UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MITCHELL A. LEVINSKY,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
NY-0752-03-0329-I-1

DATE: September 9, 2005

Lawrence Berger, Esquire, Garden City, New York, for the appellant.

Elizabeth Goitein, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision ordering it to mitigate the appellant's removal to a 60-day suspension. For the reasons stated below, the petition is GRANTED, and the initial decision is AFFIRMED as MODIFIED by this Opinion and Order. The appellant's removal is SUSTAINED.

BACKGROUND

¶2 The agency's Executive Office for Immigration Review (EOIR) employed the appellant as an immigration judge beginning in November 1995. Agency File, Tab 4h, Subtab F10 (the appellant's unsworn declaration of Aug. 7, 2000) at 1; *id.*, Tab 4a (form documenting the

appellant's removal); *id.*, Tab 4c (transcript of the appellant's oral response to the proposal to remove him) at 6-8.[1] Beginning in August 1996, the appellant's full-time duty station was at the Downstate Correctional Facility (DCF) in Fishkill, New York, a maximum security prison. *Id.*, Tab 4h, Subtab F10 at 1; *id.*, Tab 4i, Subtab 24 at 1.[2] While he was employed at that location, the appellant was responsible for conducting hearings in the cases of aliens who had been convicted of serious felony offenses, and for deciding whether those persons should be deported or permitted to remain in the United States. Agency File, Tab 4i, Subtab 24 at 1.

¶3 In September 1998, Mercedes Cesaratto began working at DCF as an Immigration and Naturalization Service (INS) trial attorney. Agency File, Tab 4h, Subtab F1 (Cesaratto affidavit) at 2. Sometime prior to October 27, 1999, her second-level supervisor, INS's New York District Counsel, advised EOIR's Assistant Chief Immigration Judge that Ms. Cesaratto had raised allegations of misconduct on the part of the appellant; and on November 15, he referred Ms. Cesaratto's allegations to the agency's Office of Professional Responsibility (OPR). OPR Investigative Report at 1, Agency File, Tab 4f; Agency File, Tab 4h, Subtab F9 (Meyers affidavit at 1-2); *id.*, Tab 4i, Subtab 2 (District Counsel's letter of Oct. 27, 1999). EOIR (through a contract investigator) and OPR conducted separate investigations of the complaint, along with investigations of allegations by the appellant of impropriety by Ms. Cesaratto; on March 28, 2000, Ms. Cesaratto filed a discrimination complaint in which she alleged that the appellant had discriminated against her on the bases of sex, religion (Catholic), and race and national origin (which she identified as Hispanic) by "subject[ing her] to a continuously hostile and discriminatory work environment"; and a contractor employed by INS's Equal Employment Opportunity (EEO) Office investigated that complaint. OPR Investigative Report at 2-4;

Discrimination Complaint, Agency File, Tab 4h, Subtab A; EOIR Investigative Report, Agency File, Tab 4i.

¶4 The EOIR investigative report was issued on May 12, 2000, and a copy of the report on the investigation of the discrimination complaint was forwarded to Ms. Cesaratto on November 29, 2000. EOIR Investigative Report at 1-2. While the report of the discrimination complaint investigation did not include any findings or conclusions, the EOIR investigative report included a finding that the appellant had "personal mannerisms and exercise[d] verbal communication that appear to be inappropriate and offensive to INS employees …." EOIR Investigative Report at 4. On April 24, 2001, the INS EEO Office issued a final agency decision finding that the appellant had subjected Ms. Cesaratto to a discriminatory hostile work environment and that Ms. Cesaratto therefore was entitled to relief. Agency File, Tab 4g at 1, 18-26. In the letter by which it forwarded a copy of the decision to EOIR's EEO Officer, the complaint adjudication officer warned that EOIR could be held liable in a future discrimination complaint against the appellant if the conduct found to have occurred continued and if EOIR failed to take appropriate action related to that conduct. Agency File, Tab 4g at 27. (memorandum of Apr. 24, 2001, from complaint adjudication officer to EOIR EEO Officer). In July 2001, the agency placed the appellant on administrative leave. Appeal File, Tab 29 (agency prehearing submission at 11-12). Sometime after this action, Ms. Cesaratto filed a civil action in a federal district court, seeking damages for injuries she allegedly sustained as a result of the appellant's actions; and on January 31, 2002, she and the agency entered into an agreement settling the complaint. OPR Investigative Report at 3-4. Under the agreement, the agency was to pay Ms. Cesaratto $60,370; she was not to be required to appear before the appellant or to be assigned to any facility where the appellant was assigned; and, if necessary to comply with these

terms, the appellant was to be assigned to another immigration court. Settlement Agreement at 2, 4, Agency File, Tab 4e.

¶5 On September 23, 2002, OPR issued the report of its investigation of Ms. Cesaratto's allegations. OPR Investigative Report at 1. In that report, it found that the evidence regarding some of the allegations showed that the appellant either engaged in professional misconduct or exercised poor judgment with respect to some matters and that the evidence regarding other allegations did not support a finding of wrongdoing. *Id.* at 4-6, 65-67. It also recommended that the appellant be suspended for 7 to 20 days, that he receive "sensitivity training," and that EOIR managers regularly monitor his courtroom behavior. *Id.* at 6, 67.[3]

¶6 Two months later, on November 4, 2002, the appellant's second-level supervisor proposed to remove the appellant for (1) repeated use of sexist and ethnically insensitive generalizations and (2) repeated use of profanity. Proposal Notice, Agency File, Tab 4e. The Associate Deputy Attorney General, who acted as the agency's deciding official in the case, subsequently sustained both charges, and the appellant was removed effective July 1, 2003. Removal Decision Notice, Agency File, Tab 4b; *id.*, Tab 4a (form documenting the appellant's removal).

¶7 The appellant appealed his removal to the Board's New York Field Office; and, after a hearing, the administrative judge assigned to the case issued an initial decision sustaining all but one specification of the charge of using sexist and ethnically insensitive generalizations, sustaining both charges, finding that the agency had neither denied the appellant his due process rights nor committed harmful procedural error in removing him, but finding further that the maximum reasonable penalty for the appellant's offenses was a 60-day suspension. Appeal File, Tab 1; Initial Decision, *id.*, Tab 36.

¶8 The agency has filed a timely petition for review of the initial decision, arguing that the administrative judge erred in mitigating the penalty and in failing to sustain all the specifications of the first charge. Petition for Review (PFR), PFR File, Tab 1. The appellant has filed a timely response to the petition. *Id.*, Tab 3.[4]

ANALYSIS

Whether the administrative judge erred in declining to sustain all specifications of the charge of repeatedly using sexist and ethnically insensitive generalizations

¶9 In the first charge, i.e., the charge of repeatedly using sexist and ethnically insensitive generalizations, the agency alleged that the appellant had made "statements to the effect that: women are inherently homosexual …; all Colombians and Cubans are drug dealers …; Mexicans are drunks …; Salvadorans prefer incest …; Dominican women will have children with anyone …; Poles drink too much …; Chinese are kidnappers …; Jamaicans, Dominicans and Cubans are murderers …; Jamaican women make good housekeepers and nannies …; and [the appellant did] not like Japanese people …." The appellant denied that he had made these statements; he alleged before the administrative judge that, to the extent he had made comments linking the behavior or characteristics mentioned above with various categories of people, he had been referring to his personal observations regarding those criminal aliens who had appeared before him; and he alleged further that, to the extent he had made remarks critical of Japanese people, he had been referring to "atrocities committed by Imperial Japan in World War II." *E.g.*, Appellant's Post-Hearing Brief at 10-12, Appeal File, Tab 34. He also indicated that his comments were made during "off-the-record courtroom banter among the courtroom staff" and that they accurately reflected conviction patterns of the aliens whose cases he

handled; and he argued that the agency failed to show that he was biased in his treatment of aliens, that he appeared to be biased, or that he had offended any aliens. *Id.* at 5, 10, 14-15.

¶10 The administrative judge did not sustain the specification in which the appellant was alleged to have made a statement to the effect that Dominican women would have children with anyone. In addressing this specification, he noted that the agency had presented the testimony of Ms. Cesaratto, the employee who had complained of the appellant's actions and allegedly discriminatory treatment of her; and he described Ms. Cesaratto as having testified that the appellant stated that, in order to have more children, he would "have to go to the Dominican Republic and get myself a Dominican woman because they'll have children with anyone." Initial Decision at 32-33 (quoting Hearing Transcript (H.T.) at 40. He also indicated that he did not find the testimony credible because the statement Ms. Cesaratto attributed to the appellant was self-deprecating, and because he did "not find that [the appellant was] prone to making self-deprecating statements." Initial Decision at 33.

¶11 The agency argues that this finding is erroneous. It asserts that, "while a comment deriding certain women who are potential sexual partners as 'loose' could conceivably be viewed as reflecting on the speaker's own sexual desperation, the speaker generally intends these comments to insult the women rather than himself." PFR at 23 n.5.

¶12 The agency's argument is not persuasive. The administrative judge did not find that the self-deprecating aspect of the appellant's alleged statement was inconsistent with a finding that the remarks were also insulting to Dominican women. Instead, he indicated that Ms. Cesaratto's account of the alleged statement was not credible because it depicted the appellant as making a self-deprecating statement. Initial Decision at 33.

¶13 We note further that the finding that the appellant was not "prone to making" such statements was based in part on the administrative judge's observations of the appellant's demeanor. Our reviewing court has held that the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). It has held further that the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Id.* The agency does not challenge the administrative judge's finding that the appellant was not prone to making self-deprecating statements. In fact, it has raised no arguments in opposition to the administrative judge's analysis of this specification other than the argument described above. Moreover, the administrative judge found that the other agency witnesses had not specifically addressed the specification, and he indicated that he found the appellant's testimony on the subject was credible. *See* Initial Decision at 33. Under these circumstances, we find no basis for disturbing the administrative judge's finding regarding this specification.[5]

Whether the administrative judge erred in mitigating the appellant's removal to a 60-day suspension

¶14 The Board will review an agency-imposed penalty only to determine whether the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). When the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

¶15 In this case, the administrative judge's decision to mitigate the removal was based in part on his finding that the agency had relied on misconduct with which the appellant had not been charged. Initial Decision at 74. That is, he found "credible evidence" that INS's conclusion that the appellant had discriminated against Ms. Cesaratto was a significant factor in the decision to remove the appellant, and he indicated that consideration of this factor was improper because the appellant "was not charged with that misconduct." *Id.* He also found that the deciding official had failed to give proper weight to the appellant's good behavior during the 20-month period prior to his removal, and to the potential for rehabilitation that this behavior demonstrated. *Id.* Based on these factors, the absence of a prior disciplinary record, "the appellant's repeated expressions of remorse and contrition," his length of service with the agency and the federal government, the absence of malicious intent, and the appellant's "unquestioned performance of his duties on the bench," the administrative judge found that the maximum reasonable penalty for the appellant's offenses was a 60-day suspension. *Id.* (emphasis in the original).

¶16 In its petition for review, the agency alleges that the deciding official did not rely on the finding of discrimination. PFR at 60.[6] For the reasons stated below, we agree.

¶17 The INS's decision on Ms. Cesaratto's discrimination complaint is included in the file the agency submitted in response to the appellant's appeal; the agency therefore appears to have regarded the decision as relevant to the removal decision; and the deciding official testified that he read the report of the investigation of that complaint. Agency File, Tab 4g; H.T. at 417. Nothing in the record, however, indicates that the finding of discrimination was a material factor in the deciding official's penalty determination. Although the decision notice is fairly lengthy, and although

it addresses in some detail both the reasons for sustaining the charges and the reasons for finding that removal was warranted, it includes no mention of the finding of discrimination, of the lawsuit, or of any costs associated with the discrimination claim. Moreover, the deciding official testified unequivocally that he did not consider the settlement agreement or the other "administrative difficulties" mentioned in the proposal notice in making his penalty determination, that he instead decided to disregard them, and that he considered nothing other than the "specific utterances" and instances of profanity that were cited as bases for the charges. H.T. at 471-74. As the administrative judge indicated, Initial Decision at 65-66, the appellant did not rebut this testimony.

¶18 The agency also challenges the administrative judge's finding that the deciding official failed to give proper consideration to the appellant's potential for rehabilitation. PFR at 38-53; *see Douglas*, 5 M.S.P.R. at 305 (the potential for the employee's rehabilitation is a factor relevant in assessing the reasonableness of the agency's penalty selection).

¶19 As the administrative judge noted, Initial Decision at 62, and as the facts described above indicate, the agency did not place the appellant on administrative leave until July 2001, about 20 months after November 1999, when Ms. Cesaratto's allegations of misconduct were referred to OPR for investigation. The appellant has alleged that his performance during this 20-month period, after Ms. Cesaratto's allegations put him on notice of the need to avoid profanity and comments that could be regarded as ethnically insensitive, was "stellar," and that there were no complaints about his performance during that period. Appeal File, Tab 34 (appellant's post-hearing brief at 5-6). Moreover, he has noted that the proposing official issued a memorandum to staff members on May 8, 2001, in which he "ask[ed] each court employee to let [him] know if … conduct [such as the

use of profanity and the making of racist, sexist, or ethnically offensive remarks] continued into this past year or beyond …," and he has asserted that no complaints were made in response to this request. *Id.* at 6, 17-18; *see* Appeal File, Tab 30, Appellant's Ex. C (memorandum of May 8, 2001).

¶20 We have indicated above that the appellant was charged with offenses that were "repeated," and that he has been found to have engaged in those offenses on numerous occasions. His ability to refrain from engaging in similar behavior over an extended period of time therefore could be regarded under some circumstances as significant evidence that his potential for rehabilitation is good. Moreover, the agency has not identified any occasions after November 1999 when the appellant used profanity or made sexist, racist, or ethnically insensitive remarks, and it has presented no persuasive evidence that the appellant continued to engage in this behavior after he learned of Ms. Cesaratto's complaint.[7] Instead, it has taken the position that any "evidence of a temporary improvement in behavior … would not necessarily signal the potential for permanent rehabilitation" because, as the deciding official testified, employees "under surveillance so to speak" could be expected to "alter their behavior for as long as they think necessary." PFR at 42 (quoting H.T. at 482).

¶21 We believe the agency's reservations about the significance of the appellant's apparent efforts to modify his behavior are reasonable. The appellant had been warned on previous occasions that his profanity and his comments regarding various nationalities could be regarded as offensive, and any effect these warnings may have had evidently was only temporary. For example, he acknowledged realizing that his use of profane language offended one of the legal technicians assigned to work in his courtroom; and, although he indicated that he had therefore refrained from using that kind of language in her presence, the technician testified that his efforts to

do so "didn't last." Agency File, Tab 4c (transcript of appellant's oral reply to removal proposal) at 97-98; H.T. at 186-87 (testimony of V. Anderson).[8] The same witness testified that she heard Ms. Cesaratto complain about the appellant's use of profanity, and that, although the appellant modified his behavior in Ms. Cesaratto's presence, there was no change in his behavior in the presence of others. H.T. at 187-88. Moreover, Ms. Cesaratto's supervisor, who had previously served as an INS trial attorney before the appellant, testified that he had told the appellant "on perhaps two occasions" that he should "watch his Ps and Qs," and that, although the appellant's behavior in the courtroom "improved for a period of time[,] … he reverted back." H.T. at 260-61.

¶22 In addition, another official who had served as a trial attorney before the appellant, who had been assigned to DCF in 1998, and who had therefore tried cases before the appellant, testified that the appellant had frequently made comments linking various nationalities or ethnic groups with various kinds of cases; that the witness had regarded these comments as "potentially harmful to [the appellant] in his capacity as a seated judge"; and that he had "implor[ed]" the appellant, on at least two occasions, to stop making those comments. H.T. at 548-49, 554-56; *see id.* at 562-63. He testified further that he told the appellant that he thought the comments were unprofessional, inflammatory, and self-destructive, and that on at least one occasion the appellant told him that he "was probably right." *Id.* at 563. According to that witness, the appellant's conduct improved after these conversations, but "the improvement would be … brief and fleeting." *Id.*

¶23 Under the circumstances described above, we find that the appellant's potential for long-term rehabilitation is, despite his apparently successful

efforts to modify his behavior after learning of Ms. Cesaratto's complaint, somewhat uncertain.

¶24 Another factor relevant for consideration in assessing the reasonableness of the agency-imposed penalty is the nature and seriousness of the offenses, and their relationship to the employee's duties, position, and responsibilities. *Douglas*, 5 M.S.P.R. at 305. The Board has indicated that it will consider, in connection with this factor, whether the offenses were committed maliciously. *Id.*

¶25 As the administrative judge indicated, the appellant did not act with malicious intent in using profanity in his courtroom. The record indicates instead that his use of such language was a habit for him. *See, e.g.*, EOIR Investigative File, Tab 26 (declaration in which J. Opaciuch stated that he had "heard [the appellant] use swear words … on a number of occasions," but had "never heard him direct profanity or anything that I would classify as a cursing word toward an individual"); *id.*, Tab 21 (declaration in which K. Young stated that appellant used profanity "but not with any intent to offend or hurt or intimidate anyone," and that he had "never directed profanity at any individual, but … [had] used it … as part of his everyday conversations"); *id.*, Tab 23 at 2 (declaration in which V. Anderson stated that using profanity was "part of [the appellant's] personality," "like breathing to him," and that he did not "even know he [was] doing it at times"). Moreover, the record indicates that the appellant avoided using profanity on the record of the hearings he conducted. *See, e.g.*, EOIR Investigative Report, Tab 21 at 2 (K. Young's testimony that he never saw the appellant use profanity on the record); H.T. at 186 (V. Anderson's testimony, when asked who was present in the courtroom when the appellant used profanity, that, "[f]or the most part it would be the people that he was most comfortable with; [i.e.,] the court officers, his court clerks,

[an EOIR official responsible for managing immigration judges' support staff], certain interpreters, some of the trial attorneys, … [and] certain correctional officers from other correctional facilities").

¶26 We note, however, that the record includes credible evidence that the appellant used profanity in communicating with at least one respondent and that he did so in a demeaning manner. A legal technician who testified that she "got along very well" with the appellant, and who indicated that she was not offended by his profanity, also testified that, on one occasion, the appellant went off the record during a hearing, told a respondent, "Just shut the f--- up and listen to me," and then went back on the record. H.T. at 117, 137 (testimony of C. Lopez); EOIR Investigative Report, Tab 22 at 3. Furthermore, the appellant's profanity clearly was offensive to some of the people with whom he worked. It offended not only Ms. Cesaratto, but also an employee who sometimes substituted as an INS trial attorney before the appellant and, as noted above, one of the appellant's two legal technicians. H.T. at 186-87 (testimony of V. Anderson); EOIR Investigative Report, Tab 25 at 1-2 (declaration of D. Roy). We note further that we agree with the agency that profanity is inappropriate in a court such as the one over which the appellant presided, and we agree that those offended by such language would not necessarily feel free to complain about it. Under these circumstances, we find that the sustained charge that the appellant repeatedly used profanity warrants a significant penalty.

¶27 With respect to the charge of making insensitive generalizations, the deciding official acknowledged in his testimony that the appellant had not acted maliciously; he stated in his decision notice that he did "not believe that [the appellant was] a dishonorable person who harbor[ed] virulently racist beliefs"; and nothing in the record suggests either that the appellant's rulings or decisions were affected by any prejudice or bias, or that the

agency believed that they were. H.T. at 430; Removal Decision Notice at 5; *see* Appeal File, Tab 25 (agency's motion in limine at 4 (the agency's statement that it "has made no allegation that Appellant was unfair or partial in his rulings or other aspects of how he treated respondent-aliens," that it "never alleged or considered that Appellant's rulings reflected bias," and that "it was the *appearance* of partiality or bias that concerned the Agency") (emphasis in the original). Moreover, the appellant has argued consistently that his remarks did not reflect a belief that persons of a particular nationality generally committed the crimes he mentioned in his remarks, or a belief that they generally shared the characteristics to which he referred in those remarks, and he has maintained that he was instead voicing his observations regarding patterns he had noticed among the convicted felons who appeared before him. *E.g.*, Appeal File, Tab 34 (appellant's post-hearing brief at 4). The record supports this claim. *See, e.g.*, H.T. at 554-55 (testimony of D. Roy that he "interpret[ed the appellant's] comments as applying to the aliens that were appearing in Court"); *id.* at 156-57 (testimony in which C. Lopez explained that, although the appellant did not always specifically state that his remarks did not apply to particular ethnic groups in general, the context in which he made the remarks showed that they applied only to the convicted felons who appeared before him); *see also id.* at 425 (testimony of deciding official that "[i]t may very well have been that what he really wanted to say was that … based on what I've been [seeing] as an Immigration Judge … people who commit this kind of crime are usually this nationality").[9]

¶28 We note further that the appellant does not appear to have made any of the remarks at issue here while on the record during an adjudication procedure, and that he has maintained that he made the remarks only during "down time," i.e., while he was waiting for a respondent or other person to be brought to the courtroom so that he could proceed with a hearing. *See*

Appeal File, Tab 4c (transcript of the appellant's oral reply to the proposal notice) at 9-12; H.T. at 131 (V. Anderson's testimony that respondents were never present during the remarks); *see* Appeal File, Tab 25 (motion in limine at 8-9, in which the agency stated that it had not alleged or considered that the appellant made his statements during recorded proceedings). He also has denied making any such remarks in the presence of respondents or their attorneys; he has indicated that, to the extent he made them, he did so in the presence of employees with whom he worked, i.e., the INS trial attorney, his court clerk or legal technician,[10] an interpreter, and the court officers who provided security; and these assertions are supported by credible evidence, including the testimony of a generally adverse witness. *See* H.T. at 131, 169, 178 (V. Anderson's testimony); Appeal File, Tab 4c at 11-12, 45.

¶29 Because the employees mentioned above generally worked with the appellant on a more or less regular basis, they presumably would be familiar with the context in which the appellant made his remarks and would understand that they did not reflect prejudice on the appellant's part. The record shows, however, that some of those people were offended by the remarks, and that even some who were not personally offended indicated that they believed the remarks were inappropriate and at least potentially offensive. *See, e.g.*, H.T. at 176 (V. Anderson's testimony that she was "surprised" at the appellant's statement regarding Poles); *id.* at 218, 222 (P. Buchanan's testimony that the appellant made "[g]eneral derogatory comments" about Cubans and Dominicans, and that his statement that he did not like Japanese people "struck [her] as … an inappropriate thing to say"); *id.* at 261, 269, 280 (testimony of J. Opaciuch). More important, because the appellant was the official in control of courtroom proceedings, and the one responsible for disposing of the claims presented there, it is entirely possible that persons who witnessed his remarks regarded them as reflecting

bias but were unwilling to express their views. In addition, we note that the tone of voice in which the appellant made his remarks has been described, by a witness whose credibility we have no basis for questioning, as "tend[ing] to be dismissive and flippant." HT at 557 (testimony of D. Roy).

¶30 Perhaps most important, the appellant's position as an immigration judge carries with it special obligations and responsibilities. As the agency has pointed out, an immigration judge is required not only to carry out his adjudicatory responsibilities in a fair, unbiased, and impartial manner, but also to "refrain from words or conduct manifesting bias or prejudice of any sort …." *See, e.g.*, Agency File, Tab 29, Ex. 2 (training materials from agency's 1997 Immigration Judge Conference) at 23. As an official responsible for ruling on matters affecting the lives of aliens, the appellant had a special obligation to avoid giving the impression that his decisions could be influenced by the aliens' nationalities. His remarks linking members of certain nationalities to certain crimes and other undesirable conduct could reasonably be construed as manifesting ethnic bias. Accordingly, the sustained charge relating to those remarks warrants a very substantial penalty.

¶31 Finally, we note that other factors relevant to the penalty determination fail to provide significant support for mitigation. Although the appellant evidently had no prior disciplinary record and no performance problems, and although he had more than 15 years of federal service at the time of his removal, he had less than 8 years of service with the agency, and he spent two of those years in a nonduty status. Agency File, Tab 4a. We also are not persuaded that any remorse that the appellant may have expressed constitutes a significant mitigating factor. As the agency has indicated, the appellant's response to the allegations against him appears to have been

characterized more by indignation than by remorse and contrition. *See, e.g.*, Agency File, Tabs 4c (oral reply to charges), 4d (written reply to charges).

¶32 Under the circumstances described above, we find that the penalty of removal does not exceed the bounds of reasonableness. *See Douglas*, 5 M.S.P.R. at 306; *Devall*, 178 F.3d at 1260. The appellant's removal therefore is SUSTAINED.

ORDER

¶33 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

/s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

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[1] The agency file can be found at tabs 6, 7, 8, and 9 of the appeal file.

[2] The appellant, who was a full-time employee throughout his employment as an immigration judge, spent part of his time at DCF from January until August 1996, and worked there full-time beginning in August 1996. *See* Agency Prehearing Submission at 11, Agency File, Tab 29 (describing facts to which both parties agreed); Agency File, Tab 4i (EOIR investigative report), Subtab 24 at 1.

[3] OPR also referred one of the matters with respect to which it had found that the appellant had engaged in professional misconduct to the New York Bar (of which the appellant was a member) for its consideration. OPR Investigative Report at 6, 67. This matter is not among the bases for the appellant's subsequent removal, however.

[4] In his initial decision, the administrative judge ordered the agency to provide interim relief to the appellant under 5 U.S.C. § 7701(b)(2)(A). Initial Decision at 75. The agency has certified that it provided this relief, PFR at 87 n.28, and the appellant has not challenged the agency's compliance with the administrative judge's order.

[5] Because the appellant has not filed a cross petition for review challenging the administrative judge's findings regarding the other specifications of this charge or the charge of repeatedly using profanity, we have not reviewed those findings.

[6] The agency also alleges that, even if the deciding official relied on the finding, his reliance would not have been improper because the finding of discrimination was based on the same misconduct on which the removal is based. PFR at 60-63. In light of our findings below, we need not address this allegation.

[7] In its petition for review, the agency refers to the testimony of two INS trial attorneys. PFR at 39-41. One of those attorneys, who appeared before the appellant a total of about 12-20 times, including about 6 times "[d]uring the period after the complaint was initiated," testified that she "did not notice a difference" in the appellant's use of ethnic generalizations after October 1999, H.T. at 222-23, and the other, who "believe[d he] continued to appear before [the appellant] until April … 2000," testified that the "frequency of … [the appellant's] unprofessional conduct decreased, but … did not disappear" after Ms. Cesaratto complained of it, H.T. at 564-65. Neither witness, however, identified any profanity or ethnically insensitive remark that the appellant made after the complaint was filed.

[8] We see no basis for questioning the credibility of this witness. The witness no longer worked for EOIR, and she testified that she "ha[d] no malice towards" the appellant. H.T. at 164, 207.

[9] As indicated above, the administrative judge found that the appellant had stated that he did not like Japanese people, and that he had made a statement to the effect that all women were homosexual. The record shows, however, that the appellant and his family volunteered to be "host parents" for a Japanese exchange student for a year, and the agency has not rebutted the appellant's assertion that he raised, on his own initiative, the possibility that a lesbian respondent could avoid deportation based on her sexual orientation. *See* Agency File, Tab 4c, Ex. 5 (letter from guidance counselor, praising the appellant and his family for providing a "warm and caring home" for the teenager); Agency File, Tab 4f, Subtab A (transcript of the appellant's OPR interview at 25); *id.*, Tab 4i, Subtab 24. Evidently, therefore, the appellant's remarks regarding female homosexuality and the Japanese people do not reflect any prejudice against lesbians or Japanese nationals.

[10] The terms "court clerk" and "legal technician" evidently were used interchangeably to refer to the EOIR employee who assisted the immigration judge in the courtroom. *See* H.T. at 164-65.