. Further, the evidence clear that, in the exit interview, the appellant was instructed to discontinue use of the template. Thus, I find that substantial evidence supports that the instruction the appellant received earlier in the day was not only to cease discontinuing pending orders, but also to discontinue use of the template.

The appellant also argues that his email on June 29, 2016 followed the instruction he was given, ordering pharmacy employees not to the use of the template and to cease discontinuing pending orders. I disagree. At best, the appellant's email told non-supervisors to cease discontinuing orders and to cease using the template, while openly permitting supervisors to do so. IAF, Tab 25, p. 285. Thus, I find that, in the email, the appellant did not follow the instruction to discontinue use of the template. This determination is not merely an overly technical reading of the email; the evidence reflects that GLA pharmacy employees did not cease use of the template, but instead continued using it until the template was deactivated in the system on July 8, 2016.

I find that the agency proved the gravamen of its specification by substantial evidence, and that the conduct described in the specification is a failure to follow instructions. Accordingly, I find that the agency proved this charge by substantial evidence, and I sustain it.

The appellant failed to prove age discrimination.

The appellant alleges the agency's decision to remove him was discrimination based on his age. When an appellant asserts an affirmative defense of discrimination or retaliation under 42 U.S.C. § 2000e-16, the Board

first will inquire whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. Such a showing is sufficient to establish that the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1).

In making his initial showing, an appellant may rely on direct evidence (*i.e.*, evidence that can be interpreted as an acknowledgment of discriminatory intent), or any of the three types of circumstantial evidence, either alone or in combination. The first kind consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. The second kind of circumstantial evidence is comparator evidence, consisting of evidence that similarly situated employees were treated more favorably. The third kind consists of evidence that the agency's stated reason for its action is unworthy of belief and a mere pretext for discrimination. *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 42 (2015). If the appellant meets his burden, the Board then will inquire whether the agency has shown by preponderant evidence that the action was not based on the prohibited personnel practice, *i.e.*, that it still would have taken the contested action in the absence of the discriminatory or retaliatory motive.

The gravamen of the appellant's age discrimination claim is that the agency's removal decision was made on such tenuous grounds with so little consideration of his tenure, his reply, and the underlying circumstances that the removal simply could not have been based on the grounds that were claimed. HCD, appellant closing argument. Instead, he argues that agency officials were well aware that he was retirement eligible (and thus over 40 years of age) when it decided to remove him, and their desire to remove him was based on age related

animus, which led to them manufacturing reasons to remove him and misinterpreting evidence and circumstances to meet that end. *Id.* Ultimately, the agency then chose to fill the appellant's position with an acting Chief of Pharmacy who was in his forties, and thus much younger than the appellant. *Id.*

As explained above, I find that the agency met its burden to prove both of the charges against the appellant by substantial evidence. While the agency's evidentiary support for the removal action had weak spots, the overall impression left by the evidence was that, under the appellant's leadership, the pharmacy service had significant weaknesses in areas for which the appellant had ultimate responsibility and the appellant failed to follow a direct instruction in a manner that reflected poorly on his supervisors and potentially endangered patients. The agency has not presented any evidence that the appellant acted intentionally in engaging in this misconduct, nor do I find that the misconduct was intentional.

The appellant argued that the timing of the agency's removal decision was suspicious, supporting an inference of age discrimination under the circumstances. HCD, appellant closing argument. GLA management first became aware that the appellant had failed to follow the VACO site visit team instruction to discontinue the pending order template on July 8, 2016. HCD, Brown testimony. The appellant's supervisor detailed him out of his position that day, explaining that the detail was pending a review. IAF, Tab 5 p. 53. The appellant remained detailed to a position in Quality Management for more than a year until the agency eventually proposed his removal. HCD, appellant testimony.

During the period of his detail, the appellant was denied the opportunity to attend certain conferences that would have been routine for the Chief of Pharmacy to attend, and never received a performance evaluation. HCD, appellant testimony. On at least one occasion, the appellant's supervisor informed

him that he was being denied these opportunities in part because the investigation was ongoing, including an Administrative Board of Investigation inquiry into allegations of misconduct by a pharmacy employee. *Id.* Also during this period, the agency brought in a second acting Chief of Pharmacy and a VISN site visit team who uncovered significant opportunities for improvement in the pharmacy service. HCD, Hartronft testimony, Evans testimony.

While the appellant contends that the agency's actions in placing the appellant in a lengthy holding pattern in his detail without a performance appraisal or other information regarding his performance is indicative of discriminatory animus, I find that the delays are far more likely due to unrelated agency delays and a reticence to take action against the appellant. After the appellant was detailed in July 2016, the agency conducted an inquiry to determine whether any patients were injured by the appellant's failure to follow instructions. HCD, Evans testimony, Cortez testimony. It appears that inquiry was ongoing when the agency began the Administrative Board of Investigation inquiry into alleged misconduct by a pharmacy service employee. IAF, Tab 26, pp. 32-43. In October 2016, the Administrative Board of Investigation inquiry completed with one of the conclusions being "There is little to no oversight and accountability for employees in Pharmacy when conduct and performance issues are visibly apparent," and one of the recommendations being "Chief of Pharmacy and Associate Chief of Pharmacy reorganize and restructure the Pharmacy management of authority, which currently is non-existent." IAF, Tab 26, p. 32. The agency's human resources personnel were then reviewing the results of both of these investigations to determine whether to recommend any action be considered against the appellant. HCD, Hartronft testimony. Then, in April 2017, after Dr. Dawoodbhai began as acting Chief of Pharmacy, the VISN site visit uncovered several significant deficits in how the pharmacy service was run,

including several deficits rooted in the appellant's time as the Chief of Pharmacy. IAF, Tab 1, pp. 22-30. Approximately five months after the VISN site visit report was issued, the appellant's supervisor proposed his removal. IAF, Tab 1, pp. 8-12. There are certainly lengthy delays in the process occurring between when the appellant was found to have failed to follow instructions and when he was removed from his position, but the sequence of events and timing thereof reflect more the slow wheels of a large bureaucracy[13] and not discriminatory animus. I also find plausible Hartronft's testimony that determining what action to take against the appellant, if any, was not a high priority because the appellant remained employed, but was no longer managing the operations of the service. HCD, Hartronft testimony.

If, as the appellant implies, the agency was merely seeking an excuse to remove the appellant, the agency could have taken that action as soon as it had proof that the appellant's failure to follow instructions had injured patients. But they did not do so. If, as the appellant implies, the agency was merely seeking an excuse to remove the appellant, the agency could have taken that action as soon as it had the results from the investigation reflecting a lack of appropriate oversight over pharmacy employees. But they did not do so. Instead, the appellant remained employed until after a VISN site visit provided evidence of systemic problems throughout the GLA pharmacy service that reflected an overall failure by the Chief of Pharmacy to perform his assigned duties to effectively manage the organization and ensure compliance with the agency's applicable policies.

13 The appellant testified to several different agency processes that lengthen seemingly simple tasks to years-long endeavors. HCD, appellant testimony.

The appellant also argued that his age discrimination claim is supported by the agency's decision in March 2017 to appoint an acting Chief of Pharmacy who was younger than the appellant. While Dawoodbhai's age is not in the record, all witnesses queried about his age relative to the appellant indicated that Dawoodbhai was younger than the appellant. *See* HCD, Brown testimony. However, the evidence reflects that the agency first placed Marshall, who is older than the appellant in the acting role. HCD, Marshall testimony. It was only after Marshall requested to be relieved of that responsibility that the agency sought another individual. HCD, Evans testimony, Hartronft testimony. At that time, Hartronft asked Evans for assistance, and Evans asked all the VISN Pharmacy Executives for interested candidates. *Id.* Two candidates were identified, but only one – Dawoodbhai – was eventually eligible to take on the acting role. *Id.* Under these circumstances, I do not find that Dawoodbhai's age relative to the appellant is highly probative of age related animus toward the appellant.

I have considered all of the evidence in the record, but find little evidence reflecting that the agency's decision to remove the appellant was motivated even in part by his age. Accordingly, I find the appellant has not demonstrated by preponderant evidence that the agency was motivated even in part by his age. Thus, I find the appellant did not meet his overall burden of proving age discrimination, and his affirmative defense fails.

The appellant failed to prove harmful procedural error

The Board will not sustain an agency decision if the appellant proves the affirmative defense of harmful error in the agency's application of its procedures in arriving at such decision. *Doe v. Department of Justice*, 123 M.S.P.R. 90, ¶ 7 (2015). Harmful error cannot be presumed; an agency error is harmful only where the record shows the procedural error was likely to have caused the agency

to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Id*.

The appellant has alleged several errors by the agency in reaching its decision. I consider each claimed error in turn.

The appellant first argued that the agency erred by determining that the penalty of removal was appropriate based on the substantiated charges. IAF, Tab 13, pp. 9-10. The appellant pointed to the portions of the "level of discipline" paragraph in the proposal (which was adopted in the decision) that pertain to the specifications that Brown did not sustain in her decision. IAF, Tab 13, p. 10. However, in actions taken under 38 U.S.C. § 318, the agency need not demonstrate that the efficiency of the service would be served by a particular adverse action and, accordingly, the agency need not consider the *Douglas* factors in rendering a decision. Here, Brown did consider the *Douglas* factors, but any error she committed in doing so is not a harmful procedural error because she simply could have elected not to consider them at all.[14] Accordingly, I find that the appellant has not proven a harmful procedural error in this regard.

The appellant next argued that the agency committed a harmful procedural error by failing to abide the timelines provided in 38 U.S.C. § 714. IAF, Tab 13, pp 12-13. The agency provided the appellant with the notice of proposed removal on October 6, 2017. IAF, Tab 1, pp. 8-12. Pursuant to the timelines established in 38 U.S.C. § 714(c)(2), the agency was required to issue a final decision no

14 Regardless of whether the agency is required to consider the *Douglas* factors in rendering a decision in an adverse action, the agency is required to provide the appellant with notice of any information that will be considered and a meaningful opportunity to respond to that information to satisfy due process rights. Here, the agency notified the appellant it would consider this information in the notice of proposed removal, and the appellant actually replied to the information. Thus, I find no due process violation in Brown's consideration of these matters.

later than October 30, 2017. 38 U.S.C. § 714(c)(2) ("[t]he Secretary shall issue a final decision with respect to a removal . . . under [Section 714] not later than 15 business days after the Secretary provides notice to the covered individual of the removal..."). Brown testified she signed the decision on October 30, 2017, which is the date on the top of the document. HCD, Brown testimony. However, the agency did not provide the appellant a copy of the decision until November 1, 2017. IAF, Tab 1, pp. 93-95. The appellant asserts that the decision is not "issued" under the statute until November 1, 2017, and was thus untimely. I find that Brown made and signed the decision within the statutory timeline, and the agency's failure to provide the appellant copy of the decision until two days later was not an error under the statute.[15]

However, even if the agency's actions were in error, I find that the appellant has not demonstrated that he was harmed by this error. The appellant argues that, if the agency missed the timelines provided in the statute, their "cure" was to propose action against the appellant under 5 U.S.C. chapter 75 with its looser timelines and higher burden of proof. IAF, Tab 13, pp. 12-16. It appears the agency could have elected to propose the appellant's removal under Chapter 75 (either at the outset or on October 31, 2017). But I see no evidence reflecting that the agency must have done so, or that the agency would have been required to "cure" a violation of the 38 U.S.C. § 714 timelines by reverting to another statutory authority. And such an interpretation of the statute appears inconsistent with the intent of the agency's Accountability and Whistleblower Protection Act of 2017, the statutory authority for the removal, which was to narrow and

15 To the extent that the appellant is arguing that the timeline of the decision was not in accordance with 38 U.S.C. § 714 and thus cannot be sustained, I find he has not proven his claim because the agency complied with the statute when Brown made and signed the decision during the statutory timeline.

constrict the disciplinary process for covered agency employees. Thus, the appellant has not demonstrated either error or that he was harmed by any alleged error in this regard.

Accordingly, I conclude the appellant failed to establish a harmful procedural error affirmative defense.

The appellant failed to prove that the agency's decision to remove him violated his due process rights.

An appealable agency action taken without affording an employee prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates the employee's right to minimum due process. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). The appellant argued that he was denied due process of law because "Title 38 Actions do not afford due process because the Department lacks statutory authority to provide the employee with a meaningful opportunity to respond to a proposed adverse action under the timelines as stated in the Act." IAF, Tab 13, p. 22. The question before me in this appeal is not whether, in a broad sense, 38 U.S.C. § 714 violates the due process rights of employees subject to adverse actions under its terms; instead, I must decide whether the agency violated the appellant's due process rights here. I find that he has not demonstrated they did so.

The appellant received the agency's notice of proposed removal on October 6, 2017. IAF, Tab 1, pp. 8-12. The notice explained that the appellant had 7 business days from the date he received it to respond. IAF, Tab 1, p. 11. The appellant's counsel requested – and was granted – an extension of time to October 20, 2017 to respond to the proposal. IAF, Tab 5, pp. 51-52. The appellant's counsel submitted a 26-page written reply with more than 300 pages of exhibits, which was considered by Brown in rendering a decision. IAF, Tab 5; HCD, Brown testimony.

As a practical matter, the appellant had more time to reply than the agency was required to afford him under chapter 75. And he has presented no evidence of special circumstances which would have warranted the agency being required to provide him any additional time to reply to the proposed removal if the action had been proposed under chapter 75. To the contrary, I find that the agency afforded the appellant a meaningful opportunity to respond to the proposed removal, and that he was able to do so effectively within the time allotted.

Accordingly, I find that the appellant has not met his burden to prove that the agency violated his due process rights in its decision to remove him.

The agency failed to prove that the agency's decision to remove him was not in accordance with law.

An agency action that is not in accordance with law may not be sustained. *See* 5 U.S.C. § 7701(c)(2)(C); *Clark v. U.S. Postal Service*, 52 M.S.P.R. 634, 639 (1992). An appealable action is unlawful in its entirety if there is no legal authority for it, and the Board will reverse it as "not in accordance with law," even if minimum constitutional due process was afforded to the appellant and he has not shown harmful error, *i.e.,* that the alleged error prejudiced his rights so that the outcome before the agency was possibly affected. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 683–84 (1991), citing*, inter alia, Handy v. U.S. Postal Service*, 754 F.2d 335, 337–38 (Fed. Cir. 1985); *Hamilton v. U.S. Postal Service*, 58 M.S.P.R. 486, 488 (1993) (finding a demotion action to be not in accordance with law when the decision was signed by an individual who was not employed by the agency at the time of the decision). While harmful error analysis applies to all procedural errors, the "not in accordance with law" provision is applicable to other unlawful actions. *Doe v. Department of Justice*, 121 M.S.P.R. 596, 603 (2014).

Here, the appellant alleges that the agency's removal action was not in accordance with law for three reasons: the decision violated 38 U.S.C.

§ 714(c)(2) and the due process clause of the United States Constitution, the decision is not supported by substantial evidence, and removal is not an appropriate level of discipline based upon the specifications Brown upheld. IAF, Tab 13, pp. 19-23.

The appellant's claim that the decision violated 38 U.S.C. § 714(c)(2) and the due process clause of the United States Constitution is premised on his argument, discussed above, that the statutory provisions do not provide employees subject to action under 38 U.S.C. § 714 a meaningful opportunity to respond to the proposed action because of the time limitations imposed in the process. IAF, Tab 13, pp. 20-22. In essence, the appellant argues that compliance with 38 U.S.C. § 714(c)(2) is not in accordance with Constitutional due process. *Id.* I have considered this claim above, and find he has not demonstrated that the agency's actions in this regard were not in accordance with applicable due process law.

The appellant's next argument is that the removal is not supported by substantial evidence. I have considered above whether the agency met its burden to prove the charges against the appellant by substantial evidence, and find that it has. Accordingly, I find that the appellant has not demonstrated that the removal decision was not in accordance with law in this regard.

The appellant's last argument that the removal was not in accordance with law was that removal is not an appropriate level of discipline for the sustained charges and specifications against the appellant. IAF, Tab 13, pp. 22-23. The appellant argued that the removal was inconsistent with the agency's table of penalties and violates the agency's policy of progressive discipline. *Id.* However, the appellant did not identify a single law with which the decision was not in accordance. Instead, he is essentially arguing that Brown should have assessed the *Douglas* factors differently here, and determined that the appellant's

misconduct warranted a different penalty. However, under 38 U.S.C. § 714(d)(2)(B), the Board does not have the authority to mitigate the penalty prescribed by the agency. I understand a limitation on the Board's ability to mitigate a penalty as a limitation on the Board's authority to assess the factors considered or the weight accorded any particular factor in selecting a penalty. Accordingly, it appears that the Board does not have the authority to determine exactly what the appellant is requesting that I determine here: whether Brown correctly assessed particular factors in reaching the decision to remove the appellant. I find that the appellant has not provided any basis for determining that Brown's assessment of these particular factors (or her failure to consider these factors) renders the decision not in accordance with law.

Thus, I find that the appellant failed to prove that the agency's decision was not in accordance with law. Having found that the agency proved its charges by substantial evidence and the appellant did not prove any of his affirmative defenses, I affirm the agency's decision to remove the appellant.

Decision

The agency's action is AFFIRMED.

FOR THE BOARD:

_____
Samantha J. Black
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 23, 2018**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you

actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a

majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

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

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial

decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

notice OF APPEAL rights

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b).

Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

U.S. Court of Appeals
for the Federal Circuit

relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a courtappointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding

all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

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

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

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

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JEFFREY SAYERS Petitioner, v. DEPT. OF VETERANS AFFAIRS Respondent.	)	Docket No. 18-2195 Date: November 13, 2018

CERTIFICATE OF SERVICE

I certify that the forgoing Petitioner's Brief was filed with the clerk of the United States Court of Appeals for the Federal Circuit and served a copy on counsel of record, this 13th day of November 2018 through the Court's Electronic filing System.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of copies of the Petitioner's Brief will be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit in accordance with the Federal Circuit Rules

/s/ Natalie K. Khawam

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U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JEFFREY SAYERS Petitioner, v. DEPT. OF VETERANS AFFAIRS Respondent.	)	Docket No. 18-2195 Date: November 13, 2018

CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 7, 887 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure. The brief has been prepared in a 14-point proportional Garamond typeface using Microsoft Word 2016.

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