NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JOSEPH H. MARTIN,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2019-1578

Petition for review of the Merit Systems Protection Board in No. DE-0752-17-0341-I-2.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Petitioner Joseph H. Martin filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was

NOTE: This disposition is nonprecedential.

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DEPARTMENT OF HOMELAND SECURITY,
Respondent

2019-1578

Petition for review of the Merit Systems Protection Board in No. DE-0752-17-0341-I-2.

Decided: April 20, 2020

JEFFREY H. JACOBSON, Jacobson Law Firm, Tucson, AZ, for petitioner.

BORISLAV KUSHNIR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, TARA K. HOGAN, ROBERT EDWARD KIRSCHMAN, JR.

Before NEWMAN, DYK, and WALLACH, *Circuit Judges.*

PER CURIAM.

Joseph H. Martin appeals a decision from the Merit Systems Protection Board ("Board") sustaining Mr. Martin's removal from the Department of Homeland Security, Customs and Border Protection ("DHS" or "agency"). Mr. Martin was removed for conduct unbecoming a Customs and Border Protection Officer ("CBPO" or "customs officer"), lack of candor, and failure to follow a non-disclosure warning. We *affirm*.

BACKGROUND

Mr. Martin is a former DHS customs officer and former chapter president of the National Treasury Employees Union ("union"). In 2015, the DHS Office of Inspector General ("OIG") received complaints from two agency employees, Ms. Lozoya and Ms. Demara, that, while discussing union matters off-duty, Mr. Martin made sexually inappropriate comments to each of them about these employees' providing sexual favors to him in exchange for union services. DHS OIG opened an investigation and interviewed Ms. Lozoya and Ms. Demara. OIG then recorded, with the consent of Ms. Lozoya and Ms. Demara, Mr. Martin's telephone conversations with both employees, and made a video recording of Mr. Martin's meeting with Ms. Demara in a hotel room. In the telephone recordings, Mr. Martin referred to the employees as having an "IOU" list with him; he discussed spanking them; and he made comments such as "Who's your daddy?" and "It's your daddy." J.A. 5–6, 10, 12. During the video recording, Mr. Martin referred to one of his supervisors, Jimmy Tong, with a racial slur.

In the course of its investigation, on November 24, 2015, DHS OIG interviewed Mr. Martin. Despite being provided with a warning not to disclose investigative information, Mr. Martin sent a packet of materials related to the investigation to Mr. Tong. On February 11, 2016, during a second interview with OIG, Mr. Martin repeatedly stated that he did not "recall" or "remember" whether he

had made certain sexually suggestive or racially inappropriate comments towards employees. J.A. 20–21.

On June 12, 2017, Mr. Martin was removed from his position for charges of 1) conduct unbecoming a CBPO (three specifications); 2) lack of candor (two specifications); and 3) failure to follow a non-disclosure warning (three specifications). Mr. Martin appealed his removal to the Board. The Administrative Judge ("AJ") issued a decision on November 28, 2018, sustaining three out of the eight specifications made by the agency and determined that removal was the appropriate penalty. For the first charge of "conduct unbecoming a CBPO," the AJ found that although Mr. Martin made "crass and boorish" comments to Ms. Lozoya and Ms. Demara, he found that there was no implication that they should "provide him with sexual favors in order for him to represent" them in disputes with management. J.A 9, 14. The AJ found however that Mr. Martin's use of a racial slur regarding his supervisor had "no legitimate purpose" and sustained the charge on that ground. J.A. 15.

The second charge, "lack of candor" was sustained because the AJ found that Mr. Martin was attempting to "deflect the investigation" in testifying that he did not recall whether he had made certain sexually suggestive or racially inappropriate comments towards employees. J.A. 26. The AJ was persuaded by the fact that "these crass comments were [Mr. Martin's] everyday banter" and he thus "should have remembered making these statements." J.A. 26. The AJ was not convinced that medication contributed to Mr. Martin's lack of recollection because there was no "medical testimony" to this effect, and because his answers to other questions were "inconsistent with [Mr. Martin's] claims that the medication impacted his memory and concentration." J.A. 27.

The AJ sustained the third charge, "[f]ailure to follow [a] non-disclosure warning," because Mr. Martin "by

sending . . . documents to [Mr.] Tong, . . . disclosed investigative information to an individual outside DHS OIG and not involved in the investigation," violating the nondisclosure warning. J.A. 31.

The AJ found that the agency did not commit an unfair labor practice by recording employees while they discussed union business, finding the recording to be "a proper exercise of management's rights." J.A. 36. The AJ noted that even if a union representative-bargaining unit member privilege exists in this context, it was waived by Ms. Lozoya and Ms. Demara when they agreed to the recordings. He also found that Mr. Martin's Fourth Amendment rights were not violated because Ms. Lozoya and Ms. Demara consented to the recordings, and, moreover, that the exclusionary rule "does not apply to administrative proceedings." J.A. 38 (quoting *Fahrenbacher v. Dep't of Veterans Affairs*, 89 M.S.P.R. 260, ¶ 14, n.5 (M.S.P.B. 2001)). Finding a nexus between the sustained charges and the efficiency of the service, the AJ affirmed the agency's removal of Mr. Martin from federal service.

Mr. Martin did not petition the Board for review. The AJ's decision became the final decision of the Board. Mr. Martin seeks review directly by this court. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must sustain the Board's decision unless it 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). Substantial evidence is "evidence that a reasonable mind may take as sufficient to establish a conclusion." *Grover v. Office of Pers. Mgmt.*, 828 F.3d 1378, 1383 (Fed. Cir. 2016).

I

On appeal, Mr. Martin argues that the Board erred in considering the surveillance evidence gathered during the OIG investigation. This argument appears to only affect a single charge supporting Mr. Martin's removal, that of conduct unbecoming a CBPO, which the Board sustained for Mr. Martin's use of a racial slur in OIG's video recording. We agree with the government that the Board did not err in considering this material.

First, the fact that Mr. Martin was off-duty is not dispositive. We have previously noted that "adverse personnel actions may be taken for off-duty conduct if there is a nexus between the conduct and the 'efficiency of the service.'" *King v. Dep't of Veterans Affairs*, 248 F. App'x 192, 194 (Fed. Cir. 2007) (quoting *Allred v. Dep't of Health & Human Servs.*, 786 F.2d 1128, 1130 (Fed. Cir. 1986)). We have found "substantial evidence of a nexus" where "the incident happened at her employer's facility and involved a supervisor." *Id.* Similarly, here, as the Board noted, "the misconduct involved a fellow agency employee and involved an agency manager." J.A. 39. The Board did not err in considering Mr. Martin's off-duty conduct.

Second, Mr. Martin urges us to apply the exclusionary rule to the evidence collected by OIG in this investigation, because it was "a substantial intrusion upon [Mr. Martin's] right to privacy" under the Fourth Amendment. Reply 26. To the extent that the exclusionary rule applies to the Board's proceedings,[1] ten of our sister Circuits have

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[1] The Supreme Court "ha[s] repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998). The Board has held that "the Supreme Court's decisions regarding the application of the exclusionary rule to proceedings other than criminal

concluded that "government interception of oral communications [i]s permissible where one party to the conversation gave prior consent." *Holmes v. Burr*, 486 F.2d 55, 56, 58 (9th Cir. 1973). The Board correctly pointed out that Ms. Lozoya and Ms. Demara both "consented to the recordings" of Mr. Martin. J.A. 38. The Board's refusal to apply the exclusionary rule was not error.

Third, Mr. Martin argues that the Board abused its discretion in not finding that the OIG committed an unfair labor practice under 5 U.S.C. § 7116(a)(1) when it interfered with confidential conversations between a union representative and a bargaining union member. This court has not recognized a union representative-bargaining unit member privilege. To the extent that it exists, however, we hold that it does not protect union representatives from charges of misconduct based on discussions with unit member employees.

This privilege appears to originate from a decision by the Federal Labor Relations Authority ("FLRA") in *U.S. Department of the Treasury Customs Service Washington, D.C. (Respondent) & Nat'l Treasury Employees Union (Charging Party)*, 38 F.L.R.A. 1300 (Jan. 8, 1990). In that case, the privilege was recognized for the benefit of the employee: "that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense." *Id.* at 1308 (emphasis added). In the few cases that have recognized this privilege, the privilege has been asserted for the benefit of protecting employee disclosures, not those of the union representative. *See U.S. Dep't of Justice v. Fed. Labor Relations Auth.*, 39 F.3d 361, 368–69 (D.C. Cir. 1994);

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prosecutions do not provide a basis on which to extend the exclusionary rule to Board proceedings." *Delk v. Dep't of Interior*, No. DC0752920526-I-1, 1993 WL 190451, at *1 (M.S.P.B. June 3, 1993).

Bell v. Vill. of Streamwood, 806 F. Supp. 2d 1052, 1058 (N.D. Ill. 2011); *Long Beach Naval Shipyard Long Beach, California (Respondent) & Fed. Emps. Metal Trades Council AFL-CIO (Charging Party/union)*, 44 F.L.R.A. 1021, 1038 (Apr. 29, 1992). The union representative-bargaining unit member privilege is analogous to the attorney-client privilege, whose purpose is also to "to encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). And just as the attorney-client privilege "is that of the client, not that of the attorney," *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987), if there is a union representative-bargaining unit member privilege, it belongs to the employee and not the union representative. The Board thus committed no error in holding that Mr. Martin could not assert the privilege.

II

Mr. Martin additionally argues that the Board's conclusion that the agency proved lack of candor is not supported by substantial evidence. We disagree.

The Board recognized that "to constitute lack of candor, a misrepresentation or omission must have been made knowingly." J.A. 16. "Although lack of candor necessarily involves an element of deception, 'intent to deceive' is not a separate element of that offense . . . ." *Ludlum v. Dep't of Justice*, 278 F.3d 1280, 1284–85 (Fed. Cir. 2002). The charge "may involve a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete." *Id.* at 1284.

The Board's conclusion that Mr. Martin lacked candor is supported by substantial evidence. The Board found that Mr. Martin was not credible in testifying that he does not recall whether he had made certain sexually suggestive or racially inappropriate comments towards employees. The Board considered the fact that "these crass comments

were [Mr. Martin's] everyday banter" and he thus "should have remembered making these statements." J.A. 26. The Board explained that Mr. Martin "had a duty to candidly admit that he used such language, then offer an explanation" and found that "[h]e elected not to do that and . . . that he did so to deflect the investigation." *Id.* (emphasis added).

Mr. Martin also faults the Board for not considering the fact that he was on medication (Bumetanide) that allegedly could cause memory loss in assessing the lack of candor charge. The Board, however, concluded that "[t]here does not appear to be a consensus that Bumetanide tablets impact memory and concentration."[2] J.A. 27. The record only shows that "trouble concentrating, confusion, [and] memory loss" may be possible side effects of this medication for "people with liver disease," which Mr. Martin admits he does not have. J.A. 27 (quoting print out from Healthline.com). Moreover, the Board considered the fact that "when the entire transcript of the interview is reviewed, there is no other portion where the appellant responds in this manner, which I find is inconsistent with his claims that the medication impacted his memory and concentration." J.A. 27. The Board thus properly considered Mr. Martin's arguments, and its findings are supported by substantial evidence.

Finally, Mr. Martin argues that the agency did not clarify which portion of the interview it was referring to in the specification of the charge and that the Board substituted its own basis for removal, rather than relying on what was identified by the agency. He also argues that the Board "abused [its] discretion by exceeding the scope of the

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[2] Contrary to Mr. Martin's argument, the Board was not improperly shifting the burden of proof to Mr. Martin. Instead, the Board simply found that Mr. Martin did not make a sufficient showing that his memory was impaired.

proposed removal letter" in comparing Mr. Martin's answers during the interview to those of his sworn statement. Appellant's Br. 17. Neither argument is persuasive.

The charge specified the topic of the questions and described Mr. Martin's response to them:

> [D]uring an interview with Special Agents of the, [sic] DHS, OIG, you stated either "I don't recall" or "I don't remember", or words to that effect, to approximately ten (10) questions in a row asking whether you had committed certain specific acts in which you insinuated an employee must provide you sexual favors for your performance of union work on their behalf.

J.A. 20–21. Mr. Martin even admitted that he understood which portion of the interview the charge referred to. The Board thus did not substitute its own reasons for removal for those provided by the agency.

The Board also did not rely on Mr. Martin's sworn statement to uphold the charge. The Board simply considered the number of different excuses Mr. Martin provided for his evasive answers as supporting its findings that Mr. Martin was not credible. Substantial evidence supports the Board's finding that Mr. Martin lacked candor in answering certain questions during his second OIG interview.

Mr. Martin's other arguments have been considered, and we conclude that they likewise lack merit.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

JOSEPH H. MARTIN,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DE-0752-17-0341-I-2

DATE: November 28, 2018

Jeffrey H. Jacobson, Esquire, Tucson, Arizona, for the appellant.

Curtis C. Smith, Yuma, Arizona, for the agency.

Kristine E. King, Esquire, Yuma, Arizona, for the agency.

BEFORE
Glen D. Williams
Administrative Judge

INITIAL DECISION

INTRODUCTION

On June 25, 2017, the appellant timely filed his appeal from the agency's decision to remove him from federal service, effective June 12, 2017. Initial Appeal File (IAF-1), Tabs 1; 8 at 51. The Board has jurisdiction over the appeal pursuant to 5 U.S.C. §§ 7511-7513. A videoconference hearing was held on May 1-2, 2018. IAF-2, Tabs 30-31 (Hearing Recording (HR)).

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

At all times relevant prior to December 17, 2016, the appellant was employed by the agency's Customs and Border Protection (CBP) in the competitive service position of Customs and Border Protection Officer (CBPO), GS-1895-12, at the Port of San Luis, Tucson Field Office, Arizona. IAF-1, Tab 8 at 51. Again, at all times relevant, the appellant also served as the President of the National Treasury Employees Union (NTEU) Local 116. HR, appellant; IAF-1, Tab 12 at 50.

On or about May 13, 2015, the Department of Homeland Security (DHS) Office of Inspector General (OIG) initiated an investigation of the appellant after receipt of an allegation that he made "sexual innuendos and inferred sexual favors for union services during interaction" with a bargaining unit employee. IAF-1, Tab 12 at 13. On or about June 16, 2016, DHS OIG issued its Report of Investigation (ROI). IAF-1, Tabs 12-14.

On January 27, 2017, Brad Capponi, Discipline Review Board (DRB), proposed the appellant's removal based on the three charges: (1) Conduct unbecoming a CBPO (3 specifications); (2) lack of candor (2 specifications); and failure to follow nondisclosure warning (3 specifications).[1] IAF-1, Tab 12 at 5-8.

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[1] Charge No. 1, Specifications Nos. 1 and 2, and Charge No. 2, Specification No. 2, are somewhat vague, but the appellant did not allege that they were so vague as to constitute a due process violation. *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1148 (Fed. Cir. 1997) (due process requires the agency's charges as set forth in the notice of proposed removal to provide sufficient detail to allow the employee to make an informed reply). Moreover, I find that the ROI supplements the charge letter and these specifications, and provided sufficient specificity to allow the appellant to respond and defend against the charge and, thus, the agency provided adequate notice. *See, e.g., Gilmore v. U.S. Postal Service,* 103 M.S.P.R. 290, ¶¶ 7-14 (2006), *aff'd,* 232 F. App'x 276 (Fed. Cir. 2008); *Mason v. Department of the Navy*, 70 M.S.P.R. 584, 586-588 (1996).

The appellant made an oral reply with written exhibits on March 28, 2017. IAF-1, Tabs 8-11.

On June 9, 2017, Hector Mancha, Director, Field Operations, issued a decision letter sustaining Charges Nos. 1 and 2, and all of the specifications contained therein, and Charge No. 3, Specifications Nos. 1 and 2 (but not sustaining Specification No. 3). IAF-1, Tab 8 at 53-57. Mancha further found disciplining the appellant for his sustained misconduct would promote the efficiency of the service. Moreover, after discussing the relevant Douglas factors,[2] he determined that removal was the appropriate penalty. *Id.* The removal was effective June 12, 2017. *Id.* at 51.

On June 25, 2017, the appellant timely appealed the agency's action. IAF-1, Tab 1.

The appeal was dismissed without prejudice on December 29, 2017, and timely refiled on February 2, 2018. IAF-1, Tab 38; IAF-2, Tab 1.

The record closed on May 2, 2018, at the conclusion of the hearing. IAF-2, Tab 31.

Applicable law and burdens of proof

The agency has the burden of proving its charges by a preponderance of the evidence.[3] 5 C.F.R. § 1201.56(b)(1)(ii). An agency's decision to discipline a federal employee must have a "rational basis." *Kmiecz v. Department of the Army*, 29 M.S.P.R. 673, 676 (1986). When an employee challenges an adverse action, the agency must establish three things. *Pope*, 114 F.3d at 1147. First, the agency must prove, by a preponderance of the evidence, that the charged conduct occurred. *Pope*, 114 F.3d at 1147 (citing 5 U.S.C. § 7701(c)(1)(B)). Second, the

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[2] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981).

[3] A preponderance of the evidence is the amount 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 true than untrue. 5 C.F.R. § 1201.4(q).

agency must establish a nexus between that conduct and the efficiency of the service. *Pope*, 114 F.3d at 1147 (citing 5 U.S.C. § 7513(a); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984)). Third, the agency must demonstrate that the penalty imposed is reasonable. *Pope*, 114 F.3d at 1147 (citing *Douglas*, 5 M.S.P.R. at 306-07).

In this decision, to resolve issues of credibility and the weight to be given written statements and other documentary evidence, I have been guided by *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981), and *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). According to *Hillen*, when resolving issues of credibility, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in questions; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Id.*

Charge No. 1: Conduct unbecoming a CBPO.

A conduct unbecoming charge may be proven by preponderant evidence that the employee engaged in the conduct as described in the charge and that such conduct was improper, unsuitable, or detracted from his/her character or reputation. *E.g.*, *Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶ 42 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011); *Miles v. Department of the Army*, 55 M.S.P.R. 633, 637 (1992). Conduct may be deemed unsuitable and detracting from an employee's reputation if it reflects poor judgment on the part of the employee. *Miles*, 55 M.S.P.R. at 637. Unless specified in the charge, the agency is not required to show intent or that the conduct in question actually embarrassed

the agency. *See Crouse v. Department of the Treasury*, 75 M.S.P.R. 57, 63 (1997) (charge of unacceptable and inappropriate behavior does not necessarily indicate intentional misconduct, but an agency may incorporate element of intent by claiming that the employee engaged in intentional misconduct or that conduct was improper because of the employee's intent), *reversed on other grounds and remanded sub nom. Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1371-72 (Fed. Cir. 1998).

Specification No. 1:

The agency alleged:

> On or about October 2014, you made sexually inappropriate comments to Import Specialist Zeidy Lozoya, implying that she should provide you with sexual favors in order for you to represent her as a National Treasury Employees Union (NTEU) representative.

IAF-1, Tab 12 at 5.

The DHS OIG ROI further discussed this specification, stating:

> In October 2014, Martin met Lozoya in his hotel room in Nogales, AZ, to consult over a nonselection matter. Lozoya had never met or talked to Martin prior to this meeting. Lozoya alleged Martin made statements in October of 2014 such as:
>
> - He could understand "why people don't like you, you're young, pretty, and smart." He further said that her case would require him to do some research, consult with LER (CBP Labor and Employee Relations), and he "would have to put it on a credit card." Lozoya said she did not understand what Martin was referring to at first and Martin used the term credit card numerous times.
> - "This is going to cost you little girl."
> - "Have you ever slept with anyone in management? A lot of people in Nogales are known to do that."
>
> Lozoya left Martin's room and stated she felt that in order to receive help from Martin, she would have to provide him with sexual favors. Martin attempted to have Lozoya meet him in Tucson in a hotel room to further discuss her case and stated again that he would have to "put it on the credit card" and this would "cost you." Lozoya never met Martin in Tucson and had limited contact with him through text

> messages. The DHS OIG had Lozoya re-contact Martin to discuss union matters. Two recorded conversations between Lozoya and Martin were captured. During one recoded [sic] conversation, Martin greets Lozoya using the term "sweet cheeks" and tells Lozoya he was going to have to bend her over his knee and give her a spanking, referring to an email she had sent CBP management. Martin told the [sic] Lozoya the email she had sent to management had antagonized the situation. She needed to, "Get ready for your spanking and say I liked it, I liked it."

IAF-1, Tab 12 at 13-14.

Ziedy Lozoya, an Import Specialist at the Nogales Port of Entry in Nogales, Arizona, testified that in November of 2014,[4] she was passed over for a promotion. HR, Lozoya. She stated that she contacted Anna Parada, her NTEU steward, and Parada told her to contact the appellant. She called the appellant and he told her that he would be in Nogales for other matters and they could meet then. *Id.*

Later in November of 2014, Lozoya met with the appellant in his hotel room at the Candlewood Suites hotel in Nogales. She was nervous and concerned that the meeting was taking place in a hotel room. At the beginning of their meeting, she turned down the appellant's offer of a beer. The appellant opened a beer for himself and they sat at the desk in the living room area of the suite. She did not consider the appellant's conduct to be professional, in that he was dressed casually and he cursed a lot. She testified that early in their conversation, the appellant stated, "I can see why they don't like you. You're smart, you're young, and you're pretty." *Id.* She stated that he then "went off on various people in management." *Id.*

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[4] It is unclear why the agency's specification and the ROI synopsis identify the time period as October 2014, because Lozoya's testimony and various items in the ROI consistently referred to November 2014. HR, Lozoya; IAF-1, Tab 12 at 27; Tab 13 at 9, 12.

She testified that she explained her case to the appellant and he stated, "It is going to cost me and he was going to have to put in on the credit card." *Id.* At first, she did not know what he meant, so she ignored his comment. *Id.*

After the meeting with the appellant, she telephoned Parada, who told her that is how the appellant is and how he spoke, and not to take it personally. *Id.*

Lozoya telephoned the appellant and requested that they meet again regarding her issue. She suggested that they meet in a public place or her home with her husband present, but the appellant stated they could meet in his hotel room in Tucson, Arizona. She told him she was not comfortable with that and that is why she had suggested the other locations; however, he refused to meet with her if not at his hotel room. During the telephone conversation, the appellant again stated that he would have to put this on the credit card. She initially thought he was joking; however, she determined that he was not joking because he kept repeating it. She never met with the appellant again because she did not feel comfortable. *Id.*

Lozoya was interviewed by DHS OIG on May 13, 2015, and May 21, 2015. IAF-1, Tab 12 at 27-28; Tab 13 at 12-13. Lozoya's testimony at hearing is consistent with the summary of her DHS OIG interviews. *Id.* Moreover, Lozoya recorded numerous telephone calls with the appellant between May 22 and 26, 2015. IAF-1, Tab 18 at 7-17. During one of those conversations on May 26, 2015, the appellant was recorded referring to Lozoya as "Sweet Cheeks". *Id.* at 13. Later in that conversation, the following occurred:

> MR. MARTIN: So I'm going to make some calls on this anyways, and try to – I'm going to have to – I'm going to have to – I'm going to have to put you over my knee and give you a spanking for this one, though.
>
> MS. LOZOYA: A what?
>
> MR. MARTIN: I'll have to bend you over my knee and give you a spanking for this one.
>
> MS. LOZOYA: Why?

> MR. MARTIN: Because you shouldn't have sent that e-mail.
>
> MS. LOZOYA: Oh.
>
> MR. MARTIN: I mean, that's
>
> MS. LOZOYA: Been bad.
>
> MR. MARTIN: No, but the problem is that you – by sending that e-mail, you were antagonizing the situation. We're trying to make it look like she's screwing, that she's doing this.
>
> MS. LOZOYA: Okay.
>
> MR. MARTIN: So –
>
> MS. LOZOYA: Yeah.
>
> MR. MARTIN: So just get ready for the spanking, and just go I like to did it, I like to did it [sic].

Id. at 15-16. These statements were not charged misconduct, and I consider them solely as corroborating that the appellant engages in such coarse conversation.

The appellant testified that he has no recollection of a meeting with Lozoya, but he admitted that he does use foul, crude, and sexually charged language in his union activities. HR, appellant. However, he denied staying at the Candlewood Suites in Nogales in October or November of 2014. *Id.* In that regard, the appellant submitted a statement for his and CBPO Rodolfo Dibene, Vice President, NTEU Local 116, NTEU credit card for October and November of 2014, that show that the appellant's card (5290) was used for stays at the Holiday Inn Express in Nogales on October 28, 2014,[5] and Dibene's card (5308) was used at for a stay at the Candlewood Suites in Nogales on October 31, 2014. IAF-1, Tab 10 at 6. I note that the Candlewood Suites and the Holiday Inn Express in Nogales are adjacent to each other and share a parking lot. HR, appellant; IAF-1, Tab 8 at 49.

Parada testified that she met with Lozoya and as she was walking her out from the meeting, Parada received a telephone call from the appellant stating that

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[5] The amount charged – $551.70 – indicates that the stay was for multiple nights. IAF-1, Tab 10 at 6.

he was in Nogales. HR, Parada; IAF-1, Tab 10 at 11. She further testified that Lozoya requested to meet with the appellant in-person. *Id.* However, she does not know that Lozoya and the appellant ever actually met. HR, Parada. Parada also testified that she told Lozoya that the appellant was blunt, straightforward and vulgar. *Id.*

I find Lozoya's testimony that she met the appellant in a hotel room to be credible. *See Hillen*, 35 M.S.P.R. at 458. Her testimony regarding the layout of the room and where she was situated was detailed and unguarded. It is also consistent with her prior sworn statement and I discern no bias on her part. I further find her testimony consistent with Parada's concerning the appellant being in Nogales and that Lozoya wanted to meet with him. Lozoya's testimony that the meeting occurred at a Candlewood Suites is potentially contradicted by the appellant's credit card statement, but I nevertheless find that the meeting occurred, whether it was at the Candlewood Suites or the Holiday Inn Express. Similarly, I find Lozoya's unrebutted testimony of what the appellant said during their meeting to be credible. *Id.* Her testimony regarding his statements was detailed and unguarded, and is consistent with her prior sworn statement. I discern no bias on her part.

However, although I find the appellant stated to Lozoya, "I can see why they don't like you. You're smart, you're young, and you're pretty," and "It is going to cost me and he was going to have to put in on the credit card," I do not find that these statements implied that she should provide the appellant with sexual favors in order for him to represent her as an NTEU representative.

Specification No. 1 is NOT SUSTAINED.

Specification No. 2:

The agency alleged:

> On or about July 2015, you made sexually inappropriate comments to CBPO Cynthia Demara implying that she should provide you with

sexual favors in order for you to represent her as an NTEU representative.

IAF-1, Tab 12 at 5.

The DHS OIG ROI further discussed this specification, stating:

The DHS OIG obtained several recorded telephone calls and recorded in person meetings between Demara and Martin. The event that predicated the recorded interactions was Demara's reporting to the DHS OIG that Martin inferred sex for union assistance after she had filed a grievance. Demara was scheduled to meet Martin in Tucson on July 8, 2015, in preparation for a meeting at the CBP Office of Field Operations (OFO) the next day. During telephone discussions, Martin tells Demara the following between July 2 and July 7, 2015:

- She owes him and it's pay-up time.
- Add this to the "I.O.U Joey list and he wants to hear I'll take care of you Joey."
- "It's your Daddy."
- Add some things to the list of "I owe Joey," and he doesn't want to hear any crap Wednesday night. [ ]
- "That's two more I.O.Us, overtime and a trip out of town," which Demara stated she was in debt and Martin tells Demara she is totally in debt and to bring the I.O.U list with her.

Martin tells Demara the following in his hotel room and over the telephone on July 8, 2015:

- "Did you bring any lip balm? Cuz you're gonna need it today after we get done today."
- "Come on down and get it sweetheart, but you're gonna have to blow me for it," in reference to Demara asking for the beer Martin had purchased for her. [ ]

IAF-1, Tab 12 at 14.

On July 9, 2015, the appellant and Demara were scheduled to meet with William Brooks, Director, Field Operations, Tucson Field Office, in Tucson concerning a grievance filed on Demara's behalf concerning a temporary duty assignment in San Diego, California. HR, appellant, Demara; IAF-2, Tab 10 at 183, 185-186. Prior to that meeting, between July 2 and 7, 2015, Demara talked

with the appellant on the telephone six times regarding the July 9, 2015 meeting, and on July 8, 2015, the appellant and Demara met at the Holiday Inn Express in Tucson at which both were staying to prepare for the meeting the next day. Demara recorded the telephone calls and wore a wire for DHS OIG at the meeting.

During a telephone call on July 2, 2015,[6] the following occurred:

MR. MARTIN: Shut down your schedule and we'll meet Wednesday.

MS. DEMARA: Wednesday over there, in Tucson? Okay.

MR. MARTIN: Okay.

MS. DEMARA: Where – so I'll have off Wednesday and off Thursday.

MR. MARTIN: Yes. You'll be (unintelligible) – yeah. Pretty much you'll be off Wednesday and Thursday.

MS. DEMARA: Wednesday and Thursday.

MR. MARTIN: For your daddy.

MS. DEMARA: You're so stupid. So but is it going to be with Brooks, or with who?

* * *

MR. MARTIN: Don't worry. We got all day and all night to prep you.

MS. DEMARA: You're so stupid.

MR. MARTIN: Hey, I – you're the one that owes me. I don't owe you.

MS. DEMARA: Okay. All right.

MR. MARTIN: So it's pay-up time now, woman.

MS. DEMARA: Whatever. Okay. All right.

IAF-1, Tab 18 at 17-20.

During a telephone call on July 6, 2015, the following occurred:

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[6] The transcripts of the telephone conversations do not identify the dates of the calls. I have associated the dates with the calls using the DHS OIG Memorandum of Activity. IAF-1, Tab 13 at 20-21.

MR. MARTIN: Jimmy's going to be trying to hit you from the sides. Trying to trip you up. Make you say something dumb.

MS. DEMARA: Okay.

MR. MARTIN: So that's all right. Just add it to your IOU Joey list.

MS. DEMARA: Okay.

MR. MARTIN: Don't be such – are you still – I don't want to hear it. Just say, okay (unintelligible) out. All right. I'll take care of you, Joey. That's all I want to hear.

MS. DEMARA: You're so stupid.

Id. at 25.

During a telephone call on July 7, 2015, the following occurred:

MR. MARTIN: It's your daddy.

MS. DEMARA: What's up?

MR. MARTIN: Hey, a couple things here. First of all, add this to your list of I owe Joey, and I don't want to hear any crap on Wednesday night.

MS. DEMARA: Okay.

MR. MARTIN: They were trying to fuck you.

MS. DEMARA: What do you mean they were trying to fuck me?

MR. MARTIN: They were trying to make you lie about Thursday.

MS. DEMARA: Uh-huh.

* * *

MR. MARTIN: So, you know, it is what it is. Don't worry about it. It's taken care of. But just add it to your I owe Joey list. I think what they wanted – they wanted to bang you – they wanted to bang you for overtime tomorrow.

MS. DEMARA: Assholes.

MR. MARTIN: So I just say – well, actually, that's two. That's two IOUs. I just saved you from overtime and it's a trip out of town.

MS. DEMARA: Damn. I'm in debt.

MR. MARTIN: You're totally in debt. Just bring the IOU list with you and I'll say, okay, you can (unintelligible) right here.

Id. at 30, 32-33.

On another telephone call from the appellant to Demara on July 7, 2015, the appellant greeted Demara by saying, "Who's your daddy?" *Id.* at 33.

On July 8, 2015, Demara met with the appellant in his hotel room. During that meeting, the following occurred:

> MR. MARTIN: Have you ever testified in court?
>
> MS. DEMARA: No.
>
> MR. MARTIN: Did you bring lip balm? Because you're going to need it after we get done today.
>
> MS. DEMARA: Like no, I never have. I mean, I went with the AUSA once, like for an interview. That was it.
>
> MR. MARTIN: That's not testifying in court.
>
> * * *
>
> MR. MARTIN: You, Mr. Tong, violated the contract. I didn't. I'm not being selfish here. You are.
>
> This is why I'm your daddy. I've been thinking about this shit for the last week.

Id. at 53-54, 61

After the first in-person meeting in the hotel room, Demara telephoned the appellant to discuss the pending grievance meeting. During that call, the following occurred:

> MS. DEMARA: Hey, you want to give me the beer, though? Because I ordered pizza.
>
> MR. MARTIN: Come on down here, sweetheart. But you're going to have to blow me for it.
>
> MS. DEMARA: You're so retarded.
>
> MR. MARTIN: You come down and get it. I'll be in my room in a minute. All right.
>
> MS. DEMARA: All right. Bye.

Id. at 40.

The appellant admitted making "sexually charged" comments to Demara, but denied that those comments were intended to imply that she would be required to provide him sexual favors in exchange for his representation in union

activity. HR, appellant. He further admitted that his comments were unprofessional. *Id.*

I find that the appellant made the statements alleged by the agency. However, while the appellant's statements were crass and boorish, unworthy, perhaps, of a gentleman, I do not find that the appellant implied that Demara should provide him with sexual favors in order for him to represent her as an NTEU representative.

Specification No. 2 is NOT SUSTAINED.

Specification No. 3:

The agency alleged, "On or about July 8, 2015, in a discussion with CBPO Demara, you referred to Supervisory CBPO James Tong using a racial slur, specifically, "chink." IAF-1, Tab 12 at 5.

On July 9, 2015, the appellant and Demara were scheduled to meet with William Brooks, Director, Field Operations, Tucson Field Office, in Tucson concerning a grievance filed on Demara's behalf concerning a temporary duty assignment in San Diego, California. HR, appellant, Demara; IAF-2, Tab 10 at 183, 185-186. Prior to that meeting, on July 8, 2015, the appellant and Demara met at the Holiday Inn Express at which both were staying to prepare for the meeting the next day. At the July 8, 2015 meeting, Demara wore a wire for DHS OIG and recorded the following:

> MR. MARTIN: Depending on how – depending on how cheesy Jimmy gets. Remember, he's a chink. He comes from a – these fuckers are smart.
>
> MS. DEMARA: Yeah.
>
> MR. MARTIN: You got to watch out for the chinks. I always tell them you cheeky fucking bastards. (unintelligible) fucking doing.

IAF-1, Tab 18 at 55.

The appellant admitted that he referred to Tong as a "chink" during his meeting with Demara to prepare her for her meeting regarding her grievance. HR, appellant. He stated that he did not say it to be offensive and was trying to

shock Demara to toughen her up for the meeting. He said this was in his role of an advocate and he would not use that term when conducting agency business. The appellant testified he had a good and personal relationship with Tong. *Id.* I note that earlier in the conversation, the appellant told Demara, "What I'll do is, I'll treat you like they're going to treat you tomorrow. This is only going to take about ten minutes, if that." IAF-1, Tab 18 at 54.

I find that the appellant did refer to Tong as a chink. I further find the appellant's testimony that he was not trying to be offensive, but was merely using the term to prepare Demara to be not credible. While during a grievance meeting with management, a union representative is afforded leeway to promote zealous advocacy, *see Kennedy v. Department of the Army*, 22 M.S.P.R. 190, 194 (1984) and *Farris v. U.S. Postal Service*, 14 M.S.P.R. 568, 574 (1983), the meeting with Demara was not the type of meeting where tempers flare in the heat of the moment. And where it might be necessary to use racial pejoratives and ethnic slurs in preparing for a discrimination matter – because, e.g., there are allegations of such being used in the case – this was a grievance concerning temporary duty assignment to San Diego and a potential violation of Article 38 of the applicable collective bargaining agreement. In this context, Tong's ethnicity had no relevance. From the clear context of the conversation, the appellant's purpose was to slur Tong, and I find no legitimate purpose for the appellant to call Tong "a chink."

Specification No. 3 is SUSTAINED.

Because at least one of the specifications was sustained, Charge No. 1 is SUSTAINED. *Greenough v. Department of the Army*, 73 M.S.P.R. 648, 657 (proof of one or more of the supporting specifications is sufficient to sustain the charge), *appeal dismissed*, 119 F.3d 14 (Fed. Cir. 1997) (Table).

Charge No. 2: Lack of candor.

Lack of candor is a flexible charge that does not require proof of intent to deceive. *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). In order to prove a lack of candor charge, an agency must prove that an appellant was not fully forthcoming and candid with the agency as to all facts and information relevant to the matter at issue, whether or not such information was specifically elicited. *See Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 13 (2000), *aff'd*, 278 F.3d 1280. Lack of candor, as compared to falsification, "is a broader and more flexible concept whose contours and elements depend on the particular context and conduct involved." *O'Lague v. Department of Veterans Affairs*, 123 M.S.P.R. 340, ¶ 13 (2016) (citing *Ludlum*, 87 M.S.P.R. at 1284), *aff'd, per curiam*, 698 F. App'x 1034 (Fed. Cir. 2017). A charge of lack of candor does not require an affirmative misrepresentation, but "may involve a failure to disclose something that, in the circumstances, should have been disclosed to make the statement accurate and complete." *Id.* Furthermore, while lack of candor "necessarily involves an element of deception, 'intent to deceive' is not a separate element of the offense – as it is for falsification." *Id.* (citing *Ludlum*, 87 M.S.P.R. at 1284-85). Nevertheless, to constitute lack of candor, a misrepresentation or omission must have been made knowingly. *Id.* (citing *Parkinson v. Department of Justice*, 815 F.3d 757, 766 (Fed. Cir. 2016), *aff'd, in part and rev'd in part by* 874 F.3d 710 (Fed. Cir. 2017) (en banc)).

Specification No. 1:

The agency alleged:

> On or about November 24, 2015, during an interview with Special Agents of the Department of Homeland Security (DHS) Office of Inspector General (OIG), you alleged you had a prior sexual history with CBPO Demara. You did not have a sexual history with CBPO Demara.

IAF-1, Tab 12 at 5.

During his DHS OIG interview on November 24, 2015, the following occurred:

> Q. Do you have any history with her, other than this professional contact?
>
> A. As far as?
>
> Q. Are you friends? Do you hang out at her house? Does she hang out at yours?
>
> A. No.
>
> Q. Do you do anything outside of work together?
>
> A. We've had a sexual relationship in the past.
>
> Q. You have?
>
> A. Yes.
>
> Q. Okay. Tell me about that. When did that start?
>
> A. I really don't remember when it started.
>
> Q. Okay.
>
> A. It was a while ago.
>
> Q. Were either one of you married?
>
> A. When I was married.
>
> Q. You were married?
>
> A. Yes.
>
> Q. Okay. So –
>
> A. Yes. I've already told my wife.
>
> Q. You told your wife. Okay. So you had a sexual affair with Cynthia Demara?
>
> A. Yes.

IAF-1, Tab 18 at 124-25; Tab 12 at 50. Further, in a sworn statement dated November 24, 2015, the appellant stated, "Mrs. Demara & I had in the past been involved in a sexual relationship and have been for quite some time engaged in shop talk of a sexual nature." IAF-1, Tab 12 at 58.

The appellant admitted he made this claim at his November 24, 2015 interview. HR, appellant. Accordingly, I find that on November 24, 2015, during

an interview with DHS OIG, the appellant alleged he had a prior sexual history with Demara.

Demara testified that she thought Special Agent Sarah Arrasmith, DHS OIG, mentioned that the appellant alleged that the two of them had had a prior sexual relationship. HR, Demara. She testified that it was "untrue completely." *Id.* She testified that they never interacted outside the workplace and were not friends. *Id.*

Arrasmith contacted Demara on November 24, 2015, after the appellant's interview, and on December 21, 2015, Arrasmith interviewed her regarding the appellant's assertion that he previously had an affair with her. IAF-1, Tab 13 at 43, 45. "Demara denied ever having a sexual affair with Martin and stated she never engaged in sexual banter back and forth with Martin." *Id.*; HR, Arrasmith. Arrasmith testified that she believed Demara because there was no evidence in support of the appellant's claim. HR, Arrasmith. On December 21, 2015, Demara provided a sworn statement, "My relationship with him has always been on a professional level.... I have never socialized with Mr. Martin outside of work. I have never had a sexual affair with Mr. Martin." IAF-1, Tab 13 at 46-47.

The appellant testified that he had a "sporadic" sexual affair with Demara beginning in 2010 and ending in approximately 2012. HR, appellant. He testified that he did not recall many specifics. It was not "personal," it was just "sexual." He said they would go to the "no-tell hotel" behind "the old Mervyn's." They went there because the hotel took cash and he always paid cash. *Id.* He testified that he disclosed the affair to his wife and Dibene after receiving the "cease and desist letter" in September 2015. *Id.*

Patricia Martin, the appellant's wife, testified that in approximately September 2015, the appellant told her that he had an issue at work and he disclosed that he had had an affair "with this girl from work." HR, P. Martin. She testified that she did not want to know the details from the appellant, but she knew that the other woman was Demara and that the affair occurred "a couple of

years before... at an ugly hotel." She also said that she had her suspicions even before he disclosed to her. *Id.*

Martin did not observe the affair and I believe she would be biased toward the appellant, as she has an inherent interest in her spouse maintaining his job. However, I observed Martin's demeanor while testifying. She was upset and crying while testifying, and demonstrated anger toward the appellant for having done this to her – and her emotional state appeared appropriate and not overwrought. The way she looked up toward the ceiling while searching for answers for why he had an affair denoted earnestness to me and, in my opinion, everything about Martin's demeanor indicated that she was truthful. While the appellant potentially lied to his wife regarding having had an affair, I find Martin's testimony credible that the appellant told her he had an affair with Demara. *See Hillen*, 35 M.S.P.R. at 458.

Similarly, Dibene testified that he has no first-hand knowledge regarding a sexual relationship between the appellant and Demara. HR, Dibene. He testified that in preparation for the November 24, 2015 interview, the appellant told Dibene that he and Demara had an affair. *Id.* Dibene's testimony is consistent with Martin's regarding the appellant's disclosures of an affair around this time period, and, although I note that the appellant and Dibene were both union officers at the same time, I otherwise discern no bias on his part. While the appellant potentially lied to Dibene regarding having had an affair, I find Dibene's testimony credible that the appellant told him he had an affair with Demara. *See Hillen*, 35 M.S.P.R. at 458.

Demara and the appellant clearly disagree on this fact. Demara, of course, was in a position to know whether she had a sexual relationship with the appellant. I discern a bias by her; however, in that she opposed the appellant and the other union officers in union elections, and also had an EEO complaint concerning the appellant. I find the appellant's testimony that she and the appellant were not friends is contradicted by the testimony of Supervisory CBPO

Edgar Perez and Dibene concerning her interaction with the appellant. HR, Perez, Dibene. Moreover, the conversations recorded by Demara and DHS OIG evidence an easy rapport between Demara and the appellant that certainly indicates a level of friendship. I observed Demara's testimony and found her claim that any allegation of a sexual history with the appellant were "untrue completely" was underwhelming, at best, as was her lack of specific recall that the appellant was making such a claim. She fidgeted and shifted in her seat while testifying and gave a general appearance of not being earnest.

The appellant was similarly well placed to know whether he had a sexual relationship with Demara, and I similarly discern a bias by him, in that he might believe that a prior sexual relationship with Demara would absolve him of a harassment claim. I observed the appellant's demeanor while testifying regarding the affair and noted that he was visibly upset and crying. This type of emotion can be, and often is, fake; however, in this instance I observed no indications of deception and his emotional state appeared genuine. I find his testimony regarding the relationship to have been sufficiently specific as to give it credibility, although I would have anticipated even more detail. I find that the appellant's testimony is buttressed by Martin and Dibene's testimony that he disclosed the affair to both of them. His disclosure clearly caused a tremendous amount of pain for Martin and although it is conceivable he was willing to inflict that on her falsely in an effort to thwart the harassment claim, I am unwilling to impute to him the ability to do that to his wife on such outside chance that it would sufficiently insulate him from liability. Weighing the relevant *Hillen* factor for both Demara and the appellant, I find the appellant's testimony more credible. *See Hillen*, 35 M.S.P.R. at 458.

Accordingly, I find that the appellant's statement that he and Demara had a prior sexual relationship was truthful and his statement did not lack candor.

Specification No. 1 is NOT SUSTAINED.

Specification No. 2:

The agency alleged:

> On or about February 11, 2016, during an interview with Special Agents of the, [sic] DHS, OIG, you stated either "I don't recall" or "I don't remember", or words to that effect, to approximately ten (10) questions in a row asking whether you had committed certain specific acts in which you insinuated an employee must provide you sexual favors for your performance of union work on their behalf. You did so in order to not provide the information requested.

IAF-1, Tab 12 at 5.

During his DHS OIG interview on February 11, 2016, the following occurred:

> Q. Okay. So you did. All right. Got that. Next. Have you ever told a female union member that you would take their case, but that you'd have to charge their credit card?
>
> A. I don't recall that. Remember that.
>
> Q. Okay. And I remember you – the last time we tried to talk to you it was like pulling teeth. It wasn't like a fountain, you know, springing forward with information. Whenever we got into some of these specific questions you couldn't remember. Have you ever had problems with your memory? Do you suffer from Alzheimer's or dementia or anything like that?
>
> A. My memory is pretty crappy.
>
> Q. It is? Okay. As a federal law enforcement officer, you're a trained observer. You have a bad memory. Have you ever reported that? Has your memory ever been so bad that you weren't able to, you know, execute your job?
>
> A. No.
>
> Q. Okay. Because as trained observers and law enforcement officers we're supposed to actually have a pretty sharp memory. I mean, you know, let's just – so I said ever. Why don't we just limit the scope then to the last 18 months. That should be easy enough.
>
> A. I don't know.
>
> Q. In the last 18 months, you can't remember if you ever told a women [sic] to charge –
>
> A. I don't recall. I don't remember.

Q. You know I'm going to ask you some specific questions, and if you start with this I don't remember on every one of them, it's not going to bode well.

A. If I don't remember, I don't remember.

Q. Okay. Have you ever told a female union member okay. Let me just ask. Has a female union member ever inquired, during the course of your consultation and/or representation, if they owe you anything of additional value for you performing your duties as a union steward to which you replied, I'm putting this on your credit card?

A. I don't remember that.

Q. Okay. Have you ever told female employees that they have that they have IOUs, meaning, you know, they owe you something for union services you have provided?

A. I don't remember that.

Q. When dealing with female employees you represent, have you previously said things like who's your daddy or it's your daddy, when greeting them?

A. I don't recall.

MR. MIERS: Okay. We may have a little more snippets. I'm not sure.

MS. ARRASMITH: I say we get his answers.

Q. (BY MR. MIERS): We could actually jog your memory, if that's

A. Jog it.

Q. We may. We may. Because, I mean, this, you know, having you say over and over again, I mean, first of all, here we are. You're answering the questions all the way through, and then we get into specifics and now you don't remember. That's essentially obstruction. It really is. I mean, I may have you – I may have to pull out the management directive again and have you read it, because you're obstructing our questions.

A. I'm answering your questions.

Q. Again, I allege you're not answering and your [sic] obstructing.

A. That's your opinion.

Q. Well, it is my opinion, but I'm also the investigator conducting this interview.

Have you ever engaged in sexual innuendoes towards female employees that references physical sexual contact, such as flagging [sic] the body, pulling the hair, spanking the buttocks, pinching a woman's nipples?

A. I don't remember that.

Q. Okay. Have you ever told female employees that you have to that they have to blow you, quote, unquote, for any services, assistance, or just in general?

A. I don't recall that.

Q. Okay. Again, I'm not just pulling this stuff out of thin air. I'm wrapping these questions around evidence that we have, so

A. Okay.

Q. The Government alleges that we have you on audio clearly saying these things. So if you say you don't remember and if they were within 18 months, we may have a separate issue that we're going to have to deal with, and that's your medical fit for duty. When dealing with female employees, have you ever gestured toward your genital area in a sexual manner?

A. I don't recall that.

Q. You don't recall much. Have you ever used the sexual innuendo oral dictation when dealing with female employees in the workplace?

A. I don't recall that.

Q. Have you ever pointed under the desk you're sitting at and indicated to a female employee, in her presence, to get under the desk and said so in a sexually aggressive manner?

A. I don't recall that.

Q. In your federal workplace or anyplace in your capacity as a union steward, have you ever referred to ethnic groups and racial slurs in the presence of other employees or those who are representing non-union matters?

A. I don't recall that.

Q. Have you ever said to a female employee I hope you brought lip balm, you're going to need it, in a sexually suggestive manner?

A. I don't recall that.

IAF-1, Tab 18 at 201-05.

On his February 11, 2016 sworn statement, the appellant stated he was asked 43 questions by the Special Agents, including the following:

> Q: Have ever [sic] told a female union member that you would take their case, but that you'd have to charge their "credit card?" If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Has a female employee ever inquired, during the course of union consultation and/or representation, if they owe you anything of additional value for you performing your duties as union steward to which you replied, "I'm putting this on your credit card." If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Have you ever told female employees that they have "I.O.Us" for union service you have provided them? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: When dealing with the female employees you represent, have you previously said things like, "who's your daddy," or "it's your daddy," when greeting them? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Have you ever engaged in sexual innuendo towards female employees that references physical sexual contact, such as flogging the body, pulling hair, spanking the buttocks, pinching a woman's nipples? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Have you ever told female employees that they have to, "blow you," for any services, assistance, or just in general? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember. It would depend on the context of the conversation taking place.

> Q: When dealing with female employees, have you ever gestured towards your genital area in a sexual manner? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Have you ever used the sexual innuendo "oral dictation" when dealing with female employees in the work place? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> Q: Have you ever pointed under the desk you are sitting at, and indicated to a female employee in your presence to "get under the desk" - said in a manner sexually suggestive such as sexual innuendo? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.
>
> * * *
>
> Q: Have you ever said to a female employee "I hope you brought lip balm, you're going to need it," -said in a manner sexually suggestive such as sexual innuendo? If no, or I don't remember, would you think doing this is acceptable behavior.
>
> A: I don't remember that. It would depend on the context of the conversation taking place.

IAF-1, Tab 12 at 81-83.

The appellant testified that he carefully considered his answers to the questions. HR, appellant. He also testified that that he was under so much pressure during the interview – and stated that Special Agent Brian Miers, DHS OIG, was threatening him – that his mind went blank. *Id.* In this regard, I find that appellant's testimony to be contradictory.

The appellant testified that he carefully considered his answer when responding to the question, "Have you ever told a female union member that you would take their case, but that you'd have to charge their credit card?" HR, appellant. At the time he responded – and provided the sworn statement – he

could not remember a time when he told a female union member anything like that. *Id.* He noted that in his statement and in responding to a question immediately preceding the series of questions at-issue, the following occurred:

> Q: Have ever told female union members that you were representing that they "owed" you for your assistance/services?
>
> A: Other than Cynthia Demara, I don't remember. With Demara, at least once, but possibly more – I considered any mention of "owed" as a joke or joking around.

IAF-1, Tab 12 at 81.

The appellant then testified that he thought that the series of questions following this question and response referred to female union members other than Demara. HR, appellant. The cited question and the ensuing questions referenced "female union members" and Miers never excluded Demara. It was only the appellant that interposed the caveat regarding Demara and he took no steps to further interpose this caveat or to indicate that his responses did not include Demara. I find that that the appellant's testimony is not credible and I further find that he understood the questions covered his conversations with Demara because, as evidenced by the cited question, he considered Demara to be a female union member. In unilaterally excluding Demara, the appellant guaranteed that his responses were not full and complete, and thus, he lacked candor.

I find the agency proved this lack of candor specification by more than preponderant evidence. First, I find that the appellant's responses to several of the questions were incorrect. I find that the appellant did make a comment to Demara regarding her needing lip balm and that this was made in a sexually suggestive manner (IAF-1, Tab 18 at 53); that he made comments concerning IOUs (*Id.* at 25, 32-33); that he made comments such as "It's your daddy" and "Who's your daddy?" (*Id.* at 30, 33); and that he made comments concerning spanking (*Id.* at 15-16). Moreover, I find that the appellant should have remembered making these statements because I find that these crass comments were his everyday banter – and that is a large part of the reason that I did not find

that this language was meant to actually obtain sexual favors. The appellant had a duty to candidly admit that he used such language, then offer an explanation. He elected not to do that and I find that he did so to deflect the investigation.

I have considered the appellant's testimony that he was taking Bumetanide tablets at the time of his second DHS OIG interview and his belief that the medication might have impacted his memory and ability to concentrate. HR, appellant. A print out from Healthline.com states:

> More common side effects of taking this drug include muscle cramps, dizziness, low blood pressure, headache, or nausea. It may also cause trouble concentrating, confusion, memory loss, and seizures caused by abnormal brain function in people with liver disease.

IAF-1, Tab 10 at 94. However, a print out from drugs.com contains no similar statement under its section on adverse reactions. IAF-2, Tab 21 at 187-188.

There does not appear to be a consensus that Bumetanide tablets impact memory and concentration, but, moreover, I find the appellant's vague and ambiguous testimony standing alone, without additional medical testimony, to be insufficient to establish that the appellant's medication should explain his lack of response to the relevant questions. This is particularly so because, when the entire transcript of the interview is reviewed, there is no other portion where the appellant responds in this manner, which I find is inconsistent with his claims that the medication impacted his memory and concentration.

Specification No. 2 is SUSTAINED.

Because at least one specification was sustained, Charge No. 2 is SUSTAINED. *Greenough*, 73 M.S.P.R. at 657.

Charge No. 3: Failure to follow nondisclosure warning.

The agency proves a charge of failure to follow an instruction by showing that: (1) the appellant was given a proper instruction; and (2) the appellant failed to follow the instruction, without regard to whether the failure was intentional or unintentional. *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547 (1996).

Ordinarily, an employee does not have an unfettered right to disregard an order merely because he believes the order is not proper; he must first comply with the order and register his complaint or grievance. *See Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) (although management may be viewed as incompetent by an employee, this is no excuse for not doing assigned duties). The Board has recognized, though, an exception to this rule in certain limited circumstances when obedience would place the employee or others in a clearly dangerous situation. *Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); *Gomez v. Department of Agriculture*, 63 M.S.P.R. 36, 39 (1994). Thus, an employee may be justified in refusing an order if the employee reasonably believes his obedience would result in his or someone else's imminent death or serious injury. *See Larson v. Department of the Army*, 260 F.3d 1350, 1354-55 (2001); *Blocker v. Department of the Army*, 6 M.S.P.R. 467, 469 (1981).

On November 24, 2015, Special Agents Arrasmith and Miers interviewed the appellant concerning the complaints brought by Lozoya and Demara. IAF-1, Tab 12 at 50-51; HR, appellant, Arrasmith. During the interview, the appellant was given a "Verbal Disclosure Warning for Bargaining Unit Employees" that stated in pertinent part:

> **"WARNING TO NOT DISCLOSE INVESTIGATIVE INFORMATION"**
>
> You are being interviewed as part of a continuing, official investigation by the U.S. Department of Homeland Security, Office of Inspector General. As this investigation is sensitive in nature, you are instructed not to discuss the nature of this interview with any other person(s), except private legal counsel.
>
> Failure to comply with this directive could subject you to disciplinary and/or criminal action for interfering with or impeding an official investigation.

Id. at 52.

The appellant confirmed that he received and understood this warning. HR, appellant. The appellant further stated that Miers told him during the interview, "Don't even tell God about this." *Id.*

I find that the appellant was given this instruction and that it was proper.

Specification No. 1:

The agency alleged that on November 30, 2015 – after his DHS OIG interview – the appellant provided a package containing approximately 110 pages of material concerning Demara to Tong. IAF-1, Tab 12 at 6. Tong was not involved in the DHS OIG investigation and the agency contends that supplying this information to Tong violated the warning not to disclose investigative information. *Id.*

On November 30, 2015, Tong received a package of approximately 110 pages with a cover note stating, "Mr. Tong, Here is a packet that has to do with the Demara case hope this helps to shed some light and clear up some issues. Please add to the investigative file. Chapter 116 President Joe Martin." IAF-1, Tab 13 at 61; Tab 14 at 98, 100.

On that same date, Tong emailed Arrasmith, stating:

> November 30, 2015, I received an unsolicited package via registered mail from Joe Martin containing approximately 110 plus pages of Facebook posts, emails and cell phone logs with a handwritten cover note.
>
> The cover note states "Mr. Tong, Here is a packet that has to do with the Demara case hope this helps to shed some light and clear up some issues. Please add to the investigative file. Chapter 116 President Joe Martin."
>
> Since I have no direct involvement with the inquiry I will hold the materials for your review.

IAF-1, Tab 14 at 100.

On December 14, 2015, Tong received a second package of materials from the appellant.[7] *See Id.* at 101.

On December 16, 2015, Tong emailed the appellant:

> I am receipt of two unsolicited packages from you via registered mail and FedEx, received on November 30, 2015 and December 14, 2015 respectively.
>
> Since I have no direct involvement with the inquiry you reference I have forwarded all materials to the investigative agency reviewing your matter.

Id.

The appellant admits sending the package to Tong on or about November 30, 2015. HR, appellant. He stated that he put the documents into an envelope and attached the cover letter to that envelope, then placed the cover letter and packet into another envelope. He stated that he used this method because, "I didn't want Mr. Tong getting involved or looking at this" because he had nothing to do with OIG's process. *Id.* He testified he has used this method before with Tong and documents that would be sent up to the DRB. The appellant never discussed with Tong the package of documents, that the appellant was the subject of a DHS OIG investigation or nature or circumstances of the DHS OIG interview. The appellant testified he sent the package to Tong because "knowing that this may end up in a disciplinary action ... I wanted to make sure that everything that I put together for my defense got into the file." *Id.* He stated that he expected DHS OIG to produce an ROI to management – in this case, Tong because he handled labor and employee relations issues – and that a file would be sent to the DRB in Washington for potential action. He testified that he had prior experience with OIG wherein he provided a polygraph result, but OIG lost it. He therefore stated he did not trust OIG to produce a complete file. He denied that he attempted to influence the investigation and testified that his sending the

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[7] The agency did not include the second packet in this specification.

package to Tong did not violate the DHS OIG instruction because he did not orally convey the information. *Id.*

I find that the materials contained in the package of information was relevant to the DHS OIG investigation and providing the package to Tong constituted discussing the nature of this interview with him. I find the appellant's testimony that he submitted these documents to Tong solely so that they would be forwarded to the DRB is not credible because his testimony is inconsistent with his statement in the cover letter, "hope this helps to shed some light and clear up some issues." IAF-1, Tab 13 at 61. I find the clear meaning of the cover letter is that these documents were directed to Tong for his use and to somehow sway him regarding the investigation. I further find that by sending the documents to Tong, the appellant disclosed investigative information to an individual outside DHS OIG and not involved with the investigation.

Accordingly, I find that providing the package to Tong violated the nondisclosure warning.

Specification No. 1 is SUSTAINED.

Specification No. 2:

The agency contends that after his DHS OIG interview on November 24, 2015, the appellant approached Perez and "solicited a statement from him regarding CBPO Demara." IAF-1, Tab 12 at 6. Perez was not involved in the DHS OIG investigation and the agency contends that the appellant disclosed the nature of the investigation to Perez, in violation of the warning not to disclose investigative information. *Id.*

Perez wrote a statement averring:

> I [sic] writing this account as a witness of several times that Officer Demara had been at our office located in the north side of the cargo dock looking for Officers Martin or Dibene in their capacity of Union Representatives. On some of those occasions Officer Demara had come to complain about the Port Supervisors using profane and derogatory language when referring to the supervisor that she was

> talking about. I was present but did not engage in the conversation with her. Several times Officer Demara will come back to the SRI Office to talk to Officer Martin or Dibene they all will leave and talked outside the door about their business, I was not privy of their conversation, but they will burst into laugh from time to time this will go on for several minutes. In one specific occasion after Officer Martin came back from the hospital for a heart related problem Officer Demara came back to our office to welcome Officer Martin back to work and jokingly asked him if the doctor had attached his balls back while in the hospital. We all laughed about it and went back to our work. (Grammar and punctuation in original)

IAF-2, Tab 16 at 14. This statement was included in the package of documents the appellant sent to Tong on November 30, 2015.

Perez testified that on an unknown date, the appellant asked him to write a memorandum regarding conversations he had heard in the office between the appellant and Demara. HR, Perez. He testified that at the time the appellant made his request, it was common knowledge that the appellant was being investigated by DHS OIG. Perez could not recall if he learned this from the appellant or from another source; however, Perez was clear that the appellant did not discuss the substance of any interviews he had with DHS OIG. *Id.*

On June 7, 2016, Perez was interviewed by DHS OIG. IAF-2, Tab 16 at 13; IAF-1, Tab 14 at 106. A memorandum of activity prepared by a special agent summarizing the interview in pertinent part:

> CBPO Perez stated that sometime in the early months of 2016, CBPO Martin approached him and informed him that he (CBPO Martin) was being investigated for "inappropriate actions with Officer Demara." CBPO Martin asked CBPO Perez to write a statement recalling incidents where Cynthia Demara, CBPO, SLU/POE, had used profanity and made a joke referencing CBPO Martin's genitalia. CBPO Perez willingly agreed to write the letter and provided it directly to CBPO Martin shortly after.
>
> CBPO Perez recalls CBPO Martin approached him in the new prosecutions office (SRI) and asked him to write the letter. CBPO Perez could not recall if anyone else was present at the time CBPO Martin asked him write the letter however, Rudolfo Dibene and

> Wendy Luna, CBPOs, SLU/POE are also assigned to the SRI and may have been present.

IAF-1, Tab 14 at 106.

> At that time, he provided a sworn statement stating:
>
> Officer Martin approached me and asked me to write a letter to attest to conversations in the former SRI office with Officer Demara to the best of my recollection the request was made in 2016 after we have already moved to the new SRI office. I wrote the statement and provided it to him directly. The letter is attached.

IAF-2, Tab 16 at 13.

At first, Perez testified that the memorandum was complete and accurate. HR, Perez. However, Perez was represented at the interview by CBPO Steve Ponce. IAF-1, Tab 14 at 106. On March 1, 2017, Ponce wrote a memorandum stating:

> On or about June 7, 2016, acting in the capacity of Chief Steward, NTEU Chapter 116, I sat in on an interview of Officer Edgar Perez concerning a memo he wrote on behalf of Officer Joseph Martin. The interview took place at the San Luis POE. During that interview I do not recall Officer Perez saying that Officer Martin had told him that he was under investigation for inappropriate actions with Officer Demara. END.

IAF-1, Tab 11 at 29. Having reviewed this statement, Perez agreed he did not make the statement to DHS OIG, just that it was common knowledge that an investigation was being conducted. HR, Perez.

The appellant testified that he received a "cease and desist letter" in September 2015, and through his contacts at the national office of the NTEU and the grapevine, he learned that Demara had filed complaint of sexual harassment. HR, appellant. He discussed this with Dibene, and Dibene recalled several instances when Demara had been in their office and that Perez was also present. Thereafter, he talked with Perez and asked if he recalled Demara coming to the office after the appellant got out of the hospital and she asked him, "Did you have your balls reattached?" *Id.* Perez said he recalled that conversation and the appellant asked him to write a statement regarding that conversation. He testified

that he did not have to explain to Perez why he needed the statement "because everybody already knew" because Demara had already been telling everyone that she had file an EEO complaint against him. *Id.* He testified that he never discussed with Perez that he had been interviewed by DHS OIG, the nature of the DHS OIG investigation, or the content of the interview. I note that the memorandum of activity summarizing the appellant's interview on November 24, 2015, states that the appellant was already aware of the sexual harassment allegations made against him. IAF-1, Tab 12 at 50. Further, in a sworn statement dated November 24, 2015, the appellant stated:

> I was interviewed by OHS/OIG on 11/24/15 in Tucson, Arizona concerning sexual harassment, I was aware of the claim made because NTEU had given me some in info about the claim and that Mrs. Demara had made the complaint.

Id. at 57.

Dibene testified that he represented the appellant at his November 24, 2015 interview. HR, Dibene. He testified; however, that he knew that Demara had filed a complaint against the appellant prior to the OIG interview – he had heard from the national union and it had "gotten around the port." *Id.* In that regard, he wrote a statement similar to Perez's. IAF-1, Tab 13 at 63. The statement was dated November 3, 2015, and Dibene testified he did not back date the statement. *Id.*; HR, Dibene.

I find that the appellant knew that Demara had filed a complaint prior to his November 24, 2015 DHS OIG interview and further find he was aware of this at least as of November 3, 2015. I find that the appellant requested that Dibene write a statement on or before November 3, 2015. I further find that the appellant had sufficient information prior to his interview to prompt him to request a statement from Perez (and Dibene) and that he did request such statements. Most importantly, the agency has not established by preponderant evidence that the request for the Perez statement was made after the interview and therefore has

failed to prove that the request for the Perez statement was made after the appellant received the instruction not to disclose investigative information.

Specification No. 2 is NOT SUSTAINED.

Because at least one specification is sustained, Charge No. 3 is SUSTAINED. *Greenough*, 73 M.S.P.R. at 657.

Affirmative defenses.

An agency's decision may not be sustained if the employee shows: (1) harmful error in the application of the agency's procedures in arriving at such decision; (2) the decision was based on a prohibited personnel practice as described in 5 U.S.C. § 2302(b); or (3) the decision was not in accordance with law. 5 C.F.R. § 1201.56(c); 5 U.S.C. § 7701(c)(2); *see Ray v. Department of the Army,* 97 M.S.P.R. 101, ¶ 12 (2004), *aff'd*, 176 F. App'x 110 (Fed. Cir. 2006). An appellant has the burden of proving these affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C).

Harmful error:

The burden is on the appellant to prove a claim of harmful error. "Harmful error" is "[e]rror by the agency in the application of its procedures that is 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. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights." 5 C.F.R. §§ 1201.4(r), 1201.56(b)(2)(i)(C). Thus, the appellant must prove there was a law, rule or regulation applicable to his removal; that the agency did not follow it; and that, if it had been followed, the agency was likely to reach a different decision. *See Defense Intelligence Agency v. Department of Defense*, 122 M.S.P.R. 444, ¶ 14 (2015); *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 17 (2015); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

The appellant alleges "the DHS OIG investigation may have violated the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, by interfering with, restraining, and coercing employees in the exercise of rights protected under the Statute.

The Board has the authority to determine whether an agency's conduct constituted an unfair labor practice in an appeal from an otherwise appealable action under Chapter 75. *Marshall v. Department of Veterans Affairs*, 106 M.S.P.R. 478, ¶ 15 (2007).

The appellant was acting in his capacity of a union official engaged in grievance activity in each of the three specifications set forth in Charge No. 1.[8] It is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter...." 5 U.S.C. § 7116(a)(1). If the agency disciplines an employee for actions taken in the course of processing a grievance, and those actions are not, in fact, in violation of the applicable statutes or regulations, then the agency has interfered with the employee's rights and committed an unfair labor practice. *National Treasury Employees Union v. Federal Labor Relations Authority*, 791 F.2d 183, 186 (D.C. Cir. 1986).

The *Authority* has held that an agency's right to determine its internal security practices include the policing of its own employees. The right to determine its internal security practices also includes the right to determine the investigative techniques management will employ to attain its internal security

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[8] I previously noted that the Board declined to decide whether to establish a union representative – bargaining unit member privilege as recognized by the FLRA. *See* IAF-1, Tab 31; *Berkner v. Department of Commerce*, 116 M.S.P.R. 277, ¶¶ 7, 8 (2011). However, even if such privilege was recognized, I would find that it was waived when the bargaining unit employees that met with the appellant cooperated with DHS OIG and provided it with the substance of the conversation. Moreover, I would find that the agency had an extraordinary need to conduct an investigation. *Id.* at ¶ 11.

objectives. *Department of the Treasury, U.S. Customs Service, El Paso, Texas,* 56 F.L.R.A. 398, 403 (2000).

> Under long-standing precedent, where management shows a link, or reasonable connection, between its objective of safeguarding its personnel, property or operations and the investigative technique designed to implement that objective, a proposal that "conflicts with" the selected investigative technique directly interferes with management's right under section 7106(a)(1).

Id. I find that electing to record the appellant was a proper exercise of management's rights.

The Board has held that, "in the absence of gross insubordination or threats of physical harm, an employee may generally not be discharged for rude or impertinent conduct in the course of presenting grievances." *Social Security Administration v. Burris*, 39 M.S.P.R. 51, 58 (1988) (quoting *Kennedy*, 22 M.S.P.R. at 194), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table), *cert. denied*, 493 U.S. 855 (1989). However, the protections afforded to the filing of grievances and to statements made within them are not absolute. The Board has found that where there has been abusive behavior during grievance hearings and where actions have been taken in bad faith, an employee may be disciplined for grievance-related conduct under the efficiency of the service standard. *Id.* (citing *Farris*, 14 M.S.P.R. 568).

In *Farris*, during a grievance meeting with management, the appellant was found to have become angry, to have told the management official in a loud voice that he despised him, to have called him a "pompous ass," and a "baby." *Farris*, 14 M.S.P.R. at 571. The appellant was also found to have told the management official that he would "ruin" him as a supervisor, and that he could knock him to the ground and stomp his teeth out, but that he would not do so. *Id.* In addition to the words which were used toward the management official at the grievance meeting, the appellant was found to have blocked the management official's exit from the hearing room, to have crumpled some of the management official's

sheets of paper and tossed them over the official's head, to have taken this official's keys and tossed them off the table and to have taken a pencil from behind the management official's ear and thrown it over his head. *Id.* The Board found such conduct "was beyond the protective seal of the act." *Id.* a 575. "We perceive the admitted misconduct to be of a severe nature rather than mere understandable anger in the course of disagreements over matters under discussion." *Id.*

I sustained, above, Charge No. 1, Specification No. 3, and thus find that the agency did not commit an unfair labor practice when he was disciplined for that misconduct. *NTEU*, 791 F.2d at 186. More importantly, I would have sustained Specification No. 2 if the specification had not narrowed the charge from conduct unbecoming to "implying that she should provide you with sexual favors in order for you to represent her," as the appellant's statement to Demara was inappropriate. *Id.* I would not have sustained Specification No. 1 even if the specification had not narrowed the charge because the proven conduct did not rise to the level of conduct unbecoming. Because I find that the agency could have properly disciplined the appellant for his misconduct set forth in two of the three specifications of Charge No. 1, I find the agency did not interfere with his rights and did not commit an unfair labor practice.

Due process:

The appellant contends that DHS OIG[9] may have violated his 4th amendment right to privacy when it recorded conversations to which he was a party without his consent. However, federal law allows such recordings when a person acting under color of law is a party to the communication or one of the parties to the communication has given prior consent to the recording. *See* 18 U.S.C. § 2511(2)(c); *see also Wenzel v. Department of the Interior,*

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[9] I note that DHS OIG is a nonparty agency, separate from Customs and Border Protection (CBP).

33 M.S.P.R. 344, 352 (1987) (citing *Middleton v. Department of Justice*, 23 M.S.P.R. 223, 226 (1984) (MSPB has held that taped conversations between an employee and an informant are not illegal where one party consents to the taping)), *aff'd*, 837 F.2d 1097 (Fed. Cir. 1987) (Table). In this case, one of the parties to the communications (Lozoya and Demara) consented to the recordings. Moreover, the Board has held that "the 'exclusionary rule,' derived from the fourth amendment protection against unlawful search and seizure, does not apply to administrative proceedings" such as the instant appeal. *Fahrenbacher v. Department of Veterans Affairs*, 89 M.S.P.R. 260, ¶ 14, n.5 (2001) (citing *Delk v. Department of the Interior*, 57 M.S.P.R. 528 (1993)).

For all of the above reasons, I find that DHS OIG did not violate the appellant's Fourth Amendment right to privacy and that the CD and transcript evidence of the recorded telephone conversations and the surveillance are not excludable on the basis that the recordings were (allegedly) illegally obtained.

Nexus.

The agency must show that there is a nexus between the sustained charge(s) and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified, Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75, n.2 (1987).

Here, there is an obvious nexus between the failure to follow instructions and the efficiency of the service. *Haebe v. Department of Justice*, 81 M.S.P.R. 167, 184 (1999) (the Board has found that there is a nexus between the failure to follow instructions and the efficiency of the service as such failure affects the agency's ability to carry out its mission). Further, the agency has a right to expect its workers to be honest, trustworthy, and candid. *Ludlum*, 87 M.S.P.R. at ¶ 28. Lack of candor strikes at the heart of the employment relationship, and it directly impacts the efficiency of the service. *Chavez v. Small Business*

Administration, 121 M.S.P.R. 168, ¶ 7 (2014). Lastly, the appellant's conduct unbecoming a CBP Officer was technically off-duty; however, the misconduct involved a fellow agency employee and involved an agency manager and "must be seen as clearly destructive of the supervisor-employee relationship." *Farris*, 14 M.S.P.R. at 574.

Thus, I find that there is a nexus between the sustained charges and the efficiency of the service.

Penalty

Where the agency has proven all of its charges, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Ellis v. Department of Defense,* 114 M.S.P.R. 407, ¶ 11 (2010); *Douglas,* 5 M.S.P.R. at 305-06. In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Ellis,* 114 M.S.P.R. at ¶ 11; *Douglas,* 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Ellis,* 114 M.S.P.R. at ¶ 11; *Singletary v. Department of the Air Force,* 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd,* 104 F. App'x 155 (Fed. Cir. 2004).

In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position and responsibilities, including whether the offenses were intentional or frequently repeated. *Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 9 (2003); *see Batts v. Department of the Interior,* 102 M.S.P.R. 27, ¶ 11 (2006); *see also Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282

(1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). Other factors to consider are: the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; his potential for rehabilitation; the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties; his past disciplinary record; his past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability; and consistency of the penalty with the applicable table of penalties. *Douglas,* 5 M.S.P.R. at 305-06.

The deciding official, Mancha, set forth his consideration of the *Douglas* factors in his decision letter and he further testified regarding his penalty determination. IAF-1, Tab 8 at 53-55; HR, Mancha. The record reflects that he considered the relevant factors, including the nature and seriousness of the offense. *Id.* He stated that the charges against the appellant were "very serious" and he testified that the lack of candor charge was the most serious. HR, Mancha. He noted that the appellant holds a law enforcement position and is properly held to a higher standard. IAF-1, Tab 8 at 53-55; HR, Mancha; *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 26 (2012) (law enforcement officers are held to a higher standard of conduct than other employees). He stated that he had lost confidence in the appellant and in the appellant's judgment. HR, Mancha; *Woodford v. Department of the Army*, 75 M.S.P.R. 350, 357 (1997) (loss of confidence is a significant aggravating factor.) Mancha further found that the appellant's prior 30-day suspension an aggravating factor. IAF-1, Tab 8 at 53-55; HR, Mancha; IAF-1, Tab 15 at 42. He believed the appellant was on clear notice given the prior guidance he had received and prior counseling for making sexually inappropriate comments to a co-worker. IAF-1, Tab 8 at 53-55; HR, Mancha; IAF-1, Tab 15 at 39-40. He also considered that removal was consistent with the CBP Table of Offenses. IAF-1, Tab 8 at 53-55; HR, Mancha. He

considered alternative penalties, but determined a lesser penalty unwarranted because of the appellant's prior 30-day suspension and due to the likely impact the lack of candor finding would have on the ability of the appellant to continue as a law enforcement officer.[10] HR, Mancha. He also considered that the appellant did not express any remorse for his actions. *Id.*; *Singletary*, 94 M.S.P.R. at ¶ 15 (an employee's admission of his misconduct and his expression of remorse are indicative of his rehabilitative potential and constitute a significant mitigating factor when the employee notifies an agency of his wrongdoing of his own volition, prior to the agency's initiating an investigation into the misconduct).

In mitigation, Mancha considered that the appellant had approximately 24 years of civil service and six years of military service. IAF-1, Tab 8 at 53-55; HR, Mancha. He also testified that the appellant "had done good work as an enforcement officer and seemed that he had a good track record." HR, Mancha. He testified that the appellant's work performance – particularly his years of service – made the decision to remove very difficult for him, but in the end, these mitigating factors did not outweigh the many aggravating factors. *Id.*

Preponderant evidence therefore shows, and I find, that the deciding official considered the relevant factors, and exercised his discretion within the tolerable limits of reasonableness. *Stoddard v. Department of the Army*, 109 M.S.P.R. 199, ¶ 10 (2008); *Douglas*, 5 M.S.P.R. at 306. Under the circumstances, I cannot find that the agency's choice of penalty was so excessive

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[10] Under *Giglio v. United States*, 405 U.S. 150 (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, any potential impeachment evidence concerning the agents involved in the case. The prosecutor will then exercise his discretion regarding whether the impeachment evidence must be turned over to the defense. A "Giglio-impaired" agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case. Thus, a case that depends primarily on the testimony of a Giglio-impaired witness is at risk." *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 4, n.1 (2012).

as to be an abuse of discretion, or that it exceeds the maximum reasonable penalty. Accordingly, the agency's action is AFFIRMED.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Glen D. Williams
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 2, 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 date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must

state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

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

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

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

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

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

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for

review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

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

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