

CURTIS DOUGLAS
v.
VETERANS ADMINISTRATION

Docket No.
AT075299006

JOSEPH E. CICERO
v.
VETERANS ADMINISTRATION

Docket No.
NY075209013

DOUGLAS C. JACKSON
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DE075299003

JAMES K. ANDERSON
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
AT075209029

LUIS A. JIMENEZ
v.
DEPARTMENT OF THE ARMY

Docket No.
NY075209018

JOHN NOCIFORE
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075299023

JOHN DENNIS
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075299024

OPINION AND ORDER

Under 5 U.S.C. 1205(a)(1), as enacted by the Civil Service Reform Act of 1978 ("the Reform Act"),¹ this Board is authorized and directed to "take final action" on any matter within its jurisdiction. These cases present the question of whether that statutory power includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. For the reasons set out hereafter, we conclude that the Board does have authority to mitigate penalties when the Board determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. We also conclude that this authority may be exercised by the Board's presiding officials, subject to our review under 5 U.S.C. 7701(e)(1).

The appellants in these cases, career employees in the competitive service, were each removed by their agencies upon charges of job-

¹All citations herein to Title 5 of the United States Code are to U.S.C.A. (1980), unless otherwise stated.

related misconduct under 5 U.S.C. 7513. In all but one case, they alleged in their appeals before this Board that the penalty imposed by the agency was too severe. The Board's presiding officials sustained the agency decisions, finding that selection of an appropriate penalty is a matter essentially committed to agency discretion and not subject to proof. The Board thereupon reopened the initial decisions to consider these issues. Subsequently, by Federal Register notice the Board invited the submission of amicus briefs on whether the "preponderance of the evidence" standard is applicable in determining whether the agency-imposed punishment is to be sustained, and on whether the Board may modify or reduce an agency-imposed penalty when it finds that the penalty does not promote the efficiency of the service.² Briefs were filed by a dozen federal departments and agencies, by four federal employee unions, and by the parties.³ Requests for oral argument, filed by OPM and AFGE, are hereby DENIED.

We address these issues, and the application of our determinations on these questions to the cases before us, in three parts herein. In Part I we consider whether the Board has authority to mitigate agency-imposed penalties, concluding that it has the same broad authority that the former Civil Service Commission had in this respect. In Part II we consider and elaborate upon the standards which govern the proper exercise of this authority. In Part III we consider the application of those standards to the cases of the seven individual appellants, which are hereby consolidated for purposes of this decision. 5 U.S.C. 7701(f)(1); 5 C.F.R. 1201.36(a)(1).

I. THE BOARD'S AUTHORITY TO MITIGATE PENALTIES

The Office of Personnel Management (OPM), most of the agencies, and AFGE urge that the Board lacks authority to mitigate an agency-selected penalty. They acknowledge that an agency's choice of penalty may be so disproportionate to an offense or otherwise improper as to constitute an abuse of discretion warranting reversal by the Board. However, they assert that in such cases the Board may not itself reduce or modify the penalty but must instead remand the appeal to the employing agency for selection and imposition by the agency of a substitute penalty, subject to further appeal to the Board from the agency's sub-

²45 Fed. Reg. 6677 (1980).

³Briefs were received from the Office of Personnel Management (OPM), the Acting Special Counsel of the Board, the Departments of Agriculture, Health Education and Welfare (now Health and Human Services), Interior, Justice, and the Navy, the Defense Logistics Agency, the Federal Trade Commission, the Internal Revenue Service, the U.S. Postal Service, the American Federation of Government Employees (AFGE), the National Federation of Federal Employees, the National Association of Government Employees, and the National Treasury Employees Union. A statement in support of OPM's brief was submitted by the Securities and Exchange Commission. Briefs had also been received from OPM as intervenor in response to our reopening orders, and OPM with the Board's leave filed a response to the amicus briefs.

stituted penalty.⁴ For the Board itself to modify or reduce a penalty, they contend, would intrude upon the employing agency's managerial functions. The proponents of this position cite various federal court decisions referring to selection of penalties as a matter within "agency" discretion; OPM also emphasizes the purpose of the Reform Act to separate managerial from adjudicatory functions in the civil service system.

The other federal employee unions and the Acting Special Counsel, on the other hand, point to the authority previously reposed in the former Civil Service Commission to mitigate or lessen agency-imposed penalties. The Commission delegated that authority to its Federal Employee Appeals Authority (FEAA) and Appeals Review Board (ARB) for certain categories of cases,⁵ otherwise reserving such authority to the Commissioners themselves.⁶ Under Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, it is contended, this Board as the successor agency to the Commission is vested with the same power to mitigate or lessen penalties imposed by agencies. These participants also urge that such authority is inherent in the Board's adjudicative function and is necessary to the proper exercise of the Board's statutory role as a strong, independent protector of merit system principles, including particularly the principle of "fair and equitable treatment in all aspects of personnel management."⁷

None of the cases relied upon by OPM and those supporting its position holds or even states in dictum that the Board, or the Civil Service Commission before it, lacks mitigation authority. In numerous other cases, discussed below, the federal courts have directed the Board or

⁴AFGE contends that the Board can only reverse the entire adverse action, providing such guidance as the Board chooses to reduce the likelihood of a further appeal from a newly-imposed penalty upon a second adverse action which may thereupon be instituted by the agency. AFGE Br. at 11-12.

⁵Civil Service Commission Personnel Manual, Delegations of Authority, secs. 106.01(G), 109.01(C) (May 1975) (authority delegated to FEAA and ARB to "mitigate or lessen penalties imposed by agencies by adverse actions, when . . . the penalties imposed are not in accord with agency policy or practice in similar situations"). The predecessor of the ARB was the Commission's Board of Appeals and Review (BAR).

⁶*Id.*, secs. 106.01(I), 109.01(D).

⁷5 U.S.C. 2301(b)(2). In addition, these unions and the Acting Special Counsel refer to 5 U.S.C. 7121(e)(2), which requires arbitrators when considering grievances otherwise appealable to the Board to be governed by the same standards that govern adverse actions before the Board, a provision designed to promote consistency in resolution of adverse action disputes and to avoid forum-shopping. See Conference Report on S.2640, H. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978). This provision, they contend, indicates that Congress understood the Board's authority to include mitigation of penalties, since Congress was presumably aware of the well-known power of arbitrators to mitigate or modify agency-imposed discipline and the Congressional purpose of achieving consistent outcomes and avoiding forum-shopping could not be achieved if the Board were not expected to exercise the same power. We find it unnecessary to address this contention in view of the other grounds for our decision.

its predecessor Commission to redetermine agency-imposed penalties, or acted upon the clear premise that the courts and/or the Board or Commission possessed authority to impose lesser penalties, or the courts have themselves mitigated Commission-approved penalties. It is undisputed that the Commission did in fact exercise authority to mitigate penalties. Before examining those cases, however, an important distinction which has been generally ignored in the agency briefs and elided by OPM should be clarified.

All of the cases cited to us relate to the scope of *judicial* review of agency action. Much confusion in the arguments before us arises from the unarticulated and mistaken assumption that the Board's role in relation to employing agencies must be assimilated to that of a reviewing federal court. It is indeed true that Congress clearly intended the Board to function in an independent, nonpartisan, quasi-judicial role with newly authorized powers normally exercised only by courts.⁸ In this respect the Reform Act was responsive to studies which had long suggested a need for the appellate functions of the former Civil Service Commission to be performed in a more judicial manner.⁹ However, the Board nonetheless remains and is designed to function as an independent administrative establishment within the Executive Branch, not as part of the Judicial Branch. The Board's authority may rest as uncomfortably on the shoulders of the agencies whose actions are appealable to it as the authority of the NLRB, SEC, FTC, FCC, and other independent regulatory agencies rests upon those whose actions are subject to their respective jurisdictions. Nevertheless, as is the case with those agencies, it is the final orders or decisions of the Board which constitute the acts of "the Government" for purposes of judicial review.¹⁰

It is, therefore, incorrect to assume that federal court decisions concerning the scope of judicial review of "agency actions" apply equally to the Board's review of appealable personnel actions. Such an assumption most obviously ignores the fact that 5 U.S.C. 7701 provides for *de novo* review by the Board of both factual and legal questions,¹¹ whereas

⁸See H.Rep. No. 95-1403, 95th Cong., 2d Sess. 4, 6-7, 18-20, 22-23 (1978); S.Rep. No. 95-969, 95th Cong., 2d Sess. 6-7, 29-32, 51-55, 60-64 (1978); H.Rep. No. 95-1717, 95th Cong., 2d Sess. 133, 137-43 (1978).

⁹*E.g.*, Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 Am. U. L. Rev. 323, 333-51, 365-66 (1970).

¹⁰See 5 U.S.C. 7703(a)(1), (d). Compare 5 U.S.C. 702 (1977).

¹¹See *McTiernan v. Gronowski*, 337 F.2d 31, 35-36 (2d Cir. 1964). See also H.Rep. No. 96-1080 on H.R. 2510, 96th Cong., 2d Sess. 3 (1980) ("... it is true as OPM points out that . . . section 7701 of Title 5, United States Code, . . . provides for a *de novo* review by the Board of both procedural and factual questions. . . ."); S.Rep. No. 96-1004 on H.R. 2510, 96th Cong., 2d Sess. 2-3, 5 (1980). The power of *de novo* review includes the power to modify penalties. See *Goodman v. United States*, 518 F.2d 505 (5th Cir. 1975); *Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975) (en banc); *Brennan v. Occupational Safety and Health Review Comm'n*, 487 F.2d 438, 441 (8th Cir. 1973); *United States v. Daniels*, 418 F.Supp. 1074, 1080-81 (D. S.Dak. 1976). Moreover, the Board, unlike the courts,

judicial review of Board decisions is limited to the record established before the Board (except in discrimination cases).¹² We have previously referred to this distinction in explaining the special meaning of the term "appellate jurisdiction" as used in our regulations:

The term "appellate jurisdiction" is used because the Board is reviewing an appeal from an agency action. Use of this term is not meant to indicate that the Board's review of the agency determination is limited to a traditional appellate review. [44 Fed. Reg. 38342 (1979)]

More recently, in *Parker v. Defense Logistics Agency*, 1 MSPB 489, 497 (1980), we amplified on this same distinction:

. . . [T]he Board is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch, albeit one exercising independent quasi-judicial functions. It is the Board's decision, not the agency's, that constitutes an "adjudication" (5 U.S.C. 1205(a)(1)) which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals (or by the Court of Claims, 5 U.S.C. 7703). The mere fact that the agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court. . . .

The federal courts have recognized, in the very cases relied upon by OPM, that it was the exercise of the Civil Service Commission's discretionary authority that was under review and entitled to a degree of judicial deference, not simply the employing agency's.¹³ This has been

"deals with the relationship of penalty to violation on a frequent basis" and is thus better positioned than the courts to achieve "uniformity and coherence of administration," See *Kulkin v. Bergland*, 626 F.2d 181, 185 (1st Cir. 1980).

¹²See 5 U.S.C. 7703(c); *Pascal v. United States*, 543 F.2d 1284, 1287 n.3 (Ct. Cl. 1976); *Dabney v. Freeman*, 358 F.2d, 533, 537 (D.C. Cir. 1965). This distinction is overlooked by OPM in asserting erroneously that Congress established "a similar reviewing role for both MSPB and the courts" (OPM Memorandum as Intervenor in Douglas and Jackson, at 3 n.2). On that mistaken premise OPM then erects the argument that judicial principles governing review of an agency-imposed penalty should also be applied by the Board, citing *Morgan v. United States*, 307 U.S. 183, 191 (1939). However, *Morgan* held that a federal court of equity should avoid reaching a result contrary to that of a federal agency on a rate-making question within the agency's statutory jurisdiction, a conclusion which, if pertinent at all to the present issue, suggests rather that the courts should respect the results reached by the Board within its statutory jurisdiction. See *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973). *Morgan*, of course, predates the Administrative Procedure Act of 1946 whose judicial review provision, section 10(e), 5 U.S.C. 706 (1977), is now paralleled by 5 U.S.C. 7703(c).

¹³*Henley v. United States*, 379 F.Supp. 1044, 1049 (M.D. Pa. 1974); *Grover v. United States*, 200 Ct. Cl. 337, 354 (1973); *Birnholz v. United States*, 199 Ct. Cl. 532, 538 (1972); *Heffron v. United States*, 405 F.2d 1307, 1310 (Ct. Cl. 1969). In *Harvey v. Nunlist*, 499 F.2d 335 (5th Cir. 1974), the employee bypassed Civil Service Commission appellate procedures which were then optional for Post Office employees, see 5 C.F.R. 771.222 (1973), and appealed directly to federal court after exhausting internal Post Office administrative appeals. *Henley v. United States*, *supra*, in regarding the penalty selected as beyond the court's scope of review, relied upon a statement in *Jaeger v. Stephens*, 346

recognized in numerous other cases as well,¹⁴ some of which emphasized the deference due the discretionary determinations of the Civil Service Commission as the agency charged by Congress with the primary responsibility for enforcing the employee protection provisions of the Veterans Preference Act.¹⁵ In consequence, courts have sometimes loosely equated the Civil Service Commission and now the Board with the agency taking the adverse action against the employee.¹⁶ Frequently the severity of the penalty has been explicitly referred to by the courts as a matter within the discretion of the Civil Service Commission.¹⁷

It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies.¹⁸ Nor can it be doubted that the

F.Supp. 1217, 1226 (D.Colo. 1971), quoting *Bishop v. McKee*, 400 F.2d 87, 88 (10th Cir. 1968), for the principle that the "remedy necessary to promote the efficiency of the civil service is a matter peculiarly and necessarily within the discretion of the Civil Service [Commission] and cannot be disturbed on judicial review absent exceptional circumstances not here present." *Bishop v. McKee* and its progeny thus expressed no limitation on the Civil Service Commission's authority concerning penalties.

¹⁴*E.g.*, *Elliott v. Phillips*, 611 F.2d 658, 660 (6th Cir. 1979); *Smith v. United States Air Force*, 566 F.2d 957, 958 (5th Cir. 1978); *Phillips v. Bergland*, 586 F.2d 1007, 1012, 1015 (4th Cir. 1978); *Cameron v. United States*, 566 F.2d 1191 (Ct. Cl. 1977); *Doe v. Hampton*, 566 F.2d 265, 275 (D.C. Cir. 1977); *Pascal v. United States*, 543 F.2d 1284, 1290 (Ct. Cl. 1976); *Wroblaski v. Hampton*, 528 F.2d 852, 855-56 (7th Cir. 1976); *Liotta v. United States*, 174 Ct. Cl. 91, 96 (1966); *Dabney v. Freeman*, 358 F.2d 533, 537 (D.C. Cir. 1965); *Monahan v. United States*, 354 F.2d 306, 310 (Ct. Cl. 1965); *Carter v. Forrestal*, 175 F.2d 364, 365-66 (D.C. Cir. 1949).

¹⁵*E.g.*, *Adkins v. Hampton*, 586 F.2d 1070, 1074 (5th Cir. 1978); *Gueory v. Hampton*, 510 F.2d 1222, 1227 (D.C. Cir. 1974).

¹⁶*E.g.*, *Yacovone v. Bolger*, No. 79-2043 (D.C. Cir. Feb. 20, 1981) (Slip Op. at 7) (MSPB decision referred to as "nexus determination . . . made by the agency"); *Boyce v. United States* 543 F.2d 1290, 1294-95 (Ct. Cl. 1976); *Fitzgerald v. Hampton*, 467 F.2d 755, 766 (D.C. Cir. 1972) (Commission "takes affirmative action" affecting employee's rights); *Norton v. Macy*, 417 F.2d 1161, 1169 (D.C. Cir. 1969) (dissenting opinion) ("action of the Commission in dismissing this man").

¹⁷*E.g.*, *Tucker v. United States*, 624 F.2d 1029, 1034 (Ct. Cl. 1980); *Byrd v. Campbell*, 591 F.2d 326, 331-332 (5th Cir. 1979); *Bruzzone v. Hampton*, 433 F.Supp. 92, 96 (S.D.N.Y. 1977); *Giles v. United States*, 553 F.2d 647, 651 (Ct. Cl. 1977); *Coates v. United States*, 208 Ct. Cl. 1035, 1037 (1976); *Wathen v. United States*, 527 F.2d 1191, 1203 (Ct. Cl. 1975), cert. denied, 429 U.S. 821 (1976). See also *Bishop v. McKee*, quoted in note 13, *supra*.

¹⁸OPM so concedes in its Memorandum as Intervenor in Douglas and Jackson, at 4. While the Board's records of CSC cases are incomplete, the following examples are sufficient to illustrate the actual exercise of the Commission's mitigation authority: *Clyde Hayes (TVA)*, No. RB752B50288 (ARB Sept. 19, 1974) (removal reduced to 30-day suspension); *James F. Lillard (TVA)*, No. RB752B50289 (ARB Sept. 19, 1974) (removal reduced to 30-day suspension); *David C. Corson (Dept. of Army)*, Commissioners' Letter to agency reopening BAR No. 752B-73-558 (May 11, 1973) (removal reduced to 30-day suspension); *James D. King, Jr. (Post Office)*, No. 752B-72-___ (BAR Sept. 19, 1972) (removal reduced to 30-day suspension); *Thomas A. Horan (Postal Service)*, No. 752B-73-33 (BAR July 25, 1972) (removal reduced to 60-day suspension); *Richard D. Meehan*

federal courts have regarded that authority as properly within the Commission's power.¹⁹ Indeed, the courts have themselves exercised the power to mitigate Commission-sustained penalties.²⁰

The Commission's mitigation authority was based on 5 U.S.C. 7701 (1967) and on 5 U.S.C. 1104(a)(5) and (b)(4) (1977). The former provision, relating only to adverse action appeals of preference eligibles, required employing agencies to "take the corrective action that the Commission finally recommends."²¹ The latter provisions established a statutory ba-

(Canal Zone), CSC Minutes of Proceedings Oct. 7, 1970 (Appeals Examining Office's reduction of removal to 90-day suspension following remand from Court of Appeals for "agency" reconsideration of penalty, 425 F.2d at 473, approved by Commissioners notwithstanding Canal Zone Government's contention upon request for reopening that "the issue remanded was to be resolved by the agency, and not the Commission," Letter of Canal Zone governor to CSC Chairman, Aug. 28, 1970, at 6). See also *Minnie L. Dixon (Internal Revenue Service)*, No. 752B-74-4 (BAR July 3, 1973) (removal reduced to 60-day suspension) and *Margaret E. Boyce (Internal Revenue Service)*, No. 752B-74-6 (BAR July 3, 1973) (removal reduced to 90-day suspension), both of which were subsequently overruled by the Commissioners whose decision was thereafter reversed by the Court of Claims in *Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976). In numerous other cases the Commission explicitly weighed the severity of the penalty as distinct from whether some disciplinary action was warranted, e.g., No. AR752B90458 (Office of Appeals Review, July 5, 1979); No. RB752B80194 (ARB May 17, 1978); No. RB752B70253 (ARB Sept. 9, 1977); No. 752B-73-666 (BAR April 17, 1973).

¹⁹*E.g.*, *Cafferello v. Civil Service Commission*, 625 F.2d 285 (9th Cir. 1980) (reversing district court which found that ARB should have mitigated penalty, but not questioning ARB's authority to mitigate); *Howard v. United States*, No. Civ. LV-77-219 RDF (D. Nev. July 3, 1980) (remanding to MSPB to reconsider severity of penalty and, if removal is found unwarranted, to "formulate an appropriate remedy"); *Byrd v. Campbell*, 591 F.2d 326, 331-32 (5th Cir. 1979) (remanding to FEAA for reconsideration of severity of penalty); *Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976) (Commissioners provided inadequate explanation for overruling BAR's decision to reduce penalties); *Slowick v. Hampton*, 470 F.2d 467, 469 (D.C. Cir. 1972) (ordering remand for "administrative re-determination of the proper sanction"), thereafter remanded to the Commission by the district court's order of Dec. 13, 1972 for "a determination of the proper sanction," where-upon the Commission, after affording the parties an opportunity to comment, directed the agency to cancel the removal action and reinstate the employee with no suspension, No. 752B-73-666 (BAR April 17, 1973); *Meehan v. Macy*, 425 F.2d 472, 473 (D.C. Cir. 1969) (*en banc*) (remanding to Civil Service Commission to reconsider severity of penalty), thereafter considered by the Commission in *Richard D. Meehan (Canal Zone)*, discussed in note 18, *supra*. See also cases cited in note 17, *supra*.

²⁰*E.g.*, *Francisco v. Campbell*, 625 F.2d 266 (9th Cir. 1980) (affirming district court's finding that penalty was excessive but reversing reinstatement order and remanding to district court for "reconsideration of the imposition of proper discipline"); *Power v. United States*, 531 F.2d 505, 510 (Ct. Cl. 1976), *cert. denied*, 444 U.S. 1044 (1980) (awarding back pay because removal penalty was excessive but not ordering reinstatement); *Clark v. United States*, 162 Ct. Cl. 477, 486-87 (1963) (back pay award for improper removal reduced to allow for 90-day suspension); *cf. Cuiffo v. United States*, 137 F.Supp. 944, 950 (Ct. Cl. 1955) (back pay award for excessive suspension reduced to allow for 30-day suspension).

²¹This provision derived from section 14 of the Veterans Preference Act of 1944, as amended in 1947 to provide that "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends," Pub. L. 80-325, Aug.

sis for the Commission's function of "hearing or providing for the hearing of appeals" and "taking . . . final action" in all matters appealable to it, as well as of "enforcing" its decisions.²²

The authority granted by each of these provisions was expressly specified to "remain with the Board" under Reorganization Plan No. 2 of 1978, which redesignated the Commission as the Merit Systems Protection Board²³ and provided in Section 202:

(a) *There shall remain with the Board the hearing, adjudication, and appeals function of the United States Civil Service Commission specified in 5 U.S.C. 1104(b)(4) (except hearings, adjudications and appeals with respect to examination ratings), and also found in the following statutes:*

(i) 5 U.S.C. . . . 7701. . . .

(b) *There shall remain with the Board the functions vested in the United States Civil Service Commission, or its Chairman, pursuant to 5 U.S.C. 1104(a)(5) and (b)(4) to enforce decisions rendered pursuant to the authorities described in Subsection (a) of this Section. [Emphasis supplied]*

These provisions have now been succeeded by new Section 1205(a) of Title 5, as enacted by the Reform Act, sec. 202(a), 92 Stat. 1122, which provides:

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title

4, 1947, 61 Stat. 723, originally codified as 5 U.S.C. 863 and recodified in 1966 as Section 7701. See also the 1948 amendment to section 19 of the Veterans Preference Act, applicable to appeals of preference eligibles based on Commission regulations, which similarly provided that "any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency," Pub. L. 80-741, June 22, 1948, 62 Stat. 575, originally codified as 5 U.S.C. 868 and also recodified in 1966 as Section 7701. The effect of the 1947 amendment is discussed in *Feldman v. United States*, 181 F.Supp. 393, 395-96 (Ct. Cl. 1960); *Goodwin v. United States*, 118 F.Supp. 369, 370-71 (Ct. Cl. 1954); *Wettre v. Hague*, 74 F.Supp. 396, 399 (D. Mass. 1947), vacated and remanded on other grounds, 168 F.2d 825 (1st Cir. 1948); 33 Comp. Gen. 295, 296 (1954) ("the Commission has the authority to determine what constitutes proper 'corrective action' . . ."); 28 Comp. Gen. 489, 491 (1949) ("it is clear that the Civil Service Commission is authorized to determine the nature and extent of the corrective action to be taken").

²²Section 1104 in 1966 codified section 2(a)(6) of Reorganization Plan No. 5 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067, which provided for the Commission's function with respect to "enforcing" its decisions and "the hearing or providing for the hearing of appeals . . . and the taking of such final action on such appeals as is now authorized to be taken by the Commission." Appeal rights were extended to non-preference eligibles in the competitive service by Executive Order No. 10,988 of January 17, 1962, 3 C.F.R. 521, 5 U.S.C. 631 (1964), and Executive Order No. 11,491 of October 29, 1969, 3 C.F.R. 861 (Supp. 1966-1970), 5 U.S.C. 7301 (1970).

²³Sec. 201(a), H.Doc. No. 95-341, 95th Cong., 2d Sess., 92 Stat. 3784, 5 U.S.C. 1101 note.

. . . or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order. . . .

Thus, unless "inconsistent with any provision in" the Reform Act,²⁴ the functions specified as remaining with the Board under Section 202 of Reorganization Plan No. 2 of 1978, including the former Commissioner's mitigation authority, remain vested in the Board through 5 U.S.C. 1205(a).²⁵

Neither OPM nor any other participant has claimed that the mitigation authority preserved in the Board by section 202 of Reorganization Plan No. 2 is inconsistent with any particular provision of the Reform Act. Instead, OPM argues broadly that the former Commission's mitigation authority reflected its "management responsibilities" in the Commission's dual capacity as government-wide personnel manager and appeals adjudicator, and that the separation of such "managerial decision-making" functions from the Board's adjudicatory function was one of the fundamental principles of the Reform Act.²⁶

OPM's statement of this Reform Act principle is generally unexceptionable. However, the argument that this principle excludes the Board's mitigation authority takes no account of the obvious fact that the identical principle was also embodied in Reorganization Plan No. 2 of 1978,²⁷ which as shown by the foregoing discussion expressly provided in section 202 that the statutory functions establishing the former Commission's mitigation authority were to remain with the Board. That authority was thus clearly included among those described by both the President and Congress, in explaining the Reorganization Plan, as comprising the former Commission's adjudicatory and appellate functions.²⁸ The Reform Act

²⁴Sec. 905 of the Reform Act, 92 Stat. 1224, 5 U.S.C. 1101 note.

²⁵Of course, Section 1205(a) is not the exclusive provision embodying the surviving authorities set forth in the pre-Reform Act provisions of 5 U.S.C. 1104 and 7701. Both of those provisions, as amended substantially by the Reform Act in respects not pertinent here, survive as sources of important authorities for OPM and the Board respectively.

²⁶OPM Memorandum as Intervenor in Douglas and Jackson, at 4-5. See also amicus brief of the Department of the Navy, at 5-6.

²⁷See Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1978, H.Doc. No. 95-341, 95th Cong. 2d Sess. 1 (1978); H.Rep. No. 95-1396, 95th Cong., 2d Sess. 1-2, 5-6, 9-11 (1978); S.Rep. No. 95-1049, 95th Cong., 2d Sess. 1-2, 5-6 (1978).

²⁸See Message from the President, *id.* at 1 ("The . . . Board will exercise all of the adjudication and appellate functions now vested in the Civil Service Commission"); S.Rep. No. 95-1049, *supra*, at 2 (same); Hearings Before a Subcom. of the House Comm. on Government Operations on Reorganization Plan No. 2 of 1978, 95th Cong., 2d Sess. 13, 22 (statements of James T. McIntyre), 56, 70, 92 (statements of Alan K. Campbell) (1978).

was designed to make no change in the assignment to the Board of those functions.²⁹

The 1947 amendment to section 14 of the Veterans Preference Act, from which the Commission's mitigation authority originally derived,³⁰ had been similarly regarded as necessary to the Commission's appellate adjudicative function.³¹ That amendment was opposed by several agencies in 1947 on the same purported grounds of managerial prerogative now revived by OPM, but the objection was then deemed "groundless" by Congress,³² and intervening law and history have rendered the argument obsolete. The Reform Act and Reorganization Plan No. 2 of 1978 were companion enactments adopting a complementary set of reforms as part of a comprehensive legislative proposal.³³ It is too late now to contend that a hitherto unperceived inconsistency between section 202 of the Reorganization Plan and unspecified provisions of the Reform Act somehow had the effect of silently abrogating the Board's mitigation authority, on the strength of theories about managerial prerogative that Congress expressly rejected more than 30 years ago.³⁴

²⁹See H.Rep. No. 95-1403, 95th Cong., 2d Sess. 4, 6 (1978); 124 Cong. Rec. H9875 (daily ed. Sept. 11, 1978) (statement of Rep. Ford) (" . . . there is a merit system protection board of three members which performs the merit system protection functions that the present three Civil Service Commissioners have traditionally performed"). See also note 33, *infra*, and accompanying text.

³⁰See note 21, *supra*.

³¹See H.Rep. No. 315 on H.R. 966, 80th Cong., 1st Sess. 1-2 (1947); S.Rep. No. 568 on H.R. 966, 80th Cong., 1st Sess. 1-3 (1947); S.Rep. No. 631 on S.1494, 80th Cong. 1st Sess. 1 (1947); 93 Cong. Rec. 7467 (daily ed. June 19, 1947) (amendment "protects veterans from arbitrary administrative decisions by making the recommendations of the Civil Service Commission binding on the executive departments and agencies"); Hearings Before Senate Comm. on Civil Service, on Veterans' Legislation, 80th Cong., 1st Sess. 29 ("In this instance [under prior law] we have an appeal system, but the final court of appeals is unable to enforce its findings upon the agencies involved"), 35 ("We feel that the Civil Service Commission, sitting in judicial capacity, can much more fairly pass on these things than the supervisors of some of these agencies, and on up the line. . .") (1947).

³²H.Rep. No. 315 on H.R. 966, 80th Cong., 1st Sess. 2 (1947). See also S.Rep. No. 568 on H.R. 966, 80th Cong., 1st Sess. 2-3, 5-6 (1947).

³³See Message from the President, *supra*, at 1; S.Rep. No. 95-1049, *supra*, at 1; Hearings before a Subcom. of the House Comm. on Government Operations on Reorganization Plan No. 2 of 1978, 95th Cong., 2d Sess. 15-16, 106, 108, 232; S.Rep. No. 95-969 on S.2640, 95th Cong., 2d Sess. 2, note 1 (1978); Hearings Before the House Comm. on Post Office and Civil Service on H.R. 11280, 95th Cong., 2d Sess. 20, 23-24 (1978).

³⁴OPM does not claim that either the Reorganization Plan or the Reform Act assigned to OPM the authority to order a modification in an agency-imposed penalty, nor has OPM purported to assert such authority in any of the roughly 12,000 cases already adjudicated by the Board under the Reform Act. OPM's argument thus amounts to a contention that Congress in 1978 repealed altogether the mitigation authority conferred by the 1947 amendment to the Veterans Preference Act. Nothing in the Reform Act or Reorganization Plan, or their legislative history, supports such a contention. Of course, repeals by implication are disfavored. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978);

Beyond legal analysis, there are also practical considerations which, although not mandating our construction of the Board's authority, assure us that this construction is consistent with the Reform Act's purposes and efficient performance of the agencies' responsibilities. If we were to conclude that the Board must remand cases involving excessive penalties to the employing agency for selection and imposition of a new penalty by that agency, then a renewed appeal to the Board to review the new penalty must be allowed, as OPM, the agencies, and AFGE concede.³⁵ Such successive appeals would prolong ultimate resolution of these cases, a result clearly contrary to Congress's desire for expedition in concluding adverse action appeals.³⁶

One agency suggests that if the Board has mitigation authority, managers might tend to impose unwarranted removal sanctions in reliance upon Board modification of such penalties, instead of carefully considering the most appropriate penalty at the outset. We doubt this is a substantial risk in many cases, given the care with which most agency managers properly approach the exercise of their disciplinary responsibilities, as shown in thousands of cases already reviewed by this Board and in innumerable cases before the former Civil Service Commission which was vested with that same mitigation authority. The question is not whether excessive penalties will sometimes be imposed by agencies, which is probably inevitable regardless of the scope of the Board's authority, but whether in such cases the Board must be powerless to prescribe a suitable remedy.

Virtually every objective study of the former Commission's appellate operations recommended more rather than less frequent exercise of the mitigation authority, in fairness both to employees and to agencies whose disciplinary actions might otherwise be reversed on insubstantial grounds to avoid imposition of a penalty perceived as too harsh.³⁷ We find no

Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-34 (1974). If the Reform Act and the mitigation authority vested in the Board by Section 202 of the Reorganization Plan are "capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, not only is there no such clearly expressed congressional intention, there is clear indication that Congress intended in the combined Reform Act and Reorganization Plan to provide for *all* of the former Commission's functions. In transmitting the Reorganization Plan to Congress, the President expressly stated that, "No functions are abolished by the Plan. . . ." Message from the President, *supra*, at 2.

³⁵See note 4, *supra*, and accompanying text. Under that view there could in principle be an indefinite number of such successive appeals in any particular case, until the agency finally hits on a penalty that the Board sustains.

³⁶See 5 U.S.C. 7701(i)(4); S.Rep. No. 95-969 on S.2640, 95th Cong., 2d Sess. 9 (1978).

³⁷*E.g.*, Merrill, Report in Support of Recommendation 72-8, in 2 *Recommendations and Reports of the Administrative Conference of the United States*, 1007, 1070-71 (1972). See also Note, *Removal for Cause From the Civil Service: The Problem of Disproportionate Discipline*, 28 Am. U. L. Rev. 207 (1979); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196, 258-60 (1973); Guttman, *The Devel-*

reason to believe that Board mitigation authority will encourage easy Draconianism in agency managers, or that any such tendency would be greater if the Board prescribes the modified penalty than if the Board-directed the agency itself to select a lesser penalty. Any operational or disciplinary considerations deemed pertinent by the agency to selection of a penalty will have already been brought to the attention of the Board's presiding official if the agency has presented its case properly.³⁸ Moreover, nothing in the Board's regulations restricts the discretion of a presiding official to afford the parties an opportunity to submit additional information relating to possible alternative penalties if the presiding official finds it advisable to do so.

We hold that the Board's authority under 5 U.S.C. 1205(a)(1) to "take final action" on matters within its jurisdiction includes authority to modify or reduce agency-imposed penalties. Like all other authorities exercised in appellate cases on the Board's behalf by its presiding officials pursuant to 5 U.S.C. 7701(b) and 5 C.F.R. 1201.41, that authority is subject to review or reopening by the Board under 5 U.S.C. 7701(e)(1).

II. STANDARDS GOVERNING EXERCISE OF THE BOARD'S MITIGATION AUTHORITY

A. *Scope of Review*

Since the agency actions in these cases were taken under Chapter 75 of Title 5, the respective agency decisions to take those actions may be sustained only if supported by a preponderance of the evidence before the Board. 5 U.S.C. 7701(c)(1)(B). We must therefore consider whether the preponderance standard applies only to an agency's burden in proving the actual occurrence of the alleged employee conduct or "cause" (5 U.S.C. 7513) which led the agency to take disciplinary action, or whether that standard applies as well to an agency's selection of the particular disciplinary sanction.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, consistency with other agency actions and with agency rules, or similar factual considerations which may be deemed relevant by the agency to justify the particular punishment. Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action "decision" nec-

opment and Exercise of Appellate Powers in Adverse Action Appeals, 19 Am. U. L. Rev. 323, 361-62 (1970); Report to Congress by the Comptroller General, No. B-179810, *Design and Administration of the Adverse Action and Appeals Systems Need to Be Improved* at 6-7, 22-26 (Feb. 5, 1974).

³⁸See Report to Congress by the Comptroller General, *id.* at 23.

essarily includes selection of the particular penalty as well as the determination that some sanction was warranted.³⁹ The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein.

It is also clear, however, that the appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." *Kulkin v. Bergland*, 626 F.2d 181, 185 (1st Cir. 1980). It is well established that "assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power." *Beall Const. Co. v. OSHRC*, 507 F.2d 1041, 1046 (8th Cir. 1974).⁴⁰ Thus, an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction. *Doe v. Hampton*, 566 F.2d 265, 271-72 n. 15 (D.C. Cir. 1977), citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974).

The evidentiary standards of 5 U.S.C. 7701(c) specify the quantity of evidence required to establish a controverted fact.⁴¹ As procedural devices for allocating the risk of erroneous factual findings,⁴² those standards are inapposite to evaluating the rationality of non-factual determinations reached through the exercise of judgment and discretion. For such determinations, the characteristic standard of review is the arbitrary-or-capricious, or abuse-of-discretion, standard.⁴³

The standard of arbitrariness, capriciousness, or abuse of discretion is employed by the courts in reviewing non-factual agency determina-

³⁹See *Young v. Hampton*, 568 F.2d 1253, 1264 (7th Cir. 1977). In construing a statutory provision for *de novo* review of the "validity of the questioned administrative action" under the Food Stamp Act, the Fifth Circuit has observed: "'Action' is a unitary concept which encompasses both a determination on the merits, and where guilt is established, the meting out of a consequent penalty. Indeed, by the plain meaning of the term, it would seem that 'action' against a guilty party is not complete until a sanction is imposed." *Goodman v. United States*, 518 F.2d 505, 510 (5th Cir. 1975).

⁴⁰See also *Fuhrman v. Dow*, 540 F.2d 396, 398 (8th Cir. 1976), quoting *Brennan v. OSHRC*, 487 F.2d 438, 442 (8th Cir. 1973); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 U. Va. L. Rev. 196, 232 (1973).

⁴¹See *Steadman v. SEC*, 49 U.S.L.W. 4174 (U.S., Feb. 25, 1981); *Parker v. Defense Logistics Agency*, 1 MSPB 489, 509 (1980).

⁴²See *Addington v. Texas*, 441 U.S. 418, 423-27 (1979); *Losure v. ICC*, 2 MSPB 361, 366 (1980); McCormick on Evidence §§ 336-339 (2d ed. 1972); Winter, *The Jury and the Risk of Nonpersuasion*, 5 Law & Soc. Rev. 335, 337 (1970-71).

⁴³E.g., *Amer. Optometric Ass'n v. FTC*, 626 F.2d 896, 904 (D.C. Cir. 1980); *Francisco v. Campbell*, 625 F.2d 266, 269 (9th Cir. 1980); *Giles v. United States*, 553 F.2d 647, 651 (Ct. Cl. 1977), quoting *Power v. United States*, 531 F.2d 505 (Ct. Cl. 1976), cert. denied, 444 U.S. 1044 (1980). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

tions, including those made by the former Civil Service Commission and by this Board. See 5 U.S.C. 7703(c). However, as we have previously noted, *ante*, 316, 317, it is incorrect to assume that the scope of judicial review of "agency actions" applies equally to the board's review of appealable personnel actions, since our review is *de novo* and from an appellate court's standpoint this Board's action is itself part of the "agency action" reviewed under Section 7703(c). For this Board to exercise only the limited review of adverse actions that the courts will subsequently exercise in reviewing our own decisions under Section 7703(c) would indeed seem anomalous. Such review would serve primarily to anticipate the review function performed by the courts, perhaps thereby screening out some adverse action decisions that would otherwise be reversed by the courts but failing entirely to exercise the degree of independent discretionary judgment entrusted to the Board by the Reform Act.

We need not resolve this conundrum for present purposes, however, since in mitigating penalties we are not construing an authority newly conferred upon us but are exercising only inherited authority. Our authority in this regard is the same as that previously vested in the former Civil Service Commission. In enacting Section 7701(c), Congress understood that it was codifying the standard of proof previously used by the Commission for misconduct cases,⁴⁴ and that for both misconduct and performance cases the evidentiary standards of Section 7701(c) apply to resolution of factual issues.⁴⁵ There is no suggestion in the Reform Act or its legislative history that Congress sought to alter the scope of the authority previously exercised by the Commission in reviewing agency-imposed penalties, as we have already found in Part I of this Opinion. Therefore, in the absence of any indication that Congress intended us to exercise a different authority, we will adhere to the standard of review that was consistently articulated by the Commission and presumably known to Congress.⁴⁶

By that standard, the Commission reviewed agency penalties to determine whether they were "clearly excessive" or were "arbitrary, ca-

⁴⁴See S. Rep. No. 95-969, 95th Cong., 2d Sess. 54 (1978); H. Rep. No. 95-1403, 95th Cong., 2d Sess. 22 (1978).

⁴⁵See House Comm. on Post Office and Civil Service, Committee Mark-up of Civil Service Reform Legislation, 95th Cong., 2d Sess. 64, 85-86, 93-94 (Comm. Print No. 33-782, 1978); Conference Report No. 95-1717, 95th Cong., 2d Sess. 139 (1978); 124 Cong. Rec. 13611 (daily ed. Oct. 14, 1978) (statement of Rep. Ford).

⁴⁶In *Parker v. Defense Logistics Agency*, 1 MSPB 489, 499 n. 14 (1980), we noted with respect to an evidentiary standard that had previously been applied by the Commission but was modified by the Reform Act, "Regardless of whether the Commission's adoption of this standard may have 'confused the standard for judicial review . . . with the standard of proof governing the agency,' . . . the Commission's consistent use of this standard . . . was presumably known to Congress."

precious, or unreasonable."⁴⁷ Other formulations of the standard commonly recited by the Commission were whether the penalty was "too harsh and unreasonable under the circumstances,"⁴⁸ or was "unduly harsh, arbitrary, and unreasonable,"⁴⁹ or reflected "an abuse of agency discretion, or . . . an inherent disproportion between the offense and the personnel action, or disparity in treatment" in violation of the "principle of like penalties for like offenses."⁵⁰ The latter principle dates to 1897, when it was originally promulgated by President McKinley as part of Civil Service Rule II under the Pendleton Act.⁵¹

In focusing not merely on whether a penalty was too harsh or otherwise arbitrary but also on whether it was "unreasonable," the Commission's standard appears considerably broader than that generally employed by the federal courts. Both the Court of Claims and the Courts of Appeals have characteristically reviewed Commission-approved penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties.⁵² The Commission's broad standard of "unreasona-

⁴⁷*E.g.*, No. RB752B80194 (ARB May 17, 1978; No. RB 752B80080 (ARB Dec. 28, 1977); No. RB752B70204 (ARB June 21, 1977); *Richard R. Swanson (National Security Agency)*, No. RB752B60094 (ARB Sept. 3, 1976). See CSC Board of Appeals and Review, Memorandum No. 2, Guidelines for Determining When to Request a Single Delegation of Authority From the Commissioners to Reduce Penalties in Part 752-B Cases, § 7, Sept. 28, 1972 ("Whether the penalty imposed is clearly excessive, or is arbitrary, capricious or unreasonable, i.e., whether there are compelling reasons for reducing the penalty. In other words, when the fact of error in the penalty assessed is so evident that justice or equity demands a reduction of that penalty").

⁴⁸*E.g.*, *Clyde Hayes (TVA)*, No. RB752B50288 (ARB Sept. 19, 1974); *James F. Lillard (TVA)*, No. RB752B50289 (ARB Sept. 19, 1974).

⁴⁹*E.g.*, *Richard D. Meehan (Canal Zone)*, Appeals Examining Office decision, July 27, 1970, approved in CSC Minutes of Proceedings, Oct. 7, 1970.

⁵⁰*E.g.*, No. AR752B90458 (Office of Appeals Review, July 5, 1979). See also No. RB752B50387 (BAR Dec. 16, 1974) ("so harsh as to be arbitrary and capricious"); *David C. Corson (Dept. of Army)*, Commissioners' Letter reopening BAR No. 752B-73-558 (May 11, 1973) ("under all the circumstances too harsh"); *Minnie L. Dixon (Internal Revenue Service)*, No. 752B-74-4 (BAR July 3, 1973) ("too harsh"); *Margaret E. Boyce (Internal Revenue Service)*, No. 752B-74-6 (BAR July 3, 1973) ("too harsh"); *James D. King, Jr. (Post Office)*, No. 752B-72-___ (BAR Sept. 19, 1972) ("unduly harsh"); *Thomas A. Horan (Postal Service)*, No. 752B-73-33 (BAR July 25, 1972) ("too harsh").

⁵¹Fourteenth Report of the Civil Service Commission 113 (1896-1897). Rule II, § 6, provided: "In making removals or reductions, or in imposing punishment, for delinquency or misconduct, penalties like in character shall be imposed for like offenses, and action thereupon shall be taken irrespective of the political or religious opinions or affiliations of the offenders." See also Federal Personnel Manual, ch. 751, subch. 1-2c (Dec. 21, 1976); compare 5 U.S.C. 2301(b)(2).

⁵²*E.g.*, *Francisco v. Campbell*, 625 F.2d 266, 269-70 (9th Cir. 1980); *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978); *Young v. Hampton* 568 F.2d 1253, 1264 n. 12 (7th Cir. 1977); *Giles v. United States*, 553 F.2d 647 (Ct. Cl. 1977); *Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976); *Power v. United States*, 531 F.2d 505 (Ct. Cl. 1976), cert. denied, 444 U.S. 1044 (1980); *Rifkin v. United States*, 209 Ct. Cl. 566 (1976); *Grover v.*

bleness," encompassing greater latitude of review than is typically employed by the appellate courts in appeals from Commission or Board decisions, accords a measure of scope to the Commission's and now this Board's independent discretionary authority which the courts have recognized.⁵³

The Board's marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the federal work force and maintenance of discipline among its members is not the Board's function.⁵⁴ Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.⁵⁵

At all events the Board must exercise a scope of review adequate to produce results which will not be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when reviewed by appellate courts under Section 7703(c). This is the identical standard prescribed by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. 706(2)(A) (1964 ed., Supp. V). To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty "was based on a consideration of the relevant factors and [that] . . . there has [not] been a clear error of judgment." *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971).⁵⁶ We take the expression "clear error of judgment" in the sense of "clearly erro-

United States, 200 Ct. Cl. 337 (1973); *Heffron v. United States*, 405 F.2d 1307 (Ct. Cl. 1969). But see *Cuiffo v. United States*, 137 F.Supp. 944, 950 (Ct. Cl. 1955) (penalty "was determined by accident, and not by a process of logical deliberation and decision").

⁵³See text and cases cited at notes 13-17, *supra*.

⁵⁴See 5 U.S.C. 7106 and authorities cited at notes 27-29, *supra*; Exec. Order 9830 of Feb. 24, 1947, §§ 01.1, 01.3, 3 C.F.R. 608 (1943-1948 Comp.).

⁵⁵*Cf. Ketterer v. Dept. of Agriculture*, 2 MSPB 459, 461 (1980) (reassignment discretionary when based on legitimate management considerations); *Losure v. ICC*, 2 MSPB 361, 366 (1980) (RIF regulations may be invoked for management considerations of the character appropriately committed to agency discretion); *Griffin v. Dept. of Agriculture*, 2 MSPB 335, 336-37 (1980) (Board lacks jurisdiction to review discretionary considerations underlying legitimate management reason for RIF).

⁵⁶See also *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Amer. Optometric Ass'n v. FTC*, 626 F.2d 896, 905 (D.C. Cir. 1980); *Howard v. United States*, No. Civ. LV-77-219 RDF (D. Nev. July 3, 1980) (court reviewing federal employee removal considers "whether the agency decision was based on consideration of the factors relevant to a reasoned determination" of "the appropriateness of removal as

neous," i.e., a determination "is 'clearly erroneous' when although there is evidence to support it, the [Board] . . . is left with the definite and firm conviction that a mistake has been committed."⁵⁷

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the *Overton Park* criteria for measuring arbitrariness or capriciousness have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Before turning to matters which may be pertinent in determining whether the agency's selection of a penalty was based on consideration of the relevant factors, it seems advisable to address one further point which has been a source of much semantic muddle. The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or "nexus" between the grounds for an adverse action and "the efficiency of the service." The establishment of such a relationship between the employee's *conduct* and the efficiency of the service, while adequate to satisfy the general requirement of Section 7513(a) that no action covered by Subchapter II of Chapter 75 may otherwise be taken,⁵⁸ "is not sufficient to meet the statutory requirement that removal for cause promote the efficiency of the service." *Howard v. United States*, No. Civ. LV-77-219 RDF (D. Nev. July 3, 1980) (Mem. Order at 11).⁵⁹ The appropriateness of a particular Subchapter II penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is "yet a third distinct determination." *Young v. Hampton*, 568 F.2d 1253, 1264 (7th Cir. 1977).

a sanction") (Mem. Order at 9); *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 49 U.S.L.W. 4174 (U.S., Feb. 25, 1981) (when Commission imposes most drastic sanction, "At the least the Commission specifically ought to consider and discuss . . . the factors that have been deemed relevant to the [penalty]. . .").

⁵⁷*Hernandez v. United States*, 636 F.2d 704, 707 (D.C. Cir. 1980), quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

⁵⁸Subchapter II of Chapter 75, Title 5, applies to a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, or a furlough of 30 days or less. 5 U.S.C. 7512. The "efficiency of the service" requirement applies to the determination of whether any such action may be taken, as well as to the particular action. 5 U.S.C. 7513(a).

⁵⁹See also *Tucker v. United States*, 624 F.2d 1029, 1033-34 (Ct. Cl. 1980); *Phillips v. Bergland*, 586 F.2d 1007, 1010-11 (4th Cir. 1978), quoting *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977).

Indeed, under some circumstances "an unduly harsh penalty can effectively ruin [an agency's] . . . goal of deterrence," *Power v. United States*, *supra*, 531 F.2d at 509. Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case.⁶⁰ Thus, while the efficiency of the service is the ultimate criterion for determining both whether *any* disciplinary action is warranted and whether the *particular* sanction may be sustained, those determinations are quite distinct and must be separately considered.

B. Relevant Factors in Assessing Penalties

A well developed body of regulatory and case law provides guidance to agencies, and to the Board, on the considerations pertinent to selection of an appropriate disciplinary sanction. Much of that guidance is directed to the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation.⁶¹ OPM's rules on this subject, like those of the Commission before it, emphasize to agencies that in considering available disciplinary actions, "There is no substitute for judgment in selecting among them."⁶²

Further, OPM has specifically counseled agencies that:⁶³

Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.

. . . .

. . . Agencies should give consideration to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such other matters as mitigating circumstances,

⁶⁰Congress has declared that merit system principles should be adhered to in Federal personnel management "in order to provide the people of the United States with a competent, honest, and productive Federal work force . . . and to improve the quality of public service." Sec. 3(1) of the Reform Act, 5 U.S.C. 1101 note.

⁶¹*See* 5 C.F.R. 731.202(c); *Howard v. United States*, No. Civ. LV-77-219 RDF (D. Nev. July 3, 1980) (Mem. Order at 10); *Masino v. United States*, 589 F.2d 1048, 1055-56 (Ct. Cl. 1978).

⁶²Federal Personnel Manual, ch. 751, subch. 1-2a (Dec. 21, 1976).

⁶³*Id.*, subch. 1-2b, 1-2(c)(2). Regardless of whether these provisions of the Federal Personnel Manual are "mandatory" or "precatory," *see Doe v. Hampton*, *supra*, 566 F.2d at 281, many such provisions have been made mandatory by implementing regulations of the individual agencies. In any event, in reviewing any particular agency action the Board may consider whether the agency has acted reasonably in light of such OPM guidance.

the frequency of the offense, and whether the action accords with justice in the particular situation.

Section 7513(b)(4) of Title 5 requires that written agency decisions taking adverse actions must include "the specific reasons therefor." While neither this provision nor OPM's implementing regulation, 5 C.F.R. 752.404(f), requires the decision notice to contain information demonstrating that the agency has considered all mitigating factors and has reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts.⁶⁴ Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official,⁶⁵ and the decision notice should explain what weight was given to those factors in reaching the agency's final decision.

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:⁶⁶

⁶⁴See *Democratic Senatorial Campaign Committee v. FEC*, Dkt. No. 80-2074 (D.C. Cir. Oct. 9, 1980) (agency's entitlement to deference "depends upon the quality of its determinations. Factors to be considered include 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements' ") (Slip. Op. at 8-9); *Boyce v. United States*, 543 F.2d 1290, 1294-95 (Ct. Cl. 1976) ("where the agency fails to give reasons, the court cannot accord the usual deference to the exercise of administrative discretion"); Cf. *Steadman v. SEC*, *supra*, 303 F.2d at 1137, 1139 (when Commission imposes most drastic sanction, it must articulate carefully the grounds for its decision, including an explanation of why a lesser sanction will not suffice).

⁶⁵Since 5 C.F.R. 752.404(f) forbids the agency from considering any reason not specified in the advance notice of proposed action, agencies must consider in preparing the advance notice required by Section 7513(b)(1) all of the factors on which they intend to rely in any subsequent decision. Cf. *Albert v. Chafee*, 571 F.2d 1063, 1066 (9th Cir. 1977); *Iannarelli v. Morton*, 327 F.Supp. 873, 882 (E.D. Pa. 1971), *aff'd*, 463 F.2d 179 (3d Cir. 1972). Of course, this does not require designation in the notices of all circumstances that could conceivably be relevant to the penalty; for example, if an appellant contends that a penalty exceeds that imposed upon other employees in like circumstances, the agency would remain free to present evidence to rebut such contention notwithstanding its failure to have recited such information in its advance or final notices. Cf. *Cafferello v. Civil Service Commission*, 625 F.2d 285, 288 (9th Cir. 1980).

⁶⁶See generally 5 C.F.R. 731.202(c); Federal Personnel Manual, ch. 751, subch. 1-2 Dec. 21, 1976); CSC Board of Appeals and Review, Memorandum No. 2, *supra*, note 47; *Rancisco v. Campbell*, 625 F.2d 266, 269-70 (9th Cir. 1980); *Howard v. United States*, o. Civ. LV-77-219 RDF (D. Nev. July 3, 1980) (Mem. Order at 9); *Giles v. United States*, 3 F.2d 647, 650-51 (Ct. Cl. 1977); *Boyce v. United States*, 543 F.2d 1290, 1294 (Ct. Cl. 76). See also *Tucker v. United States*, 624 F.2d 1029, 1034 (Ct. Cl. 1980); *Byrd v. Campbell*, 591 F.2d 326, 331 (5th Cir. 1979); *Clark v. United States*, 162 Ct. Cl. 477, 485 (1963).

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.⁶⁷

Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously

⁶⁷Some of the factors listed above may be pertinent to other issues as well as to penalty selection, such as the alleged relationship of the appellant's conduct to the efficiency of the service or affirmative defenses of various kinds. Care should be taken to distinguish issues relating to whether *any* sanction may be imposed from those relating to whether a *particular* penalty may be sustained, even though the same facts may sometimes be pertinent to both types of issues.

tiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of "like penalties for like offenses" does not require mathematical rigidity or perfect consistency regardless of variations in circumstances or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management.⁶⁸ As such, this principle must be applied with practical realism, eschewing insistence upon rigid formalism so long as the substance of equity in relation to genuinely similar cases is preserved.⁶⁹ OPM has required that agencies "should be as consistent as possible" when deciding on disciplinary actions, but has also cautioned that "surface consistency should be avoided" in order to allow for consideration of all relevant factors including "whether the action accords with justice in the particular situation."⁷⁰ Similarly, agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case.⁷¹

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained under Section

⁶⁸5 U.S.C. 2301(b)(2). See also Exec. Order 9830 of Feb. 24, 1947, § 01.2(d), 3 C.F.R. 608 (1943-1948 Comp.), which provides: "The [Civil Service] Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions, and suspensions in the competitive service which will insure equitable and uniform treatment to employees against whom adverse action is proposed."

⁶⁹The Supreme Court has recently observed that, "The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible." *Schweiker v. Wilson*, 49 U.S.L.W. 4207, 4209 (U.S., Mar. 4, 1981).

⁷⁰Federal Personnel Manual, ch. 751, subch. 1-2c(1), (2) (Dec. 21, 1976) (original emphasis).

⁷¹*Id.*, subch. 1-2c(3). A penalty may be excessive in a particular case even if within the range permitted by statute or regulation. *Power v. United States*, 531 F.2d 505, 507-508 (Ct. Cl. 1976), cert. denied, 444 U.S. 1044 (1980); *Rifkin v. United States*, 209 Ct. Cl. 566, 584-85 (1976). However, a penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious, even though such a table provides only suggested guidelines. *Power, supra*; *Grover v. United States*, 200 Ct. Cl. 337, 353 (1973); *Daub v. United States*, 292 F.2d 895, 897 (Ct. Cl. 1961); *Cuiffo v. United States*, 137 F.Supp. 944, 950 (Ct. Cl. 1955).

7701(c)(1) only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision.⁷² The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the service. See *Young v. Hampton*, *supra*, 568 F.2d at 1264.

In many cases the penalty, as distinct from the underlying conduct alleged by the agency, will go unchallenged and need not require more than prima facie justification. An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its fact inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty, or when the Board's presiding official perceives genuine issues of justice or equity casting doubt on the appropriateness of the penalty selected by the agency,⁷³ the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official.⁷⁴

Whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency.⁷⁵ In all cases in which the appropriateness of the penalty has

⁷²For this reason we reject the contention, urged upon us by NTEU, that the appropriateness of a particular penalty is a question of law which arises under 5 U.S.C. 7701(c)(2)(C). Such a conclusion would place the burden upon the appellant to prove the penalty unlawful, since Section 7701(c)(2) deals with affirmative defenses. See *Parker v. Defense Logistics Agency*, 1 MSPB 489, 492, 495-96 (1980). Moreover, while it is possible for a penalty to be so disproportionate to the offense as to be "illegal," *Albert v. Chafee*, 571 F.2d 1063, 1068 (9th Cir. 1978); *Jacobowitz v. United States*, 424 F.2d 555, 563 (Ct. Cl. 1970), that is merely another way of saying that imposition of such a penalty is arbitrary and constitutes an abuse of discretion. The appropriateness of a penalty is a matter of judgment and discretion, not a question of law *per se*. See text and authorities cited at note 40, *supra*.

⁷³*Cf. Parker v. Defense Logistics Agency*, 1 MSPB 489, 496 n. 9 (1980).

⁷⁴*Cf. Losure v. ICC*, 2 MSPB 361, 366 (1980).

⁷⁵See CSC Board of Appeals and Review, Memorandum No. 2, note 47 *supra*, § 3a; *Francisco v. Campbell*, 625 F.2d 266 (9th Cir. 1980); *Meehan v. Macy*, 425 F.2d 472 (D.C. Dir. 1969) (en banc).

been placed in issue, the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibly.

III. APPLICATION TO APPELLANTS

We turn now to the application of these standards to the cases of the individual appellants. In doing so, we shall discuss the relevant facts of each case and the arguments of the parties.

A. Curtis Douglas v. Veterans Administration

Appellant Douglas was employed by the Veterans Administration as a Supply Clerk Dispatcher, GS-4. He was removed from the agency for being absent without leave for thirty minutes, for being away from his assigned duty station without permission, and for selling his employment services to a physically handicapped employee. These charges all arose out of events occurring on January 14, 1979. In selecting the penalty, the agency considered four past disciplinary actions: (1) a February 25, 1977 admonishment for eight hours of being AWOL; (2) a June 3, 1977 reprimand for failure to report for duty on May 28, 1977 and four hours of being AWOL on June 2, 1977; (3) a five-day suspension of June 28, 1977 for a 45-minute period of AWOL; and (4) a 20-day suspension of October 2, 1978 for another period of AWOL.

Upon appeal to the Board, the appellant declined a hearing and the presiding official sustained the action based on the evidence in the record. In his initial decision the presiding official described the facts surrounding the conduct which resulted in appellant's removal, stating:

Here, the record reveals that on January 14, 1979 the appellant was assigned the job of SPD Dispatcher with a tour of duty from 8:00 a.m. to 4:30 p.m. and that at approximately 9:10 a.m. the telephone at the appellant's dispatch station rang several times and in his absence was finally answered by the SPD Preparation Area Supervisor, Mr. Edward L. Regan, who, after taking a request for supplies and arranging for their deliverance, became aware that the appellant was absent from his work station without permission. In the meantime, the Ward Supply Clerk Supervisor, Ms. Margaret B. Thomas, was trying to contact the appellant on several occasions at his work site, the Dispatch Office, between 9:00 a.m. and 9:35 a.m. from the wards by use of the executive without success. Consequently, at 9:35 a.m., she asked Mr. Regan of the appellant's whereabouts only to learn that Mr. Regan did not know since the appellant had not requested permission to leave the work station. Thereafter, Ms. Thomas found the appellant on the sixth floor stocking nurservers for physically handicapped Supply Clerk Richard B. Eckert from whom, according to Mr. Eckert, the appellant has

solicited \$5.00 in payment for helping him do his work and to which the appellant offered that he needed the money.

The presiding official found, after carefully considering appellant's argument to the contrary, that the agency had proven the above facts by a preponderance of the evidence. The record does not contain any evidence which would cause us to change those factual determinations.

Appellant contended that the penalty was too severe. However, he did not explain why he believed the penalty to be too severe, nor did he introduce any evidence to support this contention. In the absence of any specific explanation of this contention from the appellant, we will consider whether, after relevant factors are considered, the penalty of removal was disproportionate to the seriousness of the offense.

The offense in this case was serious. It had a direct impact on the agency's ability to accomplish its mission. According to the agency, appellant's position was "critical to the process of furnishing vital supplies and equipment for emergency as well as routine patient care to all areas of the Medical Center." By being absent from his post, appellant created a situation which could have resulted in serious consequences to a patient who needed equipment or supplies immediately. The seriousness of the offense is compounded by the fact that appellant's absence was intentional and was occasioned by his desire for personal gain.

The record also shows that appellant has been disciplined for unauthorized absence on four previous occasions. This record of progressive discipline demonstrates that appellant was clearly on notice that unauthorized absence from his duty station was a serious offense. It also demonstrates that sanctions less severe than removal have not been successful in curbing appellant's misconduct. On the basis of the above findings, we conclude that the removal penalty was not arbitrary or unreasonable in light of all the circumstances and constituted an appropriate penalty.

Accordingly, the removal action is AFFIRMED.

B. Joseph E. Cicero v. Veterans Administration

Appellant Cicero was removed from his position as a Housekeeping Aide, effective July 13, 1979, at the Franklin Delano Roosevelt Hospital, Montrose, New York, for failure to comply with the instructions of his supervisor to remove boxes from a hallway which were considered to be hazardous to elderly patients. Appellant's prior disciplinary record, consisting of four similar incidents involving failure to perform his work in a timely fashion, was considered by the agency. On appeal, appellant testified that although his supervisor had ordered him to remove several large boxes, the boxes had already been removed by another Housekeeping Aide. The presiding official found the appellant's testimony less credible than the supervisor's and concluded that the preponderance of evidence supported the reasons for the action. The presiding official also found that removal for failure to carry out instructions relating to the

well-being of the patients "constitutes such cause as will promote the efficiency of the service."

Appellant argues that the lack of any discipline against him for a number of months prove that the removal sanction was not for such cause as will promote the efficiency of the service. The agency argued that in light of a pattern of disregard for supervisory authority reflected in all of appellant's incidents of misconduct, his removal was "patently" for the efficiency of the service.

The instant charge, standing alone, although significant, would not warrant removal because the agency failed to establish the likelihood of injury of patients as a result of appellant's failure to timely comply with his orders. However, the agency has demonstrated that its imposition of lesser penalties in the past has failed to correct appellant's insubordination. Namely, between June 1978 and January 1979 appellant was (1) suspended for 10 working days for deliberate failure or unreasonable delay in carrying out instructions; (2) issued a letter of reprimand for disobeying a direct order; (3) issued a letter of reprimand for failing to complete a work assignment; and, (4) admonished for willful idleness. This record of progressive discipline also demonstrates that appellant was on notice regarding the consequences of his failure to follow the instructions of his supervisor.

Appellant's argument that he had not been disciplined for a number of months is relevant in considering the appropriateness of the penalty. However, in this instance appellant's argument is not persuasive due to the fact that this was appellant's fourth offense involving failure to follow instructions in two years, with the suspension occurring only three months prior to notice of the proposed removal. Thus in the absence of any other relevant argument from the appellant, the question turns on the presence of other mitigating circumstances in the record. The record shows that appellant's performance was otherwise satisfactory and that he had completed five and a half years of service. However these factors are outweighed by the appellant's continued insubordination, and the fact that such continued insubordination indicates little likelihood of potential rehabilitation. An agency need not exercise forbearance indefinitely.

On the basis of the above findings, we conclude that the removal penalty was not arbitrary or unreasonable in light of all the circumstances.

C. Douglas C. Jackson v. Department of the Air Force

Appellant Jackson was employed as a Sheet Metal Worker-Helper (Aircraft) with the Department of the Air Force. He was removed from his position for "deliberate misrepresentation" because he had submitted false evidence in order to prove college nightclass enrollment so that he might obtain a day-shift assignment. In addition, four elements of appellant's past disciplinary record were considered by the agency in determining the severity of the penalty. In his initial decision, the presiding

official found that a preponderance of the evidence of record supported the charge of deliberate misrepresentation. He further found that the appellant failed to show that the removal penalty exceeded the penalty listed in the table of penalties, and that the agency's action was neither arbitrary nor capricious, but was taken for cause such as would promote the efficiency of the service. Accordingly, the agency's action was affirmed.

The agency did not allege that the misrepresentation impacted on appellant's job performance but in determining the severity of the penalty, the agency also considered the appellant's past disciplinary record which included a letter of reprimand for "wanton disregard of directives" involving parking without a valid permit on four occasions; a one-day suspension for being AWOL and failing to request leave in accordance with established procedures; a letter of reprimand for being AWOL and failing to request leave in accordance with established procedures; and a letter of reprimand for the offense of deliberate misrepresentation for driving on base with an unauthorized base registration decal.

Appellant did not deny having engaged in the charged offense, but requested consideration of his age (22) and the fact that he was the sole support of his wife and child. Appellant also asked to be put on a trial period, assured the agency of no further wrongdoing, and requested a lesser penalty. Notwithstanding these pleas in mitigation, the agency determined that removal would promote the efficiency of the service.

The likelihood of rehabilitation is the most persuasive of appellant's pleas in support of mitigation. The hardship caused by removal is not unique in most cases. Similarly, unless the employee's age is somehow connected to the offense, failure to consider age would not make an agency's selection of a particular penalty arbitrary or unreasonable.⁷⁶

The likelihood of rehabilitation must be viewed in light of appellant's past actions. Under the circumstances, appellant's promise that he would not engage in future prohibited conduct is insufficient to outweigh other relevant factors which tend to indicate otherwise. This was not appellant's first offense. Appellant frequently disregarded agency rules in committing various offenses. An agency is entitled to expect its employees to adhere to reasonable directives and to discipline them for failure to do so. Appellant had repeatedly been warned about such conduct, and due to the number of disciplinary actions during two years of employment, the agency could reasonably conclude that the likelihood of rehabilitation was too remote to warrant mitigating the penalty.

Accordingly, we find that the agency did not act arbitrarily in its decision not to mitigate this case, and that the penalty of removal was not unreasonable.

⁷⁶Of course if a particular penalty was selected as a result of age discrimination, the penalty could not be affirmed. 5 U.S.C. 2302(b)(1) and 5 U.S.C. 7701(c)(2)(B).

D. James K. Anderson v. Department of the Air Force

At the time of his removal on August 10, 1979, appellant, a veteran, had been employed by the Department of the Air Force at Robins Air Force Base, Georgia, as a Packer, WG-6, for most of his 24 years of civilian government service. He was removed for failure to properly request leave between May 31 and June 20, 1979, a total of 15 working days, when he was absent from duty due to chronic foot problems from which he had been suffering since 1975.

In reaching its decision to remove him, the agency considered two previous ten-day suspensions which also related to absence arising from appellant's medical condition.⁷⁷ The agency considered no other factors in its decision to remove appellant.⁷⁸ The agency was aware of appellant's medical condition, and did not charge him with unauthorized absence or absence without leave (AWOL).

Appellant did not deny that he was absent on the days in question, but did deny that he had failed to properly request leave. The presiding official sustained the charges, and found that removal would promote the efficiency of the service. However, he did not explain his reasons for the latter conclusion.

Under the particular circumstances of this case, we find that the agency has not carried its burden of demonstrating that removal was reasonable. Our decision in this case is based on the unique arrangement which the agency had with the appellant with respect to the manner in which appellant was required to request leave for medical reasons, as is explained in detail below.

The record reveals that for some time prior to 1976, the appellant, whose duties required standing on his feet for lengthy periods of time, had been experiencing considerable difficulty with his feet. In May of 1976 he underwent a foot operation which appears to have done little to alleviate this troubling condition. Substantially all of appellant's absences after 1976 were related to this medical problem.⁷⁹

When appellant was absent from work, it was his practice to send a short letter to his supervisor requesting that he be placed on sick or annual leave. Appellant's supervisor testified that appellant was "real good" about reporting his absences by letter, and that if the letter did

⁷⁷Appellant was suspended in October 1977 for unauthorized absence on seven working days, and in October 1976 for failing to properly request leave on nine days. Not considered by the agency was a 5-day suspension in July 1975 for failure to properly request leave on six days, and a reprimand in March 1975 for failure to properly request leave on three days. The record is devoid of any other evidence of misconduct by appellant during his lengthy government service.

⁷⁸The agency originally stated it would present testimony from the proposing and deciding officials to establish their reasons for selection of the penalty of removal, but these witnesses were not called at the hearing.

⁷⁹Although the record indicates that the agency had not modified appellant's duties to accommodate his medical problems, it also suggests that the agency was very tolerant of appellant's frequent absence due to his foot condition.

not come in on the day of the absence, it would always appear a day or two later. (Tr 9). He also testified that if appellant did not send a letter, appellant would bring in a doctor's certificate, and that he had never placed appellant in an AWOL status (Tr 7). The agency did not offer evidence of any regulations demonstrating a contrary method for requesting leave, nor did it suggest that the practice followed by appellant was unsatisfactory. Therefore we conclude that the practice established by appellant and his supervisor was acceptable to the agency. It is important to note, however, that a consequence of this practice was that the agency was unable to determine in advance whether the appellant would be absent on any particular day.

On May 25, 1979, appellant had a conversation with his second level supervisor⁸⁰ during which he indicated that he was going to see his doctor that day because of pain in his feet, and that he was under medication. Appellant reported for work the following day, but experienced a great deal of pain in his feet. The 27th and 28th of May were appellant's days off. Appellant failed to return to work until June 21, but he did send letters to his supervisor on May 29 and May 30 requesting leave for those two days. In the letter of May 30, appellant stated that his absence was due to his foot problems. Appellant did not send the agency any letters requesting leave for his subsequent absences; consequently, he failed to follow the established practice for reporting his absence. The agency charged appellant with failure to properly request leave for each working day he was absent except for May 29 and 30. Sometime after his return to work on June 21st, appellant provided a doctor's certificate which appears to address appellant's problems only on May 25th. Although appellant contended that the agency should have realized his absences after May 30 were also due to his foot problems, and that his letter of May 30 was sufficient to cover him for the remaining time, he has also admitted that he had no good reason for his subsequent failure to contact the agency.

The agency has, however, presented no evidence or argument to establish the impact of appellant's failure to properly request leave on the accomplishment of the agency mission. Under the more common practice of requiring an employee to call in as soon as he or she knows of an impending absence, an agency has some advance notice in which to plan for the replacement of that worker. Consequently, the disruption to the orderly process of accomplishing the agency's work upon failure to adhere to the proper method requesting leave is readily apparent under such circumstances. Such is not the case here. The agency could not reasonably expect to know that appellant would be absent in advance, nor would it know the reasons for that absence, until two or three days after it had occurred. In the absence of any readily apparent

⁸⁰ Apparently, appellant's immediate supervisor was on leave and it was this second level supervisor who marked appellant's time cards for the period through June 20, 1979.

adverse impact on the agency, we conclude that the seriousness of the offense must be discounted. In drawing this conclusion, we emphasize that appellant was not charged with unauthorized absence or absence without leave. The serious adverse impact on the agency's mission resulting from an authorized absence of some three weeks is self-evident, and, in the absence of any rebuttal from the appellant, an agency need not expect to present detailed evidence concerning that impact. Had the agency established that appellant had been AWOL for the time here in question, our conclusion with respect to the appropriateness of removal might well be different.

This, however, does not mean that the agency may not discipline the appellant for failing to adhere to the established procedures for reporting his absences. An agency is entitled to expect its employees to adhere to its reasonable directives, and to discipline them for failure to do so. The appellant has clearly failed to do so here, and the record shows that he has violated these procedures in the past. The severity of the discipline under such circumstances should be determined in light of the number of past violations of the directive and the importance to the agency mission of carrying out the directive. The record indicates that appellant failed to adhere to the established procedures on four separate occasions, and has been suspended for a total of 15 days, but does not indicate the importance to the agency of carrying out the directives. The record also indicates that appellant has had a long career with the government, which has been unblemished with the exception of the disciplinary actions which relate to his medical condition. Moreover, since the agency has presented no evidence indicating that appellant's performance on the job was deficient, the appellant is entitled to the presumption that his performance has been satisfactory. In light of these considerations, we find that the penalty of removal was unreasonable and that a suspension of 30 days for the instant violation of agency procedures is appropriate. Accordingly, the agency action is REVERSED and the agency is hereby ORDERED to cancel the removal action and substitute in its place a thirty-day suspension.

E. Luis A. Jimenez v. Army

Appellant, a Motor Vehicle Dispatcher, GS-4, employed by the Department of the Army at Fort Buchanan, Puerto Rico,⁸¹ was removed for unauthorized use of a government-owned vehicle. He admits the facts underlying the charges as set forth below, but contends that the penalty is too severe.

On the morning of June 4, 1979, the transportation officer for whom appellant worked discovered that one of the government vehicles was absent from its normal parking place but was not signed out to anyone.

⁸¹The record does not indicate how long the appellant, a veteran, had been employed in this capacity, but he had worked at Fort Buchanan for four years. His service computation date was January 2, 1968.

Upon inquiry to the military police, he learned that appellant had been seen leaving the NCO Club with three women in the vehicle at approximately 1:45 a.m. on Saturday, June 2, 1979. When questioned by the guard at the gate, appellant had produced a dispatch ticket, stated that the women were scheduled to perform at a show on the post on Sunday, and that he was taking them to their downtown hotel.

Appellant was off duty from 3:30 p.m. on Friday, June 1, 1979, until 7:30 a.m. on Tuesday, June 5, 1979, and was not authorized to use a government vehicle between those hours. Appellant failed to report as scheduled on the 5th, but called in later that day to report that he had been involved in an accident while driving the government vehicle, on June 4th, at approximately 7:30 p.m., had gone to the hospital, and needed a wrecker to tow the car back to the motor pool.

In deciding to remove the appellant, the agency considered his written and oral pleas in mitigation, which included the claim that this was the first offense as a federal employee; that he was not responsible for the accident;⁸² that he wanted to make the federal service his career and removal would prevent him from doing so; that he had four children to support, was heavily in debt and could not afford to lose his job; that his work had always been satisfactory and he was a dedicated employee; that his four years of good service should be considered in selecting the penalty and he was proud to work for the federal government; and that a lesser penalty would benefit both him and the service. We find that all the mitigating factors raised by the appellant were proper matters for the agency to consider in selecting the penalty. Notwithstanding these considerations, the agency determined that removal would promote the efficiency of the service. The deciding official gave appellant the following explanation for that decision.

In your verbal reply you told me that the allegations in the Proposed Notice of Removal were true, specifically, that you were guilty of unauthorized use of government vehicle while serving as a Motor Vehicle Dispatcher. You reiterated the fact that you were aware of the provisions against unauthorized use of government property and that you were guilty of the charge . . . I am convinced that you were aware of the "Official Use" requirement contained in Army Reg. 600-50, and that you failed to observe that regulation . . . As a Motor Vehicle Dispatcher you are entrusted with insuring that the government's interests are protected in the area of vehicle usage. You were held responsible for approving or disapproving requests for motor transportation. You are expected to report violations of "Official Use" to higher level officials for corrective action. You occupy a position of trust and by taking a vehicle during the period specified in the proposed notice for your own

⁸²The agency action was not based on the accident, and we agree with the agency that this consideration is irrelevant.

purposes which included driving three people from the NCO Club to their downtown hotel, you have violated that trust placed upon you. In light of that trust inherent in your position the unauthorized use of government property is considered a major offense. Removal is warranted for this offense and falls with the Department of Army, Table of Penalty Guidelines . . . You intentionally ignored AR 600-50, Standard of Conduct, which is a regulation prescribed by competent authority. Within that regulation is a provision prescribing when government property can be used. You chose not to adhere to the "Official Use" requirement contained in AR 600-50 which I consider much more serious than accidentally forgetting to observe an order or regulation . . .

Appellant appealed the removal to the New York Field Office of the Board, but did not request a hearing. His arguments were limited to the question of the severity of the penalty. In its response to appellant's petition, the agency contended that the appellant had proven himself untrustworthy in the performance of his duties and to retain him under those circumstances would not promote the efficiency of the service. The presiding official found that removal was appropriate under the circumstances, and affirmed the removal.

In response to our briefing order, the appellant reiterated the factors he considered relevant to mitigation which he had set forth to the agency and the presiding official, but made no attempt to explain why, in light of his conduct, a lesser penalty would be appropriate. The agency argued that in cases such as this, where the relationship between the employee's conduct and the adverse impact on the accomplishment of the agency mission is obvious on its face, it need not present evidence concerning that relationship.

We agree with the general proposition stated by the agency. However, whether that relationship is "obvious" depends to a great extent on the background and knowledge of the person to whom such an argument is addressed. Nor is it self-evident that the appellant was responsible to approve or disapprove vehicle requests, to report violations of the "Official Use" regulations to his supervisor, or that he was aware of the contents of those regulations. Such matters are, however, important considerations in determining whether removal is appropriate under the circumstances of this case, and the agency bears the burden of introducing evidence to establish these facts. If it had done so, the agency would then be in a position to argue that appellant's improper conduct casts grave doubt upon his ability to faithfully discharge his duties, that his misconduct was such that the agency could no longer reasonably rely on his ability to properly carry out his duties in the future, and that removal would therefore be warranted.

The agency has not, however, introduced any evidence to establish the nature of appellant's duties and responsibilities or his background and knowledge. The only indication of the nature of appellant's duties

and responsibilities is found in the rationale utilized by the deciding official's decision to effectuate appellant's removal. Accordingly, we are unable to determine whether the alleged facts underlying the rationale for the removal penalty are supported by a preponderance of the evidence. In the future, an agency will risk having its selected penalty reduced, if it does not meet its burden of proof on the underlying factual issues. However, because the agency's burden has been outlined for the first time in this decision, it would not serve the interest of justice to take that course here. Consequently, the presiding official's initial decision sustaining the agency's removal of appellant is VACATED and the case is REMANDED to the New York Field Office. On remand the presiding official shall afford the parties the opportunity to introduce additional evidence on the question of mitigation, including evidence of the appellant's duties and responsibilities and his awareness of the agency's rules concerning unauthorized use of motor vehicle.

F. John Nocifore and John Dennis v. Department of the Navy

Appellants Nocifore and Dennis were removed for the attempted theft of a satchel of brass fittings from the Long Beach Naval Shipyard. According to the agency's Inventory and Identification of Recovered Evidence, the fittings were worth approximately \$600.00. Appellants did not deny the charged misconduct, either before the agency or the Board's presiding official. The presiding official of the Board's San Francisco Field Office sustained the charge, and the removal actions were affirmed. A joint hearing was held incident to their appeals, and their cases will be considered together in this section.

While the agency has a policy of considering mitigating factors and imposing the minimum penalty that can be reasonably expected to correct an offending employee, it recognizes that certain misconduct may warrant removal in the first instance. (CMMI 751.1, Sec. 1-2a, December 1975, Agency Exhibit 2.) The Shipyard officially identified the offense of attempted or actual theft of government property as warranting the penalty of removal for the first offense, "unless extraordinary mitigating circumstances exist which would indicate the suitability of a lesser penalty." (NAVSHIPDLBEACH/SUPSHIPNOTE 12750, 26 September 1977, Agency Exhibit 2.) This Notice required that the agency's policy regarding the offense be "published in the Digest semi-annually and that all employees are (to be) informed of this policy upon entrance to duty." We find that the Shipyard clearly articulated and communicated its policy regarding proven theft-related offenses.

In deciding whether to impose lesser penalties, the agency considered Mr. Nocifore's 13 years, and Mr. Dennis' 6 years, of good job performance in the Shipyard, an award for meritorious service received by Mr. Dennis in 1977, the fact that they had no prior disciplinary records, and the "financial problems" of Mr. Nocifore. The agency did not find that these factors warranted reductions in the penalties. These decisions were made in the context of approximately \$300,000 worth of losses due

to theft which the Shipyard claims to suffer annually, (Tr. at 23), and the Shipyard's need to deter such misconduct.

Appellants did not deny having engaged in the charged misconduct, but claimed that they were treated disparately as compared with other employees disciplined for theft-related offenses in the 2-year period preceding their removals.

We find that the record does not support appellants' contention that the agency practice was to impose suspensions rather than removals for theft-related offenses. In each of the six cases cited by the appellants, removal had been initially proposed. The proposed penalty was effected in two cases and reduced in four others after consideration of mitigating factors.

In one case the penalty was reduced because the agency concluded that the offense was not committed for personal gain; in another there was insufficient evidence of intent; and in a third the agency reprimanded a temporary employee for taking a jacket which he claimed he mistakenly picked up. The fifth case referred to by the appellants was comparable to theirs in its seriousness. A supervisor had utilized his position to have certain goods made for him by his subordinate employees. His removal was originally proposed but he was ultimately suspended because the agency concluded, based on his years of good service, his offer to make restitution, and good character attestations, that a repeat of the offense was unlikely.⁸³ We do not find that the agency's consideration of the mitigating factors in the supervisor's case indicates that appellants were treated disparately. See *Jones v. United States*, 617 F.2d 233 (Ct. Cl. 1980). We agree with the presiding official that the agency could reasonably decide not to reduce the penalty in the instant cases. As the presiding official noted:

. . . appellant's supervisors did not come forward on his behalf and although union officials did so they volunteered information about appellant's personal financial condition rather than his "character"; employees in the cases cited by appellant were more cooperative [sic] freely providing additional assistance and information to the agency; and, the others were not shown to be involved in resale activities whereas the credible evidence indicated appellant intended to convert the property to cash. . . . (Nocifore Initial Decision at 5).

Accordingly, we find that the seeming disparity has been adequately explained by the agency. The agency has demonstrated that its practice is to weigh the individual merits and mitigating factors applicable in each instance of a theft-related offense, to arrive at a penalty resulting

⁸³In essence, the agency appears to have determined that there was a good potential for the employee's rehabilitation. This is a valid mitigating factor which an agency may consider. See text at notes 66-67, *supra*.

from reasoned deliberation of those factors, and that it did so in this case.⁸⁴

Theft of government property "carries on its face prejudice to the service," and is "without question related to the faithful and loyal performance of his duties by an employee. . . ." *Phillips v. Berglund*, 586 F.2d 1007, 1011 (4th Cir. 1978). The thefts in these cases were serious offenses. They were intentional misdeeds, motivated by the desire for personal gain. They were committed despite the clear notice the appellants and other employees received that the agency considered theft a serious offense. If appellants were not removed they would continue to have access to government material, and the agency's ability to deter such conduct by other employees could be lessened. This consideration is significant in view of the substantial losses the Shipyard has been suffering through theft. Under all the circumstances in these cases, we find that the penalties of removal were not arbitrary or unreasonable. Accordingly, the removal actions of John Nocifore and John Dennis are **AFFIRMED**.

This is the final order of the Merit Systems Protection Board in these appeals.

Appellants are hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

RONALD P. WERTHEIM.
ERSA H. POSTON.
RUTH T. PROKOP.

WASHINGTON, D.C., *April 10, 1981*

⁸⁴Evaluation of the factors pertinent to individual cases of employees charged with misconduct by the agency precludes mathematical rigidity or perfect consistency. See text at notes 67-70, *supra*.