UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN GALE,

Plaintiff-Petitioner

-against-

MICHAEL CHERTOFF, SECRETARY OF DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY, KIP HAWLEY, ASSISTANT SECRETARY/ ADMINISTRATOR, TRANSPORTATION SECURITY ADMINISTRATION, TRANSPORTATION SECURITY ADMINISTRATION, MERIT SYSTEMS PROTECTION BOARD,

Defendants-Respondents.

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CV 07 5211
IRIZARRY, J.
GO, M.J.

COMPLAINT

____CV____ ( )

JURY TRIAL DEMANDED

The Plaintiff-Petitioner complains of the Defendants as follows:

**JURISDICTION**

1. The court has jurisdiction of this matter pursuant to its Federal Question Jurisdiction of 28 U.S.C. §1331. This case is brought pursuant to 5 U.S.C. §§ 7702 and 7703 for judicial review of a final order of the Merit Systems Protection Board which resulted in the termination of the Plaintiff-Petitioner and because and since

the Plaintiff-Petitioner alleged and alleges that he was discriminated against, based on his race, color and/or national origin. In addition, this case is brought pursuant to 42 U.S.C. §2000e-16.

## VENUE

2. Venue is appropriate pursuant to 28 U.S.C. §1391 because it is the district that the Defendants have a principal place of business and it is the district in which the Plaintiff-Petitioner was employed at the Federal Air Marshal Service a sub-agency of the Department of Homeland Security, 75-20 Astoria Boulevard, Suite 240, East Elmhurst NY 11370. Finally, it is the district the cause of action arose.

## PARTIES

3. The Plaintiff-Petitioner is an individual who resides at 456 Great Beds Court, Perth Amboy, New Jersey. The Plaintiff-Petitioner is an individual. He is an African-American and he was born on

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4. The Defendant-Respondent, Michael Chertoff is the Secretary of the Department of Homeland Security, duly appointed, qualified and acting , and as such Secretary he is the administrative head of the Department of Homeland

Security and is responsible for its acts and omissions, including but not limited to terminating the Plaintiff-Petitioner's employment from the Department of Homeland Security, Transportation Security Administration. He has a principal place of business at 601 South 12th Street, Arlington, Virginia, 22202.

5.The Defendant, The Department of Homeland Security is the agency empowered to defend the United States of America from foreign aggression or attack. It has been empowered by the President and the Congress of the United States for overall responsibility and coordination of many agencies, including but not limited to the Transportation Security Administration to insure the security of the people of the United States of America from outside attack or aggression. It has a principal place of business at 75-20 Astoria Boulevard, East Elmhurst, New York 11370.

6. The Defendant, Kip Hawley is the Assistant Secretary/Administrator of the Transportation Security Administration an agency under the Department of Homeland Security that is empowered and authorized to secure the safety of the United States public when traveling or in transport. As such Defendant Hawley was the senior individual in Mr. Gale's agency. His principal place of business is 601 South 12th Street, Arlington, Virginia, 22202.

7. The Transportation Security Administration is a sub-agency under the

Department of Homeland security responsible for the security and safety of the people of the United States of America while traveling or in transport. It has a principal place of business at 75-20 Astoria Boulevard, Suite 240, East Elmhurst, NY 11370.

8. The Merit Systems Protection Board is the agency that is empowered to hear the appeals of federal civil servants in regards to personnel actions that are taken against them. It has a principal place of business at 26 Federal Plaza, New York, New York.

FACTS

9. In or about September 21, 2001, the Plaintiff-Petitioner John Gale (hereinafter "Gale") applied for the position of Federal Air Marshal (hereinafter "FAM").

10. In or about May 2003, Mr. Gale began working as a FAM. Gale's primary responsibility was to travel of aircraft incognito protecting the traveling public from attack and securing the safety of the traveling public. In this regard, Gale would travel on a regular and ongoing basis on commercial aircrafts.

11. From May 2003 until January 23, 2007, Gale did good work and he

continued to work as a FAM.

12. On or about June 30, 2005, Mr. Gale was falsely accused of brandishing his weapon and harassing a stewardess while he was on a lay over in Los Angeles. In sum and substance Gale was accused of harassing a Mexicana stewardess while he was staying at the Sheraton Four Points Hotel at the Los Angeles airport while he was on a layover waiting to board a plane the following day as a Federal Air Marshal. In addition, Gale was accused of brandishing his weapon and acting in a manner that was "unbecoming a federal air marshal". He was suspended from his job as a FAM and his identification and weapon were taken from him.

13. Gale flew home to New Jersey and on the next available work day his identification and weapon were given back to him and he was told to report back to work and on July 6, 2005, Gale continued working as a FAM, from that day until January 23, 2007 when he was suspended pending an administrative hearing.

14. Gale was not told on July 6, 2005, when he returned to work that he was under a disciplinary cloud and he simply continued to work until he was suspended.

15. Approximately, eighteen months later, on January 23, 2007, Gale was informed that he was being suspended pending a hearing by the Transportation

Security Administration, a sub-agency of the Department of Homeland Security because of the incidents of June 30, 2005 and the fact that he had missed a flight on October 19, 2006. Mr. Gale had continued to work as a FAM from the date of the alleged incident until January 23, 2007, when he was suspended.

16. In or about January 23, 2007, Gale was served with charges in which the Transportation Security Agency demanded his dismissal.

17. Upon information and belief, similarly situated non African-American FAMs that were charged with the same or similar charges, were not charged and/or the discipline of discharge was not demanded.

18. In addition, in the charges the Plaintiff-Petitioner's rights were violated because the Transportation Security Administration did not conflate the charges of similarly situated non African-American Federal Air Marshals which was, upon information and belief a violation of the rules and regulations of the Transportation Security Administration and bundled to prejudice the Plaintiff-Petitioner's rights.

19. In response to the alleged charges which consisted of two sets of charges, to wit: the allegations of conduct unbecoming an officer arising from the incidents of June 30, 2005, and an allegation of missing a flight on October 19, 2006, the Plaintiff-Petitioner, raised the affirmative defense that he was being

treated in a disparate and discriminatory manner because similarly situated non African-American FAMs were not treated in the manner that he was being treated and that the demand for his termination was discriminatory within the context of the facts and circumstances of his case because similarly situated non African-American Federal Air Marshals were not treated in the same manner.

20. Gale's case went to an administrative hearing before Administrative Law Judge JoAnn M. Ruggiero on September 17, 2007. The Plaintiff-Petitioner appeared and objected to, among other things, the multiple hearsay and other violations of evidentiary rules. The Plaintiff-Petitioner also raised the affirmative defense of disparate treatment and specifically preserved the issue that the agency could not prove the burden of proving that his termination affected the efficiency of the service as is required by law.

21. On October 23, 2007, Administrative Law Judge JoAnn M. Ruggiero rendered her decision upholding the charges and upholding the Transportation Administration's demand for Gale's termination. The decision of Administrative Law Judge Ruggiero is attached as Exhibit A.

22. The decision of Administrative Law Judge Ruggiero became final on November 27, 2007.

23. In the decision of the Administrative Law Judge there are many errors of law and procedure, including but not limited to errors of law and procedure such that her decision is both arbitrary and capricious, that the Administrative abused her discretion and was not in accordance with the law, the decision was obtained without the required procedures of law and was not supported by substantive evidence. Among many other issues that the Administrative Law Judge erred on is that the testimony of the Transportation Security Administration witnesses was either utterly incredible and that her findings of fact are not based on substantial evidence. In addition, one of the incorrect holdings of the Administrative Law Judge, among many other holdings, is the fact that the Transportation Security Administration satisfied its burden in regards to proof regarding the efficiency of the service and that Gale had failed to prove his affirmative defense of being treated in a disparate manner and being discriminated against.

24. The actions and omissions of the Department of Homeland Security by the Transportation Security Administration was discriminatory because both in the charges and the manner of prosecution of the case, the Transportation Security Administration and the Department of Homeland security treated the Petitioner and Plaintiff in a disparate manner in that he was treated differently than similarly situated non African-American FAMs.

**FIRST CAUSE OF ACTION**

25. The actions and omissions of the Defendant-Respondents in charging and prosecuting the Plaintiff-Petitioner and the decision of Administrative Law Judge Ruggiero was:

(1) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law;

(2) obtained without procedures required by law, rule or regulation having been followed; and

(3) unsupported by substantial evidence.

26. As a result of the above mentioned violations of law and procedure the Petitioner has been damaged and is requesting review pursuant to 5 U.S.C. §§7702 and 7703 of the Administrative Law Judge's decision and the record to determine that said decision is not, upon review, consistent with the law rules and regulations.

**SECOND CAUSE OF ACTION**

27. Plaintiff-Petitioner repeats and realleges paragraphs one (1) through twenty-six (26) and restates them as paragraph twenty-seven (27) herein.

28. The actions and omissions of the defendant-respondents in the both the manner and procedure of filing the charges and the prosecution of the charges

when similarly situated non African-American FAMs are not treated in such a severe manner, including but not limited to demanding his termination violated the Plaintiff-Petitioner's rights as secured by 42 U.S.C. §2000e-16, in that he was treated in a disparate manner and discriminated against based on his race, color and or national origin and as such he was discriminated against and damaged.

WHEREFORE, the Plaintiff-Petitioner demands the following relief:

(1) As a Petitioner the Plaintiff-Petitioner requests that the court review the decision of the Administrative Law Judge under the authority as stated in

And upon review enter an order reversing the order of the Administrative Law Judge because said decision was in violation of

And upon reversal, the Plaintiff Petition demands full back pay and seniority, reinstatement, and the clearing of his name in any and all respects.

(2) As a Plaintiff whose rights were violated as secured by

Because he was discriminated against based on his race, color or national origin, the Plaintiff-petitioner demands

a. Reinstatement and both preliminary and permanent injunction reinstating him to his job as a federal Air Marshal with full back pay, seniority and any and all other benefits;

(3) Under both causes of action:

a. All costs;

b. Attorney's fees;

c. Interest both pre and post judgment;

d. damages for emotional harm and humiliation and compensatory damages;

e. any and other relief that this court deems is just and appropriate.

Dated: New York, New York
December 13, 2007

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**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**NEW YORK FIELD OFFICE**

JOHN GALE,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-07-0275-I-1

DATE: October 23, 2007

Noah A. Kinigstein, Esq., New York, New York, for the appellant.

Suzette Atkinson, Esq., Arlington, Virginia, for the agency.

**BEFORE**
JoAnn M. Ruggiero
Administrative Judge

## INITIAL DECISION

## INTRODUCTION

By timely appeal, Mr. Gale challenged a decision of the Transportation Security Administration (TSA) to remove him from the position of Federal Air Marshal, New York Field Office, East Elmhurst, New York. *See* Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over the appeal. *See* 49 U.S.C. § 114(n).

At the appellant's request, I held a hearing. *See* IAF, Tab 32. For the reasons explained below, I AFFIRM the agency's decision to remove him.

## ANALYSIS AND FINDINGS

The removal action

On January 18, 2007, the appellant's removal from federal service was proposed by Allen Keaney, Assistant Special Agent in Charge of the New York Field Office of the Federal Air Marshal Service (FAMS). Mr. Keaney's proposal was based on two charges. There was one specification under each charge. *See* IAF, Tab 4, Subtab 4H.

The first charge was labeled "conduct unbecoming a federal air marshal." It involved an incident—actually a series of incidents—that occurred at the Sheraton Four Points Hotel in Los Angeles, California on Thursday, June 30, 2005 while the appellant was on an overnight assignment for the agency. The second charge involved the appellant's missing an assigned flight on Thursday, October 19, 2006. The second charge was labeled "failure to make a scheduled flight mission." *Id.*

The appellant received the notice of proposed removal on January 22, 2007. *Id.* In early February 2007, he responded orally and in writing to Michael Ball, the deciding official. Mr. Ball is the Deputy Special Agent in Charge of the New York Field Office of FAMS. *Id.,* Subtabs 4A and 4D.

On May 31, 2007, Mr. Ball issued his decision. He sustained both charges and determined that the appellant should be removed from federal service. The effective date of the removal action was June 1, 2007. *Id.,* Subtab 4A. This appeal followed. *Id.,* Tab 1.

In an adverse action, the agency has the burden of proving its charges by a preponderance of the evidence[1]. *See Burroughs v. Department of the Army,*

[1] "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 to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

918 F.2d 170, 172 (Fed. Cir. 1990). In addition to proving its charges, the agency must establish that a nexus exists between the misconduct and the efficiency of the service. *See* 5 U.S.C. § 7513(a). Further, the agency must establish that the penalty imposed is reasonable. *See Crawford-Graham v. Department of Veterans Affairs,* 99 M.S.P.R. 389, 396 (2005); *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302-08 (1981).

Background

The record indicates that the appellant began working as a federal air marshal on May 4, 2003. *See* IAF, Tab 4, Subtab 4P. He had prior federal civilian service; he had worked as a correctional officer for the Bureau of Prisons (BOP) at the Metropolitan Detention Center in Brooklyn, New York. According to him, he began working for BOP in 1999 and remained with BOP for two and one-half years. *See* Hearing Tape (HT) 4, Side A.

When he applied for the position of federal air marshal, the appellant revealed that he had been convicted in Brooklyn, New York on January 16, 2002 of driving while intoxicated (DWI). *See* IAF, Tab 9, Attachment 1. It turns out that he was arrested on December 22, 2001 and later pled guilty. *Id.,* Tab 14.

In April 2003, FAMS hired the appellant for the position of federal air marshal despite his January 16, 2002 DWI conviction. *Id.,* Tab 4, Subtab 4P.

The first charge—Conduct unbecoming a federal air marshal

In the specification under the charge, Mr. Keaney, the proposing official, alleged:

> On June 30, 2005, while on an overnight mission, you were involved in a confrontation with a flight attendant at the hotel where you were both staying. The flight attendant accused you of pushing her twice. The second time you allegedly pushed her in the presence of hotel staff who then escorted you to your room. As the hotel staff was escorting you, you allegedly brandished your government issued firearm and flashed your Federal Air Marshal credentials. As a result, hotel security contacted the

> local police department, and police officers were dispatched to your room. The police and hotel staff found you in your room asleep on the bed and still wearing your government issued firearm which was visible. During this entire incident, the flight attendant, hotel staff, and the police all claim that you appeared under the influence of alcohol. Hotel staff and the police also stated that you were belligerent, argumentative, unprofessional, rude, and profane.

*The agency's version*

Howard Okorie, a former security officer at the Sheraton Four Points Hotel in Los Angeles, testified that he was on duty at the hotel on the night of Thursday, June 30, 2005. Mr. Okorie testified that he was called to the Guest Services area in the lobby of the hotel at about 10 p.m. and saw the Guest Services supervisor with a woman who appeared tearful and shaky. Mr. Okorie testified that he asked what was happening, and the supervisor replied that the woman reported having been harassed by a man. Mr. Okorie testified that the woman, a Mexicana Airline flight attendant named [redacted], told him that a man pushed her while she was at a public telephone in the lobby of the hotel and that the man attempted to speak with her. *See* HT 1, Side A.

Mr. Okorie testified that, as [redacted] was explaining what had happened, the appellant tapped him from behind, introduced himself, and tried to explain the situation. Mr. Okorie testified that the appellant held a glass, and he (Mr. Okorie) smelled whiskey in the glass and on the appellant's breath. Mr. Okorie testified that after verifying that the appellant was a guest of the hotel, he asked the appellant to go to his room, but the appellant did not go. Mr. Okorie testified that he then stated he would accompany the appellant to his room and the two of them (Mr. Okorie and the appellant) proceeded to the elevator. (The appellant's room was 635.) Mr. Okorie testified that as they reached the sixth floor, the appellant showed him a gun and a badge. Mr. Okorie testified that the appellant waved his hand with the gun while claiming he was the state and the law and that no one

could touch him. Mr. Okorie testified that the appellant also said "'Fuck that bitch.'" *See* HT 1, Side A.

Mr. Okorie testified that when the door of the elevator opened onto the sixth floor, he requested the appellant to put the gun away and the appellant complied with the request. Mr. Okorie testified that he unlocked the door of the appellant's room; he told the appellant that he would be back; and the appellant told him that he (Mr. Okorie) had fifteen minutes to get the 'bitch' to calm down because he (the appellant) wanted to go back downstairs to the lobby. *Id.*

Mr. Okorie testified that as soon as he left the appellant's room, he informed Sean Carter, the hotel's security director, of the situation involving the appellant. Mr. Okorie testified that Mr. Carter then had one of the employees call the police. Mr. Okorie testified that he had someone monitor Room 635 and that he (Mr. Okorie) was in the lobby of the hotel when two officers of the Los Angeles Police Department (LAPD) arrived. *Id.*

Mr. Okorie testified that the police officers spoke with [redacted] and then requested to go to the appellant's room. Mr. Okorie testified that he and Mr. Carter accompanied the officers to the door of the appellant's room; the officers directed him (Mr. Okorie) to knock on the door; he knocked numerous times and called out, "'Security—open up'"; there was no answer; the officers directed him to open the door with a master key; he opened the door; the officers pulled out their guns and entered the room; he saw the appellant asleep on the bed; the officers tried to rouse the appellant; one officer patted the appellant down and pulled out the appellant's badge and gun; one officer told the other officer that they would have to contact their supervisor because the appellant was a federal law enforcement officer; the officers kept shaking the appellant and eventually he woke up; the appellant had a very aggressive demeanor; the officers questioned the appellant about what happened with [redacted]; the appellant claimed not to know what the officers were talking about; and then the appellant denied bothering the woman. Mr. Okorie testified that he and Mr. Carter went

down to the lobby and he (Mr. Okorie) was told that someone from the appellant's agency was coming to the hotel. *See* HT 1, Side A.

As the story goes, Fred Fukunaga, a supervisory federal air marshal in Irvine, California, was the duty officer that night. According to Mr. Fukunaga, the TSA duty center in Los Angeles called him at approximately 11:30 p.m. and informed him of the incident involving the appellant. Mr. Fukunaga testified that he called FAMS's Mission Operations Center in Washington, D.C. and he called supervisors in Los Angeles; he arrived at the hotel around 1:30 a.m. or 1:45 a.m. on Friday, July 1, 2005 and met with Gregory Probst, the supervisor of the two LAPD officers; and he then spoke with Mr. Okorie, Mr. Carter, the two LAPD officers, and the appellant. Mr. Fukunaga testified that the appellant was disheveled and there was an odor of alcohol on his breath. Mr. Fukunaga testified that the appellant denied brandishing his weapon. Mr. Fukunaga testified that Mr. Carter told him that he did not want the appellant to remain in the hotel. According to Mr. Fukunaga, Mr. Carter explained that Mexicana Airline had a contract with the hotel, and Mr. Carter's superiors were concerned about the potential impact that the incident could have on the relationship between the hotel and the airline. *Id.*, Side B.

Mr. Fukunaga testified that he helped make arrangements for the appellant to go to the Hilton Hotel; he transported the appellant to the Hilton; he spoke by telephone with James Cappiello, the appellant's supervisor in New York; he (Mr. Fukunaga) took the appellant's gun and gave it to the appellant's co-worker, Eric Rowley; and he (Mr. Fukunaga) informed Mr. Cappiello that the appellant would return to New York on July 1, 2005 in a non-mission status. *Id.*

Mr. Okorie testified that Mr. Fukunaga questioned him about his encounter with the appellant. He testified that Mr. Fukunaga asked him whether the appellant pointed the gun at him, and he replied that the appellant did not but waved his hand while holding the gun. He testified that Mr. Fukunaga asked him whether he wanted to press charges. He testified that he and Mr. Carter told

Mr. Fukunaga that they wanted the appellant to leave the hotel, and he (Mr. Okorie) suggested that Mr. Fukunaga ask [redacted] whether she wished to press charges. *See* HT 1, Side A.

Mr. Okorie testified that after his conversation with Mr. Fukunaga, he had to write an incident report for the hotel. He testified that it was getting close to 3 a.m. on July 1, 2005 when he wrote the report. *Id.* A copy of Mr. Okorie's report is in the record, and it is essentially consistent with his testimony. *See* IAF, Tab 14, Subtab 4L at 000057.

*The appellant's version*

The appellant testified that on June 30, 2005, he arrived at the Sheraton around 3 p.m. or 4 p.m. and went for dinner in the hotel around 5 p.m. He testified that after he had dinner, he noticed a lot of people in the lounge, patio, and bar areas and he found out that they were attending a teachers' convention. He testified that he mingled with some people; he used his computer; he had some beers; and he had Scotch whiskey with some people who ordered a round of drinks. *See* HT 4, Side A.

The appellant testified that at some point before 9:30 p.m., he decided to go to a restaurant a block away from the hotel. He testified that he put the computer in his room; he went back downstairs; and as he was about to walk out of the hotel, he noticed an attractive woman at a telephone booth. He testified that he did not believe that she was using the telephone. He testified that he tapped her gently and introduced himself to her. He testified that she became upset and yelled, "'Don't touch me!'" He testified that he put his hands up and told her that he did not mean to offend her, but she yelled and ran to the front desk. *Id.*

The appellant testified that in an attempt to de-escalate the situation, he approached Mr. Okorie and stated that he was trying to meet the lady. He testified that Mr. Okorie asked him to take a walk with him, and they went toward the elevator. He testified that, contrary to Mr. Okorie's statements, there was no glass

in his hand at that time; he testified that he finished drinking before he brought the computer back to his room. He testified that as he spoke with Mr. Okorie, he put his hand in his back pocket and took out his FAMS credentials. He testified that when he pulled out his credentials, the holster started dropping into his pants. He testified that he pulled up the gun and the holster, and Mr. Okorie looked at him as though he were crazy. He testified that he stuck the gun in his waistband without the holster; he covered it with his shirt; and Mr. Okorie saw what was happening, but did not say anything. He testified that he then told Mr. Okorie that he had to go to the men's room. He testified that he went to the men's room in the lobby of the hotel; he readjusted the gun and the holster; he returned to the area by the elevators; Mr. Okorie was gone; he (the appellant) took the elevator by himself and returned to Room 635 by himself; he put the television on; and he fell asleep on the bed. *See* HT 4, Side A.

The appellant denied referring to [redacted] as a bitch and denied claiming that he was the state and the law. He testified that he was never with Mr. Okorie in the elevator; he never waved the gun around; and Mr. Okorie never escorted him to his room. *Id.*

The appellant testified that around midnight, he woke up and saw people in his room. He testified that he did not know what was going on and he sprung up off the bed so he could read the badge of one of the LAPD officers. He testified that the officers kept telling him that they were not going to arrest him. He testified that they told him there were allegations that he hit a woman and waved the gun around. He testified that he told them that the allegations were untrue, and he and the officers then engaged in law enforcement "shop talk" until Mr. Fukunaga arrived. He testified that Mr. Fukunaga told him that because of the allegations regarding the drinking and the weapon, he (Mr. Fukunaga) had to take the weapon and he (the appellant) had to leave the hotel. *Id.*

The appellant testified that it must have been around 3 a.m. when they arrived at the Hilton; Mr. Fukunaga escorted him to his room; and Mr. Fukunaga

called Mr. Cappiello and Mr. Ball. The appellant testified that he and Mr. Rowley flew back to New York in non-mission status on July 1, 2005; he (the appellant) had his regularly scheduled days off on Saturday (July 2, 2005) and Sunday (July 3, 2005); he was off duty on Monday for the Fourth of July holiday; Tuesday, July 5, 2005 was a scheduled training day; on July 5, 2005, he submitted a memorandum about the incident to Mr. Cappiello to give to Felix Jimenez, Special Agent in Charge of the New York Field Office; and on Wednesday, July 6, 2005, he (the appellant) got his weapon back and was allowed to resume his duties as a federal air marshal. *See* HT 4, Side A.

The appellant testified that Mr. Jimenez told him that he had not received anything about the matter from headquarters and therefore he (the appellant) could return to work. The appellant testified that he knew the matter was under investigation because Mr. Cappiello alluded to it on performance evaluations. He testified that he nevertheless was allowed to continue working and even served as a team leader on international flights. *Id.*

The appellant testified that in February 2006, he was interviewed by Luis Velasquez of the Internal Affairs Division of TSA's Office of Inspection. He testified that in addition to the oral statement, he gave Mr. Velasquez a written statement. *Id.* A copy of the appellant's February 7, 2006 statement to Mr. Velasquez is in the record as is the appellant's undated statement to Mr. Jimenez. *See* IAF, Tab 14, Subtab 4L at 000077-000083.

When asked whether he believed he had a drinking problem, the appellant testified that he did not. *See* HT 4, Side B.

*The investigation*

Mr. Velasquez testified that the matter was assigned to him in January 2006. He testified that the reason for the delay was that the matter was initially assigned to the Office of Professional Responsibility of Immigration and Customs Enforcement (ICE) because FAMS was part of ICE at the time of the incident, but

FAMS became part of TSA in late 2005 and the matter was then transferred to TSA's Office of Inspection. *See* HT 2, Side A.

Mr. Velasquez testified that he interviewed Mr. Carter, Mr. Fukunaga, Mr. Okorie, Mr. Cappiello, the appellant, [redacted] Attila Kreidl (one of the LAPD officers), and Mr. Probst. A copy of Mr. Velasquez's memoranda of interviews is in the record. *See* IAF, Tab 14, Subtab 4L.

According to Mr. Velasquez's memoranda, Mr. Carter, Mr. Fukunaga, Mr. Okurie, [redacted], Mr. Kreidl, and Mr. Probst stated that the appellant appeared to be under the influence of alcohol at the time in question. *Id.* Mr. Velasquez testified that he asked the appellant whether he thought he had a drinking problem and the appellant denied that he did. *Id.,* HT 2, Side A.

Mr. Velasquez testified that he visited the Sheraton Four Points Hotel and that there were no cameras in the elevator, but there were cameras in some areas of the lobby. He testified that he asked Mr. Carter about surveillance video of the incident. He testified that Mr. Carter told him that if there had been any videotape of the incident, it would no longer be available because of the period of time that elapsed. *Id.,* Sides A and B.

The first charge must be upheld.

The agency proved the first charge by a preponderance of the evidence. I found Mr. Okorie's version of what occurred to be much more credible than the appellant's version.

Mr. Okorie's testimony was consistent with the report that he wrote on the morning of July 1, 2005 shortly after his encounter with the appellant. Moreover, Mr. Okorie did not seem to have a motive to cause trouble for the appellant. Both Mr. Okorie and the appellant testified that they did not know each other before the night of June 30, 2005. *See* HT 1, Side A and HT 4, Side A. The appellant testified that he had no idea why Mr. Okorie would make false statements about him. *See* HT 4, Side B. However, counsel for the appellant argued that because of

the contract between the Sheraton and Mexicana Airline, Mr. Okorie had reason to embellish the story so that there would be an excuse to put the appellant out of the hotel. *See* IAF, Tab 34. I do not agree with counsel's argument. Mr. Okorie testified credibly that he personally was not worried about the contract; all guests of the hotel were the same to him; and he did not get a commission based on "contract" guests. *See* HT 1, Side A.

Even if one accepts counsel's argument that Mr. Okorie had a motive to be less than candid about happened, the point remains that other individuals who had no such motive made statements to Mr. Velasquez that were unfavorable to the appellant. For example, Mr. Probst of LAPD stated that he believed that the appellant was intoxicated. *See* IAF, Tab 14, Subtab 4L at 000019. Mr. Kreidl of LAPD stated that the appellant cursed him and his partner and appeared to be under the influence of alcohol. *Id.* at 000022-000023.

Further, I note that the memorandum that the appellant prepared for Mr. Jimenez in early July 2005 differed in various respects from the appellant's testimony during the hearing. In the memorandum, the appellant did not state that he had been drinking on the night of June 30, 2005. In the memorandum, the appellant did not state that he left Mr. Okorie by the elevator to go to the men's room. There was also a conflict as to when the appellant approached [redacted]. He testified that he approached her just as he was about to leave the Sheraton to go out to a restaurant. In the memorandum to Mr. Jimenez, however, the appellant stated that he approached [redacted] when he was waiting for an elevator to return to his room. *Id.* at 000082.

In view of the foregoing, the first charge is SUSTAINED.

The second charge—Failure to make a scheduled mission

In the specification under the charge, Mr. Keaney, the proposing official, alleged:

> On October 19, 2006, while on the last part of a four-part mission, you left the gate area to use the terminal restroom unbeknownst to your partner. By the time you returned from the restroom, the plane had departed and you missed the flight.

*See* IAF, Tab 4, Subtab 4H.

The flight in question was a Delta flight from Washington, D.C. to New York City. *See* HT 2, Side B. Richard Bradish, the appellant's partner on October 19, 2006, testified that when he took his seat on the plane, he did not see the appellant and assumed that the appellant was in a lavatory on the plane. Mr. Bradish testified that after the door closed, a flight attendant told him that the appellant was not on the plane. Mr. Bradish testified that the appellant did not tell him that he was leaving the gate area. *Id.*

The appellant acknowledged missing the flight. He testified that he did not tell Mr. Bradish that he was going to the men's room. He testified that when he returned from the men's room, he waited. He testified that when he heard an announcement regarding another flight, he inquired about the flight to which he was assigned and was told that that flight had already departed. *See* HT 4, Side A.

The second charge must be upheld.

Based on the testimony of Mr. Bradish and the appellant, the second charge is SUSTAINED.

Affirmative defenses

*Race discrimination*

On his appeal form, the appellant who is African-American alleged that the penalty of removal was disproportionately harsh when compared with the treatment of similarly situated federal air marshals who are not African-American. *See* IAF, Tab 1. I informed him about what he would have to show in order to establish the affirmative defense of race discrimination. *Id.*, Tab 7.

procedures; rather, it involves the merits of the agency's action. It involves the issue of whether the agency was able to prove the first charge. *See Boatman v. Department of Justice,* 66 M.S.P.R. 58, 64 (1994). Therefore, the affirmative defense of harmful error is REJECTED.

*The appellant did NOT assert the affirmative defense of disability discrimination.*

The appellant maintains that he does not have an alcohol problem. *See* HT 4, Side A. Moreover, agencies are no longer obligated by the Rehabilitation Act to offer a firm choice of treatment to alcoholic employees before imposing discipline for their misconduct. *See Kimble v. Department of the Navy,* 70 M.S.P.R. 617, 620 (1996).

Nevertheless, drinking can be symptomatic of conditions such as depression, and I advised the appellant as to what he would have to show in order to establish disability discrimination. *See* IAF, Tab 22. I also explained that a medical condition can be a mitigating factor under *Douglas.* Citing *Bond v. Department of Energy,* 82 M.S.P.R. 534, 544 (1999), I stated that evidence indicating that an employee's medical condition played a role in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor. *Id.*

Efficiency of the service

An agency may take an adverse action against an employee only for such cause as will promote the efficiency of the service. *See* 5 U.S.C. § 7513(a). The agency has met its burden in this regard. The appellant's act of waving his weapon around on the night of June 30, 2005 raises serious doubts as to his judgment. Moreover, his boorish behavior caused embarrassment to the agency. Employees of various entities outside the agency—LAPD, Mexicana Airline, and the Sheraton—observed the appellant behave in a manner totally unlike that of a law enforcement officer. Moreover, the appellant's missing his assigned flight on

October 19, 2006 compromised the safety of Mr. Bradish, the crew, and the passengers.

Penalty

Where the Board sustains the charges and underlying specifications, it will defer to the agency's penalty decision unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is so harsh and unconscionably disproportionate to the offenses that it amounts to an abuse of discretion. That is because the agency has primary discretion in maintaining employee discipline and efficiency. *See Jones v. United States Postal Service,* 103 M.S.P.R. 561, 568 (2006). The Board will not displace management's responsibility, but will instead ensure that managerial judgment has been properly exercised. *Id.*

At the time of his removal, the appellant had approximately six and one-half years of federal civilian service, four of which were with FAMS. *See* IAF, Tab 4, Subtab 4P and HT 4, Side A. His prior disciplinary record consists of a letter of warning dated December 1, 2005 and a one-day suspension which was imposed on October 22, 2006. *Id.,* Subtabs 4K and 4M..

Under *Bolling v. Department of the Air Force,* 9 M.S.P.R. 335, 340 (1981), when an agency relies on past discipline to support the disciplinary action that is being appealed, the Board will generally review the past discipline to determine whether: (1) the employee was informed of the action in writing; (2) the employee had an opportunity to have the action reviewed on the merits by an authority different from the one who took the action; and (3) the action was made a matter of record. If those three criteria are met, the Board will discount the past discipline only if the Board is left with the definite and firm conviction that a mistake was committed. *See Rosenberg v. Department of Transportation,* 105 M.S.P.R. 130, 144 (2007).

Mr. Ball issued the December 1, 2005 letter of warning to the appellant because of an incident that occurred on August 23, 2005 in Millbrae, California; Mr. Ball stated that the appellant had behaved unprofessionally. The record indicates that the appellant was stopped by police because of a report that a "suspicious" person was observed jumping into traffic and then was observed getting into the automobile of an elderly woman. A police officer indicated that the appellant, who eventually identified himself as a federal air marshal, had been drinking and accepted a ride from an elderly woman when he was unable to get a cab. *See* IAF, Tab 4, Subtab 4M.

The appellant argued that because he was not arrested or ticketed by the police in Millbrae, he should not have been given the letter of warning. *Id.,* Tab 34.

The three criteria under *Bolling* were met. *Id.,* Tab 4, Subtab 4M. I am not left with a definite and firm conviction that the agency erred in issuing the letter of warning to the appellant. The fact that the appellant was not arrested or given a ticket by Millbrae police does not mean that he could not be disciplined by his agency.

As for the one-day suspension on October 22, 2006, the record indicates that it was imposed because the appellant lost an agency issued device—a "personal digital assistant" (PDA)—and delayed in reporting the loss of the PDA. *See* IAF, Tab 4, Subtab 4K.

The appellant argued that the one-day suspension should not be considered because the agency determined that the loss of the PDA was not due to the appellant's negligence; the agency required him to pay for the lost PDA; and the agency eventually decided to refund the money to him. *Id.,* Tab 34.

The three criteria under *Bolling* were met. *Id.,* Tab 4, Subtab 4K. I am not left with a definite and firm conviction that the agency erred in imposing the one-day suspension on the appellant. The record indicates that he delayed in reporting the loss of the PDA. His having to pay for the lost device was not a punishment;

it was to cover the cost of the lost device. The agency's decision to refund the money was based on a change of policy and it applied to all federal air marshals who had paid for PDA's that they lost. *See* HT 3, Side A.

The appellant has made much of the fact that he was allowed to work from July 6, 2005 (shortly after the incident at the Sheraton in Los Angeles) until January 2007 when the agency decided to initiate removal proceedings. *See* IAF, Tab 34. In *Edwards v. Department of the Army,* 87 M.S.P.R. 27, 31 (2000), *aff'd sub nom. Rodriguez v. Department of the Army,* 25 F. App'x 848 (Fed. Cir. 2001), the Board rejected such an argument; the Board stated that the fact that the appellant resumed work after the misconduct in no way diminishes the seriousness of the misconduct.

Mr. Keaney, the proposing official, testified that at the time of the Sheraton incident, he was not in the appellant's supervisory chain of command and had no role in the July 6, 2005 decision to give the appellant back his weapon and return him to duty. *See* HT 2, Side B and HT 3, Side A. Mr. Keaney testified that he believed that the reason the appellant was allowed to resume work pending the investigation was that he had not been arrested. Mr. Keaney testified that FAMS's New York Field Office had no control over the investigation. He testified that he did not receive Mr. Velasquez's report until August 2006; he (Mr. Keaney) made a recommendation by telephone to the Policy Compliance Unit (PCU) in Washington, D.C.; and he did not receive a response from PCU until almost January 2007. *Id.*

Mr. Ball, the deciding official, testified that he was in the appellant's supervisory chain of command at the time of the incident. Mr. Ball testified that the decision to return the appellant to duty on July 6, 2005 was made by Mr. Jimenez and an official in headquarters, George Papantonio. Mr. Ball testified that he believed that Mr. Papantonio conferred with other "headquarters elements." Mr. Ball testified that he (Mr. Ball) did not know of the appellant's 2002 DWI conviction until February 2006. *See* HT 3, Sides A and B.

The fact that management exercised poor judgment in allowing the appellant to resume work on July 6, 2005 does not diminish the seriousness of his misconduct. *See Edwards,* 87 M.S.P.R. at 31. Law enforcement officers are held to a higher standard of conduct with regard to the seriousness of their offenses. *See Todd v. Department of Justice,* 71 M.S.P.R. 326, 330 (1996). As a federal air marshal, the appellant held a position of trust and responsibility. The very nature of his work—protecting the flying public from acts of terrorism—renders the sustained misconduct even more serious.

Having reviewed the record, I find that the penalty of removal—albeit harsh—is within the limits of reasonableness. *See Douglas,* 5 M.S.P.R. at 306.

## DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

JoAnn M. Ruggiero
Administrative Judge

## NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

## NOTICE TO APPELLANT

This initial decision will become final on **November 27, 2007** 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. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. 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 more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date 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 e-mail 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. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW**

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

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

**JUDICIAL REVIEW**

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the