UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JAMES R. TALTON,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-0707-15-0094-J-1

DATE: November 19, 2014

James R. Talton, Wetumpka, Alabama, pro se.

Gia M. Chemsian, Esquire, Washington, D.C., for the agency.

BEFORE
Thomas J. Lanphear
Chief Administrative Judge

FINAL DECISION

On October 30, 2014, the appellant, James Talton, SES-0670, Director, Central Alabama Veterans Administration (agency or VA) Healthcare System (CAVHCS), timely filed this appeal challenging his removal from Federal service, effective October 24, 2014. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. 38 U.S.C. § 713(e); 5 U.S.C. § 7701(b)(1). The appellant waived his right to a hearing and thus, this decision is based on the parties' written submissions. AF, Tab 20. For the reasons detailed below, the agency's action is AFFIRMED.

Background

At all times relevant to this appeal, the appellant served as the Director of CAVHCS. CAVHCS is comprised of seven sites of care, including two large campuses, the East Campus located in Tuskegee, Alabama and the West Campus located in Montgomery, Alabama. The appellant is a Member of the Senior Executive Service (SES).

In his role as Director of CAVHCS, the appellant was responsible for overseeing all matters pertaining to CAVHCS. The appellant's primary responsibility, however, was to ensure that Veteran patients received quality and efficient care. Regarding disciplinary and adverse actions taken against CAVHCS employees, the appellant was responsible for delegating authority to supervisors for direction and discipline of employees and making final decisions to suspend, demote, or remove employees. AF, Tab 6, Agency File Part 1 at 34, (CAVHCS Memorandum No. 05-12-12). At issue here are two instances of alleged employee misconduct and the appellant's role in CAVHCS's failure to timely take any disciplinary action against the employees.

Kennedy Case

The first instance of alleged misconduct (Kennedy case) took place on March 6, 2013. There, an employee who occupied the role of Peer Support Specialist, Joe Kennedy, allegedly drove a Veteran patient who was being treated for substance abuse at CAVHCS (rehab patient) to a location known for illegal drug use and distribution (i.e. a crack house) so that the rehab patient could obtain illegal drugs and sex.[1] AF, Tab 11, Agency File Part 5 at 8, (Agency's

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[1] Peer Support Specialists, as part of their duties, are tasked with taking patients to approved locations in the community and returning the patients to the facility promptly following the completion of their designated tasks. At the time that the incident occurred on March 6th, the Peer Support Specialist was supposed to be escorting the rehab patient to a local automobile repair shop so the rehab patient could check on the status of repairs to his vehicle. AF, Tab 8, Agency File Part 2 at 6, (Follow-Up Investigative Report).

Narrative Response). Once at the crack house, the rehab patient claimed to have smoked crack cocaine with several of the occupants. AF, Tab 9, Agency File Part 3 at 9, (Patient's Sworn Declaration). Mr. Kennedy then allegedly left the rehab patient at the crack house and failed to return. AF, Tab 8, Agency File Part 2 at 13, (Follow-Up Investigative Report). When the rehab patient returned to the East Campus of CAVHCS on March 8, 2013, he was discharged from the substance abuse program for being absent without leave (AWOL) and testing positive on a drug screen. *Id.* After the rehab patient became enraged when denied access to the facility on March 8th, CAVHCS police were informed and responded to the incident. *Id.* at 4, (Investigative Report).

Initially, CAVHCS police characterized the incident as disorderly conduct by the rehab patient due to his unruly behavior. AF Tab 8, Agency File Part 2 at 5, (Investigative Report). Once the investigators arrived, however, the rehab patient told them that Mr. Kennedy borrowed $600 from him, facilitated his drug use by dropping him off at a crack house, and failed to return him to CAVHCS. *Id.* Due to the seriousness of the rehab patient's allegations, the agency characterized the incident as patient abuse, and a preliminary investigation ensued. *See Id.* According to the Chief of Police at the facility, Elvis Walton, and the Investigating Officer, Cedric Thomas, the appellant was given a "heads-up" regarding the alleged misconduct sometime during the week of March 17, 2013. AF, Tab 14, Agency File Part 8 at 41:14-18, (Administrative Investigative Board (AIB) Testimony of E. Walton); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 9, (Declaration of C. Thomas).

As part of his investigation, Officer Thomas interviewed and took sworn statements from the complaining rehab patient, the rehab patient's roommate, who stated that Mr. Kennedy had told the men he could get the patients drugs and sex, and another patient who alleged that Mr. Kennedy attempted to borrow $250 from him in early March 2013. *See* AF, Tab 9, Agency File Part 3, (Statements of Patients). In addition, Officer Thomas spoke with a car salesman at the car

dealership where the rehab patient and his roommate stated Mr. Kennedy took them so Mr. Kennedy could purchase a car. AF, Tab 8, Agency File Part 2 at 15, (Investigative Reports). During the course of his investigation, Officer Thomas also prepared a thorough investigative report outlining his findings. *See generally* AF, Tab 8, Agency File Part 2, (Investigative Reports). Officer Thomas concluded his investigation into the alleged crack house incident and other alleged misconduct by Mr. Kennedy on May 13, 2013. *See* AF, Tab 8, Agency File Part 2, (Investigative Reports); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 10, (Declaration of C. Thomas). The investigation revealed that, in addition to the evidence supporting the rehab patient's account of the alleged crack house incident, there was also evidence that the employee misused a government vehicle for his benefit, submitted an inappropriate request for overtime compensation, and engaged in inappropriate financial transactions with Veteran patients. AF, Tab 11, Agency File Part 5 at 8, (Agency's Narrative Response); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 11, (Declaration of C. Thomas).

Upon concluding his investigation, sometime during the week of May 12, 2013, Officer Thomas and Chief Walton formally briefed the appellant of these findings. AF, Tab 14, Agency File Part 8 at 203-206, (AIB Testimony of C. Thomas); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 11, (Declaration of C. Thomas); AF, Tab 14, Agency File Part 8 at 204:19-21, (AIB Testimony of E. Walton); AF, Tab 26, Agency Exhibit Tab 10 at ¶ 8, (Declaration of E. Walton). Officer Thomas also stated that during this briefing he specifically told the appellant that Mr. Kennedy left the rehab patient overnight at the crack house and that the rehab patient was subsequently removed from the CAVHCS's substance abuse program. AF, Tab 14, Agency File Part 8 at 242:4-23; at 244:1-6, (AIB Testimony of C. Thomas); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 11, (Declaration of C. Thomas). When informed by Officer Thomas at the May briefing that the incident was considered an administrative matter rather than criminal matter, the appellant's response was to turn the investigation over to his Chief of Staff, Cliff Robinson,

and CAVHCS's human resources (HR) staff for action. AF, Tab 14, Agency File Part 8 at 72:14-20, (AIB Testimony of J. Talton); *Id.* at 208: 4-13, (AIB Testimony of C. Thomas). Officer Thomas asserted that the May briefing lasted between 20 to 25 minutes. *Id.* at 210:12-13, (AIB Testimony of C. Thomas); AF, Tab 25, Agency Exhibit Tab 9 at ¶ 11, (Declaration of C. Thomas).

Subsequently, on May 15, 2013, the case file was referred to Employee Relations and Labor Relations (ER/LR) Specialist Kimberly Elston. AF, Tab 10, Agency File Part 4 at 80, (E-mail from K. Elston to R. Tremaine). On May 22, 2013, Ms. Elston referred the matter to Brenda Winston, Chief Quality Management (QM), for a QM review.[2] *Id.*; AF, Tab 15, Agency File Part 9 at 379, (AIB Testimony of B. Winston). Ms. Winston determined that there was sufficient evidence to take action against Mr. Kennedy without an AIB but if HR or the appellant needed more evidence then an AIB should be convened. *Id.* Ms. Winston informed Ms. Elston of her determination in July 2013. Notwithstanding Ms. Winston's conclusion and recommendation, however, no action was initiated against Mr. Kennedy for patient abuse related to the alleged crack house incident and no AIB was convened. *See* AF, Tab 6, Agency File Part 1 at 12-14, (AIB Report).

Although not officially reassigned, on July 30, 2013, Mr. Kennedy's assignment was changed from performing Peer Support Specialist duties to working with the chaplain. *Id.* at 8. Several e-mails were exchanged among CAVHCS HR personnel during the summer and early fall of 2013 as the case was shuffled among HR personnel, but no disciplinary action was ever initiated against Mr. Kennedy.[3] After observing Mr. Kennedy at CAVHCS facility

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[2] A QM review is the process by which the agency determines if there is sufficient evidence to conduct an AIB. AF, Tab 15, Agency File Part 9 at 379, (AIB Testimony of B. Winston).

[3] Dr. Jessaka Fife, the Acting Associate Chief of Staff (ACOS), for Mental Health, followed up with Ms. Elston on October 24, 2013 by E-mail, asking what the status of

roughly three to four months after the alleged crack house incident, Officer Thomas inquired with Mr. Robinson as to why no action was being taken against the employee. AF, Tab 14, Agency File Part 8 at 216:6-23, 218:5-11, 32:4-9, (AIB Testimony of C. Thomas). Officer Thomas and Chief Walton also followed-up with the appellant after speaking with Mr. Robinson to inform the appellant that no action had been taken by HR. *Id.* at 219:13-19. As in May of 2013, the appellant told Officer Thomas that he would refer the issue to Mr. Robinson and HR to handle. *Id.* at 219:15-18. A few months later, in November 2013, Officer Thomas once again approached the appellant with his concerns regarding the handling of Mr. Kennedy's case. *Id.* at 221:20-23; AF, Tab 25, Agency Exhibit Tab 9 at ¶ 14, (Declaration of C. Thomas). Additionally, on November 27, 2013, Mr. Kennedy inquired into the status of his case with HR, and HR determined that there was no information that could be shared with him at that time. AF, Tab 12, Agency File Part 6 at 83, (E-mail from J. Kennedy dated Nov. 27, 2013). Mr. Kennedy's inquiry sparked a renewed interest among the HR personnel regarding his case, and the issue was immediately elevated to Dr. Fife.[4] *Id.* at 81, (E-mail from J. Fife dated Nov. 27, 2013). Dr. Fife stated in her E-mail to several HR staff, including Ms. Elston, that she hopes the matter can be resolved quickly, but "the fact that he's been left in the job, and he has clearly violated rules, has been the problem." *Id.*

Despite Dr. Fife's concern, the matter continued to be shuffled among HR personnel without any action being initiated by HR, Mr. Robinson or the

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the Kennedy case was and expressing her concern that nothing had been done on the matter despite the fact that there were concerns that he was potentially selling drugs on campus. AF, Tab 12, Agency File Part 6 at 77-78, (E-mail from Dr. Fife on Oct. 24, 2013).

[4] Dr. Fife's predecessor, Dr. Arthur Soule, was notified of the Kennedy case in April of 2013, and demanded action. AF, Tab 10, Agency File Part 4 at 83, (E-mail from Dr. Soule dated April 2, 2013) (stating there "is [a] credible accusation that [Kennedy] is causing potential harm to Veterans and embarrassment to the institution").

appellant for much of 2014. *See* AF, Tab 6, Agency File Part 1 at 18-19, (AIB Report). During this time, Ms. Winston became increasingly frustrated with HR because of their failure to initiate any action or to convene an AIB. AF, Tab 15, Agency File Part 9 at 382, (AIB Testimony of B. Winston). According to an e-mail provided by Ms. Winston to the AIB, on March 28, 2014, Ms. Winston briefed the appellant on the details of the crack house incident, the status of the matter, and her findings related to her QM review. AF, Tab 13, Agency File Part 7 at 17, (E-mail from B. Winston on Sept. 11, 2014). Although there is evidence that Ms. Winston made the appellant aware of the fact that no action had been taken against Mr. Kennedy - over a year after the incident allegedly occurred - the matter continued to remain dormant. On August 16, 2014, an article was published in the Montgomery Advertiser, a local newspaper, regarding Mr. Kennedy's alleged misconduct and the failure of CAVHCS to act. AF, Tab 6, Agency File Part 1 at 52-53, (Montgomery Advertiser Article). Following the publication of the article, the appellant showed a heightened interest in the matter.

On August 19, 2014, the appellant met with Officer Thomas and Chief Walton regarding the Kennedy case. AF, Tab 25, Agency Exhibit Tab 9 at ¶ 15, (Declaration of C. Thomas); AF, Tab 25, Agency Exhibit Tab 10 at ¶ 14, (Declaration of C. Walton). On August 29, 2014, CAVHCS issued a notice of proposed removal to Mr. Kennedy.[5] AF, Tab 14, Agency File Part 8 at 30, (Notice of Proposed Removal). On October 10, 2014, Mr. Kennedy was removed from Federal service, 19 months after the alleged incident occurred. AF, Tab 19, Agency File Proposed Exhibits at 135, (Removal Decision). The appellant's inattention to the Kennedy case became the basis for his removal from Federal service as detailed below.

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[5] At that time, the appellant had already been placed on authorized absence.

Brooks Case

The second incident of alleged employee misconduct forming the basis for this appeal came to light during the AIB inquiry into the handling of the Kennedy case. The second incident took place on April 22, 2013 and involves another VA employee, Daniel Brooks (Brooks case). There, Mr. Brooks, a Vocational Rehabilitation Specialist, was allegedly involved in a car accident while using a government vehicle and then misled CAVHCS police about the circumstances surrounding the accident. AF, Tab 11, Agency File Part 5 at 8, (Agency's Narrative Response). A significant amount of damage was done to the vehicle, requiring repairs totaling $5,800. AF, Tab 12, Agency File Part 6 at 10, (Follow-Up Investigative Report). As a Vocational Rehabilitation Specialist, Mr. Brooks' duties required that he travel to perform checks on the facility's Veteran patients. On the day in question, Mr. Brooks stated that he was traveling to visit a patient when several deer jumped in front of his vehicle causing him to swerve and hit a sign. *Id.* at 9. After the accident, Mr. Brooks stated that he obtained the statement of a passer-by regarding the incident and proceeded to visit a former Veteran patient of the facility. *Id.* An investigation into the matter was initiated on May 16, 2013. AF, Tab 8, Agency File Tab 2 at 61, (Issue Brief dated Aug. 20, 2014). As with the Kennedy case, Officer Thomas was the investigating officer. According to Officer Thomas, during the course of his investigation he gave approximately three to four updates to the appellant and his Chief of Staff, Mr. Robinson. AF, Tab 25, Agency Exhibit Tab 9 at ¶ 19, (Declaration of C. Thomas).

The investigation revealed that Mr. Brooks' account of the accident was not supported by the evidence, the statement he got from the passer-by was fabricated, and the patient he visited was not on his list for visitation. AF, Tab 12, Agency File Part 6 at 9-14, (Follow-Up Investigative Report); AF, Tab 10, Agency File Part 4 at 50-51, (Declaration of Patient D. Brooks Visited) (stating he was discharged from CAVHCS in April of 2012 and Mr. Brooks visited him

on five to seven occasions, but he did not know the visits were related to the VA and he was not part of any VA follow-up program). In June 2013, the appellant was fully briefed on the accident and Mr. Brooks' alleged cover-up. AF, Tab 25, Exhibit Tab 9 at ¶ 19, (Declaration of C. Thomas). Officer Thomas stated that he requested status updates from HR and the appellant on the Brooks case approximately three to four times. *Id.* at ¶ 21.

On October 25, 2013, the appellant requested information on removing Mr. Brooks from a position that required the use of a government vehicle and asked if Mr. Brooks could be required to pay for the damage to the vehicle. AF, Tab 14, Agency File 11, (E-mail from J. Talton dated Oct. 25, 2013). On October 28, 2013, the appellant requested that Mr. Robinson and HR speak with Officer Thomas, determine a course of action and apprise him of the results. *Id.* at 10, (E-mail from J. Talton on Oct. 28, 2013).

Although Mr. Brooks was initially prohibited from performing driving/transportation duties following the investigation into the accident, in August of 2013, he was notified that he could resume his driving duties. AF, Tab 8, Agency File Tab 2 at 62, (Issue Brief dated Aug. 20, 2014). Like the Kennedy case, this case was shuffled among HR personnel for much of 2013. *See* AF, Tab 8, Agency File Tab 2 at 61-62, (Issue Brief dated Aug. 20, 2014) (timeline of the actions taken by CAVHCS personnel in response to the alleged misconduct). During this time, several individuals within HR debated as to whether CAVHCS was barred from taking action against Mr. Brooks because they failed to act in a timely manner. *Id.* The Brooks case sat dormant until August 2014, despite Officer Thomas informing the appellant that no action had been taken against Mr. Brooks in the fall of 2013. AF, Tab 14, Agency File Part 8 at 222:4-9, (AIB Testimony of C. Thomas). Mr. Brooks was proposed for removal from employment with CAVHCS on October 15, 2014. AF, Tab 19, Agency File Proposed Exhibits at 140, (Notice of Proposed Removal).

Procedural History

After the publication of the Montgomery Advertiser article on August 16, 2013, regarding the alleged misconduct of Mr. Kennedy, an investigation into the incident and other incidents that had failed to be properly addressed by CAVHCS management was initiated. On August 21, 2014, the appellant was placed on authorized absence pending the findings of the AIB. AF, Tab 6, Agency File at 4, (Direct Order for Administrative Absence). An AIB was convened on August 24, 2014. *Id.* at 6. On August 26-27, 2014, the AIB took sworn statements from the appellant, his Chief of Staff, Officer Thomas, Chief Walton and six HR specialists involved in the management of the incidents. *Id.* The AIB found neglect and mismanagement by the appellant, Mr. Robinson and several members of the HR staff. *Id.* at 20-21. Regarding the appellant, the AIB specifically found that, although he was made aware of both instances of alleged employee misconduct, he failed to ensure that appropriate and timely action was taken in the matters.

On October 3, 2014, the Deputy Secretary of the Department of Veterans Affairs, Sloan Gibson, proposed the appellant's removal from Federal service based on two charges: 1) neglect of duty; and 2) failing to provide appropriate information to his supervisor. AF, Tab 1 at 6, Notice of Proposed Removal. The appellant replied in writing on October 14, 2014. AF Tab 5 at 64, (Response to Proposed Removal). On October 24, 2014, Deputy Secretary Gibson sustained the charges and removed the appellant from Federal service. AF, Tab 1 at 5. This appeal followed.

ANALYSIS AND FINDINGS

Charge One: Neglect of Duty (Specification One)

The first charge contained in the notice of proposed removal dated October 3, 2014, is labeled neglect of duty with two supporting specifications. Specification one provides:

> On or about May 14, 2013, CAVHCS Police informed you that their investigation indicated a CAVHCS employee Joseph Kennedy transported a Veteran patient being treated for substance abuse to a location known for illegal drug use and distribution; misused a government vehicle for personal benefit; submitted an inappropriate request for overtime compensation; and engaged in inappropriate financial transactions with Veteran patients. After being notified of this misconduct and despite repeated reminders of the incident, you failed to exercise appropriate oversight to ensure that timely and appropriate action was taken against this employee for his misconduct.

AF, Tab 17 at 32-33.

In support of this specification, the agency has introduced sworn testimony from relevant witnesses before the AIB, including the appellant, Chief Walton, Officer Thomas and Ms. Winston. *See* AF, Tab 14, Agency File Part 8, (AIB Testimony). Officer Thomas testified that the during the first substantive meeting on May 14, 2013, he informed the appellant that Mr. Kennedy transported the patient to a crack house where he obtained drugs and left the patient at the crack house overnight despite the fact that he called Mr. Kennedy multiple times.[6] Officer Thomas also informed the appellant that the patient was discharged from the rehabilitation program because he was AWOL and tested positive for drugs. AF, Tab 25, Agency Exhibit Tab 9 at ¶ 11, (Declaration of C. Thomas). He further testified that the appellant failed to ask him if the allegation of patient abuse was "substantiated," but if he had asked this question, Officer Thomas would have replied "yes." *Id.* According to Officer Thomas, the briefing lasted approximately 20-25 minutes, and he discussed "what he uncovered during the course [of his] investigation in detail." *Id.* When they met in August 2014, Officer Thomas testified that he briefed the appellant again regarding his findings and continued to express his concerns that no action had been taken against Mr. Kennedy. *Id.* at ¶ 15.

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[6] Officer Thomas verified the phones calls by obtaining Mr. Kennedy's mobile phone. AF, Tab 14, Agency File Part 8 at 248:11-14, (AIB Testimony of C. Thomas).

Chief Walton testified that, during the briefing on May 14, 2013, he and Officer Thomas advised the appellant that the investigation was completed, the details of the investigation, and who had been contacted. AF, Tab 26, Agency Exhibit Tab 10 at ¶ 8, (Declaration of E. Walton). Specifically, Chief Walton stated that they "provided a detailed account of [Officer Thomas's] findings concerning patient abuse, including: (1) the fact that Joseph Kennedy took the patient to a crack house, dropped him off there, and did not return to pick him [up], resulting in the Veteran patient being discharged from his treatment program; (2) Joseph Kennedy borrowed and attempted to borrow money from patients: (3) Joseph Kennedy falsified his overtime claims; and, (4) Joseph Kennedy misused a government vehicle for his personal benefit." *Id.* According to Chief Walton, the appellant "appeared to be shocked by the investigative findings." *Id.* They also informed the appellant that the matter could not be criminally prosecuted and "that administrative action needed to be taken." *Id.* Chief Walton further testified that, during the August 19, 2014 meeting, "the information [they] discussed with [the appellant] about the Joseph Kennedy case...was the same information that [they] had already provided to [the appellant] during [their] various briefings on the Joseph Kennedy case." AF, Tab 26, Agency Exhibit Tab 10 at ¶ 14, (Declaration of E. Walton).

It is undisputed that, on June 20, 2013, Ms. Winston emailed Ms. Elston, HR Employee/Labor Relations Specialist, wherein she stated "[t]here appears to be sufficient evidence and, with the admission of his own guilt to various allegations (which violated both policies), Mr. Kennedy's supervisor has enough information to take actions without an AIB." AF, Tab 10 at 93, (E-mail of B. Winston dated June 20, 2013)(quoted as in original). Subsequently, Ms. Winston submitted an e-mail to the AIB which discussed her briefing with the appellant on March 28, 2014, concerning the specific details of the Kennedy case and expressing her concern over the delays in initiating any action against Mr.

Kennedy. AF, Tab 13, Agency File Part 7 at 17, (E-mail from B. Winston dated Sept. 11, 2014).[7]

In reply to the notice of proposed removal, the appellant contended that he was justified in not taking immediate action against Mr. Kennedy on the charge of patient abuse because he believed the charge was "not substantiated." AF, Tab 5 at 8, (Talton Appeal Narrative). While the appellant acknowledged that he met with the police officers on several occasions, he asserted that the police officers failed to provide him with specific information that would justify some type of action against Mr. Kennedy for patient abuse. *Id.* The appellant testified that he asked the police officers three times if there were any witnesses to the events described in specification one and that the briefings provided by police lasted only two to three minutes. AF, Tab 14, Agency File Part 8 at 57: 16-18, (AIB Testimony of J. Talton). Further, he asserted that he did not know that Mr. Kennedy deserted him at the crack house, or that the rehab patient was subsequently discharged from the drug treatment program based upon Mr. Kennedy's actions. *Id.* at 80: 22. The appellant argues that had he "been aware of such facts, [he] would have elevated the case to a more urgent status and would have addressed the matter more expeditiously." AF, Tab 5 at 8, (Talton Appeal Narrative). Finally, the appellant contended that he only learned of these additional facts when he met with Chief Walton and Officer Thomas on August 19, 2014. AF, Tab 14, Agency File Part 8 at 83:4-6, (AIB Testimony of J. Talton).

In this case, the appellant basically argues that his inaction was justified because he lacked sufficient information to warrant taking a disciplinary action against Mr. Kennedy. Assessment of the probative value of hearsay evidence

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[7] Indeed, the appellant acknowledged Ms. Winston's views when he testified before the AIB and stated "she's the one who told them there was enough evidence in the police report to sustain an administrative action." AF, Tab 14, Agency File Part 8 at 96:7-10, (AIB Testimony of J. Talton).

necessarily depends on the circumstances of each case. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83–87 (1981).[8] With regard to the information provided to the appellant concerning the Kennedy investigation, for the following reasons, I find the sworn testimony of Officer Thomas, Chief Walton, and Ms. Winston and supporting documentation more persuasive than the testimony of the appellant. The testimony provided by Chief Walton and Officer Thomas before the AIB is consistent in that they provided detailed information concerning the nature of the events surrounding the Kennedy investigation. Additionally, the sworn declarations by Chief Walton and Officer Thomas that were submitted as part of the agency's closing brief reiterates their testimony before the AIB and pinpoints what information was shared with the appellant regarding the Kennedy and Brooks cases and when that information was shared with the appellant. It was sufficient for a reasonable person to conclude that the initiation of discipline was appropriate. Even the transporting of a rehab patient to the crack house would in itself constitute a sufficient reason to initiate disciplinary proceedings against Mr. Kennedy. Indeed, such activity is totally inconsistent with the mission of the agency to serve the interests of those who have served our country. Also, Ms. Winston's testimony and documentation corroborates the seriousness of the events described in specification one. It is incredible to believe that in light of these briefings as provided in the

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[8] Under the Board's *Borninkhof* decision, the following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; (8) credibility of declarant when he made the statement attributed to him. 5 M.S.P.R. at 87.

administrative file, the appellant would claim that he was unaware of the severity of Kennedy's actions.

In order to prove the specifically labeled charge of "neglect of duty," the agency must show "a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit." *Thomas v. Department of Transportation*, 110 M.S.P.R. 176, ¶ 9 (2008); *see also Mendez v. Department of Treasury,* 88 M.S.P.R. 596, ¶ 26 (2001); *Williams v. Department of Veterans Affairs,* 65 M.S.P.R. 612, 614–16 (1994) (finding negligence established on showing of duty, the employee's knowledge, and breach of duty of health care worker's responsibility for surgical instrument sterilization), *aff'd,* 69 F.3d 554 (Fed. Cir. 1995). To establish the appellant's duty, the agency must prove that the appellant either knew or should have known of that duty. *See Green v. Department of Navy*, 61 M.S.P.R. 626, 630–31 (1994).

I find that the agency proved that the appellant was aware of the full details of the Kennedy investigation and that he failed to take appropriate action. In the alternative, I find that, under the circumstances of this case and in light of the mission of the agency, the appellant should have known that these instances warranted his immediate and continued attention.[9] The appellant is a Member of the SES and Director of CAVHCS. Based on evidence of record, a person of ordinary prudence in the same situation and with equal experience as the appellant would have ensured that timely and appropriate administrative action was taken against Mr. Kennedy. *See Thomas*, 110 M.S.P.R. at ¶ 9. It is uncontested that no action was taken against Mr. Kennedy over eighteen months after the appellant became aware of the allegations. Thus, I find that the agency

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[9] There is evidence in the record that Mr. Kennedy also borrowed and attempted to borrow money from other patients at CAVHCS. *See* AF, Tab 8, Agency File Part 2, (Investigative Reports).

proved that the appellant failed to exercise appropriate oversight to ensure that timely and appropriate action was taken against Mr. Kennedy, and that the agency proved specification one by preponderant evidence.[10]

Charge One: Neglect of Duty (Specification Two)

Specification two provides:

> In June 2013, you were aware that CAVHCS employee Danny Brooks was involved in a vehicle accident while misusing a government vehicle and then misled CAVHCS Police regarding the circumstances surrounding the accident. After being informed of this misconduct, you failed to exercise appropriate oversight to ensure that timely and appropriate action was taken against this employee.

AF, Tab 17 at 32-33.

It is undisputed that Officer Thomas and Chief Walton met with the appellant in mid-summer 2013 concerning the Brooks case, and, by that time, Officer Thomas had concluded that Mr. Brooks damaged a government vehicle and provided false information during the investigation. AF, Tab 25, Agency Exhibit Tab 9 at ¶ 18, (Declaration of C. Thomas). Chief Walton testified that during this meeting the appellant was briefed regarding Officer Thomas' findings, namely that "the fact that Danny Brooks was in an accident that caused almost $6000 in damage to a Government car, left the scene of the accident, failed to report the accident, claimed to be visiting a Veteran patient who [was] determined not to be a current patient, among other things." AF, Tab 26, Agency Exhibit Tab 10 at ¶12, (Declaration of E. Walton). Subsequently, after Officer Thomas observed Mr. Brooks driving around the Montgomery campus several months after he concluded his investigation, he contacted Chief Walton, and they requested a status update from the appellant. *Id.* at ¶ 13. As previously

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[10] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

discussed, it was not until October 25, 2013, that the appellant requested information on removing Mr. Brooks from a position that required the use of a government vehicle and asked if the Mr. Brooks could be required to pay for the damage to the vehicle. AF, Tab 14, Agency File Part 11, (E-mail from J. Talton dated Oct. 25, 2013). Three days later, the appellant instructed his chief of staff and HR to confer with Officer Thomas to determine a recommended course of action. *Id.* at 10, (E-mail from J. Talton dated Oct. 28, 2013). After October 28, 2013, however, there is no evidence that the appellant took any additional action on the matter.

In response, the appellant again asserts, similar to the Kennedy case, that he was aware that Mr. Brooks had damaged the government vehicle but was unaware of any evidence that he had misrepresented the details of the accident. AF, Tab 5 at 8, (Talton Appeal Narrative). The appellant further asserts that he was not fully aware of the situation until August 19, 2014.

However, I find the sworn declarations of Officer Thomas and Chief Walton, as well as the testimony given by them both before the AIB and the investigative record demonstrate that the appellant was aware of the Brooks situation, including the allegations that Mr. Brooks misrepresented the circumstances of the accident and the fact that Mr. Brooks was not conducting official agency business where the accident occurred.[11] As in the Kennedy case, the investigative file is full of examples of Mr. Brooks' distortions to the investigating officers, and I find that the information provided was sufficient for a reasonable person to conclude that the initiation of discipline was appropriate. Thus, I find that the agency proved that the appellant was aware of the full details of the Brooks investigation and failed to take appropriate action.

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[11] During the investigation, the patient Mr. Brooks visited after the accident stated that he "was sure it was not official Veteran Affairs business" as he had been discharged in 2012. AF, Tab 10, Agency File Part 4 at 50-51, (Declaration of Patient D. Brooks Visited).

Further, I find that it was the appellant's duty to ensure that timely and appropriate administrative action was taken against Mr. Brooks, and it is uncontested that no action was taken for over 15 months after the appellant became aware of the Brooks case. Thus, I find that the agency proved that the appellant failed to exercise appropriate oversight to ensure that timely and appropriate action was taken against Mr. Brooks and that the agency proved specification two by preponderant evidence. Charge one is SUSTAINED.

Charge Two: Failure to Provide Appropriate Information to Supervisor (Specification One)

The second charge provided in the notice of proposed removal is titled failure to provide appropriate information to supervisor with two supporting specifications. Specification one provides:

> On or about March 8, 2013, you became aware of serious allegations that a CAVHCS employee facilitated the drug use of a Veteran patient being treated for substance abuse by taking him to a location known for illegal drug use and distribution; misused a government vehicle for personal benefit; submitted an inappropriate request for overtime compensation and engaged in inappropriate financial transactions with Veteran patients. Although you acknowledged that you should have made your supervisor aware of these allegations, you failed to do so.

AF, Tab 17 at 32-33.

In order to prove the second charge, the agency must show that the appellant was aware of the requirement to provide appropriate information to his supervisor and he failed to do so. Here, the appellant admits that he never informed his supervisor of the Kennedy case. AF, Tab 5 at 8, (Talton Appeal Narrative). Further, the agency submitted testimony from his supervisor, Charles Sepich, that he first learned of the Kennedy case from the news article. AF, Tab 23, Agency Exhibit Tab 7 at ¶ 10, (Declaration of C. Sepich). The agency submitted its *10N Guide to VHA Issue Briefs*, which provides a list of "notification triggers" that should be reported as soon as possible and to keep

upper management apprised of the situation "often and early." AF, Tab 19 at 114, (Agency Proposed Exhibits and Witness List). Criminal activity, suicide gestures,[12] and events with potential negative media coverage at the facility, all of which trigger the reporting requirement, were presented by the circumstances surrounding the Kennedy case. *Id.* In light of this evidence and the appellant's admission that he did not notify his supervisor of the events in specification one, I find that the agency proved specification one by preponderant evidence. *See Cole v. Department of Air Force*, 120 M.S.P.R. 640, 644 (2014)(holding that the appellant's admission to a charge can suffice as proof of the charge without additional proof from the agency).

Charge Two: Failure to Provide Appropriate Information to Supervisor (Specification Two)

Specification two of charge two provides:

> On August 20, 2014 you sent an Issue Brief to the VISN 7 Network Director that said "the allegation that the employee transported the patient to a crack house is unsubstantiated." However, on August 26, 2014 you testified to VA investigators that after your briefing with Police Detective Thomas on August 19, 2014, you believed there was enough evidence to substantiate the allegation and that the case against the subject was now "ironclad."

AF, Tab 17 at 32-33.

This specification involves whether the appellant provided accurate information about the Kennedy case when he submitted his Issue Brief on August 20, 2014, to his supervisors. It is undisputed that the appellant met for a briefing with Officer Thomas and Chief Walton on August 19, 2014, after the publication of the news article. AF, Tab 26, Agency Exhibit Tab 9 at ¶ 15, (Declaration of C.

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[12] The rehab patient in the Kennedy case told Officer Thomas that he was contemplating suicide shortly after he was dismissed from the drug rehabilitation program. AF, Tab 14, Agency File Part 8 at 233, (AIB Testimony of C. Thomas). The record shows that the rehab patient was subsequently readmitted into CAVHCS's substance abuse program. *Id.* at 233:20-22.

Thomas); AF, Tab 25, Agency Exhibit Tab 10 at ¶ 14, (Declaration of E. Walton). Further, it is undisputed that on August 20, 2014, he informed his supervisors that "the allegation that [Kennedy] transported the patient to a crack house is unsubstantiated."[13] AF, Tab 6, Agency File Part 1 at 54, (Issue Brief dated Aug. 20, 2014). The appellant testified before the AIB on August 26, 2014. AF, Tab 14, Agency File Part 8 at 112, (AIB Testimony of J. Talton). During the AIB investigation, the appellant testified that, during the August 19, 2014 briefing with the officers, he learned additional facts that warranted a charge of patient abuse against Mr. Kennedy. *Id.* Specifically, he testified that he was informed that the rehab patient was not only brought to the crack house, but also left at the crack house by Mr. Kennedy and subsequently dismissed from the rehabilitation program. *Id.* at 79. Thus, he testified that the "patient's care was altered," the "course of treatment was altered because he didn't bring him back," and "having this information [was] going to make this case ironclad." *Id.* at 78-80.

The undisputed information in the record shows that on August 20th, the appellant represented to his supervisors that the Kennedy case was unsubstantiated, but, by his own admission, he knew on August 19th that the case against Mr. Kennedy was "ironclad." Therefore, the information he provided in his Issue Brief on August 20th was clearly inaccurate in that the Kennedy case could not be both unsubstantiated and ironclad at the same time. In light of this evidence, I find that the agency proved that the appellant failed to provide appropriate information to his supervisors on August 20, 2014. AF, Tab 14, Agency File Part 8 at 111, (AIB Testimony of J. Talton). Thus, I find that the

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[13] Additionally, there is evidence in the record that the appellant failed to provide accurate information concerning Mr. Kennedy's assignment following the crack house allegation. The Issue Brief that the appellant provided to his supervisor stated that Mr. Kennedy was immediately removed from his assignment as a Peer Support Specialist. The record indicates, however, that Mr. Kennedy's assignment was not changed until July 2013, when he was reassigned to the chaplain's service. *See* AF, Tab 6, Agency File Part 1 at 8, (AIB Report).

agency proved specification two by preponderant evidence. Charge two is SUSTAINED.

Affirmative Defenses

The appellant raised the following affirmative defenses: harmful error, violations of the Merit Systems Principles, violation of due process, and that the deciding official lacked the authority to effectuate his removal. The appellant has the burden of proving his affirmative defenses by a preponderance of the evidence. 5 C.F.R. § 1210.18(c).

Harmful Error

In support of his harmful procedural error claim, the appellant argues that the agency misrepresented or ignored his testimony and the testimony of other credible witnesses before the AIB; the AIB lacked impartiality/objectivity and exhibited bias in its conclusions; the AIB conclusions exhibited gaps in the investigative findings; the AIB postulated conclusions for which there was no evidentiary or testimonial basis; and the AIB fabricated its findings. *See* AF, Tab 27 at 9-11. (Talton Closing). To prove harmful error, the appellant must prove that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. § 1201.56(c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, *i.e.*, that it caused substantial prejudice to his rights. To the extent the AIB investigation contained inconsistencies or error or bias, I have conducted my independent review of the testimony and documents contained in the file. *See Jackson v. Veterans Administration,* 768 F.2d 1325, 1329 (Fed. Cir. 1985) (holding that the Board has de novo authority to adjudicate facts of a removal action). Moreover, based on my extensive review of the record, I can detect no harmful error and find his attack on the AIB investigation without merit. None of the evidence that the

appellant relies on to support this allegation is persuasive since the central thrust of his contentions involves mere disagreement with the AIB's findings and conclusions. Other than this disagreement, the appellant presents no meaningful evidence or argument as to what the procedural error was and how such error would have caused the VA to reach a different result. Therefore, I find that the appellant failed to meet his burden in establishing that the agency committed harmful error.

Violation of Merit Systems Principles

First, the appellant asserts a violation of Merit System Principle 5[14] ("The Federal workforce should be used efficiently and effectively."), pointing to staffing shortages and leadership turnover at CAVHCS. AF, Tab 27 at 12–13, (Talton Closing). The appellant alleges that these staffing problems, in turn, prevented him from effectively managing CAVHCS and "precipitated" the very misconduct at issue here. *Id.* The alleged staff shortages have no bearing on the appellant's responsibility to initiate action against employees who have adversely affected the missions of the agency. Therefore, I find that the appellant did not show that the alleged staffing shortage prejudiced his rights, and I find that the appellant has failed to establish this as an affirmative defense.

Second, the appellant asserts a violation of Merit System Principle 7 ("Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance"), indicating that had he been provided better "training in evidence determination," he would have better handled these cases at issue.

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[14] To prove a claim of violation of the Merit Systems Principles, the appellant is required to specifically identify the principles which he believes have been violated, the manner in which they have been violated, and the resulting harm or prejudice to his rights. Although the appellant was afforded the opportunity to clarify and present evidence to support his allegations that his removal was motivated by a prohibited personnel practice, he failed to do so. Instead, the appellant generally contended that the agency's action violated a number of the Merit Principles under 5 U.S.C. § 2301.

Again, the appellant was the Director of CAVHCS, a Member of the SES, and ultimately responsible for all affairs at CAVHCS. As such, the agency had placed a significant amount of responsibility on him and expected him to use that authority for the agency and its mission's benefit. It does not require training to understand that when an employee takes a rehab patient to a crack house some action must be initiated; this merely requires good judgment and common sense. Moreover, the appellant cites to no request for training that he made and the agency denied him. *Wright v. Federal Aviation Administration*, 40 M.S.P.R. 355, 360–62 (1989) ("[T]he Board will find a violation of 2301(b)(7) only when an appellant can show that, with respect to [his] training, the agency's action amounted to an abuse of discretion"). Therefore, I find that the appellant has failed to establish this as an affirmative defense.

Third, the appellant asserts a violation of Merit System Principle 6 ("Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards"), arguing that the agency is actually removing him for his performance and not misconduct. AF, Tab 27 at 14-15, (Talton Closing). It is well-settled, however, that an agency may choose to charge misconduct even where the nucleus of operative fact may also lend itself to an adverse action for performance deficiencies. *See, e.g., Abrams v. Social Security Administration*, 703 F.3d 538, 544 (Fed. Cir. 2012). Moreover, neglect of duty has been accepted by the Board as a reason to remove an employee from the SES under the Board's new regulations and the agency's own guidelines.[15] Therefore, I find that the appellant has failed to establish this as an affirmative defense.

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[15] "Neglect of Duty" is defined by the agency's guidelines as the "failure to provide appropriate oversight, supervision, or control over matters or personnel that are assigned to or are the responsibility of the Senior Executive." AF, Tab 17, Agency File Part 11 at 46.

Finally, the appellant asserts a violation of Merit System Principle 8(a) ("Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes."), arguing that the agency was under considerable pressure from Congress to fire subpar SES Members. AF, Tab 27, at 15-16, (Talton Closing). In support of this argument, the appellant cited to public statements from Members of Congress, including one who specifically named the appellant. *Id.* There is no evidence, however, that Deputy Secretary Gibson was coerced to remove the appellant, and his unrebutted testimony expressly denies such coercion.[16] AF, Tab 24, Agency Exhibit Tab 8 at ¶ 15, (Declaration of S. Gibson). Moreover, there is no evidence that any of the political pressure placed on the VA by Congress to fix issues garnering national media attention was *partisan* political pressure. Indeed, the concern that should have arisen in the appellant when he learned that a Veteran rehab patient was taken by a VA employee to a crack house transcends partisan political divisions. Therefore, I find that the appellant has failed to establish this affirmative defense.

Violation of Due Process

The appellant asserts that the agency failed to meaningfully consider his reply to the proposal notice, that the deciding official had "pre-decided" his removal and that such failure violated his due process rights. AF, Tab 27 at 14, (Talton Closing). To prove a claim that the agency denied the appellant due process, the appellant must establish that the agency denied him prior notice or denied him a meaningful opportunity to reply based on the timing, place, and circumstances of the procedures used. *Homar v. Gilbert*, 520 U.S. 924, 930 (1997).

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[16] In his sworn statement, Deputy Secretary Gibson testified that he "was diligent about not discussing the specifics of [the appellant's] case with the media or Congressional representatives until [he] had issued a final decision," and he "felt no pressure from the media or Congress to take a particular action against" the appellant. *Id.*

A review of the decision letter yields that Deputy Secretary Gibson did read the appellant's reply and considered, among other mitigating issues, the leadership challenges the appellant faced at CAVHCS. AF, Tab 17, Agency File Part 11 at 6; *see Franks v. Department of Air Force*, 22 M.S.P.R. 502, 505 (1984). Furthermore, Deputy Secretary Gibson's unrebutted testimony indicated that he considered the appellant's "years of service, past work record, and his written response." AF, Tab 24, Agency Exhibit Tab 8 at ¶ 7, (Declaration of S. Gibson). While Deputy Secretary Gibson may have had knowledge of the facts concerning this case prior to his decision, it is well-settled that there is no general proscription of appointing a deciding official who is familiar with the facts of the case and who has expressed a predisposition contrary to the appellant's interests. *Beatty v. Department of Housing & Urban Development*, 20 M.S.P.R. 436, 438 (1984), *aff'd*, 765 F.2d (Fed. Cir. 1985) (Table). There is simply no evidence that Deputy Secretary Gibson pre-decided this matter. Therefore, I find that the appellant has failed to establish this affirmative defense.

Deciding Official Lacked Authority

The appellant argues that the authority under which he was removed empowers only the Secretary of the VA to remove VA Members of the SES.[17] *See* AF, Tab 30. Because the Deputy Secretary removed the appellant and lacked the authority to do so, the appellant asserts his removal is contrary to law. *Id.* Pursuant to 38 U.S.C. § 512, however, Congress provided the Secretary of the VA with the authority to delegate this decisional authority, and the Secretary of the VA, Robert McDonald, expressly and unequivocally delegated his authority to remove VA Members of the SES under 38 U.S.C. § 713 to the Deputy Secretary. AF, Tab 17, Part 11 at 43. Indeed, when Congress seeks to limit delegable authority, it expressly does so. *See, e.g.*, 10 U.S.C. § 1609 (limiting delegation

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[17] Despite the fact that the appellant submitted this argument past the close of the record deadline, I considered it nonetheless.

authority in termination of intelligence officials). Therefore, I find that the appellant has failed to establish this affirmative defense.

The penalty of removal is reasonable.

The newly enacted legislation under which the Board exercises jurisdiction over this appeal narrowly circumscribes the Board's authority regarding review of the agency's penalty. 38 U.S.C. § 713(a)(1). The Board's final rule implementing this new legislation instructs as follows:

> Penalty review. As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed. However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

5 C.F.R. § 1210.18(d).[18]

In this case, Sloan Gibson, Deputy Secretary of the agency, served as the deciding official in the appellant's removal action. *See* AF Tab 24, Agency Exhibit Tab 8, (Declaration of S. Gibson). Deputy Secretary Gibson testified that he reviewed the AIB charge letter, the AIB investigative report, and the exhibits attached to the AIB report, and concluded that the appellant had engaged in a "significant dereliction of duties as the medical center director." *Id.* at ¶ 6.

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[18] The Board generally analyzes the agency's penalty selection, including penalties assessed to Members of the SES, under the statutory "efficiency of the service" standard, as interpreted by *Douglas* and its progeny. 5 U.S.C. § 7513(a); 5 U.S.C. §§ 7701(b)(3), (c)(1); *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 307–08 (1981). That general rule places the burden of proving the reasonableness of the agency's penalty selection on the agency. *Id.*; *see also* 5 C.F.R. § 1201.56(a)(ii). However, in interpreting Congress' recently enacted legislation concerning VA Members of the SES, the Board concluded that the efficiency of the service standard and *Douglas* do not apply and that the express statutory language creates a rebuttable presumption in favor of the VA Secretary's discretion to select the appropriate penalty. 38 U.S.C. § 713; 79 Fed. Reg. 63031 (Oct. 22, 2014) (codified at 5 C.F.R. § 1210.18).

Concerning the specifications under charge one, his review of the evidence led him to conclude that CAVHCS police had notified the appellant about the rehab patient's claims with respect to Mr. Kennedy, performed a complete investigation, and provided the appellant with a briefing about the serious nature of the investigative findings. Further, Deputy Secretary Gibson concluded that the appellant neither took appropriate action himself nor ensured that his leadership team took appropriate action to address "what appeared to be a clear case of patient abuse and misconduct." *Id.* at ¶ 8. According to Deputy Secretary Gibson, it was clear that the appellant was aware of the seriousness of the misconduct uncovered by the police and was provided with reminders regarding the status of the Kennedy case, however, he failed to do what a reasonable medical center director should have done under the circumstances which is to act. *Id.* Regarding Mr. Brooks, Deputy Secretary Gibson determined that Mr. Brooks was involved in a motor vehicle accident while using a government vehicle, and misled agency officials about the "facts surrounding the accident." AF Tab 24, Agency Exhibit Tab 8 at ¶ 9, (Declaration of S. Gibson). Deputy Secretary Gibson testified that the Brooks case was "another indication of [the appellant's] failure to hold CAVHCS employees accountable for serious misconduct." *Id.* Therefore, Deputy Secretary Gibson concluded that the appellant failed to exercise appropriate oversight to ensure timely and appropriate action was taken in both instances.

With regard to the second charge, Deputy Secretary Gibson testified that the appellant failed to provide appropriate information to the VISN 7 Network Director, Charles Sepich, regarding the Kennedy case. *Id.* at ¶ 10. He testified that the failure to provide notification of serious patient abuse circumvents the mission of the agency, and "veterans lose confidence in VA and the quality of care being provided at VA facilities." *Id.* Furthermore, Deputy Secretary Gibson determined that, had the appellant alerted his supervisor, "Mr. Sepich could have ensured [he] took the timely and appropriate action he failed to take." AF Tab

24, Agency Exhibit Tab 8 at ¶ 10, (Declaration of S. Gibson). With regard to the second specification, Deputy Secretary Gibson testified that "when [the appellant] ultimately provided appropriate information to Mr. Sepich about the patient abuse and misconduct engaged by Joseph Kennedy in the form of an Issue Brief, the information he provided was inaccurate." *Id.* at ¶ 11.

Deputy Secretary Gibson testified that removal was the appropriate penalty and the appellant was not a good candidate for rehabilitation because he "lost complete trust in [the appellant's] ability to function as a Federal employee." *Id.* at ¶ 16. Moreover, he found that the appellant "was made aware that an employee under his authority endangered the health and safety of a vulnerable, addicted Veteran patient entrusted to the VA's care," and "[d]espite numerous reminders by subordinate staff, he failed to assure that any meaningful action was taken to address this matter until well over a year later, when it was reported by the press." *Id.* Furthermore, Deputy Secretary Gibson submits that the appellant's "misconduct has contributed to the public's lack of trust that the VA can fulfill its mission to care for Veterans." *Id.* While Deputy Secretary Gibson considered several mitigating factors such as years of service, past work record and the appellant's response, he felt that removal was warranted because of the seriousness of the sustained charges. *Id.* ¶ 17.

In his defense, the appellant argues that removal is an excessively severe punishment because he was not aware of the seriousness of the employees' conduct until August 2014. AF, Tab 27 at 15, (Talton Closing). At most, the appellant submits that the offense in this case "amounts to failure to maintain proper processes to monitor and ensure timely completion of disciplinary action[s]." AF, Tab 5 at 21, (Talton Appeal Narrative). Moreover, the appellant maintains that the agency failed to provide stable leadership at the medical center by chronic vacancies that "permitted the organization to degenerate into a culture devoid of accountability." *Id.* Also, he asserts that "[t]he environment and operating conditions rendered it impossible to correct every performance and

process deficiency simultaneously." *Id.* at 22. According to the appellant, the agency "failed to provide [him] with the resources necessary to fully perform the duties of [his] position," including adequate funding for additional staff. AF, Tab 5 at 28, (Talton Narrative). The appellant argues that he is being held to a higher standard and treated differently than that other similarly situated employees. *Id.* The appellant states that he "deeply regret[s] the attention the issue has drawn to The Department of Veterans Affairs," and that he "remain[s] fully committed to improving the health care delivery to Veterans." *Id.* at 30. For purposes of mitigation, the appellant submits that he has made significant improvements to the overall operations to the agency; that he is a "Veteran who accepted the nearly untenable challenge of improving service to Veterans at Central Alabama Health Care System;" that the agency failed to provide him with adequate resources to fully perform the functions of his position; that he has no disciplinary record; and that he has over 31 years of Federal service. *Id.* at 85. And, "in light of the duration and character of service [he has] rendered to the Agency and the U.S. Armed Forces," he requested that I consider "the quality of [his] service, [his] many contributions to the VA and Veterans, the improvements [he has] achieved at the medical center, the conditions under which [he has] served as director, the severe impediment [to] the environment placed on [his] ability to perform [his] duties and to remain abreast of all matters within the medical center." AF, Tab 5 at 85, (Talton Narrative).

Deputy Secretary Gibson's sworn statement demonstrates that he properly and thoroughly considered all of the evidence of record when he concluded that removal was an appropriate and reasonable penalty for the misconduct at issue. AF, Tab 24, Agency Exhibit Tab 8 at ¶ 17. While I recognize that the usual *Douglas* factors do not apply to a case such as this one, in order to determine the reasonableness of the agency's decision, inherently I have to examine the seriousness of the charges to ensure that the removal action is for the efficiency of the service. *Cf. Gaines v. Department of Air Force*, 94 M.S.P.R. 527, ¶ 9

(2003). Here, the appellant's failure to adequately monitor the Kennedy and Brooks cases and to make certain that they faced appropriate disciplinary action is a dereliction of duty that cannot be minimized. Indeed, CAVHCS's failure to take immediate action against these two employees, particularly Mr. Kennedy, damages the very core of the agency's mission to take care of our nation's Veterans. The agency's mission is: "To fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans." Paramount to achieving this mission is patient safety. It is difficult to conjure a situation more diametrically opposed to the VA's mission of honoring and caring for our Veterans, and the appellant's failure to appropriately and expeditiously address this situation weighs heavily in favor of the Deputy Secretary's decision to remove the appellant.

While there appears to be failure throughout the entire process after the investigation, the appellant's assignment as an SES employee within the VA required him to accept the leadership role and responsibility to ensure that the Veterans served at CAVHCS are provided the care that the mission mandates. While such evidence highlights the difficulty of the appellant's position, it fails to excuse the utter lack of attention to a significant problem employee whose misconduct strikes at the core of the agency's mission. If CAVHCS's processes were broken, then the appellant should have endeavored to fix them. Because he did not, he, as CAVHCS's Director, is ultimately responsible for the consequences of his facility's state of ill-repair. The sustained charges demonstrate that the appellant failed to exercise the responsibility and trust placed in him as Medical Director. The appellant, as a Member of the Senior Executive Service, occupied the pinnacle of the Federal workforce. Simply put, negative media attention should not be required for a Member of the SES to ensure appropriate disciplinary action is taken especially in light of the proven facts of this case. The responsibility and trust placed in the SES makes the

appellant's breach of his duty more egregious than lower-graded employees and, consequently, renders the decision of the Deputy Secretary to remove him all the more reasonable.

The appellant's failure to inform his leadership of these problems only served to compound these difficulties. Had the appellant kept his leadership abreast of these situations, they could have properly guided him in the process of expeditiously addressing and resolving these issues. Although the appellant contends that he was not fully aware of the allegations until August 2014, this statement appears to be calculated to justify his lack of action on this matter and in no way requires an alteration in the action taken by Deputy Secretary Gibson.

Although the appellant requests that the action be mitigated for various reasons, the Board's regulations are clear that I do not have the authority to mitigate the agency's chosen penalty. 5 C.F.R. § 1210.18(d). Indeed, the agency's proof of the charges created a presumption that the removal action was warranted, and the appellant may only rebut this presumption by showing that the imposed penalty was "unreasonable under the circumstances of the case." *Id.* The appellant has failed to show that the selected penalty was unreasonable.

The appellant also asserts that no disciplinary action was initiated in a similarly situated event involving his supervisor, Charles Sepich. AF, Tab 27 at 16, (Talton Closing). I disagree that the situations are similarly situated, as the employee in the Sepich matter was arrested and there is evidence that the delay was due to the arrest and prosecution of the employee. *See*, e.g., *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 204 (1983) (finding an administrative matter was properly dismissed without prejudice where a criminal investigation on the same matter was pending). Even if I assume that the situations are similar, I do not find that it would render the agency's removal decision to be unreasonable under the circumstances of this case. As I stated earlier, the seriousness of the charges at issue are sufficient to warrant a removal decision. I find that Deputy Secretary Gibson convincingly explained why he determined that removal was the

most appropriate penalty for the sustained charges. Therefore, I find that disciplinary action is warranted to promote the efficiency of the service and the penalty of removal is reasonable.

In summary, I find that the agency has proved Charge 1, neglect of duty, (Specifications 1 and 2) and Charge 2, failure to provide appropriate information to his supervisor, (Specifications 1 and 2) by preponderant evidence. I further find that the appellant's affirmative defenses and all other assertions are without merit. Because I find that the penalty imposed by the Deputy Secretary is reasonable in light of the mission of the agency and the seriousness of the Charges, the agency's decision to remove the appellant from Federal service is AFFIRMED.

FINAL DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

Thomas J. Lanphear
Chief Administrative Judge

NOTICE TO APPELLANT

Pursuant to 38 U.S.C. § 713(e)(2), my decision is final, and there is no right to appeal this decision.