[redacted]

Merit Systems Protection Board

November 09, 2017

DOCKET NUMBER CB-7521-16-0013-T-1

Reporter

[redacted]

DEPARTMENT OF VETERANS AFFAIRS, Petitioner, v. JAMES MARKEY, Respondent.

Core Terms

email, undersigned, racist, chain, good cause, inappropriate, veteran, conduct unbecoming, initial decision, homosexual, fellow, judicial conduct, impartial, sexual, reply, court of appeals, confidence, public confidence, disciplinary action, moral character, no evidence, misconduct, stereotype, picture, ghetto, sexist, sex, ridicule, notice, hate

Counsel

[*1]

Kimberly McLeod, Esq., Biswajit Chatterjee, Esq., Hansel J. Cordeiro, Esq., On Behalf of Agency

Matthew E. Hughes, Esq., On Behalf of Respondent

Administrative Law Judge: BRUDZINSKI

Administrative Law Judge-Decision

INITIAL DECISION

I. STATEMENT OF THE CASE

The Department of Veterans Affairs (Agency or VA) initiated this action seeking to remove one of its employees for conduct unbecoming a Veterans Law Judge (VLJ) and misuse of government resources. In the Complaint filed February 1, 2016, the VA requests the Merit Systems Protection Board (MSPB or Board) find good cause to remove Veterans Law Judge James Markey (Respondent) from federal service in accordance with *38 U.S.C. § 7101A(e)(2)* and *5 U.S.C. § 7521*.

On February 5, 2016, MSPB issued an Acknowledgement Order assigning the case to USCG Chief Administrative Law Judge (CALJ) Walter J. Brudzinski. [1] On March 4, 2016, Respondent, through counsel, filed a response to

[1] Pursuant to an interagency agreement, United States Coast Guard (USCG) Administrative Law Judges are permitted to adjudicate MSPB original jurisdiction cases.

[redacted]

VA's Complaint. In his Answer, Respondent generally admitted the factual content of the emails but asserted the Agency's allegations are not enough to establish "good cause" for his removal. Furthermore, Respondent denied the Agency's characterizations **[*2]** of the email content and further denied it proves conduct unbecoming a VLJ.

The hearing convened at MSPB Headquarters in Washington D.C. from September 13, 2016 through September 15, 2016. The VA called five witnesses and offered five exhibits, of which three were admitted. Respondent called nine witnesses and offered three exhibits, all of which were admitted. *See* Attachment A (Witness and Exhibit List).

After the hearing, the parties submitted Post-Hearing Briefs on November 16, 2016. The administrative record is closed and the case is now ripe for a decision. Given the totality of the circumstances, and after thoroughly reviewing the evidence, the undersigned finds the VA has good cause to take action against Respondent. Furthermore, given the gravity of misconduct, the undersigned finds **REMOVAL** of Respondent from federal service **[*3]** is appropriate.

II. FINDINGS OF FACT

Pursuant to *5 C.F.R. § 1201.111(b)(1)*, the undersigned makes the following Findings of Fact. These facts are based on the preponderance of the evidence after a thorough and careful analysis of the documentary evidence, testimony, and the record taken as a whole. [2]

1. The Board of Veterans' Appeals (BVA), a component of the VA, hired Respondent in November of 1995 as an associate counsel. (Tr. Vol. II at 28).

2. In October 2005, Respondent became a senior counsel for the BVA. (*Id.*).

3. Respondent became a VLJ for the BVA in December 2007. (*Id.*).

4. Throughout his career at the BVA, Respondent received numerous awards, letters of praise, and excellent evaluations. (Agency Ex. 2 at 57-126).

5. VLJs are supported by a large support staff, including attorneys. (Tr. Vol. I at 100).

6. BVA employees are diverse in race, nationality, sex, religion, and sexual orientation. (*Id.*).

Emails in Question

7. On September 16, 2015, the VA Office of Inspector General (OIG) provided VA Deputy Secretary Sloan Gibson with its preliminary findings and supporting documents concerning its investigation **[*4]** of five BVA employees sending inappropriate emails. (Agency Ex. 3-A).

8. The inappropriate emails the VA OIG identified spanned a period of seven years (2008-2015). (Agency Ex. 3-D).

9. All emails included in the VA OIG investigation file and contained in Charge 1 (Specifications 1-9) of the Complaint were sent using employees' official government email addresses. (*Id.*).

10. Five BVA employees (two VLJs and three attorneys) sent and received inappropriate emails. (Agency Ex. 3-A). The employees involved were: Dennis Chiappetta, CVLJ; James Markey, VLJ (Respondent); Bernard DoMinh (Attorney); Charles Hancock (Attorney); and John Prichard (Attorney). (Agency Ex. 3-A).

11. These employees nicknamed their email exchanges the "Forum of Hate" (FOH) and referred to themselves as FOH Members. (Tr. Vol. II at 35-36; Agency Ex. 3-D).

---

[2] During the hearing the undersigned instructed the Agency to change the Agency Exhibit labeling from letters to numbers. The undersigned instructed the Agency to complete the re-labeling when the exhibits were submitted to MSPB and uploaded into the docket. Accordingly, Agency's exhibits have been re-labeled from "Agency Ex. A, B, and C, C-1through C-9" to "Agency Ex. 1, 2, and 3, 3-A through 3-I." Thus, in this Initial Decision, Agency's exhibits are referenced as "Agency Ex. 1, 2, 3," while the hearing transcripts references the exhibits as "Agency Ex. A, B, and C."

12. Respondent was friends with each member of the FOH, and with the exception of one, knew each of them for approximately 20 years. (Tr. Vol. II at 31-33).

13. Respondent participated in an email chain on or about January 14, 2008, which ridiculed a BVA Deputy Vice Chairman's Puerto Rican accent. (Tr. Vol. II at 38-39; Agency Ex. **[*5]** 3-D).

14. Respondent's reply referring to a "taco lunch" attempted to trump "the outrageousness of his [Bernard DoMinh] email" by further stereotyping and mocking the Deputy Vice Chairman's nationality. (Tr. Vol. II at 39-40).

15. Respondent participated in an email chain on or about January 14, 2008, which used homosexual slurs to discuss several BVA employees. (Tr. Vol. II at 40-41; Agency Ex. 3-D).

16. Respondent identified numerous BVA employees as homosexuals in response to the email using homosexual slurs. (*Id.*).

17. On or about March 21, 2013, Respondent participated in an email chain containing a picture of an all white little league team. In response to the picture, Respondent stated "[n]ice, but where are the white sheets? Gotta start them when they are young" and "of course my bad. 'Bon Fire' after every victory." [3] (Tr. Vol. II at 41-44; Agency Ex. 3-C, 3-D).

18. Respondent's references to the Ku Klux Klan's (KKK) infamous hooded white outfits and the KKK burning crosses in celebration are racist and offensive. (*Id.*).

19. On or about August 28, 2013, Respondent participated in an email chain containing altered pictures of an FOH **[*6]** member receiving an award; the pictures were altered to contain derogatory terms for Vietnamese people and also called an African American BVA Chief VLJ a "G-Pot." [4] (Tr. Vol. II at 44-46; Agency Ex. 3-D).

20. Respondent's statement that the racist alterations to the pictures and other racial statements were "hilarious" encouraged and condoned the use of racist terms, regardless of whether one of the individuals in the photograph was an FOH member. (*Id.*).

21. Respondent replied to an email chain containing a picture of four female BVA employees; the email contained derogatory terms to describe having sexual intercourse with one of the females in the picture. (Tr. Vol. II at 47-48; Agency Ex. 3-D).

22. Respondent participated in an email chain on September 11, 2013, where another FOH member described a BVA Chief VLJ using inappropriate terms and describing her treatment of another BVA employee. (Tr. Vol. II at 48-49; Agency Ex. 3-D).

23. Respondent replied to the email describing the BVA Chief VLJ as being a "total bitch" to the BVA employee; the reply did not use any sexist or racist terminology. (*Id.*).

24. Respondent sent an email on September 19, 2013, containing **[*7]** a news article he altered. (Tr. Vol. II at 51; Agency Ex. 3-C, 3-D).

25. Respondent altered the news article by adding the following sentences: "[t]he opponent, a fast food working, basketball type playing man, indicated that such talk just wasn't cool. He left, timidly, when 11 people causally tossed ropes at him." (Resp. Ex. B-7(1)).

26. Respondent's use of "fast food working" and "basketball type playing" refers to African Americans and are offensive racial stereotypes. (Tr. Vol. II at 53; Agency Ex. 3-C).

---

[3] Charge 1, Specification 3 of the Complaint indicates the email chain took place on March 21, 2013, but the email evidence shows the email chain took place on March 20, 2013.

[4] The term "G-Pot" means ghetto hippopotamus and refers to a fellow BVA Chief VLJ. (Agency Ex. 3-C).

27. Respondent's statement concerning tossing ropes refers to the KKK's use of ropes to lynch African Americans. (Agency Ex. 3-C).

28. Respondent participated in an email chain on or about December 13, 2013, which ridiculed a BVA Deputy Vice Chairman Puerto Rican accent. (Tr. Vol. II at 54-55; Agency Ex. 3-D).

29. Respondent's reply stating "[m]ore likely he'll roll on Dennnneeeeeese CheeeOpeeeeta and Jeeemy Marssshhhh" further stereotyped and mocked the Deputy Vice Chairman's nationality. (*Id.*).

30. On January 30, 2014, Respondent sent an email calling another VLJ an "Ewok." (Agency Ex. 3-D).

31. On January 30, 2014, Respondent participated **[*8]** in an email chain where Mr. Charles Hancock made a reference to two male BVA employees engaging in oral sex. Respondent's reply to the homosexual comment was "[y]ou're on fire today Chuckles," to which Mr. Hancock stated "I am clearly filled with hate. Need to stop." Respondent then replied "[n]o!! actually keeps it sane here." (Agency Ex. 3-D).

32. Respondent's comments to Mr. Hancock's emails condoned and encouraged Mr. Hancock's homosexually charged comments. (Tr. Vol. II at 55-56).

33. Respondent participated in an email chain on or about May 20, 2014, which included racial and homosexual slurs. (Tr. Vol. II at 59-60; Agency Ex. 3-D).

34. In the email chain, Respondent refers to two male BVA attorneys as "butt-buddies," and a Chief VLJ as "charo." (Agency Ex. 3-D).

35. The FOH used "Charo" to mean someone of Spanish decent. (Agency Ex. 3-C).

36. Respondent used "butt-buddies" to imply two BVA employees were homosexual. (Tr. Vol. II at 59-61).

37. Respondent only stopped sending FOH emails because he was "caught" by the VA OIG. (Tr. Vol. II at 88).

38. BVA's policies concerning the use of government equipment, includes refraining from using **[*9]** government equipment for inappropriate activities relating to hate speech and ridicule of others based on race, sex, religion, national origin, sexual orientation, etc. (Tr. Vol. I at 26-27; Agency Ex. 3-H).

39. Respondent received training concerning the rules and regulations governing the use of government computers, harassment, and discrimination. (Tr. Vol. I at 25-27).

Aftermath of Emails

40. As the proposing official, BVA Deputy Vice Chairman David Spickler reviewed all email communications at issue and the VA OIG investigation file, prior to issuing a Notice of Proposed Action informing Respondent the VA sought to remove him from his position as a VLJ on December 1, 2015. (Tr. Vol. I at 133; Agency Ex. 1, 3).

41. After reviewing the proposed removal, Respondent's response to the proposed removal, all evidence contained in the file, and the Douglas Factors, VA Deputy Secretary Gibson issued the Notice of Decision seeking to remove James Markey from his position as a VLJ with the VA. (Tr. Vol. I at 10 - 12; Agency Ex. 3-A - 3-I).

42. Several news articles, a blog post, and a VA press release resulted from the allegations contained in the Complaint and VA **[*10]** OIG investigation. (Tr. Vol. I at 23-25; Resp. Ex. AI -A3).

Deputy Vice Chairman Spickler's Meeting

43. Deputy Vice Chairman Spickler held weekly meetings with CVLJs who directly reported to him. (Tr. Vol. I at 159-160; Tr. Vol. II at 23).

44. After the FOH members were informed of the VA OIG investigation and the VA seeking to take disciplinary action against the FOH members, Deputy Vice Chairman Spickler raised the subject of CVLJs giving FOH members character references during one of the weekly meetings. (Tr. Vol. I at 159-161; Tr. Vol. II at 22-24).

45. CVLJ Theresa Catino attended the weekly meeting where character references were discussed. (Tr. Vol. II at 22-24).

[redacted]

46. Deputy Vice Chairman Spickler stated at the meeting that if the CVLJs are approached about giving character references they should think carefully before providing a reference. (Tr. Vol. I at 159; Tr. Vol. II at 22).

[*11]

III. PRINCIPLES OF LAW

A. Jurisdiction

Pursuant to *5 U.S.C. § 7521*, "an action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record or after opportunity for hearing before the Board." MSPB regulations provide "[a]n administrative law judge will hear an action brought by an employing agency . . . against a respondent administrative law judge." *See 5 C.F.R. § 1201.140(a)*. The covered actions against an administrative law judge include: removal; suspension; reduction in grade; reduction in pay; or, furlough of 30 days or less. *See 5 U.S.C. § 7521(b)(1) - (5)*; *see also 5 C.F.R. § 1201.137(a)*. **[*12]**

In this case, the VA seeks removal of a Veterans Law Judge. VLJs are not ALJs; however, VLJs are members of the Board of Veterans' Appeals. *38 C.F.R. § 19.2*. Pursuant to *38 U.S.C. § 7101A(e)(2)*, when seeking removal of a VLJ the VA must provide the same due process afforded an ALJ. [5] Accordingly, the Board has jurisdiction and the matter is properly before me for adjudication.

B. Burden of Proof

Pursuant to *5 C.F.R. § 1201.56(a)(ii)*, the Agency bears the burden of proving the charges and specifications by a preponderance of the evidence. *See Brennan v. Dep't of Health and Human Servs., 787 F.2d 1559, 1561 (Fed. Cir. 1986), cert. denied, 479 U.S. 985, 107 S. Ct. 573, 93 L. Ed. 2d 577 (1986)*. Because removal of a VLJ must be conducted pursuant to the same requirements as removal of an AU, the Agency is obligated to prove its case by a preponderance of the evidence. See **[*13]** *5 C.F.R. § 1201.56(a)(1)(ii)*. Title *5 C.F.R. § 1201.56(c)(2)* defines preponderance of the evidence as "[t]he 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."

C. Good Cause Standard

The Agency may remove a VLJ only after a showing of good cause. *5 U.S.C. § 7521*. If the undersigned finds the charges and specifications are supported by a preponderance of the evidence, then the undersigned must determine whether the Respondent's conduct constitutes good cause to affect discipline. *Brennan v. Dep't of Health and Human Servs., 787 F.2d 1559, 1563 (Fed. Cir. 1986)*. In essence, "[a]n employing agency may not remove an AU, suspend an ALJ, reduce an All's grade, reduce an ALJ's pay, or put an ALJ on a furlough of 30 days or less, without first establishing before the Board good cause for the action." *Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1346 (Fed. Cir. 2005)* (dissenting opinion).

Congress provided general insight to the meaning of "good cause. " The drafters of the Administrative **[*14]** Procedure Act (APA) said ALJs:

> [M]ust conduct themselves in accord with the requirements of this bill [APA] and with due regard for the rights of all parties as well as the facts, the law and the need for prompt and orderly dispatch of public business. [6]

---

[5] *See* AU removal procedures found at *5 U.S.C. § 7521*.

[6] Administrative Procedure Act-Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 268 (1946).

Nevertheless, "good cause" is not defined by 5 U.S.C. § 7521 or by the APA, 5 U.S.C. § 500, et seq.Long v. Social Sec. Admin., 635 F.3d 526, 533 (Fed. Cir. 2011). "Rather, 'good cause' is to be given meaning through judicial interpretation . . . ." *Id. quoting* Brennan, 787 F.2d at 1561-62. [7]

[*15]

The court in *Brennan* recognized, "[d]etermining the existence of 'good cause' is not a simple task, but a task that is commenced by stating what 'good cause' is not." Brennan, 787 F.2d at 1563. Such rationale is strikingly similar to that offered by Justice Potter Stewart when he wrote the: "I know it when I see it" definition of obscenity. Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (concurring opinion).

The Federal Circuit Court of Appeals recognized the "good cause" standard differs from the "good behavior" standard applicable to Article III judges. Long, 635 F.3d at 534. In fact, the "good cause" standard is much broader than the "good behavior" standard required for Article III judges, as, unlike ALJs, Article III judges cannot be removed for poor performance. Brennan, 787 F.2d at 1562. "Thus, while federal judges may only be removed, after impeachment and conviction, for 'Treason, Bribery, or other high Crimes and Misdemeanors,' U.S. Const. Art. II, § 4, ALJs can be, and have been, removed for other reasons." Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 469 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997). **[*16]** [8]

Like the various federal courts, MSPB considers "good cause" a purposefully ambiguous term of art. In fact, the Board recognizes, "the phrase 'good cause' is susceptible of more than one interpretation." Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321 (1984).

Accordingly, a review of MSPB cases concerning ALJs provides some guidance about the meaning of "good cause. " The Board has found "good cause" to exist in cases of physical incapacitation; [9] financial irresponsibility; [10] lewd and lascivious conduct; [11] insubordination; [12] forgery of a chief judge's signature; [13] and unprofessional conduct. [14]

---

[7] The legislative comments to the APA provide "[I]t will be the duty of reviewing courts . . . to determine the meaning of the words and phrases used, insofar as they have not been defined in the bill itself. For example, in several provisions of the bill, the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found, and the purpose of the entire section and bill. The cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record the cause will appear there; otherwise, it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill." Administrative Procedure Act-Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 326 (1946).

[8] Similarly, the "good cause" standard differs from that of the "efficiency of the service" standard applicable in other Agency disciplinary actions. Social Sec. Admin. v. Abrams, No. CB-7521-08-0001-T-1, CB-7521-08-0021-T-1, CB-7521-09-0002-T-1, 2010 MSPB LEXIS 2044 at *73-*74 (Mar. 29, 2010), *appeal denied*, **116 M.S.P.R. 355 (2011)**.

[9] Social Sec. Admin. v. Mills, 73 M.S.P.R. 463 (1996).

[10] McEachern v. Macy, 233 F. Supp. 516, 517 (W.D. S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965).

[11] Social Sec. Admin. v. Davis, 19 M.S.P.R. 279, 281 (1984).

[12] Social Sec. Admin. v. Burris, 39 M.S.P.R. 51 (1988); Social Sec. Admin. v. Arterberry, 15 M.S.P.R. 320 (1983) (refused to accept assignments in a particular geographical area); Social Sec. Admin. v. Manion, 19 M.S.P.R. 298 (1984) (refused to set or hear cases until certain administrative matters were resolved).

[13] Social Sec. Admin. v. Dantoni, 77 M.S.P.R. 516 (1998).

[14] Social Sec. Admin. v. Harty, 96 M.S.P.R. 65 (2004) (engaging in unprofessional and injudicious conduct, including making unprofessional or injudicious statements to agency employees).

[*17]

D. ABA Model Code of Judicial Conduct

While the issue of "good cause" is ambiguous, specific guidelines govern proper judicial conduct. The Board "has held that the American Bar Association (ABA) Model **[*18]** Code of Judicial Conduct is an appropriate guide for evaluating the conduct of ALJs [and in effect VLJs]." *Social Sec. Admin. v. Long, 113 M.S.P.R. 190 at 208 (2013)*. Two ABA Model Code (2011) rules are pertinent to this case:

> Rule 1.2: Promoting Confidence in the Judiciary - A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
>
> Rule 2.15: Responding to Judicial and Lawyer Misconduct
>
> (A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.
>
> (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

Model Code of Judicial Conduct R. 1.2; 2.15 (2011). If a judge violates these Model Rules, **[*19]** such actions can be deemed conduct unbecoming, and establish good cause to initiate disciplinary action. *See Long at 208*.

IV. ANALYSIS

A. Conduct Unbecoming a VLJ

The VA asserts Respondent committed numerous counts of conduct unbecoming a VLJ by participating in at least ten (10) email strings. These emails include various racist, sexist, and homophobic content, all of which were sent among Respondent and four other BVA employees who called themselves the Forum of Hate (FOH). Respondent admits to sending and receiving these emails, but denies that they are racist, sexist and homophobic. Respondent also concedes some of the emails' content is inappropriate, but asserts it does not rise to the level of conduct unbecoming a VLJ nor warrants removal. For the reasons stated below, the undersigned finds the emails' content egregious and constitutes conduct unbecoming a VLJ warranting Respondent's removal.

1. Racist Emails

The VA asserts in Charge 1, Specifications 3, 7, and 9, Respondent participated in a series of racist email exchanges. (Complaint). In the March 21, 2013 exchange, Respondent received an email containing a picture of an all white children's **[*20]** baseball team and responded stating "[n]ice, but where are the white sheets? Gotta start them when they are young." In response to Respondent's statement, another FOH member, BVA Chief Judge Dennis Chiappetta states, "[c]ome on James, that is the name of the kid's team: 'The Maryland White Sheets.'" Respondent replied to Mr. Chiappetta's comment "of course my bad. 'Bon Fire' after every victory." [15]

Respondent's emails concerning the baseball team refers to the Ku Klux Klan's (KKK) infamous hooded white outfits, KKK members burning of crosses during celebrations and rallies. [16] These comments are intrinsically racist and offensive and do not promote confidence in the judiciary. The ABA Model Code of Judicial Conduct Rule 1.2: Promoting Confidence in the Judiciary directs a judge to act at all times in a manner that promotes public

---

[15] The VA also seeks to remove Chief VLJ Dennis Chiappetta from federal service in a companion case filed under docket number CB-7521-16-0014-T-1.

[16] The KKK is an extremist group who generally believe in white supremacy, white nationalism and anti-immigration. *See https://en.wikipedia.org/wiki/Ku_Klux_Klan* (last visited July 11, 2017).

confidence in the integrity, **[*21]** and impartiality of the judiciary. Respondent's callous reference to such infamously racist acts, especially when referring to children's baseball team, diminishes the public's confidence in the judiciary and undermines his status as an impartial jurist. These emails alone equate to conduct unbecoming a VLJ.

But Respondent's behavior did not stop there. On September 19, 2013, Respondent emailed a news article to fellow FOH members concerning a Frederick County Sheriff who posted pro-gun videos. (Agency Ex. 3-D). The article explained the sheriff was shooting automatic weapons while shouting obscenities about liberals, minorities, and the *Second Amendment*. (*Id.*). Respondent modified the news article by adding "Some of his [the Sheriff] supporters . . . got into a heated debate with an opponent. The opponent, **[*22]** a fast food working, basketball type playing man, indicated that such talk just wasn't cool. He left timidly, when 11 people causally tossed ropes at him." (*Id.*).

Respondent admits the use of "fast food working" and "basketball type playing" refers to African Americans. (Agency Ex. 3-C). These terms are used by Respondent as racial stereotypes and meant to be derogatory. Respondent further admits his statement concerning tossing ropes refers to the KKK's use of ropes to lynch African Americans. (*Id.*). This statement, concerning lynching African Americans, is offensive and racist in nature and beneath the dignity of Respondent's position. Accordingly, I find Respondent's emailing the modified news article containing racial stereotypes and offensive racial acts violates the ABA Model Code of Judicial Conduct Rule 1.2. His actions fail to promote confidence in the judiciary and this constitutes conduct unbecoming a VLJ.

In yet another instance, Respondent received an email chain on May 20, 2014, containing various comments by FOH members the VA deemed unbecoming a VLJ. In this email chain, another FOH member states: "[d]e rules be diffrint up in de Big House where de plantation **[*23]** massah lives. Out in de fields, we field slaves hafta pick de cottin at three bales a week an'de obserseer hagta make sho he delibber 20 bales a week." This FOH member is clearly referencing African American slavery by stereotyping the way African American slaves in the south spoke.

Speaking as if one is an African American slave is inherently racist and deplorable. The rules of professional conduct do not permit Respondent to simply ignore such language; Respondent owed a duty to the bench and bar to report the email under ABA Model Code of Judicial Conduct Rule 2.15(B): Responding to Judicial and Lawyer Misconduct. Rule 2.15(B) states a "judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."

Here, the FOH member, and author of the May 20, 2014 email, is an attorney who clearly made racist, unprofessional, and offensive statements. These statements unmistakably raise questions concerning the rules of professional conduct and the attorney's fitness as a lawyer and officer **[*24]** of the court; therefore, Respondent had a duty to report the FOH member's conduct to the appropriate authority as required by ABA Model Code of Judicial Conduct Rule 2.15(B). By not reporting the email to the appropriate authority, Respondent violated ABA Model Code of Judicial Conduct Rule 2.15(B) committing conduct unbecoming a VLJ.

In three separate email chains dated August 28, 2013, September 11, 2013, and May 20, 2014 respectively, FOH members used the term G-Pot to refer to a BVA Chief VLJ. Respondent defines G-Pot as meaning Ghetto Hippopotamus. (Agency Ex. 3-C). While the referenced BVA Chief VLJ is African American, the undersigned does not find this term an overtly racist African American term. Ghetto has been used throughout history to reference a location of a city where a group (usually a minority group) lives based on socioeconomic pressures. *See http://www.merriam-webster.com* (last visited July 7, 2017).[17] The Oxford English Dictionary also defines ghetto as "a part of the city, especially a slum area, occupied by a minority group or groups." *https://en.oxforddictionaries.com/* (last visited July 7, 2017). However, as observed by one District Court,

---

[17] The most notable use of the word ghetto was the area of the city where Jewish people were required to live during World War II. *See* Generally *https://en.oxforddictionaries.com/* (last visited July 7, 2017).

[redacted]

> The **[*25]** Fifth Circuit has recognized that the term 'ghetto' has innate racial overtones. *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 348 (5th Cir.2007)* (recognizing that a supervisor's reference to inner-city children as 'ghetto children' was 'perhaps racially inappropriate. ') A review of various dictionaries shows that the term 'ghetto' is in many, if not most, cases associated with racial groups generally, not just African Americans.

*Garza v. Ranier L.L.C., No. A-12-CV-475-AWA, 2013 U.S. Dist. LEXIS 107072, 2013 WL 3967786, at *4 (W.D. Tex. July 31, 2013)*. While it is true the term ghetto is not a term exclusively referring to African Americans, the undersigned agrees it can have a racist effect, particularly when considered in context of other statements. In other words, the phrase as used in this case cannot be considered in a vacuum, but in light of all other relevant emails.

[*26]

Here, it is clear Respondent sent and received racist and racially charged emails over a span of several years. These emails make light of slavery, stereotype African Americans, and casually reference the heinous acts of the KKK. No reasonable trier of fact could review the phrase G-Pot and conclude it does not have racial overtones in light of Respondent's communications in the FOH. Therefore, the undersigned agrees Respondent's reference to a Chief VLJ as G-Pot was a racist statement, and through its use Respondent committed yet another act of conduct unbecoming a VLJ.

In addition to its racial connotation, most of the instances where the FOH used the nickname G-Pot are accompanied by the use of other disparaging terms, such as "cunt" and "twat" (the use of these words is addressed below). The FOH also frequently described this BVA as a poor manager and somewhat of a tyrant. [18] Some examples include "shouldn't manage a KFC for God's sake;" "bearer exempt from G-Pot's B.S. harassment for one year;" and "was a total bitch." (Agency Ex.3-D). Accordingly, the undersigned believes the FOH not only used the name Ghetto Hippopotamus to disparage the BVA Chief VLJ's race, but also sought **[*27]** to disparage her social class and physical appearance.

It is clear from the record that FOH members expressed racist views and the undersigned finds the term G-Pot has racial implications as used by the FOH. But, regardless of whether FOH members intended this particular nickname to be a racist term for African Americans, it is still inappropriate to use such a term when referencing a coworker. Respondent and the FOH members used G-Pot in a manner meant to degrade, humiliate, and demean this Chief VLJ as a manager, a woman and a human being. This type of behavior is appalling and in no way promotes the public's confidence in the judiciary. If this is how Respondent speaks about coworkers **[*28]** it is reasonable to believe Respondent could refer to veterans using similarly offensive terms. Accordingly, calling a coworker "Ghetto Hippopotamus" or "G-Pot" violates ABA Model Code of Judicial Conduct Rule 1.2 and constitutes conduct unbecoming a VLJ.

2. Homosexual Emails

On January 14, 2008, Mr. Charles Hancock sent the FOH an email asking whether two male BVA members "BOTH gobble jizz." Respondent replied to the email "[y]es, Regan's." Mr. Hancock followed up his statement with another email declaring "[t]here may be a spot open in AA's Forum of Gayness," to which both Respondent and Mr. DoMinh sent emails listing numerous other male BVA employees as potential candidates for the "Forum of Gayness."

Respondent defined "jizz" as sperm. (Tr. Vol. II at 40). Therefore, when Respondent replied to Mr. Hancock's email, he was implying the two male BVA employees "gobbled" a male BVA employee's sperm. As such, the January 14, 2008 email chain referenced above contains multiple homosexual references.

---

[18] The reproachful remarks concerning the referenced BVA Chief VLJ escalated to the point where FOH members described the BVA Chief VLJ as deserving to have very horrific things done to her. The undersigned will not address the specifics in this decision but details can be found in December 21, 2012 email chain. Agency Ex. 3-D.

Whether any of these individuals are homosexual is not the issue. These statements are inappropriate no matter to whom they are directed. Engaging in this type of commentary **[*29]** concerning coworkers, even in a joking manner, demeans a class of individuals which have long pursued equal dignity under the law. *Obergefell v. Hodges, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d 609 (2015)* (recognizing same-sex Americans "ask for equal dignity in the eyes of the law. The Constitution grants them that right"). These lewd, sexually charged statements, perpetuate negative connotations about homosexual conduct and fail to instill confidence in the judiciary.

The undersigned does recognize that while the referenced employees were not homosexual, it is logical for the public to conclude Respondent and other FOH members are prejudiced against homosexuals because of the verbiage chosen to describe male BVA employees engaging in homosexual acts. Respondent and other FOH members used extremely crude language to describe the sexual acts. Their actions violated ABA Model Code of Judicial Conduct Rule 1.2 by failing to act in a manner which promotes confidence in the integrity of the judiciary and is conduct unbecoming a VLJ.

On May 20, 2014, Respondent sent an email to the FOH referring to two male BVA employees as "butt budd[ies]." (Agency Ex. 3-D). The undersigned notes the term **[*30]** "butt buddies" has multiple meanings, the most common of which refers to two individuals who are very close, a modern version of "joined at the hip." *See https://www.urbandictionary.com/define.php?term=butt%20buddies* (August 2017). Another definition of the term "butt buddies" is referring to twomales engaging in sexual intercourse. *Id.; See also JR ex rel. EAR v. Pike Cty. Bd. of Educ., No. 2:06-CV-1120-MEF, 2008 U.S. Dist. LEXIS 46433, 2008 WL 2438664, at *13 (M.D. Ala. June 13, 2008)* (noting "butt buddy" may have both sexual and non-sexual connotations.)

Here Respondent's testimony is unclear as to what he meant when he referred to two male BVA employees as "butt buddies." However, the undersigned interprets the phrase within the context of the following statements: 1) "those two guys were known, like, rumormongers . . . they're always in each other's offices talking . . .;" and 2) "like they were lovers." (Agency Ex. 3-D). These statements coupled with the fact that the two male BVA employees were the same employees previously referred to as homosexuals above, could lead one to conclude Respondent meant both the friendly and homosexual connotations. *See* Tr. Vol. II at 59-60; Agency **[*31]** Ex. 3-D. Calling other BVA employees "butt buddies" fails to promote confidence in the judiciary as required by ABA Model Code of Judicial Conduct Rule 1.2. It is logical for the public to question the integrity of a VLJ if he engages in calling fellow BVA employees names. Violations of this sort constitute conduct unbecoming a VLJ.

3. Sexist Emails

On August 28, 2013, Mr. Charles Hancock sent an email to the FOH stating "Fat twat shouldn't manage a KFC for God's sake." (Agency Ex. 3-D). Respondent responded "hilarious" to this statement along with others contained in the email chain. "Twat" is a derogatory term generally used towards a female. While the VA asserts this statement contains sexist language, I do not find that the use of the word "twat" in the context of this email is sexist. Sexist (or sexism) is defined by Merriam-Webster as "prejudice or discrimination based on sex; or behavior, conditions, or attitudes that foster stereotypes of social roles based on sex. " *See https://www.merriam-webster.com/dictionary/sexism* (August 2017).

Here, I find the FOH's use of such a term inappropriate, vulgar and disgusting, but merely calling someone a foul word does not rise **[*32]** to the level of sexism. There is nothing in the email to illustrate Respondent or Mr. Hancock showed prejudice or discrimination based on sex, nor did the email foster a stereotype of social roles based on sex. However, Respondent's comment that the email chain is "hilarious" to the use of such vulgar language to refer to a fellow VLJ decimates public confidence in the integrity, and impartiality of the judiciary. VLJs sit in a position of prominence, and should eschew this type of conduct in the workplace. Accordingly, Respondent violated ABA Model Code of Judicial Conduct Rule 1.2 and this violation constitutes conduct unbecoming a VLJ.

4. National Origin

The VA asserts that Charge 1, Specifications 1, 4, 7A, 9 all contain email chains which ridicule other BVA employees on the basis of national origin. On January 14, 2008, Mr. Bernard DoMinh sent an email to fellow FOH

members mocking a BVA Deputy Vice Chairman. The email stated "Hooray! Eye weel be go-eeng choo San Peet weeth my boddy Jeeem! We weel hav a good time, si? Eet weel be FIESTA time!" Respondent replied to Mr. DoMinh's email stating "Perhaps we'll go out for a taco lunch . . . ."

Respondent testified his reference **[*33]** to "taco lunch" was obviously stereotyping because the Deputy Vice Chairman is Puerto Rican. (Tr. Vol. II at 38-40). The Deputy Vice Chairman referenced in the email did not testify at the hearing, as such, the undersigned makes no finding as to his nationality. However, the undersigned does find Respondent intended to make fun of him based on his nationality. Respondent explained his reasoning for the "taco lunch" comment as "trying to one up him [Mr. DoMinh] on the outrageousness of his email" and trying to stereotype the type of food the Deputy Vice Chairman might want to eat. Respondent also stated the purpose of his comment was to elicit a "chuckle."

Again on December 31, 2013, Mr. DoMinh sent the FOH members an email pretending to speak like the Deputy Vice Chairman. The email stated "Jeem -- Eye weel need yew choo make yor attorneez prodooose more cases! De frawnt awfeece eez maykeeng me feel woo-reed an' yew know how Eye yam choo teemid an' dot Eye fear Kawnfrawntayshun! Yew weel help me, yes?" (Agency Ex. 3-D). Respondent replied to this email "More likely he'll roll Dennnneeeeeese CheeeeOpeeeeta and Jeeemy Marssshhhh." *Id.*

ABA Model Code of Judicial Conduct Rule 1.2 **[*34]** requires a judge to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. Mr. DoMinh's January 14, 2008 email clearly ridicules the Deputy Vice Chairman's accent and Respondent's response not only fails to admonish the behavior but encourages and supports mocking his nationality. Furthermore, Respondent ridiculed the Deputy Vice Chairman's accent in his December 31, 2013 email.

A VLJ mocking a person's nationality does not promote public confidence in the integrity or impartiality of said VLJ. The BVA hears Veterans' benefit claims and claimants appearing before the VLJs represent every nationality in the United States. Respondent's participation in the January 14, 2008 and December 31, 2013 email strings ridiculing a person's accent and stereotyping his nationality contaminates the public's perception of a fair and impartial judge; if a presiding officer is free to ridicule someone's nationality in private, how is a claimant to assume he will receive impartial adjudication of his claim? Respondent's actions here call his judgment into question and the public would be reasonable to assume he was somewhat biased against certain **[*35]** nationalities. Respondent's conduct fails to promote confidence in the judiciary in violation of Rule 1.2 and constitutes conduct unbecoming a VLJ.

On August 28, 2013, Respondent received an email from Mr. DoMinh containing altered pictures of a FOH member receiving an award. One picture was altered to read "Guess I didn't kill all the gooks in Vietnam." (Agency Ex. 3-D). The FOH member in the picture is Mr. DoMinh and Mr. DoMinh is Vietnamese. (Tr. Vol. ?? at ??, Agency Ex. 3-D). Respondent commented on the alterations to the photographs stating they were "hilarious." (Agency Ex. 3D). Respondent condoned and encouraged Mr. DoMinh's use of offensive language referring to people from Vietnam. There is no excuse to use such a term. It is obvious that any person who is not only a Vietnamese American, but anyone who is an Asian American would not believe a VLJ who used or condoned such language would be impartial. Therefore, Respondent's statement violates the ABA Model Code of Judicial Conduct Rule 1.2 and establishes conduct unbecoming a VLJ.

On May 20, 2014, Respondent sent an email calling a BVA Chief VLJ "Charo." The undersigned notes that "Charo" is a famous Spanish-American actress **[*36]** known for speaking with a strong Spanish accent. Accordingly, Respondent referred to some people of Spanish decent as "Charo." (Agency Ex. 3-C). Clearly, calling anyone who is of Spanish decent "Charo," the name of a woman known for her thick Spanish accent is an attempt to poke fun at their perceived national origin. Such behavior violates the ABA Model Code of Judicial Conduct Rule 1.2 because it fails to promote confidence in the judiciary, and thus, is conduct unbecoming a VLJ.

5. Other/Remaining Emails

On September 11, 2013, Mr. Hancock sent two emails to fellow FOH members stating "[w]ho is the chick besides Amy Crazy in the top right pic; not the terrorist" and "Mike to have my pee pee introduced to her va jay jay." Respondent replied to these statements, "[n]o -- pic is much better than how she looked in person." Discussing the desire to have sexual intercourse with a woman, potentially a coworker, over government email is clearly improper and objectifies women. [19] This type of behavior is unprofessional and particularly offensive to women; it does not promote the public's confidence in the judiciary. This email exchange violates ABA Model Code of Judicial Conduct **[*37]** Rule 1.2 and therefore constitutes conduct unbecoming a VLJ.

Finally, in an email dated January 30, 2014, Respondent sent an email calling another VLJ an "Ewok." The email chain continued with Mr. Hancock stating "Maybe a clandestine bj meeting has been arranged" and "I am clearly filled with hate. Need to stop." In response to these statements Respondent stated: "You're on fire today, Chuckles!!!" and "No!! [A]ctually keeps it sane here." (Agency Ex. 3-D).

An Ewok is a fictional teddy bear like creature from the Star Wars Movie: Return of the Jedi. *Totah v. Lucasfilm Entm't Co., 2010 U.S. Dist. LEXIS 133295, 2010 WL 5211457 (N.D. Cal. Dec. 16, 2010)*, aff'd, *500 F. App'x 573 (9th Cir. 2012)*. Based on the description of an Ewok one can make assumptions about the appearance of the VLJ Respondent called an Ewok. While the use of the term Ewok in and of itself is not offensive, it is nonetheless inappropriate **[*38]** to call fellow BVA employees names. I do not find this behavior alone raises to the level of conduct unbecoming a VLJ.

The email chain does not stop there. Mr. Hancock's reply to Respondent's Ewok comment refers to a "clandestine bj meeting." Instead of chastising Mr. Hancock for an inappropriate sexual comment, Respondent states "You're on fire today, Chuckles." Respondent is clearly encouraging Mr. Hancock's use of inappropriate workplace language and Respondent's encouragement did not stop there. After making the sexual comment, Mr. Hancock seems to acknowledge the inappropriateness of his statement by exclaiming "I am clearly filled with hate. Need to stop." Respondent replies to this by stating "No!! [A]ctually keeps it sane here." The continued encouragement by Respondent is deplorable and yet another reason these types of email correspondences continued over the course of seven years. There is no question that Respondent's actions in this email chain constituted conduct unbecoming a VLJ and it violates ABA Model Code of Judicial Conduct Rule 1.2. Respondent's actions do not promote the public's confidence in the judiciary, encouraging such behavior and sexual commentary degrades **[*39]** the integrity of the BVA judicial process.

B. Misuse of Government Equipment

Here, it is undisputed that all the members of the FOH used their VA government email address to send the email chains at issue in this case. Each of Respondent's emails containing inappropriate and offensive language were sent using his VA issued government email address, regardless of whether it was sent during work hours. Respondent sent these emails over the VA email system even after receiving training concerning appropriate use of government equipment, including computers, phones and emails systems.

VA Directive 6001 governs VA employees' use of government office equipment and information technology. It states "[e]mployees are expected to conduct themselves professionally in the workplace and are required under the Standards of Conduct to refrain from using Government office equipment for activities that are inappropriate. " The Directive defines inappropriate use as being activities that are "offensive to fellow employees or the public. Such activities include hate speech, or material that ridicules others on the basis of race, creed, religion, color, sex, disability, national origin, or sexual **[*40]** orientation."

Respondent received training concerning the use of government office equipment and information technology. Accordingly, Respondent was aware or should have been aware that using his government email address to send inappropriate and offensive statements is against VA policies. I find Respondent violated VA Directive 6001, and the VA proved Respondent misused government equipment.

---

[19] It is unclear from the record whether the woman described in the pictures is a coworker or not.

C. Respondent's Defenses

Respondent alleges three due process violations in his Post-Hearing Brief, which he believes should negate the proposed sanction of removal. He asserts that since these violations occurred the VA has not shown good cause to sanction Respondent.

1. Fatal *Ex Parte* Communications

Respondent asserts his due process rights were violated when Deputy Secretary Sloan Gibson consulted with a representative from the Office of Accountability and Review (OAR) while determining whether to file a complaint with the MSPB. Here, Respondent claims Deputy Secretary Gibson did not inform Respondent of his discussions with OAR, just his discussions with counsel. The law Respondent relies upon to make this argument is a "deciding official violates an employee's due process **[*41]** rights when he relies upon new and material *ex parte* information as a basis for his decision on the merits of a proposed charge or the penalty to be imposed." *See Stone v. Federal Deposit Insurance Corporation, 179 F.3d. 1368, 1376-77 (Fed. Cir. 1999)*; *Norris v. Securities & Exchange Commission, 675 F.3d 1349, 1354 (Fed. Cir. 2012)*; and *Gray v. Department of Defense 116 M.S.P.R. 461 (2001)*.

While Respondent's interpretation of the rule of law is correct concerning prohibited *ex parte* communications and penalty imposition, his application of that law is not. The cases cited by Respondent all refer to sanctioning employees other than ALJs. The law concerning sanction of ALJs is different. The suggested sanction of an agency to the MPSB "is not due a high degree of deference." *Social Sec. Admin. v. Glover, 23 M.S.P.R. 57, 79 (1984)*. It is the Board, not the agency, which chooses and authorizes the appropriate sanction. *Id.*

In this case Deputy Secretary Gibson is not the deciding official; the Board is the deciding official, after the undersigned issues an initial decision. Deputy Secretary Gibson is merely **[*42]** the official representative of the VA who filed the complaint with the MSPB seeking a sanction against Respondent. In essence, Deputy Secretary Gibson is the proposing official when drawing comparison to the law cited by Respondent and the undersigned is the deciding official. Therefore. "*Stone* is inapplicable to this case because there was no agency employee who served as a deciding official. Rather, it is the Board which makes the decision to approve a disciplinary action against an All pursuant to *5 U.S.C. § 7521*." *See Social Security Administration v. White, 119 M.S.P.R. 390, 2013 WL 9678046 (2013) * 5.*

Even assuming Respondent's interpretation of the law is correct, Deputy Secretary Gibson's consultation with OAR did not harm Respondent. Contrary to Respondent's assertions in his Post-Hearing Brief, there is no evidence that Deputy Secretary Gibson's discussions with OAR investigators in an effort to understand and analyze the evidentiary file, introduced new and material information of which Respondent was unaware. Therefore, the undersigned finds Respondent's due process rights were not violated by Deputy Secretary Gibson's discussions with OAR. **[*43]**

2. Failure to Consult the Table of Penalties

Respondent asserts Deputy Secretary Gibson's failure to consult the table of penalties prior to filing a complaint with the MSPB proposing removal of Respondent from federal service constitutes harmful error. The undersigned disagrees. Deputy Secretary Gibson was the proposing official and his failure to consult the table of penalties was, at most, harmless error. As discussed above, the Board, not the agency, chooses the appropriate sanction. Hence, Deputy Secretary Gibson's failure to consult the table of penalties is harmless error because the undersigned (on the Board's behalf) determines whether good cause exists to take action against Respondent and ultimately what action is appropriate.

3. Witness Tampering

Finally, Respondent argues an agency supervisor, Mr. David Spickler, attempted to dissuade witnesses from providing written statements on behalf of FOH members. As explained below, while there is evidence that at least one witness decided not to testify because of Mr. Spickler's statements, there is no evidence any witnesses would have testified on Respondent's behalf, but changed their minds after speaking with **[*44]** Mr. Spickler.

[redacted]

The record shows Mr. Bernard DoMinh asked Judge Theresa Catino to provide a statement on Mr. DoMinh's behalf after the Agency pursued disciplinary proceedings against him. (Tr. Vol. II at 21). Judge Catino's testimony also shows after she met with Mr. Spickler she changed her mind ultimately deciding not to provide Mr. DoMinh a character statement. (Tr. Vol. II at 20-26). Mr. Spickler testified he told the VLJs to think carefully before providing character references. (Tr. Vol. I at 159).

Respondent provides no evidence that he asked Judge Catino or any of the other VLJs present at the meeting with Mr. Spickler to provide him with a character statement. In fact, Judge Catino testified at Respondent's hearing and was free to state her opinion of Respondent. During her testimony Judge Catino did not give her opinion of Respondent, nor did she say she would have but for her conversation with Mr. Spickler. More importantly, Judge Catino directly testified Respondent never asked her for a character statement. (Tr. Vol. II at 23-24). There is simply no evidence Mr. Spickler's statements ever harmed Respondent. Further he provides no evidence of any witnesses that would have **[*45]** provided a reference on his behalf, but changed their minds as a result of Mr. Spickler's statements. Respondent has not shown Mr. Spickler's statements affected witnesses who might have spoken for or against Respondent's character.

D. Does Good Cause Exist For Discipline?

The VA proved Respondent committed acts unbecoming a VLJ and misused government equipment. Having engaged in conduct unbecoming a VLJ and misuse of government resources, good cause exists to take action against Respondent. As set forth in 5 U.S.C. § 7521, an agency may take any of the following actions once it establishes good cause to the Board: removal, suspension, reduction in grade, reduction in pay, and furlough of 30 days or less. Accordingly, an analysis of which disciplinary action is appropriate needs to be undertaken. Although the VA seeks Respondent's removal, the suggested sanction "is not due a high degree of deference." *Social Sec. Admin. v. Glover, 23 M.S.P.R. 57, 79 (1984)*. It is the Board, not the Agency, which chooses and authorizes the appropriate sanction. *Id.* To determine if removal is appropriate, a detailed review of Respondent's conduct needs **[*46]** to be examined in light of the *Douglas* Factors.

E. The *Douglas* Factors

The undersigned must make a thorough and reflective analysis of Respondent's conduct before the Board can impose any sanction. Toward that end, *Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981)*, provides a variety of considerations, or "factors," appropriate when determining a sanction. [20] Federal courts recognize the "*Douglas* Factors" are not intended to be an exhaustive list and should not be mechanically applied. *Nagel v. Dep't of Health and Human Servs., 707 F.2d 1384, 1386 (Fed. Cir.1983)*. Nor has the Board required every "*Douglas* Factor" be considered. *Social Sec. Admin. v. Davis, 19 M.S.P.R. 279 (1984)*.

[*47]

1. The Nature and Seriousness of the "Offense"

To determine the nature and seriousness of the offense, I must consider the offenses' relations to Respondent's duties, position and responsibilities. *Villada v. U.S. Postal Service, 2010 M.S.P.B. 232, 2010 WL 4909470 (M.S.P.B. Dec. 2, 2010)*. Other considerations include whether the offense was intentional, technical or inadvertent; committed maliciously or for gain and frequency of the offense. *Id.*

In this case, Respondent holds a position of high prominence within the VA and his core duties are to render fair, impartiality and unbiased decisions. Respondent is expected to uphold the values of the VA and should conduct himself in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

---

[20] *See also Soc. Sec. Admin. v. Steverson, 111 M.S.P.R. 649, 658 (2009)* (holding that the Board will consider the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated).

ABA Model Code of Judicial Conduct Rule 1.2. Furthermore, Respondent must avoid impropriety and the appearance of impropriety at all times. *Id.*

The comments made by Respondent and fellow FOH members in this case were disgraceful. Whether they intended for the targets of their offensive statements to receive the emails does not negate the fact that the comments were wholly unfit for a judicial **[*48]** officer. Respondent specifically imitated fellow VLJ's accents for the purpose of amusing fellow FOH members; referred to other VLJs as "butt buddies;" called an African American coworker "Ghetto Hippopotamus" and in response to an FOH member exclaiming two fellow VLJs "gobble jizz" Respondent stated "yes, R[]'s." *See* Initial Decision Sections IV(A) (1,2, and 4). There is no question as to whether these comments are hurtful and degrading to the individuals of whom Respondent referred. Furthermore, fellow FOH members made deplorable and offensive comments regarding fellow VA employees while Respondent encouraged them. Specifically, Respondent encourages Mr. Charles Hancock's reference to a "clandestine bj meeting" when Respondent stated "You're on fire today Chuckles." (Agency Ex. 3-D).

Clearly this behavior was intentional. Respondent and fellow FOH members continually sent emails to each other with increasing vulgarity on a myriad of subjects involving VA employees. One cannot argue that the actions were not intentional when each member individually chose to participate in the FOH and no one claims to have accidentally typed or responded to any of the messages. Respondent was **[*49]** not merely the recipient of the emails, he actively composed messages and sent numerous offensive emails containing racist, homosexual, and derogatory terms. But even where Respondent was merely the recipient of the emails, he failed to do what was right by reporting and/or taking steps to put a stop to the FOH conduct.

The longevity of the emails is perhaps the most damning consideration in this case. Respondent and FOH members continued their reprehensible conduct over the course of seven years. The only reason these emails are not continuing today is because the FOH emails were discovered during an IG investigation.

Respondent showed no qualms about referring to the KKK even when discussing children. Specifically, Respondent inquires why an all white children's baseball team was not wearing "white sheets" in reference to the KKK. (*See*Initial Decision Section VI(A)(1)). Respondent also altered a news article to include derogatory terms to refer to an African American male and a reference to lynching. (Agency Ex. 3-C). These atrocities transpired during a period of time our courts refer to as "horrors"; "dark days"; "a dark period in American history"; and "the most deplorable **[*50]** moments in America's tortured racial history." [21] Repeatedly, Respondent expressed racist views or condoned other FOH member's racist comments, as well as those, mocking homosexuals, women, and other nationalities.

Respondent believes the nature and seriousness of the offense are not severe enough to warrant removal. First, Respondent argues he did not intend to harm others, did not seek personal gain, nor did he have any offensive physical contact with another employee. He asserts the intended audience was only the fellow FOH members who also sent "outrageous and un-PC" emails. (Resp. Post-Hearing Brief at 31). Finally, Respondent claims there has been no impact on his ability to perform his duties as a VLJ.

The undersigned finds Respondent's argument without **[*51]** merit. The notion that these emails had no negative impact on his ability to perform his job as a VLJ is unpersuasive and defies credulity. By Respondent's own admission, "the Agency withdrew his duties as a VLJ at the time of its proposed action." (Resp. Post-Hearing Brief at 31). Respondent is no longer hearing cases, issuing or writing decisions, in essence, Respondent is no longer functioning as a VLJ because of his conduct. It is illogical to conclude these offenses had no negative impact on his ability to perform his duties as a VLJ. The mere proposal of taking action against Respondent was based on actions the VA views as so egregious it caused the VA to strip Respondent of his judicial duties and propose removal.

---

[21] *Newman v. Vill. of Hinsdale, 592 F. Supp. 1307, 1307 (N.D. Ill. 1984), aff'd* ***767 F.2d 925 (7th Cir. 1985)***; *Brown v. Peterson, No. 7:03 CV 0205, 2006 U.S. Dist. LEXIS 4311, 2006 WL 349805, at *9 (N.D. Tex. Feb. 3, 2006).*

[redacted]

Respondent's involvement in sending racist, offensive, and hurtful emails, coupled with his encouragement of other FOH members to continue the misconduct is deplorable. To insinuate that these actions are in any way menial or irrelevant is unimaginable. Respondent's actions erode the public's confidence in the VA judicial process. It is clear Respondent's participation in seven years of emails containing racist, sexist, lewd, offensive statements constitute frequent **[*52]** and extremely serious offenses meriting the weightiest sanction: removal.

2. Respondent's Position and it's Prominence Respondent holds the position of a VLJ within the BVA. VLJs have decision making authority on behalf of the Secretary. (Tr. Vol. I at 94). The VLJ hiring process takes many months as VLJs must go through a multistage interview process and then are appointed by the Secretary with the approval of the President. (Tr. Vol. I at 94-96). The position of VU is vested with significant judicial and professional esteem and responsibility. *See Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)* [addressing professionalism of ALJs, which are comparable to VLJ]; *Ramspeck v. Federal Trial Exam'rs. Conf., 345 U.S. 128, 73 S. Ct. 570, 97 L. Ed. 872 (1953)*; *Social Sec. Admin. v. Carter, 35 M.S.P.R. 466, 482 (1985)*.

Respondent's position is one of great prominence and he has a duty to conduct himself in a manner which reflects the VA's mission and ideals. It is the BVA's purpose to conduct hearings and decide appeals of Veterans' benefit claims. The standard of conduct of a judge is higher than that of an attorney, but the undersigned notes mere admission to the bar **[*53]** as attorney is markedly high. As observed by one common law court, when seeking admission to the bar,

> Each [attorney] must produce record evidence of full age and good moral character. One that is based on the right to admission as an attorney. It would require no argument to show that if good moral character when admitted is necessary, the reason is just as strong **for his retaining that good moral character after admission**, good moral character being a pre-requisite and quality in the attorney. It is the bounden duty of courts, when their attention is directed to it, **to see that such good moral character** shall be constantly preserved. The property, characters, and, to some extent, even **the lives, of individuals are committed to the care of the profession**. It is not only a **high** and honorable **calling**, to which the community naturally look up, but connected with it is a trust: of the profession is expected probity, integrity and example; **next to a judge** he should be the guardian of the constitution and of the law, because he is presumed to know what it is, and because his oath has bound him honestly and faithfully to walk within the pale **[*54]** of her precepts.

Smith v. State, 9 Tenn. 228, 239 (1829) (emphasis added). Respondent's conduct in this case did not set an example to the community entrusting him to adjudicate cases; nor would his conduct induce the public to look up to him or other participants in the FOH. Respondent did not preserve good moral character when he failed to report and put a stop to the inappropriate emails exchanged among the FOH. He did not satisfy the high calling entrusted to him by the President that tendered his appointment, nor the people of the United States, for whom he serves.

Clearly, Respondent did not conduct himself in a manner which would promote public confidence in the VA, the judiciary, or the bar. Because Respondent's position is one of such prominence, his actions negatively impact the VA to a much greater extent than if he held a less prominent position. Accordingly, Respondent's actions within the FOH erode the public's confidence in the VA and the judiciary and warrant the most severe sanction of removal.

3. Past Disciplinary Record

Respondent has worked for the BVA since November 1995. Since 1995, Respondent has not been the subject of any previous **[*55]** disciplinary actions. A lack of prior disciplinary action usually mitigates a lesser sanction under normal circumstances. However, given the totality of the circumstances, and consideration of other *Douglas* factors, the undersigned finds lack of prior disciplinary action is outweighed in this case. *Soc. Sec. Admin. v. Steverson, 2009 M.S.P.B. 143, 2009 WL 2222372 (M.S.P.B. July 27, 2009)*, aff'd, *383 Fed. Appx. 939 (Fed. Cir. 2010)*.

4. Past Work Record

[redacted]

Since being hired by the VA in November 1995, Respondent has received numerous awards, letters of praise, and excellent evaluations. Respondent is known as a hard worker, a judge BVA attorneys would like to work for, and generally liked by his colleagues. (Agency Ex. 2 at 57-126). However, the undersigned finds Respondent's awards and evaluations should have suffered had the Agency known of his participation in the FOH. Although there is no evidence Respondent has ever received a poor evaluation, the record shows he operated in the FOH unnoticed and undetected for a number of years. Accordingly, Respondent's ability to operate unnoticed in the FOH must be considered when evaluating Respondent's work record. **[*56]**

5. Effect of the Offense on Respondent's Performance

The fifth *Douglas* factor to consider is "the effect of the offense upon [Respondent's] ability to perform at a satisfactory level and its effects upon supervisor's confidence in [Respondent's] ability to perform assigned duties." *Douglas, 5 M.S.P.R. at 305*. Deputy Secretary Gibson, the deciding official who officially proposed Respondent's removal in this case, stated during his testimony he felt Respondent

> would be unable to perform in a role at the Board of Veterans Appeals where he was in any way, shape or form involved in making decisions around a veteran's appeal because of the need for, not just the absolute exercise of judgment in a fair, unbiased and impartial way, but the perception by those whose cases are being heard that he was fair, impartial, and unbiased." Tr. Vol. I at 30.

David Spickler, the proposing official and Deputy Vice Chairman at the time the VA proposed Respondent's removal, testified "in my view based on these offenses, and what I would expect and I believe the public expects of a Veterans Law Judge, I think [Respondent's] ability to serve as a Veterans **[*57]** Law Judge is just completely compromised by the nature of the offenses." [22] (Tr. Vol. I at 145). Finally, Judge Kimberly Osborne testified that in her current position as Deputy Vice Chairman for the VA:

> [N]ot only would I be concerned for myself, I would also be concerned with the many employees that are Hispanic, that are African American, that are Asian, that are gay.
>
> It would take me off the focus as far as what I need to do to truly serve veterans. And then, you know, if he was allowed to continue to do cases and do hearings, I would always think that I need to go behind the decisions and make sure that fair decisions are being made and that biases have not taken place in the decisions. (Tr. Vol. I at 184).

Several character witnesses testified on Respondent's behalf, including fellow VLJs **[*58]** and attorneys. These witnesses stated the content of the emails does not affect their opinion of Respondent's ability to do his job. Chief VLJ James March, Respondent's first line supervisor, testified he still has confidence in his ability to do his job even after knowing the content of the emails at issue in this case. (Tr. Vol. III at 64-65). The general consensus of his character witnesses is that these emails were private and therefore outside the scope of his ability to perform his duties as a VLJ.

The undersigned disagrees with this assessment. As stated in VA Directive 6001, Respondent and fellow FOH members had no expectation of privacy while using the VA government email. (Agency Ex. 3-H). It is irrelevant whether FOH members perceived these email chains as a group of coworkers communicating in private. The FOH members' communications were deplorable. Finally, even FOH member Chief Judge Dennis Chiappetta stated in an email dated December 7, 2010, "[y]ou should set up private email accounts for this stuff. I have one at . . . ." (Agency Ex. 3-D).

Although there is no evidence whether Respondent's decisions were in fact biased against veterans because of race, sexuality, **[*59]** national origin, etc., the fact remains Respondent expressed and condoned those views. As Deputy Secretary Gibson stated at the hearing "[p]eople are going to look at this and say, this is what you [Respondent] believe because you were saying these things when you felt like no one else was watching." (Tr. Vol. I at 33). There is no question that prior to being made aware of these emails, Respondent's supervisors had

---

[22] The supervisory structure at the BVA is ever changing. Currently, and at the time this case was initiated by the VA, the Deputy Vice Chairman oversees CVLJs and VLJs. Tr. Vol. I at 131-32.

confidence in his work based on good performance evaluations and letters of recognition he received. As evidenced in Deputy Secretary Gibson's statement above as well as those of Mr. Spickler and Judge Osborne, VA supervisors now lack confidence in his ability to do his job properly and feel the public will also share this sentiment. Again, the undersigned notes Respondent's current supervisor, Judge March, states he still has confidence in Respondent's ability to function as a VLJ, but Judge March repeatedly minimizes the severity of the comments. (Tr. Vol. III at 64-65). Furthermore, Judge March also testified that "if a veteran read the emails not knowing, not meeting Judge Markey, I'm sure he would question his judgment in the case." (Tr. Vol. III at 72). Therefore, **[*60]** I find Respondent's participation in the FOH negatively affects his ability to perform the duties of a VLJ. This factor substantiates a more severe sanction.

6. Consistency of the Penalty with those Imposed on Other Employees

Respondent participated in numerous inappropriate, vulgar, and offensive email chains. These facts do not correlate with any previously adjudicated MSPB matters. However, four other BVA employees were involved, to include three attorneys and one Chief VLJ. Two of the attorneys resigned and one attorney received a disciplinary suspension for his involvement. Concerning the Chief VLJ, the Agency is seeking removal.

Respondent believes the Board should not authorize his removal because his conduct was not severe enough to warrant removal. Respondent further argues removal is not consistent with penalties previously imposed by the VA. In his Post-Hearing Brief, Respondent cites to the testimony of several BVA employees who gave examples of how the VA has disciplined employees in the past.

First, Respondent relies on Mr. Bernard DoMinh testifying about a fellow attorney in the late nineties. (Tr. Vol. II at 7). There, the attorney allegedly sent harassing **[*61]** emails to an African American coworker and VA only suspended the attorney. (*Id.*). There is no firsthand knowledge of this nor did Respondent present any verifiable evidence concerning the details or sanction of the said employee. Next, Respondent cites to Judge Robert Sullivan's testimony that two VA employees "basically embezzled hundred of thousands of dollars giving themselves these higher classified jobs with the VA, and the Deputy Secretary ended up not terminating them, but giving them some minor punishment." (Tr. Vol. II at 107). Finally, Respondent relies on sworn testimony from Ms. Jacqueline Connolly, a GS-14 attorney with the VA, who testified the VA has had "a lot of instances of people making mistakes at the Board ... you know, cases, other email cases, sexual harassment cases, some involving touching, and those people were not removed." (Tr. Vol. III at 114-15).

Although hearsay is allowed in administrative hearings, this type of evidence must be given its due weight. *Long, 2010 M.S.P.B. 19, 2010 WL 391482 (M.S.P.B. Jan. 27, 2010), affd, 635 F.3d 526 (Fed. Cir. 2011)*. The examples given by Judge Sullivan, Mr. DoMinh and Ms. Connolly are anecdotal **[*62]** at best and akin to water-cooler gossip. No evidence was presented by Respondent to show who these employees are, the details of their alleged offenses, and how they were actually disciplined. [23] Furthermore, there is no evidence any of these employees were VLJs at the time the alleged actions took place. Accordingly, they are not similarly situated employees (see discussion below) and not subject to the same MSPB sanction process protections as ALJs. Employees not subject to MSPB protections have an entirely different removal process which is governed directly by the applicable employment regulations and the hierarchy of the agency. Therefore, the undersigned does not give these examples much weight as comparators.

Of the previously disciplined FOH members, Respondent would like to equate himself with the suspended attorney. When determining the propriety of a penalty, the Board looks at the consistency of the penalty with those imposed on similarly situated employees for the same or similar offenses. *See Lewis v. Department of Veterans Affairs, 113 M.S.P.R. 657 at 660, 2010*. Here, Respondent should not be treated in the same manner as a suspended attorney because **[*63]** attorneys are not similarly situated employees. While attorneys are held to a high standard of conduct, judges are held to an even higher one.

---

[23] The undersigned does note that one employee was named during the hearing and linked to racist emails, but no details were provided.

The VA did not intend VLJs to be similarly situated or comparable to a VA GS-14 attorney as evidenced in the VA's regulations. These regulations illustrate the intention for a VU to be comparable to an Administrative Law Judge (ALJ). During the rulemaking process, the VA describes the term "Veteran Law Judge," as having almost identical functionality to that of an ALJ. *See Appeals Regulations: Title for Members of Board of Veterans' Appeals, 68 Fed. Reg. 6621, 6622-23 (Feb. 10, 2003)*. The VA holds both VLJs and ALJs are "judges" as they hold hearings and make decisions. *Id.* VLJs are very experienced and move easily into the ALJ ranks; neither are subject to normal performance reviews applicable to most civil service **[*64]** employees. Both exercise similar decisional independence and their pay is the same. *Id.* The Board holds ALJs (here VLJs) are prominent positions with a very high standard of conduct. *See SSA v. Long, 113 MSPR 190, 211 (2010)*. Judges are held to higher levels of conduct than typical government employees, because their indiscretions can violate public trust and diminish confidence in the administrative adjudicative process. *Id.* Consequently, I do not consider Respondent (a VLJ) to be similarly situated or comparable to a VA attorney.

7. Consistency of the Penalty with the Applicable Agency Table of Penalties

Under General Misconduct in the VA Handbook, the maximum penalty for a first time offender is removal. *See* VA Handbook 5021/15 Part I, Appendix A. *www.va.gov/vapubs/viewPublication.asp?Pub_ID=714*. General Misconduct No. 21 applies to this case, as it references making disrespectful, abusive, or obscene language aboutsupervisor or other employees. *Id.* Respondent's involvement and participation in the FOH included offensive, abusive, obscene and disrespectful language directed at multiple BVA employees. This is exactly the type of misconduct **[*65]** contemplated within General Misconduct No. 21. Because the maximum first time penalty for Misconduct is removal, the requested penalty is consistent with the Agency's Table of Penalties.

8. Notoriety of the Offense

Another factor to look at is the notoriety of the offense and its effect upon the reputation of the agency. It is well known the VA has received a lot of bad press in recent years. One of the first times the subject matter of this case came to light was when the VA Watchdog & Progressive Advocacy group issued a blog post addressing a developing story about VA judges and attorneys being fired over improper emails. *See* Attachment B. Of particular note, the blog states:

> If I were a veteran and learned that my BVA denial may have been decided by an individual who holds racist or sexist bias, I'd sure be speaking with a veterans law attorney. This is one more embarrassing event for your Department of Veterans Affairs. Only at the VA will you find adult professionals who think it's OK to distribute racist or sexist email message to others. *Id.*

Several months later, the Wall Street Journal sought comments from the VA on this matter and informed the **[*66]** VA they would be publishing an article. (Tr. Vol. Vol. I at 24). On March 1, 2016, the VA issued a short press release announcing proposed disciplinary actions were being taken against three BVA attorneys and two BVA judges for sending inappropriate emails. (Respondent's Answer Ex. 1). The Wall Street Journal also published an article on the same date addressing the proposed disciplinary action stating, "[t]he latest action raises questions as to whether appeals from minority veterans received a fair hearing." *https://www.wsj.com/articles/veterans-affairs-takesaction-against-five-staff-members-for-emails1456872525*.

Following the VA press release and the Wall Street Journal article, other news sources picked up the story and published articles. (Tr. Vol. I at 25). However, most details concerning this case have not been released to the public; but after the Initial Decision in this case is made public, more details of the inappropriate emails will be released and the potential for adverse publicity increases. As such, it is reasonable to conclude the VA may likely reap more public embarrassment and disrepute because of Respondent's action. Deputy Secretary Gibson stated the notoriety **[*67]** of the offense was one of the most important factors in his *Douglas* analysis:

> Everything we do as a Department is built on a foundation of trust, and especially in the role of a Veterans Law Judge, trust and the individual's judgment and strength of character to exercise their fiduciary responsibilities in a fair, impartial and unbiased kind of way. And from my perspective this behavior dramatically undermines that

> foundation of trust that has to be there. So I think the notoriety both past and what I expect will be in the future will have a very negative impact on the Department. (Tr. Vol. I at 23).

Therefore, the "potential adverse publicity" is relevant to this *Douglas* analysis. *See Byrd v. U.S. Postal Service, 13 M.S.P.R. 86, 90 (1982)*.

Respondent argues in his Post-Hearing Brief that "no actual information came to the public eye but for the Agency's voluntary press release." Respondent is not correct. In January 2016, around the same time of Respondent's proposed removal, the VA Watchdog & Progressive Advocacy Group published a blog on the issue. Further, the VA issued a voluntary press release *after* the Wall Street Journal contacted **[*68]** the VA to elicit comments concerning this issue, informing the Agency it planned to publish an article. (Tr. Vol. I at 24). Respondent's argument is not persuasive. Accordingly, the undersigned finds Respondent and the FOH members' conduct has received significant public attention.

9. Was Respondent on Notice of Any Rules or Conduct?

Throughout his career with the VA, Respondent has taken annual training concerning discrimination and retaliation as do other BVA employees. (Tr. Vol. I at 25-27). There are also BVA policies concerning the use of office equipment as well as ridiculing individuals based on race, sex, color and sexual orientation. (*Id*). VA Handbook 6500 Appendix G and VA Directive 6001 govern the use of VA's information technology systems. (Agency Ex. 3-G, 3-H). All employees are required to acknowledge and sign the VA Handbook. (Agency Ex. 3-G). As discussed above, these emails in question clearly ridicule fellow BVA employees based on race sex, color, and sexual orientation. Here, the undersigned finds Respondent had ample notice of the rules that govern and discourage this type of conduct.

10. Potential for Rehabilitation

The record is devoid of evidence **[*69]** concerning Respondent's potential for rehabilitation. Respondent does argue in his Post-Hearing Brief he has a strong potential for rehabilitation based on his strong work ethic, past work history, and the favorable opinions of his coworkers. As shown below, these facts do not, in and of themselves, illustrate a potential for rehabilitation.

The undersigned notes that Respondent is unlikely to repeat this type of behavior after getting caught, but Respondent's lack of remorse is concerning. Is Respondent truly rehabilitated if the sole reason the behavior ceased was because he was caught? Does getting caught change the hateful, inappropriate, and contemptible views Respondent expressed and encouraged in the email chains? Respondent never truly apologized for his actions. Respondent does makes semi-apologetic statements, for example: "I have no excuse for it" (Tr. Vol. II at 39); and "it's in poor taste." (Tr. Vol. II at 44). However, declarations such as these, in both his hearing testimony and in his IG interview, trivialized the seriousness of his actions. For example, after making inappropriate homosexual comments Respondent stated, "[f]ind somewhere where I picked out a homosexual **[*70]** and made a bad remark about them, just based on that." (Tr. Vol. II at 60). As discussed above, just because the people you are speaking about are not homosexual, does not mean the comment was any less inappropriate.

As such, Respondent's judgment and trustworthiness is in doubt. Deputy Secretary Gibson testified "they [VLJs] serve in a position of trust" and that participation in the FOH makes it "impossible . . . that [Respondent] is a person that's going to be able to exercise fair, impartial and unbiased rulings. When in fact, there is a pattern over an extended period of time of racist, sexist and homophobic statements." (Tr. Vol. I at 21). The damage Respondent has done through his actions as a member of the FOH shattered one of the most essential elements of his position as a VLJ, to act with the highest integrity. Taking all of this into consideration, the undersigned does not find Respondent can be fully rehabilitated.

11. Mitigating Circumstances

Next I must determine if any mitigating circumstances exist in this case. Throughout his career with the VA, Respondent received good performance evaluations along with awards and letters of praise. (Agency Ex. 2 at **[*71]**

57-126). During the hearing several character witnesses testified on Respondent's behalf. These character witnesses stated Respondent had a reputation as being professional, hard working, nice, and fair. He was also viewed by his colleagues as an impartial judge. Witnesses also stated many attorneys liked to write for Respondent. Finally, there is no evidence in the record Respondent ever wrote a decision discriminating against a veteran due to race, sexual orientation, sex, or national origin.

Respondent argues another mitigating factor to take into consideration is the unusual job tensions which lead to a toxic work environment. As stated before, Respondent asserts these emails were not meant to harm others and were just a way for FOH members to blow off steam by making each other laugh using over-the-top comments. Respondent claims the FOH was just a way to "temporarily escape the reality of the Agency." (Resp. Post-Hearing Brief at 39).

Respondent showed little to no remorse for his actions. Even Respondent's Post-Hearing Brief concerning mitigation repeatedly puts Respondent's and other FOH member's comments in a trivializing light. Respondent claims these FOH emails were not **[*72]** "real conversations" nor did they "state serious or real opinions." (*Id*). However, Respondent specifically argues "indeed, many of the emails' subjects were the authors of the e-mails themselves and/or an Agency employee who perpetuated the toxic work environment at the Agency...." (Resp. Post-Hearing Brief at 39-40). The undersigned is left with no other conclusion than Respondent truly feels the subjects of the emails got what they deserved. Instead of taking full responsibility for his role in the FOH and the offensive statements he made, Respondent continually belittled the severity of his conduct throughout his testimony, thus diminishing the mitigation. (Tr. Vol. II at 26-92; Agency Ex. 3-C).

12. Will Other Sanctions Deter Future Conduct?

Respondent claims he has already been punished severely because of the discovery of the email chains and resulted charges. However, the undersigned must consider whether a lesser sanction will deter such future conduct by Respondent or others, not just whether the discovery of Respondent's conduct negatively affected him. While I generally believe it is unlikely Respondent will send any more emails of a similar nature, his lack of **[*73]** remorse and continued view that the email content was not that bad concerns me. A lesser sanction may deter him from committing such actions in the future. The parties provided no evidence addressing how a lesser sanction would deter "others" from sending inappropriate emails. While it is true a long suspension or demotion might deter others from committing similar conduct, the harshest penalty of removal would have a greater deterrent effect.

The VA prescribes a policy of progressive discipline. This policy provides employees a chance to be rehabilitated. If a first time offender is removed, the VA prescribed policy of progressive discipline would not be followed, thus needing aggravating circumstances to exist. Here, such circumstances do exist, such as the seriousness of the offense, Respondent's position, and his supervisors' lack of trust. If Respondent were demoted from VLJ to a GS-14/15 attorney, it would not solve the other problems addressed above. Although a VLJ position differs from an attorney position, the attorneys must still maintain high moral characters, particularly since they advise the VLJs and assist in drafting decisions. Even without presiding over the hearings, **[*74]** the position of BVA attorney is still a very prominent position within the Government. Therefore, demotion is not a viable solution to Respondent's actions. It is the undersigned's opinion Respondent would also be unfit to serve as an attorney for the Agency.

V. CONCLUSION

Accordingly, good cause exists to remove Respondent from his position as a Board of Veterans' Appeals Veterans Law Judge. Respondent's participation in the Forum of Hate, a group which spieled unprofessional, vulgar, and offensive communications, is disturbing. Although, Respondent did not author the most hateful and degrading statements used in the emails, his comments were nonetheless racist, unprofessional, and appalling. Further, Respondent encouraged other FOH members to continue the hateful correspondence. Moreover, Respondent failed to report the FOH members' misconduct.

Respondent's position as a VLJ is one of prominence, appointed by the Secretary with the approval of the President. The core of Respondent's duties are to render fair, impartial and unbiased decisions. While there is no

evidence in the record that Respondent ever wrote a biased decision, his actions within the FOH emails, especially **[*75]** the racist nature of many of the comments, severely compromise his ability to render such decisions. These actions, already covered by the press, will likely gain additional coverage, thus continuing to erode the public's confidence in the VA and the judiciary. The nature and seriousness of the offenses and the fact that these emails spanned the course of seven years and only ended when FOH members were caught, depicts the gravity of his misconduct and his ability to continue to serve as a VLJ. The undersigned therefore finds **REMOVAL** from federal service is the appropriate disciplinary action.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. VA has authority to bring this disciplinary action.

2. Respondent, James Markey, and the subject matter of these proceedings, are properly within the jurisdiction vested in MSPB.

3. The preponderance of the evidence establishes Respondent conduct was unbecoming a VLJ.

4. The preponderance of the evidence establishes Respondent engaged in misuse of government resources.

5. Respondent's conduct constitutes good cause to affect the discipline proposed by the BVA; thus Respondent's REMOVAL from employment **[*76]** as a BVA VLJ is the proper disciplinary action.

VII. DECISION

The allegations as set forth in the Complaint are found **PROVED**. Given the totality of the circumstances, Respondent's own testimony, the administrative record as a whole and with due regard to the "*Douglas* Factors," the undersigned finds good cause exists to support the proposed action of removal from federal service.

VIII. ORDER

IT IS HEREBY ORDERED that authority is granted to the Department of Veterans Affairs to remove Veterans Law Judge James Markey from federal service.

PLEASE TAKE NOTICE that any party may file a petition for review with the Merit Systems Protection Board in accordance with the procedures set forth in "Attachment C."

FOR THE BOARD

WALTER J. BRUDZINSKI

CHIEF ADMINISTRATIVE LAW JUDGE

Appendix

ATTACHMENT A - WITNESS AND EXHIBIT LIST

Agency Witnesses

1. Sloan Gibson
2. Bruce Gipe
3. David Spickler
4. Kimberly Osborne
5. John Jones

Agency Exhibits

[redacted]

1: VA Deputy Secretary Sloan Gibson's Notice of Decision dated January 18, 2016, containing Douglas Factors list dated January 19, 2016

2: Respondent's **[*77]** Letter of Apology to Deputy Secretary Gibson; Respondent's Written Response and attachments, dated January 8, 2016; Affidavit by James Markey, dated January 8, 2016

3: Proposal from Deputy Vice Chairman David Spickler dated December 1, 2015 and Evidence File (Subparts 3-A through 3-1).

3-A: OIG Report

3-B: Training Records

3-C: OIG Interview Transcript

3-D: Emails

3-E: Position Description

3-F: SF-50

3-G: VA Handbook 6500

3-H: VA Directive 6001

3-I: Douglas Factors

Respondent Witnesses

1. Bernard DoMinh
2. Theresa Catino
3. James Markey
4. Robert Sullivan
5. Joy A. McDonald
6. Jacqueline Connolly
7. Kerri Millikan
8. Thomas Dannaher
9. James March

Respondent's Exhibits

A-1: VA News Release (March 1, 2016) -- VA Takes Accountability Actions against Board of Veteran Appeals Personnel

A-2: Stars and Stripes (March 2, 2016): VA: Department Attorneys, Judges Sent Racist, Sexist Emails

A-3: Veterans Affairs Takes Action Against Five Staff Members Over Alleged Discriminatory Remarks (March 1, 2016)

A-4: SF52 -- Request for Personnel Action

A-5: Memorandum from D. Spickler **[*78]** (March 1, 2016) to J. Prichard-- Subj: Decision to Suspend for Calendar Days Without Pay

A-6: Memorandum from OVLJ (February 4, 2016) to J. Prichard -- Subj: Notice of Proposed Suspension for Days 21

A-7: Deposition of David Spickler (August 10, 2016)

B-1: Email from J. Markey to B. DoMinh; D. Chiappetta; J. Prichard; C. Hancock, Subj: RE: WEEKLY (January 14, 2008)

B-2: Email Chain, Subj: RE: WEEKLY (January 14, 2008)

B-3: Email from J. Markey to D. Chiappetta; C. Hancock; B. DoMinh; J. Prichard, Subj: RE: Emailing: 734065_501096609953763_.jpg (March 20, 2013)

B-4: Email from D. Chiappeta to B. DoMinh; J. Markey; C. Hancock; J. Prichard, Subj: an award I can finally use (August 28, 2013)

B-5: Email Chain, Subj: RE: get the fiddler downstairs to play an accompaniment to the collage (September 11, 2013)

B-6: Email Chain, Subj: RE: get the fiddler downstairs to play an accompaniment to the collage (September 11, 2013)

B-7(1): Frederick County Sheriff Chuck Jenkins; PA Town Seeks to Fire Police Chief in Gun Videos

B-7(2): Email Chain (December 31, 2013), Subj: RE: VBMS Error Message

B-8: Email Chain (January 30, 2014), Subj.: RE: truth? **[*79]** Or exaggeration?

B-9: Email Chain (May 20, 2014), Subj: RE: first RUMORED list of VLJ picks

C: Deposition of Sloan Gibson (August 12, 2016)

ATTACHMENT B -- VA WATCHDOG & PROGRESSIVE ADVOCACY BLOG

Another outrage from your VA, this time it's even more unbelievable than ever.

You'll read about this only at the VA Watchdog. We're keeping an eye on the VA because someone has to!

The Board of Veterans' Appeals (also known as "BVA" or "the Board") is a part of the VA, located in Washington, D.C.

Members of the Board review benefit claims determinations made by local VA offices and issue decision on appeals. These Law Judges, attorneys experienced in veterans law and in reviewing benefit claims, arc the only ones who can issue Board decisions. Staff attorneys, also trained in veterans law, review the facts of each appeal and assist the Board members.

The VA Watchdog has learned that the BVA has experienced a significant problem over that last few months. As unbelievable as it may seem, you'll soon read a VA - OIG report confirming that certain veterans law judges and other lawyers on the staff of the BVA have been terminated for **[*80]** cause.

The cause for termination? A long pattern of inappropriate emails that feature racist and sexist writings by judges and attorneys.

Why is this important?

The load of appeals sent to the BVA has increased significantly over the last 3 or 4 years. This is rightly assumed to be the result of the push to lower the numbers of backlogged claims in VA regional offices. Many claims were inappropriately denied and will have to be appealed to the BVA for a proper decision.

In simple terms, the backlog of claims wasn't eliminated, those backlogged claims are still backlogged, just at a different place.

There are a finite number of decision makers and professional support staff at the BVA. Some judges are retired but they've been called back to try to help BVA to catch up. The employees who are being terminated have been restricted from working on appeals for some months while the VA - OIG investigates the allegations of improper emails.

As this story has developed over the last few weeks, it's become readily apparent that the loss of these decision makers is a serious blow to productivity in an already overburdened division of the VA. Morale at the **[*81]** BVA is said to be at an all lime low and the termination of senior executives won't improve attitudes within the halls of the organization.

Beyond all that is the conclusion that a lot of the appeals already decided or influenced by anyone associated with this alleged email misconduct will have a right to have their cases heard again. If I were a veteran and learned that my BVA denial may have been decided by an individual who holds a racist or sexist bias, I'd sure be speaking with a veterans law attorney.

This is one more embarrassing event for your Department of Veterans Affairs. Only at the VA will you find adult professionals who think it's OK to distribute racist or sexist email messages to others.

The end result is that your appeal to the BVA will be further delayed as VA administration tries to sort out yet one more VA boondoggle.

We anticipate the release of the full report by the VA - OIG within days or weeks. You can depend on the VA Watchdog to publish the full report the moment it's available.

Best,

Jim Strickland

jim912@gmail.com

ATTACHMENT C - REVIEW RIGHTS

NOTICE TO PETITIONER

This initial decision will **[*82]** become final on **December 14, 2017**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, *5 U.S.C. § 1201*, but currently only one member **[*83]** is in place. Because a majority vote of the Board is required to decide a case, *see 5 C.F.R. § 1200.3(a), (e)*, the Board is unable to issue decisions on petitions for review filed with it at this time. *See 5 U.S.C. § 1203*. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

[redacted]

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to *5 C.F.R. § 1201.115*, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material **[*84]** fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will 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.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, **[*85]** was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in *5 C.F.R. § 1201.114(h)*, a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits **[*86]** set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross 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. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support **[*87]** your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See 5 C.F.R. § 1201.4(j)*. If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See 5 C.F.R. § 1201.14(j)(1)*.

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

[redacted]

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Petitioner" section above. *5 U.S.C. § 7703(a)(1)*. By statute, the nature of your claims determines **[*88]** the time limit for seeking such review and the appropriate forum with which to file. *5 U.S.C. § 7703(b)*. Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with **[*89]** the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. *5 U.S.C. § 7703(b)(1)(A)*.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, *www.cafc.uscourts.gov*. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court'sRules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at *http://www.mspb.gov/probono* for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept **[*90]** representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision--including a disposition of your discrimination claims--by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. *5 U.S.C. § 7703(b)(2)*; *see Perry v. Merit Systems Protection Board, 582 U.S. , 137 S. Ct. 1975, 198 L. Ed. 2d 527 (2017)*. 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. § 2000e-5(f)* and *29 U.S.C. § 794a*. **[*91]**

[redacted]

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. *5 U.S.C. § 7702(b)(1)*. You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. *5 U.S.C. § 7702(b)(1)*.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option **[*92]** applies to you only if you have raised claims of reprisal for whistleblowing disclosures under *5 U.S.C. § 2302(b)(8)* or other protected activities listed in *5 U.S.C. § 2302(b)(9)(A)(i), (B), (C),* or *(D)*. If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. *5 U.S.C. § 7703(b)(1)(B)*.

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, *www.cafc.uscourts.gov*. Of particular relevance **[*93]** 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at *http://www.mspb.gov/probono* for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

[redacted]

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

End of Document