NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

LILIBETH MICHELSON,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2019-1811

Petition for review of the Merit Systems Protection Board in No. AT-0752-18-0424-I-1.

Decided: May 11, 2020

JACK BRADLEY JARRETT, III, Alan Lescht and Associates, PC, Washington, DC, for petitioner.

ISAAC B. ROSENBERG, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, REGINALD THOMAS BLADES, JR., ROBERT EDWARD KIRSCHMAN, JR.

Before CHEN, LINN, and STOLL, *Circuit Judges*.

PER CURIAM.

Lilibeth Michelson ("Michelson"), a former Supply Technician at the Reserve Officer Training Corps in Daytona Beach, Florida, appeals from the final decision of the Merit Systems Protection Board ("Board"), stemming from the Initial Decision of the Administrative Judge ("AJ"), affirming her removal from Federal Service based on three charges: (1) absent without leave ("AWOL") from January 9, 2018 through January 19, 2018; (2) failure to follow directions on January 29, 2018; and (3) creating a disturbance on January 29, 2018. *Michelson v. Dep't of the Army*, No. AT-0752-18-0424-I-1 (Dec. 21, 2018) ("*Initial Decision*"). Because the AJ's Initial Decision was in accordance with law and supported by substantial evidence, we affirm.

Petitioner has the burden to show that the agency action is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

With regard to the first charge, Michelson argues that the AJ erred by not accepting an October 25, 2018 letter from nurse practitioner Anthony Lagana as administratively acceptable evidence of Michelson's anxiety and depression during the AWOL period. Substantial evidence supports the AJ's finding that Lagana's October 25, 2018 letter was not administratively acceptable.[1] As the AJ correctly found, several problems undermine the force of that letter. Most fundamentally, the letter does not go into detail about the relationship between Michelson's anxiety

[1] Because the letter was found not to be administratively acceptable, we need not address whether the letter, dated after Michelson's removal, was properly considered.

and depression and her inability to perform her work. Rather, the letter was conclusory in its key statements that "Ms. Michelson needed to be off work until 1/19/18 for medical purposes due to her anxiety and depression," and was "medically incapacitated and unable to attend work." J.A. 42. *See Young v. U.S. Postal Serv.*, 79 M.S.P.R. 25, 33 (1998) (rejecting, due to a "lack of detail as to the medical condition, the diagnosis and prognosis," a letter stating that "the appellant was unable to work" because "she was 'overwhelmed and depressed'"). Moreover, the letter's conclusions were based on Michelson's appointment with nurse practitioner Kayla Ritzel on December 13, 2017, a visit that was scheduled as a follow-up visit for a sore throat. According to the contemporaneous progress notes of that appointment, anxiety was discussed, but there is no indication that Michelson would be imminently unable to perform her work duties. Indeed, the notes show that, while Michelson requested a month off "to help her anxiety, depression and get her started on her new meds," J.A. 76, Ritzel made no determination that this was a medical necessity.

Moreover, as detailed in the Agency's removal letter, Michelson had thrice sought and been denied various types of leave for much of the time period for which she was AWOL: once as annual leave (January 8 through 19), once to take care of her ill father (January 8 through 16), and once based on a December 15, 2017 letter from Ritzel (December 18 through January 19).

Additionally, Michelson argues that the AJ refused to consider Lagana's letter of October 25 because it was submitted after the AJ's determination, and that this was error. *See Initial Decision* at 14 ("Further, the appellant failed to provide this information to the agency in a timely manner even in response to the notice of proposed removal. Thus, the agency's AWOL decision remains appropriate" (citing *Atchley v. Dept' of the Army*, 46 M.S.P.R. 297, 301 (1990))). However, the AJ *did*, in fact, consider that letter,

and found it to be not administratively acceptable for substantive reasons. *Id.* at 13–14 ("[E]ven if [Lagana's letter] had been timely submitted, this note does not comply with the leave restriction letter because it is conclusory and fails to explain the appellant's incapacitation.").

Charges 2 and 3 address Michelson's actions on January 29, 2018, the first day of her suspension.[2] With respect to charge 2—failure to follow directions by going to work on January 29, 2018—Michelson argues that the letter suspending her was ambiguous as to whether her suspension began upon receipt of the standard form 50 or on a date certain. The letter stated: "[Y]ou will be suspended from duty without pay for seven (7) calendar days beginning Monday, 29 January 2018 through Sunday, 4 February 2018," and "A Standard Form 50, Notification of Personnel Action, documenting your suspension will be forwarded separately." J.A. 93.

As the AJ correctly found, Michelson's suspension unambiguously began on January 29, and was not contingent on the receipt of Standard Form 50. *Initial Decision* at 15 ("COL Kraft's letter is unambiguous that the appellant was to be suspended on January 29, 2018. While it does state that an SF-50 will be issued, it does not indicate that the suspension will be held in abeyance until CPAC issues the SF-50."). "The appellant does not dispute that she came to work on January 25, 2018." *Id.* Substantial evidence supports the AJ's determination that Michelson failed to follow the unambiguous instruction not to be at work on January 29.

Michelson exacerbated that failure by remaining on campus at the computer lab after she was explicitly told to "leave the premises because she was officially suspended."

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[2] The suspension was independent of the AWOL dates in charge 1.

Id. at 16. The AJ was within her discretion to credit the contemporaneous statement by CPT Karlewicz about the interaction and to discount Michelson's assertion that she did not understand that "premises" referred to the whole campus and not just the supply room. Substantial evidence thus supports the AJ's determination as to charge 2.

Charge 3—creating a disturbance by failing to leave the premises—is also supported by substantial evidence. Michelson argues that she was not violent and did not curse or resist when found in the computer lab, and therefore was not creating a disturbance. However, Michelson's failure to leave after her confrontation with Karlewicz necessitated an "unnecessary[ily] disrupti[ve]" search of "the work place," J.A. 82, and an escort to ensure Michelson left the premises. The determination of whether that "result[ed] in an adverse effect on morale, production, or maintenance of proper discipline," AR 690-700, Chapter 751, was within the Agency's discretion.

Finally, we reject Michelson's challenge to the Agency's choice to remove Michelson from her position. Michelson failed to establish that the AJ erred in sustaining any of the Agency's three charges. Moreover, as the AJ correctly observed, the Agency considered and balanced all of the relevant factors set forth in *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 289, 305–06 (1981), including Michelson's length of service with the Agency, in selecting the penalty of removal. *Initial Decision* at 23–24. We agree with the AJ that the Agency's penalty did not "clearly exceed[] the bounds of reasonableness." *Parker v. U.S. Postal Serv.*, 111 M.S.P.R. 510, 514 (2009), *aff'd*, 355 F. App'x 410 (Fed. Cir. 2009).

* * *

For all the above reasons, we hold that the Board's decision was in accordance with law and supported by substantial evidence.

AFFIRMED

COSTS

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

LILIBETH MICHELSON,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-0752-18-0424-I-1

DATE: December 21, 2018

Victoria M. Harrison, Washington, D.C., for the appellant.

G. Houston Parrish, Esquire, Fort Knox, Kentucky, for the agency.

BEFORE
Sherry Linville
Administrative Judge

INITIAL DECISION

On April 29, 2018, the appellant filed an appeal with the Atlanta Regional Office of the agency's decision to remove her from the position of Supply Technician (MVO), GS-2005-07, with the U.S. Army, Cadet Command, Embry Riddle Aeronautical University (ERAU), Daytona Beach, Florida, effective April 16, 2018. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512(1) & 7513(d). The appellant waived her right to a hearing, and this decision is based on the written record. AF, Tab 34. For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant held the position of Supply Technician (MVO), GS-2005-07, assigned to the Reserve Officer Training Corps (ROTC) at ERAU in Daytona, Beach, Florida. AF, Tab 6 at 28.[1] Her job duties included being responsible for the ROTC "supply program for the host University and affiliates within the Task Force structure," which included providing "staff assistance to all areas of supply and logistics management;" managing the supply budget; maintaining an adequate inventory of the unit's supplies; controlling the "unit arms, ammunition, and equipment;" and maintaining the proper requisition records. AF, Tab 6 at 59-68.

On May 22, 2017, Brett Chereskin, MAJ, AV, Assistant Professor of Military Science, issued the appellant a memorandum that addressed issues surrounding her requests for sick leave. AF, Tab 6 at 44-46. Specifically, it indicated that on May 11, 2017, she called in sick, but she refused "to provide documentation to support that [she was] incapacitated for duty or had even attended a medical appointment on this date." *Id.* The memo cited 5 C.F.R. § 630.405(a), which outlines the agency authority to request administratively acceptable evidence to justify a sick leave request. *Id.* The memo directed the appellant to provide administratively acceptable evidence of her doctor's visit by May 30, 2017. *Id.* Further, it indicated that "this is not the first time that you have called out on sick leave or scheduled 'sick leave' for dates/times that conflict with cadet events and significant work obligations," and that on May 11, 2017, the appellant "had significant duty obligations for receiving turn-in of cadet equipment and had scheduled several appointments with Cadets for this purpose." *Id.* Also, the memo warned that "[i]nstitution of a leave restriction may be warranted if it is determined that you are abusing sick leave." *Id.*

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[1] All citations are to the Board's electronic record.

With regard to this issue, MAJ Chereskin issued the appellant a second memorandum on June 15, 2017. AF, Tab 6 at 47-48. In this memo, MAJ Chereskin acknowledged that the appellant provided medical documentation to justify her absence on May 11, 2017, and her time was changed to indicate sick leave. *Id.* However, the memo further stated that the appellant failed to cooperate as follows:

> In a counseling dated 22 May 2017, I directed you to produce documentation from a doctor that justified changing 11 May 2017 time period from AWOL to sick leave. On 05 June 2017 you provided me those documents and I coordinated with BDE to alter your time card from AWOL to sick leave. I received guidance from BDE that you needed to just go in to the computer system and "concur" the alteration in order for it to process correctly. In an email dated 06 June 2017, I asked that you re-concur your timecard starting 30 April to account for the alteration from AWOL to sick leave. I called you on 09 June and asked if you have completed the task that was given to you via email on 06 June and you said that you will not do it because you already concurred the original time card that depicted the 11th as sick leave and you said that "if it needs to be re-concurred, someone else could do it, just like when they changed it from sick leave to AWOL." I provided you a legal and ethical order which was in support of altering a time card from AWOL to sick leave. You flat out refused to comply with this order and you were blatantly insubordinate by telling me someone else must concur your time card for you instead of taking care of a personal responsibility.
>
> On 13 June you received an email from Joyce Stamper to once again concur the timecard starting on 30 April. I called at 1030 on the 13th to confirm that you did it and you said yes. By blatantly disregarding a lawful order you showed me that you have no respect for your direct chain of command and will only execute order from sources above the direct chain of command when you chose. This causes the unit and the BDE to have to provide double and triple guidance which causes an undue burden to the BDE staff and specifically the BDE S1 personnel in regards to this particular situation.
>
> This is the second time you refused to follow orders regarding time card management and it has become a pattern. In the rating period starting on 16 April you were directed to put the overtime you worked on 27 April into the pay system and you refused to do so

> until being ordered via the counseling statement dated 22 May 2017. During the previous incident you caused both the BN and BDE chain of command to take additional steps in order to ensure you executed a personal responsibility. Your inability to follow orders and manage the personal responsibility of time card management is becoming a time consuming and heavily resourced event on a consistent basis. In the future I ask that you follow all regulations orders related to time card management. Continued failure to comply with directives, to include time card management, or directives associated with the duties of your position will result in disciplinary action, up to and including removal from your position and federal service.

Id.

Two weeks later, on June 29, 2017, MAJ Chereskin issued the appellant a performance counseling memorandum.[2] AF, Tab 6 at 96-106. Section 12 addressed leave procedures and provided:

> All (annual, credit hours, compensatory time, leave without pay (LWOP), and sick) leave usage is to be requested, scheduled and approved in advance by your supervisor in writing, the OPM Form 71 (Request for Leave or Approved Absence) may be used. Emergency leave requests will be completed within (how many) hours of return to work.
>
> Annual leave of one or more weeks in duration will be projected out at least (insert number) days in advance and are subject to the needs of service.
>
> Emergencies do arise that preclude advance notice of advance approval. When emergency situations occur, you shall, in the absence of compelling circumstances, ensure that you notify me. If I am on leave or otherwise unreachable for more than two hours, the alternate POC is the PMS. When you must take annual leave for emergency reasons, you will describe the situation and give some estimation of how long the request is for.

Id. at 100.

Under the heading of Sick Leave, the memo provided the procedures the appellant should follow:

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[2] The appellant refused to sign the June 29, 2017 memorandum. AF, Tab 6 at 96-106.

> Notification will be made to me, (MAJ Chereskin) at (Office 386.226.6469 or [Cell] 631.974.6706) when you are unavailable to report for and or perform your scheduled duties. If you are unable to contact me, you must notify (PMS). Email messages will not be accepted, messages left with co-workers will not be accepted, messages left with friends will not be accepted, and text messages will not be accepted. You are required to notify me within the first two (2) hours of the start time of your tour of duty. Sick leave exceeding three (3) consecutive days will be supported by medical documentation. I will approve/disapprove, and determine the status of your absence from duty. Sick leave exceeding three (3) consecutive days that cannot be supported by medical documentation, or absence for medical reason without accrued sick leave to cover the absence, may be charged to absent without leave (AWOL).

Id. at 103.

MAJ Chereskin issued the appellant a second memorandum on June 15, 2017, which addressed her request to not attend the Cadet Summer Training (CST) in 2017:

> Upon review of the staff assistance visit (SAV) results conducted April 24-28th, the current state of the supply program and room, and your formal request to be removed from your duty at CST 2017, the chain of command has decided to accommodate your request to remain at ERAU during the summer. The decision to not have you attend the 2017 CST does not set a precedent for future CSTs. While remaining at ERAU over the summer, it is vital that you make the most of the time without Cadets on campus and work to correct the discrepancies that were noted by SFC Smith during the SAV. Additionally, this is a vital time to reorganize the unit supply room and work to develop SOPs that will help facilitate enduring supply operations. You will be provided a list of tasks and due dates that need to be met in order to fully justify retaining you at ERAU during CST 2017. The task list, and due dates will be furnished in the next 24 hours.

AF, Tab 6 at 49.

The appellant submitted a leave request, on August 1, 2017, for the period of January 8-19, 2018.[3] AF, Tabs 6 at 55, 21 at 37. On August 3, 2017, Todd D. Mitchell, LTC, U.S. Army Professor of Military Science, denied her request stating "same as last year, I am denying your request as too excessive. Everyone else is only taking 2 weeks."[4] AF, Tab 21 at 37. In conjunction with this request, LTC Mitchel issued the appellant a memorandum that provided:

1. Your leave is denied for the period of 08JAN18 to 19JAN18. You did indicate that your daughter was getting married on the 19JAN18. I want you to attend this event.

2. Recommendation: In order to avoid you being away from the supply room for over 37 consecutive calendar days and 25 work days, I request that you alter your approved leave 14DEC17-8JAN18, which you have indicated is Use or Lose. Please take some of your Use or Lose Leave and spread it out over the reminder of the year in order for you to take a large portion of leave in support of Christmas and your daughter's wedding. This will allow you to not be away from the supply room for an extended period of time and use all of your Use or Lose Leave from 2017.

3. Please give me your decision no later than 11 August 2017.

4. POC for this memo is the undersigned, at COM (386) 226-6471 or todd.d.mitchell.mil@mail.mil.

AF, Tab 6 at 55. The appellant also submitted a Family and Medical Leave Act of 1993 (FMLA) request on October 16, 2017, for the dates of January 5-16, 2018. AF, Tab 35 at 27. LTC Mitchell noted that the appellant did not provide the requested medical documentation, and she withdrew this request on November 27, 2017. *Id.* On November 14, 2018, the appellant submitted another request to take sick leave from January 8-16, 2018, to take care of a family member with a

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[3] The appellant's previous request for annual leave from December 14, 2017, to January 8, 2018, was already granted. AF, Tab 6 at 55,

[4] In November 2016, the appellant requested leave from December 12, 2016, to January 18, 2017. AF, Tab 35 at 22. LTC Mitchell denied her request as "too excessive." *Id.*

serious health condition. AF, Tab 6 at 56. LTC Mitchell denied this request, citing "mission requirements" and noting that "[b]beginning of semester 8JAN18, Ranger Challenge 19JAN18." *Id.*

The agency scheduled another SAV to review the supply room for the week of October 23-27, 2017.[5] AF, Tab 6 at 50. The first day of the SAV, October 23, 2017, the appellant submitted a note from Kayla Ritzel, Advanced Registered Nurse Practitioner (ARNP), Volusia Medical Center (VMC), which indicated that the appellant had a doctor's appointment that day, and she needed to be excused from work from October 23-30, 2017. AF, Tab 18 at 31. In her notes, Ritzel indicated that the appellant had "clinical complaints of anxiety attacks, not sleeping, and muscle stiffness in arms" and that she requested a psychiatrist referral. AF, Tab 32 at 26. Further, she stated the following:

> She has been battling her anxiety for quite some time, now to the point that she can't sleep, is often shaking during the day and feels like her heart beats fast. She states to be very overwhelmed at work, feels "threatened," but can't leave as she needs the benefits.

Id. Finally, she stated that the appellant requested a note to have some days off work to rest. *Id.* In response to the appellant's sick leave request for the period of time during the SAV, LTC Mitchell requested additional documentation as follows:

1. I received your request for sick leave for the period of 23 Oct 2017 to 30 Oct 2017 and a note signed by Kayla Ritzel, ARNP dated Oct 23, 2017, stating to please excuse you from work for this period. Because your absence will exceed three consecutive workdays and coincides with the notice that you were given approximately two weeks ago that Mr. Chuck Clemen would be arriving today to conduct a SAV during this [very] same period, I am requesting medical certification of incapacitation.

2. The medical certification needs to address and provide the duration of your incapacitation. A statement similar to the following would meet this

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[5] The purpose of the visit was "to address the numerous documented deficiencies in [the ERAU] Supply room." AF, Tab 6 at 50.

requirement: "Lilibeth Michelson underwent an outpatient procedure on [date of procedure] and is incapacitated and limited from any significant physical activity, including standing, walking, or sitting for extended periods of time, for the period of [start date] to [end date]. At the conclusion of this period, the employee will be able to return to full duty." Certifications stating "under my care, out of work, unable to work, or excused until further notice" are not sufficient without the information establishing the incapacitation.

3. The medical certification must come from a health care provider. It must be signed and dated. Electronic signatures are acceptable. The definition of health care provider is contained in 5 CFR 630.1202. The definition includes licensed medical doctors as well as other health care providers who are licensed [and] certified under federal or state law to provide the service. Practitioners in the second category typically include physician's assistants and psychologists; their certifications are acceptable so long as the service provided is consistent with the service their license allows them to provide.

4. The required medical documentation is due within 15 calendar days of this request, as provided by 5 CFR 630.405(b). If you are unable to obtain the information within 15 calendar days despite your diligent, good-faith efforts to do so, you may be granted a 15-day calendar day extension. If you do not provide the required certification within 30 days of this request, under 5 CFR 630.405, you would not be entitled to sick leave. As advised you will be charged absence without leave (AWOL) until such time as the documentation is received and reviewed. Upon determination that the documentation is administratively sufficient, your status will be changed to approve sick leave, otherwise your time will continue to be reflected as AWOL.

5. If you have any questions about the requirement for medical certification, please contact me at (386) 226-6471 or by email at todd.d.mitchell.mil@mail.mil.

AF, Tab 6 at 72-73. The appellant did not provide the documentation requested, and her leave from October 23-30, 2017, was charged as AWOL. AF, Tab 6 at 36. Again, the appellant refused to follow an order to certify her time accordingly. *Id.*

After this occurrence, on December 12, 2017, LTC Mitchell placed the appellant on leave restrictions for a period of 6 months.[6] AF, Tabs 6 at 50-53; 18 at 50-54. In his memorandum, LTC Mitchell cited the previous counselings the appellant had received concerning her "suspected abuse of sick leave" and stated that her "unscheduled absences cause a hardship in the workplace and impacts adversely on [their] ability to provide effective and efficient service to [their] cadets and cadre and to correct documented deficiencies in the supply room." *Id.*

On Wednesday, December 13, 2017, the appellant had a scheduled follow-up appointment with Ms. Ritzel at VMC. AF, Tab 32 at 30-33. The appellant had visited VMC the previous Friday, December 8, 2017, complaining of "sore throat, headache, body aches, and fever," stating that the symptoms began the previous day. *Id.* She was diagnosed with pharyngitis (sore throat) and acute upper respiratory infection. *Id.* On December 13th, Ms. Ritzel indicated the following:

> Lilibeth Michelson is a pleasant 57 year old female that is here today with clinical complaints of headache, sore throat, and productive cough still. She is feeling better, but missed work on Monday and is requesting a letter for work.
>
> Also states that she sees Psych in a couple of weeks, but is requesting a month off to help her anxiety, depression and get her started on her new meds. States to be overwhelmed at work, is harassed daily and she "needs a break". Denies any other complaints/concerns.

Id. Also on December 13, 2017, LTC Mitchell issued the appellant a notice of proposed suspension based in part on her attendance related problems.[7] AF, Tab 6 at 36-39. The notice of proposed suspension gave the appellant seven calendar days to provide a response. *Id.*

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[6] The leave restriction letter is dated December 4, 2017, but LTC Mitchell emailed the document to the appellant on December 11, 2017, at 9:50 a.m. because she was out of the office. AF, Tab 18 at 50. The appellant did not sign the document as requested but LTC Mitchell wrote a notation that stated the letter was issued to her on December 12, 2017. *Id.* at 54.

[7] The appellant refused to sign the notice of proposed suspension. AF, Tab 5 at 39.

On Friday, December 15, 2017, at 8:00 p.m., the appellant sent LTC Mitchell an email with an attachment. AF, Tab 6 at 40-43. The attachment was a note from the VMC, signed by Ms. Ritzel indicating:

> This is a note to confirm that Lilibeth Michelson was seen in my office today for a doctor's appointment. Please excuse pt from work from 12/18/17 until 01/19/18. Due to HIPPA laws, no more medical information can be provided.

Id. On Tuesday, December 19, 2017, LTC Mitchell denied the appellant's request, stating that it did not comport with the leave restriction letter requirements. *Id.* He further noted that the appellant had approved annual leave from December 18, 2017, to January 8, 2018, but if she wanted to convert that to sick leave, she would need to provide the necessary medical documentation. *Id.* The appellant did not report for duty from January 9-19, 2018. AF, Tab 6 at 12.

On January 24, 2018, Nelson G. Kraft, COL, Commanding Officer, issued a decision sustaining a 7-day suspension. AF, Tab 6 at 31-32. The appellant acknowledged receipt of this decision on January 25, 2018. *Id.* Nonetheless, it is undisputed that the appellant made an appearance at work on the first day of the suspension, Monday, January 29, 2018.[8] AF, Tab 6 at 12-16.

On March 16, 2018, LTC Mitchell proposed the appellant's removal from service citing one charge of AWOL for the above dates in January and two charges of failure to follow directions for her behavior on January 29, 2018. AF, Tab 6 at 12-16. While the appellant refused to sign the notice of proposed removal, she was provided a copy on March 16, 2018. *Id.* The letter provided the appellant with 15 calendar days from the date of receipt to provide a written and/or oral reply. *Id.* The appellant submitted a written reply. AF, Tab 6 at 18-20.

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[8] The appellant visited VMC on January 25, 2018, and received a note from Ritzel to excuse her "from work for sick leave" from January 25, 2018, to February 5, 2018. AF, Tab 19 at 35. She also obtained a note from Ritzel that stated, "it is unlawful and against HIPPA regulations for me to discuss any health care concerns with an employer or outside party without the consent of the patient." AF, Tab 19 at 36.

On April 16, 2018, COL Kraft sustained the removal, effective April 16, 2018. *Id.* at 39-45. This appeal followed.

Burden of Proof

The agency bears the burden of proving its charge by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q). The agency must also establish the existence of a nexus between the sustained charge and the efficiency of the service. 5 U.S.C. § 7513(a). Finally, the agency must demonstrate the reasonableness of the penalty it has imposed. *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 307–08 (1981). The appellant has the burden of proving her asserted affirmative defenses by a preponderance of the evidence. 5 C.F.R. § 1201.56(C).

The agency proved its AWOL charge (Charge 1).

To sustain an AWOL charge, the agency must prove that the employee was absent and that the absence was not authorized or that a request for leave was properly denied. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); *Boscoe v. Department of Agriculture*, 54 M.S.P.R. 315, 325 (1992). However, if an employee has provided administratively acceptable evidence of incapacity, prior to an agency's decision to remove her on AWOL charges, the agency must grant her sick leave, regardless of her failure to timely comply with the agency's sick leave procedures. *Atchley v. Department of the Army*, 46 M.S.P.R. 297, 301 (1990).

Here, it is undisputed that the appellant was absent from work on the dates in January 2018 as provided in the notice of proposed removal. Further, it is undisputed that LTC Mitchell denied the appellant's request for sick leave. AF, Tab 6 at 42. Prior to her absence, the only information she provided to the agency

was the note from Ms. Ritzel dated December 15, 2017, which provided that the appellant was seen in her office on that day[9] and to excuse her from work from December 18, 2017, to January 19, 2018. AF, Tab 6 at 40. This excuse fails to adhere to requirements of the December 4, 2017 leave restriction letter in several ways. *See* AF, Tab 6 at 50-53. Although it is expressly forbidden, the appellant emailed LTC Mitchell the medical excuse and failed to call him within two hours of her reporting time on December 18, 2017. While I understand the appellant had preapproved annual leave for that date,[10] she raised the issue of whether she needed sick leave instead. If nothing else, the appellant should have called LTC Mitchell prior to January 9, 2018, to determine the status of her sick leave. The leave restriction letter is unambiguous that "[i]n the event of illness," she was required to call LTC Mitchell "within 2 hours of [her] start time" and it was "not appropriate" to "send an email." AF, Tab 6 at 51.

Further, the appellant's request was not submitted on OPM Form 71. Likewise, it did not address the need for the incapacitation with any particularity or the appellant's medical restrictions. While the note indicates that Ms. Ritzel cannot provide information pursuant to HIPPA, the appellant could have given her permission to provide limited information to meet the needs of the agency requirements. Further, I find the appellant's testimony that she believed this note to sufficient and she was unable to access her email to know that it was denied unpersuasive. *See* AF, Tab 39 at 29. As stated above, the VMC note utterly fails to comport with the leave restriction letter.

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[9] It is unclear why Ms. Ritzel represented that the appellant visited her office on December 15, 2017, when the appellant's medical records clearly indicate she visited VMC on December 13, 2017. AF, Tab 32 at 32-33.

[10] As stated earlier, the appellant had approved annual leave until January 8, 2018. *See* AF, Tab 6 at 55

Moreover, regardless of whether she can access her email remotely, she had the ability to contact the agency via telephone, and in light of the leave restriction letter and the numerous memos addressing her use of sick leave, it is not reasonable or an excuse that she failed to further communicate with her employer prior to the date she was to return to work. Indeed, the fact that she could travel internationally[11] is an indicator that she was not incapacitated and had the ability to contact the agency. Further, even when the appellant returned to duty, she failed to provide clarifying information to agency officials. Based on the above information, I find that the agency properly denied the appellant's request for sick leave. *See Johnson v. General Services Administration*, 46 M.S.P.R. 630, 634, aff'd, 944 F.2d 913 (Fed.Cir.1991) (Table); *Cresson v. Department of the Air Force*, 33 M.S.P.R. 178, 181 (1987) (the employee is responsible for requesting leave and providing the agency with the necessary supporting medical documentation).

In her close of record submission, the appellant provided another note from VMC signed by Anthony Lagana, ARNP, and dated October 25, 2018, which provided:

> Kayla Ritzel, ARNP, is no longer with our practice; however, my name is Anthony Lagana, ARNP and I had the pleasure of seeing Lilibeth Michelson in our office throughout what was a very difficult time for her. Lilibeth was seen in our office on 12/13/2017. Based upon our observations, Ms. Michelson needed to be off work until 1/19/18 for medical purposes due to her anxiety and depression. She also needed to get acclimated to her new medication. During this time frame Ms. Michelson was medically incapacitated and unable to attend work.

AF, Tab 39 at 78 .

As an initial matter, even if it had been timely submitted, this note does not comply with the leave restriction letter because it is conclusory and fails to

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[11] The appellant traveled to Panama during this period of time. AF, Tab 39 at 29.

explain the appellant's incapacitation. Further, I question its inherent validity as the appellant's medical records show that she was seen by Ms. Ritzel on December 13th as a follow up visit to a sore throat, and while it is true that the appellant complained of anxiety, the appellant requested the month off of work for the condition. *See* AF, Tab 32 at 30-34. There is no indication that Ms. Ritzel had independently determined that appellant was incapacitated or that she was actually treating the appellant's anxiety and/or depression. Indeed, there is no suggestion that the appellant received treatment again until the following April. While Mr. Lagana saw the appellant on December 8, 2017, there is no note that she discussed her anxiety and/or depression with him and it is unclear what information he based his October 2018 assessment upon. Further, the appellant failed to provide this information to the agency in a timely manner even in response to the notice of proposed removal. Thus, the agency's AWOL decision remains appropriate. *See Atchley v. Department of the Army*, 46 M.S.P.R. 297, 301 (1990) (an agency must grant sick leave if an employee provides administratively-acceptable evidence of incapacity prior to the agency's decision to impose discipline for AWOL). Based on the above evidence, I find that the agency properly denied the appellant's request for sick leave, and the AWOL charge is SUSTAINED.

The agency proved charge of failure to follow directions (Charge 2).

An agency may prove a charge of failure to follow instructions by establishing that proper instructions were given to an employee and that the employee failed to follow them, without regard to whether the failure was intentional or unintentional. *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 556 (1996).

Specification 1

Specification 1 provides:

> On 25 January 2018, you were issued a written decision dated 24 January 2018, signed by COL Nelson Kraft notifying you of his

> decision to suspend you from duty without pay for seven (7) calendar days with an effective date of 29 January 2018. Despite knowing you were suspended and not to report to work, you ignored the directive and reported to work on 29 January 2018.

AF, Tab 6 at 12. On January 24, 2018, Nelson G. Kraft, COL, Commanding Officer, issued a decision sustaining the 7-day suspension. AF, Tab 6 at 31-32. In the decision he stated:

> I have concluded that a suspension will promote the efficiency of the service and that a lesser penalty would be inadequate. Accordingly, you will be suspended from duty without pay for seven (7) calendar days beginning Monday, 29, January 2018 through Sunday, 4 February 2018. You will return to duty on Monday, 5 February 2018. A Standard Form 50, Notification of Personnel Action, documenting your suspension will be forwarded separately. The suspension will become a permanent part of you Official Personnel Folder (OPF). This action is being taken in accordance with the provisions of Army Regulation 690-700, Chapter 751, Discipline.

Id. The appellant acknowledged receipt of this decision on January 25, 2018. *Id.*

The appellant does not dispute that she came to work on January 29, 2018, but asserts that she "had previously been informed by CPOL (i.e. the predecessor to CPAC) that [she] needed an SF-50 for a suspension to be effective." AF, Tab 39 at 29-30. Thus, she emailed CPAC to determine if a suspension SF-50 had been issued and was informed that it had not been issued at that time. *Id* The appellant testified that CPAC failed to inform her that her "belief that [she] needed an SF-50 for the suspension to be effective was inaccurate." *Id.* She further testified that she woke up worried on January 29, 2018, because the SF-50 had not been issued and she could not access her email at home. *Id.* Thus, she "went to the office for the sole purpose of checking [her] email to see if a copy of the SF-50 had been emailed to" her and that she "did not work on any assignments, nor complete any tasks." *Id.*

COL Kraft's letter is unambiguous that the appellant was to be suspended on January 29, 2018. While it does state that an SF-50 will be issued, it does not indicate that the suspension will be held in abeyance until CPAC issues the SF-

50. It is common in the federal government for the SF-50 to be issued after the personnel action takes place. Indeed, I question the veracity of the appellant's testimony in light of her long federal career and the fact that she had previously been suspended in 2013. *See* AF, Tab 35 at 20-21. Even assuming she was in fact confused, that does not excuse her failure to adhere to the suspension and not go to work. To the degree that the appellant was unsure, she had the ability to either call her command or CPAC that morning to ensure she was in compliance with the suspension.[12] I find that the agency proved specification 1 by preponderant evidence.

Specification 2

Specification 2 provides:

> On 29 January 2018, CPT Adam Karlewicz became aware that you were in the supply room. This was unauthorized based upon the notification of suspension that you received on 25 January 2018. CPT Karlewicz ordered you to stop working, close the supply room and leave the premises due to your suspended status. You failed to comply. Embry-Riddle Public Safety was contacted to assist in ensuring you left the premises.

AF, Tab 6 at 13.

CPT Karlewicz wrote in a contemporaneous statement that on January 29, 2018, at 9:15 a.m., he went to the appellant's office with CPT Salome Sotilleo and "ordered [the appellant] that she stop working, close the supply room, and leave the premises because she was officially suspended by COL Kraft." AF, Tab 6 at 85. He further stated that the appellant began to argue with him, and he said, "Ms. Michelson, you must leave now." *Id.* CPT Sotilleo signed a statement that provided that she was present on January 29, 2018, at 9:15 a.m., when CPT Karlewicz informed the appellant that she was on a week suspension; not authorized to be at work; and must leave the building. AF, Tab 6 at 84.

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[12] It is also unclear why she decided to go to the facility instead of call agency officials in light of the fact that VMC had deemed her too sick to work. *See* AF, Tab 19 at 35.

The appellant asserts that CPT Karlewicz never told her to leave the premises, and because English is her second language, she did not know what the word meant. AF, Tab 39 at 30. She asserts that she complied with his directive when she left the supply room and went to the computer lab. *Id.*

It is simply not believable that the appellant does not understand the word "premises" or that she failed to understand that she was not authorized to be there at that time. I credit CPT Karlewicz and CPT Sotilleo that the appellant was adequately informed that she was not authorized to be at the ROTC facility on that date and was asked to leave. Thus, I find that the agency proved specification 2 by preponderant evidence, and Charge 2 is SUSTAINED.

The agency proved charge of creating a disturbance (Charge 3).

> The sole specification concerning this charge is as follows:
>
> On 29 January 2018, Embry-Riddle Public Safety was contacted to assist in removing you from the premises when you failed to comply with instructions that suspended you from duty beginning on 29 January 2018. When Officer Collins arrived at the office, you had vacated the supply room, but it was determined that you were still on the premises and in the ROTC building. Christian Vanlaarhoven was requested to leave her work and check the Women's restroom. During her search of the restrooms, Air Force University Liaison, Marie Rolff stated that you had gone into the ROTC computer lab. You were located in the computer lab. Officer Collins directed that you vacate the premises. Your failure to comply with the initial directive to vacate the premises resulted in an unnecessary disruption in the work place.

AF, Tab 6 at 13.

The appellant argues that this charge should be spilt because it is based on more than one act, *i.e.*, failure to follow a directive and creating a disturbance. AF, Tab 39 at 11-12. Rather than split this charge, I believe the "failure to follow directive" portion of this charge is subsumed with Charge 2. *See, e.g., Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 9 (2007) (merger is appropriate where multiple charges require the same elements of proof and are based on the same factual specifications); *see also Alvarado v. Department of the*

Air Force, 103 M.S.P.R. 1, ¶ 18 (2006) (finding that, where two charges are based on the same act of misconduct and proof of one charge automatically constitutes proof of the other, the charges should be merged). However, I believe that the essence of this charge involves the issue of whether the appellant created a disturbance when she failed to leave the premises. An agency is required to prove only the essence of its charge, and need not prove each factual specification supporting the charge. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994), aff'd, 48 F.3d 1235 (Fed.Cir.1995) (Table). To prevail on a charge of creating a disturbance in the workplace, the agency is required to prove that an actual disturbance was created, although the length or duration of the disturbance is a factor bearing upon the seriousness of the misconduct and not an essential element of the charge. *Hanner v. Department of the Army*, 55 M.S.P.R. 113, 118 (1992).

CPT Karlewicz wrote in his statement that he gave the appellant five minutes to leave and when he noticed her car was in the parking lot, he called ERAU Public Safety. AF, Tab 6 at 85. He and the officer were required to search the ROTC building to locate the appellant, and finally located her in the Air Force's computer lab. *Id.* They also requested a female employee to check the ladies restroom. AF, Tab 6 at 83. The appellant again argues that she did not understand that she was required to leave the ROTC premises per CPT Karlewicz orders. AF, Tab 39 at 30-31. She asserts that she was not "hiding," but, instead, was trying to get access to the facility computer lab to determine whether CPAC had issued the suspension SF-50. *Id.*

As stated earlier, I do not find the appellant's testimony that she did not understand the directive persuasive, and when she failed to leave the facility, it necessitated agency personnel and the police to conduct a search for her. While she did not resist leaving once approached by them, her continued presence in the workplace created a disturbance by the mere fact that they had to search for her

and escort her out of the building. Thus, I find that the agency proved Charge 3 by preponderant evidence, and the charge is SUSTAINED.

The agency proved nexus.

An agency must establish nexus by showing that the employee's conduct (1) affected her or her coworker's job performance; (2) affected management's trust and confidence in the employee's job performance; or (3) interfered with or adversely affected the agency's mission. *Johnson v. Dep't of Health & Human Services*, 86 M.S.P.R. 501, ¶ 1(2000), *aff'd*, 18 Fed.Appx. 837 (Fed.Cir. 2001), *aff'd sub nom., Delong v. Dep't of Health & Human Services*, 264 F.3d 1334 (Fed.Cir.2001), *cert. denied*, 536 U.S. 958 (June 28, 2002). All of the charged behavior effected and/or occurred at work. *Miles v. Department of the Navy*, 102 M.S.P.R. 316, ¶ 11 (2006) (finding that it is well settled that there is sufficient nexus between an employee's conduct and the efficiency of the service where the conduct occurred at work.)

The appellant did not prove her affirmative defenses.

Even if the agency meets its burden of proof on the merits of its decision, the decision may not be sustained if the appellant proves by preponderant evidence that: (1) in arriving at its decision, the agency committed harmful procedural error in the application of its procedures; (2) the decision was based on a prohibited personnel practice as described in 5 U.S.C. § 2302(b), including unlawful discrimination or reprisal; or (3) the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56(a)(2)(iii), (b). The appellant bears the burden of proving her affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2). Here, the appellant raised the affirmative defenses of due process violation and retaliation for prior EEO activity.

Due Process

The appellant asserts that the deciding official failed to consider her reply, and thus, violated her due process rights. When an agency takes an adverse action

against an employee pursuant to chapter 75, the employee against whom the action is proposed is entitled to "(1) at least 30 days' advance written notice ... stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C. § 7513(b). These statutory provisions are consistent with the extension of the Fifth Amendment Due Process Clause to an individual's loss of government employment in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Loudermill*, the Supreme Court explained that "the root requirement" of due process is for the employee to receive "an opportunity for a hearing before he is deprived of any significant property interest." *Id.* at 542, 105 S.Ct. 1487 (emphasis in original). This requires an agency to offer the employee a "meaningful opportunity to invoke the discretion of the decision maker" before the agency effects the personnel action. *Id.* at 543, 105 S.Ct. 1487. Minimum due process requires that the employee have oral or written notice of the charges against her, an explanation of the employer's evidence, and "the opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Id.* at 546, 105 S.Ct. 1487.

In her submission, the appellant submitted Manuel Rosales, an agency employee at South Carolina State University. AF, Tab 39 at 86-88. In his sworn statement, Mr. Rosales stated that in October 2017, he we told by BDE Headquarters Supply Section that there was a "strong possibly" that the appellant's position would soon be vacant, and he was told that Chuck Clemen[13] conducted an inspection at ERAU. *Id.* He then called Mr. Clemen and asked if the

[13] Mr. Clemen conducted the October 23-30, 2017 SAV on the appellant's supply room. AF, Tab 6 at 72.

Supply Technician position would soon be available, and Mr. Clemen replied "yes but it is a long story." *Id.* Mr. Clemen never called Mr. Rosales back. *Id.* The appellant also asserts that the deciding official, COL Kraft, failed to consider her written reply as he filled out the Douglas Factor worksheet prior to her reply. AF, Tab 39 at 24.

Mr. Rosales testimony only shows that the agency was having ongoing performance problems with the appellant as evidenced by the two SAVs that are part of this record. In light of these issues and her ongoing sick leave issues, it is not surprising that agency personnel would speculate about the appellant's status. This speculation, however, had nothing to do with the appellant's decision to submit an improper sick leave request or to appear at work while on suspension. Further, there is no evidence that this speculation influenced COL Kraft.

With regard to the Douglas Factor worksheet, COL Kraft testified that he in fact considered her reply and that the Douglas Factor worksheet was dated in error. AF, Tab 35 at 13-14. I have no reason to doubt this testimony. Indeed, the decision letter discusses the appellant's reply. *See* AF, Tab 6 at 18-20. I find that the appellant did not prove her due process violation affirmative defense.

EEO Retaliation

The appellant raised a claim of reprisal based on EEO activity, which is an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). Federal employees are protected against discrimination based on race, color, sex, religion, and national origin, as well as retaliation for the exercise of Title VII rights, by 42 U.S.C. § 2000e-16. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 36-37 (2015). The Board has held that a violation is established where the appellant shows that discrimination or retaliation "was a motivating factor in the contested personnel action, even if it was not the only reason." *Id.*, ¶ 41. To establish a prima facie case of retaliation for engaging in protected activity, the appellant must show that: (a) she engaged in protected activity; (b) the accused official(s) knew of the protected activity; (c) the adverse employment

action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Cloonan v. United States Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Cloonan*, 65 M.S.P.R. at 4, n.3.

Here, the appellant asserts that she has filed several EEO complaints and in March 2017, she participated in an EEO hearing. AF, Tab 39 at 25. She further asserts that twelve days prior to her removal, she amended her complaint. Id. Further, in reply to her notice of proposed removal, she informed COL Kraft of her EEO activity. AF, Tab 18 at 5-17. Notwithstanding management's knowledge of the appellant's EEO activity, there is no evidence of retaliatory intent. Likewise, there is no evidence that COL Kraft, the deciding official, inappropriately considered the appellant's protected activity. Thus, although the appellant engaged in protected activity, there is no evidence that it was a motivating factor in the decision to remove her from service.

The agency's removal decision does not exceed maximum limits of reasonableness.

When all of the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). In applying this standard, the Board must take into consideration the failure of the agency to sustain all of its supporting specifications. *Id.* at 651. That failure may require, or contribute to, a finding that the agency's penalty is not reasonable. *Id.* In such a case, the Board will look for evidence showing that the agency would have imposed the same penalty for the sustained specifications. *Laniewicz v. Department of Veterans Affairs,* 83 M.S.P.R. 477, ¶ 9 (1999).

Nevertheless, the Board's function is not to displace management's responsibility or to decide what penalty it would impose but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶ 9, *aff'd*, 355 F. App'x 410 (Fed.Cir.2009). Thus the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Id.* If the agency's penalty is beyond the bounds of reasonableness, the Board will mitigate only to the extent necessary to bring it within the parameters of reasonableness. *Id.*

In his Douglas Factor worksheet, COL Kraft noted that the charged conduct was considered "serious in nature, particularly as [the appellant] fail[ed] to follow policy and instructions after being repeatedly instructed," and that she "repeatedly defied management directives and consistently challenge[d] work directives issued." AF, Tab 6 at 21-23. Further he noted her 3-day suspension in 2013 and 7-day suspension in 2018 as aggravating factors. *Id.* COL Kraft found that "[a]ll confidence has been lost with [the appellant] in terms of trustworthiness and professionalism and her performance of day-to-day responsibilities." *Id.* Noting that the appellant has not shown rehabilitation potential, COL Kraft also found that she was aware of the agency's requirements. *Id.* While acknowledging that the appellant presented additional information, he did not find it to be mitigating. *Id.*

The appellant argues that COL Kraft's analysis should be set aside because he failed to consider several significant mitigating factors. AF, Tab 39 at 19-20. She asserts that her behavior was "harmless and unintentional" and that she had "a good-faith, reasonable belief that she needed to have a copy of the SF-50 in order for her suspension to be effective." *Id.* Further, the appellant asserts that COL Kraft failed to consider the appellant's twenty-four years of federal service or her anxiety diagnosis. *Id.*

After considering the record, I find that it demonstrates that the deciding official properly and thoroughly considered all of the relevant *Douglas* factors. The appellant's utter failure to accept responsibility for her behavior demonstrates a lack of rehabilitation potential, and I have no confidence that she would modify her behavior if returned to work. I find it particularly egregious that she precipitously disregarded her employer's unambiguous instructions about sick leave and added two additional weeks to her holiday vacation, missing the beginning of the semester. She further exhibited contempt for her employer's authority when she showed up at the ERAU ROTC facility when on suspension. Indeed, the record is replete with examples of how the appellant disregarded direct orders. Accordingly, I find that the penalty of removal does not exceed the bounds of reasonableness and that it promotes the efficiency of the federal service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Sherry Linville
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 25, 2019**, 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