UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

93 MSPR 424

STEPHANIE M. SMITH,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-0752-01-0833-I-1

DATE: June 17, 2003

James V. Stinchcomb, Leesburg, Georgia, for the appellant.

James Mantia, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review from the initial decision which did not sustain its removal action. For the reasons that follow, the Board GRANTS the petition, REVERSES the initial decision in part, AFFIRMS the initial decision in part, and SUSTAINS the agency's action.

BACKGROUND

¶2 The appellant worked as Transportation Clerk at the agency's Gainesville, Florida, medical facility. Initial Appeal File (IAF), Tab 7. The agency removed her for disclosing sensitive and confidential information about a veteran who was

both an employee and a patient at the Gainesville facility. *Id.*, Tab 3, Subtab 4E. The administrative judge did not sustain the charge. On petition for review, the agency contends that it proved the charge. Petition for Review File, Tab 1.

ANALYSIS

¶3 A decision in this appeal depends on an analysis of all relevant facts to resolve the credibility issues. In *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), the Board held that, to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

¶4 The Board normally defers to the credibility findings of an administrative judge, especially where those findings are based on demeanor. *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985). However, because the administrative judge's findings here were abbreviated (limited to about a page), incomplete, inconsistent with the great weight of the evidence, and lead to an inherently improbable result, they are not entitled to deference. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 13 (2001).

The Charges

¶5 For privacy reasons, the patient/employee in question has been referred to as John Doe in these proceedings. Mr. Doe's medical records were available to agency employees who had access to the facility's computer records and who run what is called a "HINQ," which stands for "Hospital Inquiry." Hearing Tape

(HT) 2, Side A. At the time of the alleged misconduct, the appellant was detailed to the position of Means Test Monitor. *Id.* In that position, the appellant had access to patient information and was authorized to conduct HINQs. *Id.*

¶6 The record contains a printout of a HINQ that was run on Mr. Doe. The printout contains the appellant's handwritten initials and the date February 16, 2001. IAF, Tab 3, Subtab 4*l*. At the hearing, the appellant admitted that she did a HINQ on Mr. Doe. HT 2, Side B. The unrebutted evidence further shows that only two persons at the Gainesville facility had run a HINQ on Mr. Doe prior to the events in question. Those two persons were the appellant and John Easter, the Admissions Coordinator. *Id.*

¶7 According to the charge, on February 19, 2001, the appellant disclosed confidential and sensitive diagnostic information about Mr. Doe to Darlene Stapleton-Armstrong, a coworker. IAF, Tab 3, Subtab 4E. The evidence relating to the charge is as follows.

¶8 Ms. Stapleton-Armstrong testified that she and the appellant worked together for about 10 years, and that they frequently had conversations about other employees. HT 1, Side A. Stapleton-Armstrong said that on or about February 19, 2001, she and the appellant were working in the same area when the appellant mentioned Mr. Doe, who was a supervisor at the Gainesville facility. *Id.* According to Stapleton-Armstrong, in the course of their discussion, the appellant said that she knew something about Doe that nobody else knew. *Id.* Ms. Stapleton-Armstrong declared that when she asked the appellant what that was, the appellant told her that Doe was "service-connected for HIV." *Id.* Stapleton-Armstrong further stated that the appellant told her on February 19 that she (the appellant) had run a HINQ on Mr. Doe. *Id.*

¶9 Stapleton-Armstrong described a conversation she had about a week later on February 25, 2001, with Mr. Easter. *Id.* Stapleton-Armstrong testified that she and Easter were discussing Doe because he was a new supervisor. *Id.*, Sides A and B. According to Stapleton-Armstrong, Easter said during their

conversation that he had registered and verified the computer information on Mr. Doe, and that he was the only person to have done that. *Id.*, Side A. Stapleton-Armstrong told him that, on the contrary, the appellant mentioned on February 19 that she also had accessed the computer records and had done a HINQ on Mr. Doe. *Id.*, Sides A and B. Stapleton-Armstrong then told Easter that the appellant informed her on the 19th that Doe was service-connected for HIV. *Id.*, Side B.

¶10 Easter testified that he and Stapleton-Armstrong were talking in February 2001 when the topic turned to Mr. Doe. HT 2, Side A. According to Easter, he mentioned to Stapleton-Armstrong that he had registered Doe in the computer system and done a HINQ on him. *Id.* Easter recalled that Stapleton-Armstrong commented that the appellant had told her that she also had run a HINQ on Mr. Doe. *Id.* He remembered Stapleton-Armstrong going on to say that the appellant told her that Doe "was more than everybody thinks he is – he's got HIV." *Id.* Easter stated that he told Stapleton-Armstrong that he did not want to hear anymore because he was the only employee who was supposed to know that information. *Id.*

¶11 On February 26, 2001, Stapleton-Armstrong and Easter brought the matter to the attention of Pamela K. Thacker, the Assistant Chief of Ambulatory Care at the Gainesville facility. HT 1, Side A; HT 2, Side A; IAF, Tab 3, Subtab 4i. Ms. Thacker stated that Mr. Easter and Ms. Stapleton-Armstrong reported to her that the appellant had improperly disclosed confidential medical information. HT 2, Side A. Based on this report, Thacker asked the appellant to join the meeting. *Id.* Thacker "definitely" recalled the appellant denying at the meeting that she had done a HINQ on Mr. Doe. *Id.* Thacker also said that the appellant denied disclosing any medical information regarding Doe. *Id.*

¶12 The appellant stated that she accessed and printed out a copy of Mr. Doe's HINQ as part of her duties as Means Test Monitor. HT 2, Side B. The appellant said that when she remarked to Terry Schuler, the Acting Lead Clerk, that

Mr. Doe appeared to be a supervisor, Schuler took the record away from her. *Id.* The appellant did not say, however, that she did not look at Doe's record and his diagnosis before Schuler took the file away from her. Indeed, the appellant indicated that she knew Mr. Doe's diagnosis when she stated that she did not reveal the diagnosis to anyone. *Id.* The appellant said that she did not deny doing a HINQ on Mr. Doe when Thacker asked her if she had run a HINQ. *Id.*

¶13 There is no evidence showing that Ms. Stapleton-Armstrong had done a HINQ or accessed Mr. Doe's medical records. Moreover, there is no evidence to show that Stapleton-Armstrong knew of Mr. Doe's medical condition from any other source. Rather, the evidence shows that only two employees – Easter and the appellant – ran a HINQ on Doe and knew from that document that Doe was diagnosed as being HIV positive. Thus, unless we go beyond the evidence and make unwarranted and unsubstantiated assumptions about who else may have done a HINQ on Mr. Doe and who else may have known of that diagnosis, we must conclude that Stapleton-Armstrong learned about the diagnosis either from the appellant or from Easter.

¶14 If we credit the appellant's version of events and conclude that Easter told Stapleton-Armstrong about Doe's medical condition, we would also have to conclude that Easter and Stapleton-Armstrong decided to make up a story that the appellant was the person who revealed that information. If Easter and Stapleton-Armstrong fabricated such a story to incriminate the appellant, there is no evidence showing how they would have known that the appellant ran a HINQ on Mr. Doe so as to make their story believable, or what would have motivated Easter to make up such a story. Easter is a 16-year employee at the Gainesville facility who routinely handles confidential information. HT 2, Sides A and B. There is no evidence showing that Easter has ever breached a patient's confidentiality, or showing why he would have risked his career by revealing confidential information merely to implicate the appellant.

¶15 According to the appellant, Stapleton-Armstrong may have been motivated to get her in trouble because she had reviewed some of Stapleton-Armstrong's work and found several errors that needed a couple of minutes to correct. HT 2, Side A. This hardly seems sufficient to show bias against the appellant, particularly where the alleged errors were not shown either to have impacted Stapleton-Armstrong's performance rating or to have resulted in counseling or discipline. *Id.*

¶16 The record shows that Ms. Thacker was an Assistant Chief with 32 years of agency service. *Id.* There is no evidence showing why Thacker would have taken part in any scheme to implicate the appellant by lying about the appellant's having denied that she had run a HINQ on Mr. Doe.

¶17 The administrative judge discussed evidence regarding the appellant's propensity for telling the truth, in contrast to Ms. Stapleton-Armstrong's veracity. His findings on this point are incomplete and do not accurately reflect the record as a whole.

¶18 Evidence concerning character, particularly evidence regarding a person's veracity, is a factor to consider in assessing a witness's credibility. *Redschlag*, 89 M.S.P.R. 589, ¶ 13. Judy Cox stated that she had been the appellant's supervisor at the Gainesville center ever since the appellant started work there as a temporary employee about 9 years prior to the incident in question. HT 1, Side A. Ms. Cox also worked with Ms. Stapleton-Armstrong. In Cox's opinion, the appellant "was not a reliable source of information." *Id.* The administrative judge noted a statement by Ms. Cox that over the years she had questioned Stapleton-Armstrong's credibility, even to a union official. *Id.*; ID at 3-4. The administrative judge neglected to mention Cox's qualifying statement that "over recent years" she no longer had reason to question Stapleton-Armstrong's truthfulness. HT 1, Side A. In addition, the administrative judge did not mention Cox's opinion regarding the appellant's veracity versus that of Stapleton-Armstrong. Based on what she described as "numerous contacts with

both individuals," Cox was of the view that Stapleton-Armstrong was more credible than the appellant. *Id.*

¶19 The administrative judge also did not mention Ms. Thacker's opinion concerning the respective veracity of the appellant and Stapleton-Armstrong. As a high-level supervisor, Thacker stated that she observed the appellant for the entire 9- or 10-year period during which the appellant worked at the Gainesville facility, and that she observed Stapleton-Armstrong for the 20 years that Stapleton-Armstrong had worked at the facility. HT 2, Side A. Based on her long-term experience with both witnesses, Ms. Thacker opined that Stapleton-Armstrong was an "honest, trustworthy, dependable employee." *Id.* As an example, Thacker stated that Stapleton-Armstrong has always been trusted with safeguarding patients' money and valuables. *Id.* Thacker believed that Stapleton-Armstrong's credibility was "much higher" than the appellant's. *Id.*

¶20 Applying the *Hillen* factors set forth above, a consideration of the entire record leads to the following findings. Ms. Thacker and Ms. Cox both stated that Stapleton-Armstrong had a higher level of credibility than the appellant. There is no evidence that would call into question the integrity or Cox or Thacker. Similarly, there is no evidence to question the character or veracity of Mr. Easter. The record is devoid of anything that would show bias on the part of Easter or Thacker against the appellant, and any motivation on Stapleton-Armstrong's part to lie about the appellant is weak at best.

¶21 The testimony of Stapleton-Armstrong, Easter, and Thacker was consistent with the contemporaneous written reports that they made regarding the incident in question. IAF, Tab 3, Subtabs 4i through 4k. Their individual version of events is also consistent with each of the other witnesses' version of events, with the sole exception of the appellant, whose only explanation for the discrepancy between her version of events and all of the other versions is that Thacker, Easter and Stapleton-Armstrong all have been "untruthful." HT 2, Side B. As explained

above, it is the appellant's version of events which is inherently improbable when the record is examined as a whole.

¶22 The sole *Hillen* factor which might weigh in the appellant's favor is the witnesses' demeanor. The administrative judge indicated that Easter and Stapleton-Armstrong (particularly Easter) appeared "extremely nervous" during the hearing. ID at 4. The administrative judge stated, however, that Stapleton-Armstrong's testimony was "candid and forthright," an observation which seemingly runs contrary to his comment about Stapleton-Armstrong's alleged nervousness. *Id.* That leaves only Easter's alleged nervousness. Even assuming that Easter appeared nervous during his testimony, that fact alone would not outweigh all of the other evidence showing that the agency proved the charge. We therefore sustain the charge. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (the Board may overturn an administrative judge's demeanor-based credibility findings if the Board's reasons for doing so are "sufficiently sound").

The Appellant's Affirmative Defenses

¶23 The administrative judge allowed the appellant to present evidence on her allegation of race and disability discrimination and on her claim of retaliation for "union affiliation." ID at 5. The administrative judge found that the appellant presented no evidence in support of these affirmative defenses. *Id.* He therefore concluded that the appellant failed to meet her burden of proof as to any of the defenses. *Id.*

¶24 The appellant has not filed a petition for review contending error in the administrative judge's findings on her affirmative defenses of discrimination and retaliation, and our review of the record reveals no error in those findings. Thus, we affirm the administrative judge's findings on the appellant's affirmative defenses.

The Penalty

¶25 Because the administrative judge did not sustain the charge, he did not address the penalty. Having sustained the charge, we will now discuss the penalty.

¶26 When, as here, the Board sustains an agency's charge, the Board may mitigate the agency's original penalty to the maximum reasonable penalty only when it finds the agency's original penalty too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The deciding official was Dr. Elwood Headley, M.D., the Director of the North Florida Veterans Health System. HT 1, Side B. Dr. Headley's decision letter mentions the factors he considered in determining a penalty, and he discussed those factors at the hearing.

¶27 Dr. Headley considered the appellant's conduct to be "a very serious offense." *Id.* He explained that confidentiality of patient records and information is "crucial" in the health-care profession. *Id.* According to Dr. Headley, breaches of confidence such as the one here are "very destructive" to the medical service. HT 1, Side B. Dr. Headley stated that agency employees are provided general and specific instructions on the rules of patient confidentiality, and that the appellant never indicated she was not trained in those rules. *Id.* The appellant did not contest that statement.

¶28 Dr. Headley took into account the appellant's 9-plus years of service with the agency, the lack of any prior discipline, and her fully successful performance appraisals. HT 1, Side B; HT 2, Side A. He felt, however, that such a serious breach of confidentiality compromised the potential for the appellant to ever regain the trust of her supervisors and coworkers. HT 1, Side B. He stated that he himself had lost confidence in the appellant's ability to perform her job. *Id.*

¶29 Dr. Headley considered the appellant's potential for rehabilitation. *Id.* He felt that the appellant had a "limited possibility" for rehabilitation because she had denied her actions, including a denial that she had even run a HINQ on Mr. Doe. *Id.* Dr. Headley also consulted the agency's table of penalties for

guidance. *Id.* In particular, Dr. Headley observed that the table, which is designated as a "guide for administering disciple," indicates that removal is an appropriate penalty for a first offense of unauthorized disclosure of confidential information. HT 1, Side B; IAF, Tab 3, Subtab 4p.

¶30 Under the circumstances, we find that the agency's selection of removal as a penalty was not unreasonable. Accordingly, we will not disturb the penalty.

ORDER

¶31 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

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 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.