UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DAVID W. NOBLE, JR.,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DC-0752-11-0880-I-1

DATE: December 14, 2011

David W. Noble, Jr., Gaithersburg, Maryland, pro se.

Stephen W. Furgeson, Esquire, Landover, Maryland, for the agency.

BEFORE
Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On August 15, 2011, David W. Noble Jr. filed an appeal of the action of the U.S. Postal Service, removing him from the Level 5 position of Letter Carrier, effective May 28, 2011. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7511(a)(1)(B)(ii), 7512(1), and 7513(d).[1] I held a hearing at the request of the appellant.[2] For the reasons stated below, the agency's action is AFFIRMED.

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[1] It is undisputed that the appellant is a preference eligible. AF, Tabs 6-7.

[2] At the parties' request, I changed the date of the scheduled hearing four times, from September 28, 2011, to October 19, 2011, to October 27, 2011, and then to November 4, 2011.

ANALYSIS AND FINDINGS

Background

On April 28, 2011, the agency issued the appellant a Notice of Proposed Removal for Unsatisfactory/Absence Without Official Leave/Permission (AWOL). *See id.*, Subtab 4b. According to the agency, the appellant's removal was required when he failed to report to duty after being sent a notice regarding his absences. The agency also asserted that the appellant's failure to report to work and failure to submit medical documentation pursuant to instructions was a clear violation of Postal regulations. *See id.*

On or about July 5, 2011, Paris R. Washington, Manager, Customer Services Operations, Capital District, issued a decision sustaining the charge against the appellant and informing him that he would be removed, effective May 28, 2011. AF, Tab 7, Subtab 4a. This appeal followed. *See* AF, Tab 1.

The agency bears the burden of supporting its action by a preponderance of the evidence.

To sustain an adverse action before the Board, an agency must prove, by a preponderance of the evidence, the factual basis for the charged misconduct and establish that the disciplinary action, based on the proven misconduct, promotes the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B); 5 C.F.R. § 1201.56(a). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2).

The 'efficiency of the service' requirement includes a showing that some disciplinary action is warranted (the 'nexus' requirement) and that the particular penalty is within the tolerable limits of reasonableness. Thus, three distinct elements must be proven in any adverse action. *See, e.g.*, *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981).

The agency has met its burden of proving its charge of Unsatisfactory/Absence Without Official Leave/Permission (AWOL).

The agency charged that the appellant with being AWOL from February 24, 2011 through April 28, 2011. *See* AF, Tab 7, Subtabs 4a & 4c. The Board has held that unauthorized absence from duty is a proper basis for removal. *See Patterson v. Department of Air Force*, 74 M.S.P.R. 648, 652 (1997) (citing *Cooke v. U. S. Postal Service*, 67 M.S.P.R. 401, 404, *aff'd*, 73 F .3d 380 (Fed. Cir. 1995) (Table).

> The April 28, 2011 notice of proposed removal states as follows:
>
> A review of your attendance record shows that you have been Absent without Official Leave (AWOL) from February 24, 2011 through present.
>
> A "Return to Duty Letter of Intent" was mailed via Certified Mail … and Delivery Confirmation … to your address of record instructing you to provide documentation within five (5) calendar days from the receipt of the letter. Records indicate that these letters were delivered on February 3, 2011 and February 2, 2011, respectively. As of this date, you have not submitted acceptable documentation to support your extended absences. In the "Return to Duty/Letter of Intent" letter you were advised of the consequences if you failed to follow the instructions indicated.
>
> Additionally, you were sent a "Scheduling for Investigatory Interview" letter that scheduled you for a Pre-Disciplinary Interview (PDI) on February 23, 2011 at 9:00 am.
>
> During the PDI, which was delayed 30 minutes awaiting your arrival, you answered "No!" when asked, "Did you provide anyone in management with approved documentation to support your absence?" You also stated, "Tell you what, I'll be back when I get paid!" and you abruptly left the PDI.
>
> Your explanation and actions are unacceptable. You have failed to report for duty as scheduled and failed to submit any acceptable documentation covering your absence, your extended absence has been charged to absence without official leave/permission (AWOL).

AF, Tab 7, Subtab 4b. The agency alleged that the appellant's actions demonstrated his inability to abide by Postal Service rules and regulations, including Employee and Labor Relations Manual (ELM) Section 511.43, which

states that employees "are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required." The agency further stated that the appellant's actions abrogated ELM 665.41, which requires employees to be "regular in attendance" and warns them that failure to do so "may result in disciplinary action, including removal from the Postal Service." The agency, moreover, claimed that the appellant's behavior violated ELM Section 665.42, which states:

> Employees who fail to report for duty on scheduled days, including Saturdays, Sundays, and holidays, are considered absent without leave except in cases where actual emergencies prevent them from obtaining permission in advance. In emergencies, the supervisor or proper official must be notified of the inability to report as soon as possible. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or who fails to provide satisfactory evidence that an actual emergency existed will be placed in a nonpay status for the period of such absence. The absence may be the basis for disciplinary action.

Id.

At the hearing, Antonio L. Jones testified that he was the Acting Manager, Customer Service for the agency's Capital District during the time in question. Jones indicated that on January 31, 2011, he sent the appellant a return to duty letter, instructing him that he needed to report to work. AF, Tab 7, Subtab 4h. Jones noted that the appellant replied to the letter on February 8, 2011. *See id.*, Subtab 4g. Jones stated that other supervisors originally scheduled a PDI with the appellant for February 23, 2011, but because the supervisors were busy on that date, Jones ended up doing the PDI with the appellant. According to Jones, the purpose of the PDI was to tell the appellant that his "attendance was a problem that needed to be fixed," and to see if the appellant's supervisors needed to initiate an investigation into his AWOLs and proceed with a disciplinary action on that basis. Jones began to complete an interview form for the PDI, *see id.*, Subtab 4e, but he could not finish it because the appellant stormed out of the

meeting after only 10 minutes. Jones recalled that, as the appellant stood up to leave the meeting, Jones asked him, "Are you leaving?' The appellant replied, "Yes, I am. I'll be back when you pay me!" Jones gave the appellant a copy of a letter, which he folded and placed in his pocket while stating, "Well, I'll be back when you pay me." Jones warned the appellant that if he left the meeting, he would be considered AWOL. Jones said he asked the appellant and his union representative to verify that they understood that the appellant would be charged AWOL if he exited the building, and they replied that they did indeed understand. Jones explained that the appellant never returned to duty after he exited the PDI meeting. Jones confirmed that the appellant never tried to contact him after he abruptly left the PDI.

Jones went through the documentary evidence in the record, and explained that he himself entered some of the AWOLs into the agency's Time and Attendance Control System (TACS) after the appellant never returned to work after the PDI nor presented documentation to substantiate his absences. Jones remembered that he discussed with supervisors Sterling Colter, Paris Washington, and William French the fact that the PDI with the appellant ended abruptly. Jones testified that he left the agency's Friendship Post Office (where he and the appellant worked together) on April 15, 2011, and so he did not make the decision to remove the appellant, and he was not aware who did.

Sterling Colter testified that he has been the Supervisor and Acting Manager at the Friendship Post Office for approximately one year. Prior to that, he was the Supervisor, Customer Service at another Washington, D.C. postal facility. Colter confirmed that the appellant was AWOL on all the charged dates. Colter verified that the appellant never reported for duty, nor called into work to say he would not be reporting, on any of the charged AWOL dates. Colter said that he independently checked TACS to ascertain that the appellant was indeed in an AWOL status on those dates. Colter also personally entered some of the AWOLs into TACS when the appellant did not appear for work or present

documentation for his absences. When asked why some of the appellant's payroll stubs reflect that he was in a leave without pay (LWOP) status, rather than an AWOL status,[3] Colter explained that an employee's payroll stub will not indicate that he was AWOL; instead, it only will appear as LWOP. Colter explained that French was the "initiating" official and proposing official for the appellant's removal, and he, Colter, was the concurring official. Colter noted that, as Acting Manager, he was required to sign off on disciplines involving his subordinate employees. Colter stated that, before he made his decision here, he reviewed the PDI. At the time, Colter was not aware that the appellant did not complete the PDI. Colter, though, was aware that the appellant was not showing up at work and it seemed as if he had no intention of returning. Colter discussed the proposed removal with the deciding official, Washington. Colter did not try to influence Washington's proposed decision to remove.

William French testified that he is the Supervisor, Customer Services of the agency's Capital District. He also is the appellant's direct supervisor. He indicated that he issued the charges underlying the removal against the appellant, based on the terminated PDI with Jones and his continuous AWOLs thereafter. French indicated that the appellant only brought in one medical certificate to the office, which said that he could handle his regular duties and maintain a regular schedule. *See* AF, Tab 9, Agency Exhibit (Exh.) 1 (Dr. Nelson L. Lui's medical certificate, which states that the appellant is "[s]ufficiently recovered to resume a normal workload" as of January 12, 2011). French initiated and signed the notice

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[3] With his prehearing submission, the appellant apparently tried to submit exhibits that might pertain to this issue. According to his list of exhibits, Appellant's Ex. O refers to "[v]arious of Appellant's pay stubs" and Appellant's Ex. P are "USPS document[s] showing that Appellant was in LWOP status during the period he was charged with being AWOL." AF, Tab 11. However, Appellant's Ex. O is actually an Opinion and Award, *In the Matter of Arbitration between United States Postal Service and the National Association of Letter Carriers*, Case No. E1N-2D-D6913 (Sept. 23, 1983), and he did not attach any Exhibit P to his prehearing submissions.

of proposed removal. AF, Tab 7, Subtab 4b. He explained that he took the action against the appellant because he was continually and repeatedly AWOL, which is a "terminable offense." French said that, when the PDI occurred, he was sitting in the office next door. French explained that he heard the appellant, as he was leaving the PDI, raise his voice and say to Jones, "I'll come back to work when I get paid!", or words to that effect.

French stated that he assembled a disciplinary action request package on the appellant, to get some feedback from the Employee and Labor Relations (ELR) Office about what to do regarding the appellant's extended absences. French recalled that the ELR Office agreed with his suggestion, which was to discipline the appellant. French explained that he needed to get his immediate supervisor to concur with his recommendation to discipline the appellant. French said that he gave the notice of proposed removal to Colter, who signed it and returned it to French. French stated that he and Washington had a brief discussion about the appellant's case. Washington asked French three questions: (1) had the notice of proposed removal been mailed yet to the appellant?; (2) had French received confirmation that the notice of proposed removal was sent to the appellant?; and (3) were any grievances filed on the same facts that led to the issuance of the notice of proposed removal? French said he did not try to influence Washington's decision on whether or not to remove the appellant. French said that, according to the ELM, AWOL charges can be considered a "terminal offense."

Paris R. Washington testified that he is a Manager, Customer Services Operations, with the agency's Capital District. Washington pointed out that the notice of proposed removal advised the appellant that he could contact Washington to discuss the proposed action. Washington related that, because the appellant never did so, he eventually had to issue the decision, which upheld the removal action. Washington said that he did not know the appellant, and in fact, he only saw him for the first time at the hearing. Washington believed that the

removal was justified because the appellant had abandoned his job for months, without calling in to advise his supervisors of his whereabouts, and he failed to provide any documentation to substantiate a valid reason for his lengthy absence. In addition, the PDI with Jones allowed the appellant to explain to a higher authority the reasons for his extended absences. However, the appellant abruptly exited the PDI meeting and told his supervisor that he was leaving and he would not return until he got paid.

Louis Minor testified that he is a Letter Carrier and a union representative. He said that, in preparation for his testimony at a National Labor Relations Board (NLRB) hearing on an alleged unfair labor practice, he reviewed the appellant's attendance and leave record for the past four years. Minor noticed that the appellant only came in to work approximately 75 days over the course of those four years.

The appellant testified that he has been a Letter Carrier with the agency since 1975. He explained that for almost 16 years, he acted as a union representative.[4]

The appellant submitted a sworn declaration, in which he averred that he had open heart surgery in August 2008 and underwent physical rehabilitation for several months before he tried to return to work in March 2009. He noted that, at the time, he was 63 years old, and in addition to his coronary artery disease, he suffered from Stage 4 hypertension, emphysema, and cervical degenerative disc disease, all of which caused him great emotional stress, exacerbated his depression, and affected his ability to complete his route and work long periods

[4] The appellant lost his composure at the hearing, and so I permitted a brief recess to allow him to regain his composure. However, when we returned to the hearing, he said that he could not testify, so I offered to take another recess. When the appellant declined that offer, I allowed him an opportunity to provide an affidavit in lieu of his testimony, which he accepted.

of overtime. He further stated that he had an abdominal aortic aneurysm that was not disabling per se, but was life threatening.

The appellant wrote that in May 2010, he supplied management with a note from his physician indicating that he recommended that the appellant not work overtime. *See* Appellant's Exh. X (Dr. Lui's medical notes, stating that "In view of Mr. Noble's medical conditions, I recommend no more than 8 hours of work per day in the next 45 days."). He stated that, in May, June, and July 2010, his supervisor, Brandon D. Toatley, honored his physician's recommendation, and abstained from requiring the appellant to work overtime every day. However, the appellant indicated that his postal route, as are most of the routes in his zone, is "overburdened" and so he could not complete his route. He recounted that many of his fellow carriers began to resent him and avoid him because they were required to go back out after they had been working 11-12 hours already and complete his unfinished route. In fact, he said that some of his co-workers became openly hostile to him. He explained that:

> Nobody else in the station was allowed to bring back mail, and some other carriers began accusing me of thinking that I was special. In short time, carriers with whom I had shared a friendly rapport for years stopped smiling at me and started to avert their eyes to avoid meeting mine, or to glare at me.

AF, Tab 41 (Declaration of David W. Noble Jr.).

The appellant testified that for many months, his supervisors began to pressure him to return to work and complete his route. He recounted that, around September 2010, William French arrived in Zone 16 and took over floor supervision from Toatley. The appellant asserted that French did not honor his physician's recommendation that he not work overtime, and French gave him written instructions to work overtime for the remainder of 2010. The appellant wrote that French's written instructions forced him to make a choice each day between following his physician's recommendations or disobeying his supervisor's orders, which "caused me great emotional discomfort." The

appellant admitted that he "made the choice to disregard French's orders and continued to bring back most of my route every day for the remainder of the year, causing other carriers' hostility towards me to continue to build as I waited every day for the other shoe to drop as to my refusal to follow my supervisor's orders." *Id*.

The appellant conceded that French offered to consider adjusting his mail route, but conditioned the offer on the appellant's carrying the entire route in a single day while French walked with him. The appellant refused the offer because he did not agree with the method that French was employing to try to adjust the route. The appellant claimed that French "manufactured an impossible to meet condition as an excuse to keep from" having to adjust the route.

Next, the appellant stated that management harassed him by continuing to require him to work overtime, depriving him and his family of health benefits and life insurance for several months, not providing him with holiday pay for five days, delaying a payment for 64 hours of requested leave,[5] and making him attend two predisciplinary meetings (in August 2010 and November 2010, respectively) in which supervisors told him that he could be subjected to discipline if his extended absences did not stop.[6] He challenged all of these matters through court litigation, or by filing numerous grievance complaints and Board appeals.

The appellant acknowledged that during one of the predisciplinary meetings, he told French, among other things, that:

> [T]he Postal Service had condoned my poor attendance for years, and that under long-established arbitration precedent such condonation would prevent the Postal Service from making out a case for just

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[5] On January 13, 2011, the appellant requested leave from January 3-12, 2011, but he did not request leave after that date. *See* AF, Tab 7, Subtab 4g.

[6] In his affidavit, the appellant also stated that in May 2009, and again in February 2010, Toatley sent him written predisciplinary interviews concerning his irregular attendance and/or AWOL. Appellant's Exhs. F, G. The appellant indicated that neither Toatley nor any other agency representative disciplined him concerning the absences that had been the subject of the May 2009 or February 2010 interviews.

> cause until the Postal Service gave me and the union unequivocal notice that it would no longer condone my poor attendance. I also told French that the Postal Service was responsible for my poor attendance because it had made my working conditions so bad that I could not bring myself to work every day.

Id. The appellant remembered that Jones notified him by letter dated February 16, 2011, that he was scheduled for another predisciplinary interview on February 23, 2011. He said that he understood that the subject of the interview was an allegation that he had been AWOL from January 14, 2011 through February 16, 2011. He indicated that he went to Friendship Post Office for the predisciplinary interview with Jones on February 23, 2011. He said that, at the start of the meeting, he asked Jones to pay him for the 64 hours of annual and sick leave he requested on January 13, 2011, less than a month before. Jones informed the appellant that his pay was being processed. Jones then informed the appellant that he called him in to discuss the fact that he was irregular in attendance. When Jones asked the appellant whether he realized he was irregular in attendance, the appellant answered that "I haven't been regular in attendance for the last nine years …. In 2003 I didn't work a single day. In 2009 I worked seven days. I'm not sure what [my attendance] is for 2010." The appellant stated that Jones then asked him if he was aware that the agency had rules for employees to be regular in attendance. The appellant said he retorted that the agency should abide by rules too, and, for instance, there were rules requiring the agency to pay him for all of the 64 hours of leave he requested. Eventually, the appellant told Jones, "Well, I'll tell you what. When I get paid, call me back all right?" *Id*. The appellant then exited the meeting. He seemed to imply that because he left the meeting, then the agency failed to give him a predisciplinary interview for the period he was charged with being AWOL.

The appellant wrote that he received the notice of proposed removal on April 29, 2011, which he did not take "very seriously" for two reasons. He stated that, first, he thought that, because of its timing, he considered the proposal letter

as "just a jab calculated to disturb" him while he and the agency were in litigation in a court case. He added that the second reason he did not take the notice seriously was because he considered the case against him to be "laughably weak." *Id*.

The appellant stated that he for the most part ignored the notice of proposed removal because "I cannot multi-task," and he "was determined to try to minimize the effect the proposed removal would have on my pursuit of *Noble v. Sombrotto*." He said that, as a result, "I turned the whole of my attention back to my [law]suit." Id. He explained that because the deciding official did not immediately issue a decision letter, he concluded that he "had been correct in my evaluation of the situation, and that the Postal Service had abandoned any effort to remove me." He declared that, as a result, he "then turned my whole attention to a complaint the NLRB had issued against the union, and which was scheduled for a hearing before an administrative law judge on July 21st." *Id*.

The appellant acknowledged that the agency sent him a letter dated June 21, 2011, notifying him that he had been in a long-term LWOP status since January 14, 2011. Appellant's Exh. TT. He noted that a Standard Form 50 accompanied the letter, and also indicated that he had been placed on long-term LWOP effective January 14, 2011. Appellant's Exh. D. He argued that "LWOP" is an approved leave status, and is not a synonym for "AWOL." Appellant's Exh. C. He related that, in his opinion, the agency is mistaken in its belief that LWOP and AWOL are the same thing, or that an AWOL charge may be lodged against an employee who is in an approved leave status.

The appellant did not dispute that Paris Washington issued a decision letter sustaining the proposed notice's charges and setting an effective removal date of July 22, 2011. He stated that he filed an appeal to the Board thereafter. He objected to the agency removing him, however, "after more than 36 years of unblemished service."

I find that the documentary and testimonial establish that the appellant was AWOL for the time charged in the agency's notice of proposed removal. The record also demonstrates that the appellant failed to provide medical documentation to support his absences, despite inquiries he do so from Postal management. *See* AF, Tab 7, Subtabs 4g, 4h. I thus find it was appropriate for the agency to place the appellant in an AWOL status. *See Johnson v. General Services Administration*, 46 M.S.P.R. 630, 635, *aff'd*, 944 F2d 913 (Fed. Cir. 1991).

In addition, I find that the Board will sustain a charge of irregular attendance based on approved leave when the employee is made aware that, even though the leave is approved for pay purposes, it may still form a basis for disciplinary action. *See* *Podrazik v. U.S. Postal Service*, 54 M.S.P.R. 380, 383 (1992) (even though leave had been approved, the agency properly disciplined the appellant based on irregular and unsatisfactory attendance when he was clearly on notice that his absences were not acceptable and that, if there were repeated instances, discipline could ensue).

In *Podrazik,* the Board found that the employee was placed on notice of his unacceptable attendance and of potential discipline by his past disciplinary record consisting of a number of disciplinary actions which the appellant had received for irregular attendance in the past two years and which warned him of the consequences of his irregular attendance to include removal. *Id*. In this case, although the appellant was not previously disciplined, the agency set forth at least four predisciplinary sessions which were based, in part or in whole, on his deficient attendance, and in which he was warned that his continued irregular attendance could lead to discipline, up to and including removal.

I found the testimonies of Jones, Colter, French, and Washington to be highly credible when they stated that the appellant was absent for the charged dates, and that he failed to provide medical evidence justifying his absences for the time in question. The four agency witnesses testified in a straightforward

manner, and their testimonies corroborated each other on these important points. The appellant, meanwhile, offered no evidence in support of his bare assertion that he provided medical evidence to justify his AWOLs. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (the factors to be considered in resolving credibility determinations), *modified*, 54 M.S.P.R. 58 (1992), *rev'd and remanded on other grounds, sub nom. King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994).

As to the last point, it seems as if the appellant's main basis for claiming that he provided medical documentation is located in the file at AF, Tab 35, Appellant's Exh. X. Reviewing these medical notes, I find they merely say that "In view of Mr. Noble's medical conditions, I recommend no more than 8 hours of work per day in the next 45 days." I note that these medical reports are vague and general, and the physician does not state in particular what, if any, medical condition the appellant is suffering from, or provide any guidance based on sound medical criteria why the appellant cannot work more than eight hours per day.

The evidence of record clearly indicates that the appellant has a history of irregular attendance. In light of the undisputed evidence of record, including the appellant's own admissions, I find that the agency has proven by preponderant evidence that the appellant was irregular in attendance from February 24, 2011 through April 28, 2011. In light of these absences, and in light of the fact that the appellant was repeatedly warned that his unscheduled absences were considered grounds for discipline (even though some of the charged dates may have been approved for pay purposes, or considered LWOP), I find that the agency proved that the appellant failed to be regular in attendance during the charged period. Accordingly, I find that the charge of "Unsatisfactory/Absence Without Official Leave/Permission (AWOL)" is sustained.

The appellant bears the burden of proving his affirmative defenses by a preponderance of the evidence.

Notwithstanding the fact that the agency has supported its charge by preponderant evidence, the removal action may not be sustained if it was based on a prohibited personnel practice. *See* 5 U.S.C. § 7701(c)(2). The appellant alleged that the agency committed harmful procedural error in effectuating the removal action. He similarly argued that the agency's decision to remove him was not in accordance with law. He asserted, moreover, that the agency, prior to removing him, subjected him to intolerable working conditions. Finally, he maintained that the agency, when removing him, violated his right to due process of law. The appellant bears the burden of proving these affirmative defenses by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); 5 C.F.R. § 1201.56(c)(3).

The appellant failed to establish that the agency committed harmful error or that the agency's decision to remove him was not in accordance with law.

The appellant raised several assertions that the agency committed harmful error. Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

In his appeal, the appellant argued that he was on LWOP and that the agency violated numerous provisions of the collective bargaining agreement when it disciplined him for his use of approved leave. AF, Tabs 1, 11. I provided the appellant with an opportunity to identify the specific procedures, laws, rules, or regulations he believed the agency may have violated when it committed harmful procedural error. In response, the appellant made the following four arguments. *See* AF, Tab 18.

A. *The agency violated M-39 Section 115.1 and committed harmful error by failing to make every effort to correct a situation before resorting to removal***.**

According to the appellant, Section 115.1 of the USPS M-39 Handbook, *Management of Delivery Services*, provides that "[t]he delivery manager must make every effort to correct a situation before resorting to disciplinary measures." Appellant's Exh. B. He noted that the M-39 Handbook is incorporated into the collective bargaining agreement by reference in Article 19. He asserted that the management officials who imposed the removal action made no effort to correct the situation before resorting to discipline and that their failure to do so caused harmful error.

I find that the appellant has failed to show that the agency's action resulted in harmful procedural error based on this claim. First, this assertion actually deals with whether the agency imposed the proper penalty, which, as I find below, was appropriate under the circumstances. Second, I disagree with the appellant that the agency failed to correct the situation before instituting the removal action. The record reflects that the agency subjected the appellant to at least 4-5 predisciplinary interviews, and constantly warned him about his extensive absences and the adverse impact his absences had on the agency's ability to deliver mail. The appellant seems oblivious to the fact that it was his responsibility to heed these warnings and to return to work, which, had he done so, would have prevented the agency from having to escalate the situation to a disciplinary action. Thus, this argument lacks merit.

B. *The agency violated the requirement stated in Article 16 of the collective bargaining agreement that discipline be corrective in nature rather than punitive, when it imposed removal on the appellant without first observing the principles of progressive discipline.*

The appellant argued that Article 16 of the collective bargaining agreement requires that discipline be corrective in nature, rather than punitive. Appellant's Exh. A, p.5. He contended that the agency interpreted this requirement to mean that "for most offenses [the agency] must issue discipline in a 'progressive'

fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge." *Id.*, p.6. The appellant asserted that the agency's failure to apply the principles of progressive discipline to his offense caused harmful error. I find that that this assertion is also, in reality, an attack on the appropriateness of the penalty. As I determined below, the penalty of removal was warranted under the circumstances. Moreover, an agency is not required to use progressive discipline prior to removing an employee where, as here, the misconduct is serious in nature and the penalty imposed is not unreasonable. *See* *Thomas v. Department of Defense*, 66 M.S.P.R. 546, 553 (1995), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table).

C. *The agency violated the requirement stated in Article 16 of the collective bargaining agreement that discipline be for just cause when it initiated discipline before conducting a thorough investigation and before giving the appellant a chance to defend himself.*

The appellant next alleged that Article 16 of the collective bargaining agreement requires that discipline of Letter Carriers be for "just cause." Appellant's Exh. A, p.5. He claimed that the agency interpreted that requirement to mean, *inter alia*, that the agency must conduct a thorough and objective investigation before initiating discipline, including giving an employee the opportunity to defend himself. Appellant's Exh. A, p.6. He argued that the agency's failure to conduct a thorough investigation is fatal to a disciplinary action. Appellant's Exh. L. He stated that, because the agency did not conduct a thorough investigation and did not permit him to defend himself before implementing the removal action against him, this amounted to harmful error.

Again, I find this argument really goes to the reasonable of the penalty, which I have determined is reasonable and promotes the efficiency of the service. *See supra*. In any event, the agency provided the appellant with at least two opportunities to defend himself against the action. As to the first time, I find that, when the appellant walked out of the predisciplinary interview, he thereby

waived his right to contest the matter. This is especially true, given that he was warned about potential consequences of his leaving the PDI meeting after Jones told him that the PDI involved his irregular attendance problems. In addition, I find that the notice of proposed removal advised the appellant that he could reply to the proposed action, but he did not avail himself of this opportunity. In his sworn declaration, the appellant claimed that he tried to reach the deciding official and concurring officials to discuss the proposal, but they did not return his calls or answer his emails. At the hearing, three witnesses testified that the appellant never tried to contact them after the notice of proposed removal was issued. I found the agency's version on this point to be far more credible than the appellant's version, based on my close observation of the witnesses' demeanor at the hearing and the consistency of the agency's witnesses' testimonies on this matter. I found the agency's witnesses to be believable. I also cannot fathom why Washington would lie about this issue, especially since he testified without rebuttal that he never met the appellant and did not know him personally. In contrast, I found the appellant's unsubstantiated claim that he telephoned these individuals but they did not return his calls rang hollow to me and seemed conveniently self-serving. *See Hillen*, 35 M.S.P.R. at 458. Hence, I find the appellant's assertion lacks merit.

D. *The agency violated MSPB case law by disciplining the appellant for taking approved leave.*

Finally, the appellant argued that the agency committed harmful error by disciplining him for certain dates when he was on approved leave, or LWOP, status. He asserted that, in doing so, the agency violated Board case law.

The appellant is correct that, as a general rule, an adverse action cannot be based on an employee's use of approved leave. *See* *Edwards v. Department of Transportation*, 109 M.S.P.R. 579, ¶ 13 (2008); *Combs v. Social Security Administration*, 91 M.S.P.R. 148, ¶ 12 (2002). The Board has held, however, that an agency can bring an action against an employee for excessive approved

absence, which is what happened here. *Id.*; *see* *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984). Thus, the appellant did not show that the agency committed harmful error, by making this claim.

Finally, even assuming that the appellant's assertions that the agency's actions were harmful were somehow true, he has presented no evidence to show that these errors would likely have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. Hence, I find that the appellant has not established that the agency committed error, that he has been harmed, or that the adverse action should be reversed. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984).

The appellant did not demonstrate that the agency subjected him to intolerable working conditions.

Where an appellant has raised allegations of involuntariness based upon intolerable working conditions, the test is whether, under all the circumstances, working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to, under the facts of this case, remain away from the workplace. *Markon v. Department of State*, 71 M.S.P.R. 574, 577 (1996); *Heining v. General Services Administration*, 68 M.S.P.R. 513, 520 (1995).

After carefully considering the evidence and argument submitted by the appellant in support of this claim, I find he has failed to prove that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to stay away from the workplace. The record evidence indicates that the appellant was informed of the agency's policies regarding AWOL and the possible consequences of not adhering to those policies. The appellant's supervisors all testified credibly that they advised him repeatedly that he must return to duty or be disciplined, and they even held off disciplining for a very long time, exercising great patience and forbearance. The appellant also failed to

show that the agency failed to follow his physician's recommendations regarding his work limitations. I likewise find that the mere fact that the appellant felt uncomfortable about returning to duty or completing his mail route was not a sufficient reason for him to stay away from the worksite altogether. Similarly, the fact that management did not change the appellant's mail route in accordance with the method he deemed the most appropriate does not establish a claim of intolerable work conditions.[7] The Federal Circuit has held that a choice between two unpleasant alternatives does not rebut the presumed voluntariness of the ultimate choice, in this case, a return to duty. *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). The applicable case law has consistently held that the fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make his decision any less voluntary. *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

Finally, the record does not support an allegation that the appellant was subjected to a hostile work environment or working conditions that can be viewed as abusive, harassing or coercive during the period the agency charged him as being AWOL.

The appellant failed to establish that the agency violated his right to due process of law.

For the first time at the hearing, the appellant asked that I include a new issue in this appeal; namely, that the agency denied him minimum due process of law. The appellant's request to add a new issue for the first time at the hearing was certainly untimely. In addition, I note that he did not ask that I include this as an additional issue either during or after the first or second prehearing

[7] I will not review at length the appellant's other claims, such as his not getting holiday pay and not getting paid quickly for his requested leave of 64 hours, which issues he has challenged in other fora over the years. Suffice it to say, however, that I find that these other claims are also insufficient to prove this affirmative defense.

conference, even though he was provided an opportunity to do so. Nevertheless, I granted the appellant's request to add a new issue to the appeal.

The statute at 5 U.S.C. § 7513(b)(1) provides that an employee must receive advance written notice stating the specific reasons for the proposed adverse action. The Board has consistently held that a party must know of the claims with which he is being charged so that he may adequately prepare and present a defense before the agency. *Smith v. Department of the Interior*, 112 M.S.P.R. 173, ¶ 5 (2009) (citing *Brown v. U.S. Postal Service*, 47 M.S.P.R. 50, 57 (1991)). In order to satisfy this notice requirement, an agency is required to state the specific reasons for a proposed adverse action in sufficient detail to allow the employee to make an informed reply. *Id.* The Board will not technically construe the wording or specifications of a charge, but the Board cannot consider or sustain charges or specifications that are not included in the notice of a proposed adverse action, because the appellant must have full notice of the charges against him. *Id.* Advance written notice of the charges and an opportunity to reply before a final agency decision is made are fundamental procedural due process rights. *Id.*; *see* *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (an agency's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives the employee of a property right in employment constitutes an abridgement of constitutional right to minimum due process of law, *i.e.*, prior notice and an opportunity to respond).

I find that the appellant did not provide any argument or documentation to show how or why the agency denied him due process as to the removal action.[8] Based on my review of the testimonial and documentary evidence, I find that the agency provided the appellant with minimum due process of law.

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[8] I realize that the appellant has raised due process claims in his previous Board proceedings involving his suspension appeals.

Next, although the appellant has not raised the issue per se, the record reflects that Colter and French testified that they had a conversation about the appellant's removal with the deciding official, Washington. As the court explained in *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (citing *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1374-76 (Fed. Cir. 1999)), where a public employee has a property interest in continued employment, the Due Process Clause of the Fifth Amendment requires that the employee be afforded notice of the charges and the employer's evidence and an opportunity to respond before being removed from employment. An *ex parte* communication that introduces new and material information to the deciding official violates due process. The ultimate inquiry is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances. In *Stone*, 179 F.3d at 1377, the court stated that in deciding whether new and material information has been introduced by means of an *ex parte* contact, the Board should consider the facts and circumstances of each case, and in particular, whether the *ex parte* communication merely introduced cumulative information or new information, whether the employee knew of the error and had a chance to respond to it, and whether the *ex parte* communication was of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. Even if an *ex parte* communication does not rise to the level of a due process violation, the Board must also consider whether harmful procedural error occurred. *Ward*, 634 F.3d at 1281.

Here, Colter, in his testimony, did not indicate what he and Washington discussed about the proposal removal, although it appeared that they only had a general discussion about it. French, on the other hand, testified that Washington asked him three procedural questions about the matter: (1) had the notice of proposed removal been mailed yet to the appellant?; (2) had French received confirmation that the notice of proposed removal was sent to the appellant?; and

(3) were any grievances filed on the same facts that led to the issuance of the notice of proposed removal? There is no basis for me to assume that the testimony of these gentlemen reflected any comments that could be considered new and material information. Rather, as to what French said they discussed, this is simply the type of common sense questions that a deciding official should be able to ask, to ascertain if the appellant's rights have been fully protected in the processing of the proposal notice. In addition, both Colter and French testified without refutation that their conversations in no way tried to persuade Washington about what action, if any, to take concerning the appellant. I therefore conclude that no due process violation occurred and no harmful procedural error transpired as a result of the *ex parte* communication.

Therefore, I find that the appellant has not proven this claim.

The agency demonstrated that there is a nexus between the appellant's misconduct and the efficiency of the service.

In addition to proving the charge against the appellant, the agency must show that the action taken promoted the efficiency of the service. An adverse action promotes the efficiency of the service when the grounds for the action relate either to an employee's ability to accomplish his duties satisfactorily or to some other legitimate governmental interest. 5 U.S.C. § 7513(a); *see Fontes v. Department of Transportation*, 51 M.S.P.R. 655, 665 n.7 (1991); *Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985).

An agency is entitled to expect its employees to be present for work. *See Ritter v. Department of Transportation*, 7 M.S.P.R. 105, 107 (1981). To allow an employee to remain away from work without leave would seriously impede an agency's mission. "An unexcused absence imposes burdens on other employees and, if tolerated, destroys the morale of those who meet their obligations." *Davis v. Veterans Administration*, 792 F.2d 1111, 1113 (Fed Cir. 1986). Further poof of nexus is unnecessary in cases of AWOL. *See Crutchfield v. Department of Navy*, 73 M.S.P.R. 444, 448 (1997); *Lovenduski v. Department of the Army*, 64 M.S.P.R.

612, 617 (1994). The Board and the courts have repeatedly held that there is an inherent relationship between continuous unexcused absences and the efficiency of the service because an essential element of employment is to be present on the job when expected. *See Urbina v. United States*, 530 F.2d 1387, 1390 (Ct. Cl. 1976); *Ajanaku v. Department of Defense*, 44 M.S.P.R. 350, 355 (1990). Therefore, I find that the agency has proven here that discipline was warranted and promoted the efficiency of the service.

The penalty imposed by the agency for the sustained misconduct is within the tolerable bounds of reasonableness and promotes the efficiency of the service.

Before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of all relevant mitigating factors in the particular case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981). In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgment, but to assure that it has been properly exercised. *See id*. at 306.

Where, as here, the Board sustains an agency's charge, the Board may mitigate the agency's original penalty to the maximum reasonable penalty only if it finds the agency's penalty was too severe. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The U.S. Court of Appeals for the Federal Circuit and the Board have determined that removal was a reasonable penalty for misconduct similar to that sustained in this case. *See Dias v. Department of Veterans Affairs*, 102 M.S.P.R. 53, 58 (2006), *aff'd*, 223 F. App'x 986 (Fed. Cir. 2007); *Foreman v. U. S. Postal Service*, 89 M.S.P.R. 328 (2001); *Weber v. U.S. Postal Service*, 47 M.S.P.R. 360, 363-64 (1991).

Here, the record reflects that the deciding official, Paris R. Washington, applied the *Douglas* factors in his assessment of the appropriate penalty, and that they were outlined in his decision letter. *See* AF, Tab 7, Subtab 4a. The decision

letter provided a written explanation for Washington's reasoning in upholding the removal and by his considering the following *Douglas* factors: 1) nature and seriousness of the offense; 2) the appellant's past work history, including length of service; 3) effect of the offense upon his ability to perform at a satisfactory level; 4) potential for rehabilitation; 5) the clarity with which he was put on notice of any rules that were violated in committing the offense; 6) mitigating circumstances surrounding the offense; and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future. *See id*.

Washington testified that the notice of proposed removal informed the appellant that he could contact Washington to contest the removal, but the appellant never did so. In fact, Washington testified that he even went to the ELR Office, to find out if the appellant might have tried to contact that office to reply to the proposal notice. After waiting awhile without hearing any word from the appellant, Washington eventually decided to issue the decision letter.

Washington noted, as mitigating factors, he considered that the appellant had many years of service without any prior disciplinary record. Nonetheless, Washington thought that the appellant's extended AWOL was a "serious offense," because the agency expects its employees to be at work. Washington pointed out that the appellant is a Letter Carrier and that when he did not appear for work, other employees had to cover his route and the agency had to pay overtime. Washington also was concerned that the appellant did not provide any medical documentation to support his lengthy absences, despite being provided an opportunity to do so. Washington testified that he had no doubt that the appellant was well aware of the rules requiring regular attendance and his need to justify his absences from work. Washington testified that he had "lost trust and confidence" in the appellant's ability to perform his job successfully, based on the charged misconduct. In Washington's opinion, the penalty of removal did not exceed the maximum reasonable penalty.

After considering the deciding official's explanation of his penalty selection, I find that he considered the relevant *Douglas* factors under the circumstances of this case. Upon review of the record, I find no basis to disturb the agency's chosen penalty for the sustained charge. I thus conclude that the deciding official's determination that the penalty of removal was warranted in this case was neither arbitrary, capricious, nor unreasonable and was for such cause as will promote the efficiency of the service. Finally, the appellant in this case has failed to express remorse at any time during the proceedings for his conduct and that supports a finding that he is a poor prospect for rehabilitation. *See, e.g., Murry v. General Services Administration*, 93 M.S.P.R. 554, 558 (2003); *see also Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 117 (1998).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____/S/_____
Daniel Madden Turbitt
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 18, 2012**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative,

whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

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

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

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt.

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

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

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

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

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

NOTICE TO AGENCY/INTERVENOR

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