**Sandra Proctor v. The Library of Congress**

**Docket No. LOC-PAB 2005-01**

**Date of Decision: May 12, 2006**

**Cite as: Proctor v. LOC (5/12/06)**

**Before: Michael W. Doheny, Administrative Judge**

**Adverse Action**

**Confidentiality**

**Credibility**

**Discrimination – Gender**

**Discrimination – National Origin**

**Discrimination – Race**

***Douglas* Factors**

**Efficiency of Service**

**Misconduct**

**Penalty – Efficiency of Service**

**Penalty – Reasonableness**

**Penalty – Standard of Review**

**Removal**

## DECISION

Introduction

This matter is before the Personnel Appeals Board (PAB or Board)[1] on the appeal of Sandra Marie Proctor (Ms. Proctor or Complainant) challenging her

[1] Pursuant to a March 2005 Memorandum of Understanding between the Library of Congress and the Government Accountability Office (with a concurrence on the part of the Personnel

termination from the position of a GS-8 Equal Employment Opportunity Assistant at the Library of Congress (Library or LoC). Ms. Proctor seeks reversal of the decision removing her from employment and requests reinstatement with back pay.

Ms. Proctor contends that her alleged misconduct did not violate the relevant Library regulations, LCR 2023-1 or LCR 2023-2.[2] She claims that even if she had done what the Library alleges, such actions did not warrant termination. She argues that if the mitigating factors recognized in *Douglas v. Veterans Administration*[3] had been properly applied, she would have received a far less severe penalty. She points to the fact that in her seventeen years of Government service, she had never been the subject of any disciplinary action. Ms. Proctor also challenges the objectivity and fairness of the LoC deciding official.

For the reasons discussed below, based upon consideration of the entire record, the decision of the Library to remove Complainant is sustained.

Procedural History

On April 26, 2005, Complainant received a Notice of Proposed Adverse Action issued by her immediate supervisor, Ricardo Grijalva, Chief of the Equal Employment Opportunity Complaints Office (EEOCO). Complainant filed a Written Reply on June 1, 2005 and presented an oral reply on or about June 7, 2005. On June 20, 2005, the deciding official, Gilbert Sandate, Director, Office of Workforce Diversity, issued a Decision to remove Complainant from her position. On June 24, 2005, Complainant filed a charge claiming that she was removed because of her race, sex, and national origin; she also alleged hostile work environment. She named Ricardo Grijalva and Gilbert M. Sandate as the alleged discriminating officials. On that same date, Complainant filed a Notice of Appeal and Request for Hearing on the decision to remove her from the LoC. The case was referred for adjudication by the Personnel Appeals Board, where it was received on September 14, 2005.

On October 4, 2005, the Board notified the parties that a request for hearing had been filed and set a status conference for October 26, 2005. A second status conference was held on December 21, 2005. Both parties filed dispositive motions on February 10, 2006. The Library's Motion for Summary Judgment (MSJ) argued that

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Appeals Board, GAO), the Personnel Appeals Board assumed adjudicatory work for certain categories of Library employees in matters involving adverse actions, and grievances and discrimination complaints.

[2] Complainant's Notice of Appeal references LCR 2023-1 and LVR 2020-2. As reflected in her June 1, 2005 Written Reply to Notice of Proposed Removal as well as in the Library's June 20, 2005 Decision letter, the correct reference is LCR 2023-2, rather than LVR 2020-2.

[3] *Douglas v. Veterans Administration,* 5 MSPR 280 (1981), is the seminal case which established what factors should be considered in mitigating the penalty for an adverse action. The *Douglas* factors consist of 12 possible considerations which include *inter alia* prior disciplinary actions, performance, and potential for rehabilitation. *See infra* 39-46.

Complainant failed to establish a *prima facie* case of discrimination based on her race (Black), sex (female), and national origin (African-American), because she was not able to establish that people outside of her protected class received different treatment. LoC also argued that even if there were a *prima facie* case of discrimination, it could show that it had a legitimate, non-discriminatory reason for terminating Complainant. The Library also argued that Ms. Proctor's claim of a hostile work environment should be dismissed because it failed to state an actionable claim.[4] As to the adverse action appeal, LoC contended that the record shows by a preponderance of the evidence that Complainant did commit the misconduct with which she was charged. Furthermore, the Library argued that the penalty of removal was reasonable and appropriate and promoted the efficiency of the service.

Complainant's Opposition, filed February 17, 2006, argued that summary judgment was inappropriate because the record was "replete with contested issues of fact regarding the allegations of discrimination." As to the adverse action, Complainant claimed that the Library could not demonstrate by a preponderance of the evidence that she had committed the actions as charged (*i.e.,* with intent), that her conduct violated LoC regulations, or that her actions merited termination.

Complainant's Motion for Judgment without a Hearing (MJH) argued that, even viewing the facts in the light most favorable to the Library, Complainant's actions did not rise to the level where suspension would be appropriate—let alone removal. Ms. Proctor contended that the charges as set forth in the Proposal to Remove required the Library to establish that she had acted with intent, which it could not. Secondly, she argued that the charges outlined in the Proposal to Remove were impermissibly vague. Lastly, she argued that the alleged actions were not violative of the relevant regulations, LCR 2023-1 and LCR 2023-2. Even assuming the misconduct charge was sustained, Complainant took the position that there was harmful error in the application of the LoC's procedure in deciding to terminate her and that the Library's decision was not in accordance with the law.

On February 17, 2006, the Library filed Appellee's Reply to Appellant's February 10th Motion for Summary Judgment. The Reply stated that there were no disputes regarding the material issues of fact, specifically whether Complainant sent confidential and sensitive information to Welton Belsches (the retired EEOCO Acting Chief), whether Mr. Belsches had a right to this information, whether Complainant had made material misrepresentations to her supervisor regarding these e-mails and whether the Library's decision to remove her was reasonable. The Library concluded that since there was no factual dispute regarding the facts outlined in the Proposal to Remove, its Motion for Summary Judgment should be granted and Complainant's removal sustained.

[4] Complainant withdrew her claim of hostile work environment in her Opposition to LoC's Motion for Summary Judgment (Opp.). Opp. at 1.

Both parties' dispositive motions were denied on February 22, 2006, on the basis that because factual disputes remained, an evidentiary hearing was necessary.

On February 28, 2006, Complainant filed a Motion in Limine seeking to preclude the Library from calling certain witnesses, introducing certain exhibits, and offering evidence relating to alleged discipline based on either performance or conduct. As to the latter, Complainant argued that it was both irrelevant and unnecessary because the Library had conceded that she had never been disciplined prior to the Notice of Proposed Adverse Action which is the subject of this matter.

An evidentiary hearing was held on March 1 and 2, 2006. At the outset, Complainant's Motion in Limine was granted in part and denied in part. At the close of the hearing, the parties delivered oral closing statements in lieu of filing post-hearing briefs.

Applicable Library Regulations

LoC regulation (LCR) 2010-3.1, *Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Relations Under the Equal Employment Opportunity Program*, provides in relevant part:

> Section 4. Precomplaint Procedures
> *****
> A. . . . The counseling process shall be informal and at the request of the complainant confidential. The name of the complainant may be used only with his/her permission. . . .
>
> Section 14. Administrative Provisions
> *****
> C. Testimony given and all documents submitted at the hearing or which may already be in the investigative file shall be kept confidential at all times. The hearing examiner's report, initial or on reconsideration, and the transcript of the hearing are confidential. Recipients of these materials shall not disclose their content to anyone other than persons authorized by this Regulation to receive or be party to such information. . . . Staff members who violate these provisions shall be subject to disciplinary action.

LCR 2020-3, *Policies and Procedures Governing Adverse Actions*, provides in relevant part:

> Section 8. Final Decision to Take the Adverse Action
> A. . . [The] decision, if adverse to the staff member, shall not substitute a more severe action than that originally proposed, nor shall it rely on reasons which were not noted in the original notice. . . .

LCR 2023-1, *Personal Conduct and Personal Activities of the Staff of the Library of Congress: Purpose, Policy, and General Standards of Conduct*, provides in relevant part:

> Section 2. Policy
> The maintenance of high standards of honesty, integrity, impartiality, and conduct by staff members is essential to ensure the proper performance of the Library's business and the maintenance of confidence by citizens in their government. . . .

LCR 2023-2, *Conduct in Official Positions*, provides:

> Section 1. General Purpose
> The personal conduct of staff members in their official positions is subject to the closest public and official scrutiny, and, as representatives of the Library, they are so judged. In all their official dealings, staff members shall so conduct themselves as to permit no reasonable basis for suspicion of unethical conduct or practices. Attitude, alertness, courtesy, consideration, and promptness in carrying out one's official duties, are important aspects of conduct.
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> Section 3. Use of Library and Government Property
> Staff members shall not directly or indirectly use, or allow the use of Library or Government property of any kind, including property leased to the Government, for other than officially approved activities.

## FINDINGS OF FACT

### Background

Sandra Marie Proctor began work at the Library of Congress in April 1987 as a GS-4 Fiscal Clerk in the Copyright office. MSJ Exh. 2 at 9 (Proctor deposition); Joint Stipulation (Jt. Stip.) A. She was promoted to a GS-5 in that office. Jt. Stip. B. In October 1989, she began employment in the EEO Complaints Office as a GS-6 Secretary. Jt. Stip. C. In 1994 she was promoted to a GS-7. Jt. Stip. D. Four years later, Ms. Proctor was promoted to a GS-8 Equal Employment Opportunity Assistant. Jt. Stip. E. At about the same time, Welton Belsches became the EEOCO Acting Chief and Complainant's supervisor. Jt. Stip. F. Complainant received several awards (*e.g.*, a $250 spot award and a $300 spot award) while working for Mr. Belsches.[5] Exh. Proctor-B (P-B) at 26, 28; TR I/208-09.

As an Equal Employment Opportunity Assistant, Complainant handled reports of investigation (ROIs), informal allegations of discrimination, and formal complaint files; she had access to all the information contained in all the folders in the office. Hearing

[5] In both 2003 and 2004 Complainant received an $800 spot award. Exh. P-A at 18, 19.

Transcript (TR) I/31, 205-06.[6] ROIs contain, among other things, sensitive documents such as selection records. *Id.* Complainant understood, prior to the events in question, that information that was housed in the EEOCO was confidential. TR II/3-4. She testified that "everything that comes [in there] is confidential." TR II/22.

In November 2002, Gilbert Sandate became Director, Office of Workforce Diversity at the Library of Congress. TR I/109. The EEOCO was one of the units within the Office of Workforce Diversity. Jt. Stip. I.

As Director of the Office of Workforce Diversity, Mr. Sandate hired a number of temporary and permanent employees of varying races and national origins, including Hispanic, African-American, Asian and Caucasian. TR I/125, 187-90. He testified that he had made three permanent hires—Mr. Grijalva, who is Hispanic—and two African-Americans, one of whom heads the Affirmative Action Program Office and the other occupies Complainant's former position. TR I/125. He also testified that he did not make decisions based on race, gender or nationality. TR I/151, 186-87.

At the outset of his tenure, Mr. Sandate was advised by his supervisor, Deputy Librarian General Donald Scott, of a need to deal with the widely perceived problem on the part of the Library's Inspector General, LoC's labor unions, Members of Congress and LoC employees, that sensitive, confidential EEO information was being leaked from the EEOCO. TR I/111, 115-17.

Mr. Sandate testified that Mr. Belsches was rumored to have been the source of leaks from EEOCO during his tenure. TR I/172.

After receiving this information about perceptions of EEOCO leaks, Mr. Sandate met with the Acting Chief of EEOCO, Welton Belsches, and later with EEOCO staff, to discuss the problem and to share his views on confidentiality and on how the office should operate. TR I/119-20. Mr. Sandate considered the responsibility for running the EEOCO properly had to rest on its Acting Chief, Mr. Belsches. TR I/119.

Mr. Sandate testified that Library employees were required to be familiar with LCR 2010-3.1 (Exh. J-E) which dealt with the confidentiality of EEO materials. TR I/113. He further testified that there was no office policy addressing the need for confidentiality. TR I/163-64.

On July 3, 2003, Mr. Belsches retired. TR II/26; Jt. Stip. M. Eleven months later, on June 1, 2004, Ricardo Grijalva assumed the position of Chief of the Equal Employment Opportunity Complaints Office. TR I/22-23; Jt. Stip. N. That day he met with his supervisor, Mr. Sandate, who informed Mr. Grijalva that he had to safeguard access to records and documents in the EEOCO because there had been a problem with maintaining confidentiality. TR I/23, 126. Mr. Grijalva learned from both Mr. Sandate and employees in the LoC Office of General Counsel (OGC) that the problem

[6] TR I is the hearing transcript for March 1, 2006; TR II is the transcript for March 2, 2006. TR I/31, for example, refers to material at page 31 of March 1 testimony.

of failing to maintain security had reached a point where the OGC would no longer share settlement agreements with EEOCO, its management and staff, because of fear that what was contained therein would be disseminated. TR I/35-37. At some point after Mr. Grijalva took over as Chief, the OGC agreed to furnish him with a copy of settlement agreements upon his promise to keep such agreements locked away and not to share the information with members of his staff. TR I/37.

On June 3, 2004, Mr. Grijalva sent the EEOCO staff an e-mail about the need for confidentiality, in particular, regarding protecting the privacy of Report of Investigation files. Proctor dep. at 22; TR I/28; Exh. J-M. In his e-mail, Mr. Grijalva stated:

> Because these reports are confidential records, we need to take all precautions to preserve the integrity of the EEO Complaint process for all complainants by taking appropriate measures to protect their privacy.

Exh. J-M. Complainant opened the e-mail the next day. TR I/32; Exh. J-M. On June 4, finding ROIs lying around in an unsecured area, Mr. Grijalva sent a second e-mail to the staff regarding security and noting that he had asked Complainant to order keys for various offices and cabinets. TR I/33-34; Exh. J-N. Ms. Proctor opened the e-mail on June 8. TR I/34; Exh. J-N.

Ms. Proctor did not have her own office; for fifteen years, she worked at a desk situated in the front of the EEOCO, where she would be the first employee someone coming into the Office would encounter. TR I/206**;** MJH, Att. A, Verified Statement (Verif. Stmnt.) ¶ 27. Mr. Belsches testified that she had asked for an office on several occasions but that they "weren't able to do that." TR II/32. In her May 26, 2005 Verified Statement, Ms. Proctor acknowledged that investigative binders take up a lot of space and without enough space on her desk or in the limited storage space in EEOCO, files were at times kept on the floor. Verif. Stmnt. ¶9. Mr. Grijalva had concerns about how Complainant secured documents in her work area. TR I/34. According to Mr. Grijalva, he discussed his concerns with Ms. Proctor. TR I/34-35.

Mr. Grijalva testified that he had received complaints from an EEO complainant, an intern, a Union official, people who sought out Ms. Proctor to have things notarized, as well as co-workers and contractors, about the treatment they had received from Ms. Proctor. TR I/38-44, 46-47. Mr. Grijalva spoke with her about the complaints. TR I/41-44, 47. He offered her communications training, but she declined. TR I/44-46; *see* Exh. J-O.

Mr. Sandate also testified that he had discussed complaints about Complainant's poor interpersonal skills, *i.e.*, customer service, with her supervisor, Mr. Belsches, who did not take any action against Complainant. TR I/121-23. Mr. Belsches testified that at the first meeting Mr. Sandate had with EEOCO staff after becoming the Director, Mr. Sandate had expressed his view that the Office lacked customer service. Mr. Belsches thought those comments were particularly directed to Ms. Proctor, "since she was the point of contact in the Office." TR II/36.

Mr. Sandate further testified that concerns regarding Complainant's interactions with interns in the Office grew such that he decided to reassign the interns to another part of the Office. TR I/122.

E-mails Sent by Complainant that Formed the Basis for her Removal

The parties have stipulated that Complainant sent Mr. Belsches seven e-mails between October 22, 2004 and April 4, 2005. Jt. Stip. O-T;[7] *see* TR II/24. This occurred after Mr. Belsches' retirement.

1. E-mail of April 4, 2005

On April 4, 2005, Talmadge (Dean) D. Flowers, an EEOCO staff member, provided Mr. Grijalva with a copy of an e-mail that Ms. Proctor had sent to Welton Belsches. TR I/49; Jt. Stip. T. The e-mail had been sent that day at 7:09:38 AM; the subject line was: "Fwd: Weekly Report;" The e-mail message read "fyi." In addition to Mr. Belsches, the e-mail was sent to two employees in EEOCO. Exh. J-L. Mr. Belsches' e-mail address was "wookie1@verizon.net." TR I/50; TR II/13.

Attached to the e-mail was the Office's weekly report which contained sensitive information including the names of complainants, case numbers and the status of cases. TR I/49-51; Exh. J-L. Mr. Flowers had received the e-mail from Mr. Belsches when the latter inadvertently replied to him rather than to Ms. Proctor. TR I/50.

Ms. Proctor testified that weekly reports contain confidential information, including a complainant's name and case number. TR II/20. She further testified that she knew that she should not have sent the e-mail. TR I/240.

From her initial response to Mr. Grijalva up to and including these proceedings, Ms. Proctor maintained, however, that she had sent this e-mail to Mr. Belsches by mistake. TR I/238. Ms. Proctor testified that on the morning of April 4, 2005, she was in the process of preparing the weekly Office status report, which included soliciting information from other EEOCO staff. While she was in the middle of preparing to send the report to two colleagues, Mr. Grijalva walked up behind Complainant and asked how her "godfather" Welton Belsches was. Verif. Stmnt. ¶18. Ms. Proctor testified that she was "shocked" by his question because she didn't think that Mr. Grijalva knew Mr. Belsches. She further testified that she was "surprised" when Mr. Grijalva said Mr. Belsches' name; that she "was already sending the weekly report to Jean Johnson and Thelma Brown. And when he said his name, I honestly clicked on Welton Belsches by

[7] Joint Stipulation S acknowledges that "e-mails" were sent on March 31, 2005. The parties submitted joint exhibits which included a group of e-mails dated March 31, 2005, Exh. J-J. This exhibit includes three e-mails addressed to Mr. Belsches. Complainant, however, testified that she sent only 5 of the 7 pages of e-mails contained in the joint exhibit. TR I/230-31. Therefore, there appears to be a dispute as to the exact content of the e-mails sent on that date. However, since Exh. J-J was agreed to by both parties at the time of its submission, it will be viewed in its entirety. *See* n.12, *infra.*

mistake." TR I/238-39; Verif Stmnt. ¶18 ("it was such a surprise that I believe that I unconsciously clicked on Mr. Belsches' name from my e-mail address book and forwarded it without realizing what I had done"). Repeatedly in her testimony, Complainant stated that Mr. Grijalva's question "startled" her. TR I/240. She also claimed that she was "nervous" because she was in the process of filing an EEO complaint. *Id.*

After reading the e-mail, Mr. Grijalva spoke to Ms. Proctor. *Id.*; TR II/19. He asked her two questions: whether she had sent the e-mail to Mr. Belsches and whether she had sent other EEO information to other people outside of the Library.[8] TR I/88. Ms. Proctor responded that it was the only e-mail that she had sent and she had done so by accident. TR I/52. She also testified that she had not known that she had sent the e-mail to Mr. Belsches until the moment when Mr. Grijalva showed it to her. TR I/243. During the conversation with her supervisor, Ms. Proctor appeared to be nervous, twisted her ring, and hesitated in providing her responses. TR I/53. Mr. Grijalva called a staff meeting where he asked each person individually whether he or she had disseminated confidential information to anyone outside of the Library. TR I/78. When Mr. Grijalva questioned Ms. Proctor separately on at least two other occasions over the next day or so, she continued to maintain that there was only one e-mail sent and it was sent by mistake. TR I/52-53, 77.

Because of his concerns about breaches of security and possible adverse impact on the integrity of the office, Mr. Grijalva—after discussion with Mr. Sandate—had Ms. Proctor's computer pulled for examination on April 5, 2005. TR I/53-54; Verif. Stmnt. ¶21 Mr. Grijalva reviewed all e-mails on Ms. Proctor's computer as far back as he could go.[9] TR I/56-57. The following additional e-mails were found.

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[8] During his direct testimony, Mr. Grijalva stated that his initial question to Ms. Proctor was whether she had sent confidential information to people outside LoC. TR I/52-53. On cross-examination, he modified his testimony to conform with his December 20, 2005 deposition wherein he stated that he had asked Ms. Proctor whether she had provided confidential information "to anybody else other than Mr. Belsches, who is not an employee of the Library of Congress. . . ." TR I/88.

[9] In the Notice of Proposed Adverse Action, Mr. Grijalva stated: "On April 5, 2005, Mr. Kenneth Keeler, Supervisory Criminal Investigator, removed your government computer from your work station to examine the stored information and determine if the integrity of the EEOCO had been further compromised by the release of other information. Based upon his review of the information stored in your government computer, Mr. Keeler determined that you have been sharing confidential information with Mr. Belsches by providing numerous e-mails to him on a regular basis." Exh. L-8. In his testimony, Mr. Grijalva stated that Mr. Keeler had provided him with access to the computer but that he himself had reviewed Ms. Proctor's e-mails. TR I/55-56.

Mr. Sandate, the deciding official, testified that after making his decision to sustain the proposed removal, he learned that the above-quoted section of the Notice of Proposed Adverse Action was inaccurate in that Mr. Keeler, Assistant Inspector General for Investigations, LoC, had not made the determination that Ms. Proctor had shared confidential information; what he had done was provide Mr. Grijalva with access to Ms. Proctor's computer. TR I/151-53. Mr. Sandate concluded that Mr. Grijalva had "mischaracterized" what had happened but that he did

2. E-mail of October 22, 2004

On October 22, 2004 at 7:45:21 AM, Ms. Proctor sent Mr. Belsches an e-mail. He was the only addressee; the subject line was "Fwd: 2010-3.1 Regulation-Recommended Determinations (Section 11B)." Exh. J-F; Jt. Stip. O. The e-mail to Mr. Belsches contained no message; it had an attachment, which consisted of two e-mails, one from Mr. Grijalva to Jessie James (an LoC Associate General Counsel) and an e-mail from Mr. Grijalva to his staff. The two e-mails discussed proposed substantive changes in the Library's regulations. *Id.* Mr. Grijalva testified that the protocol at LoC was that such drafts were only disseminated to individuals who were considered to be stakeholders and that draft regulations were viewed as confidential. TR I/62-64.

During cross-examination, Ms. Proctor explained that she sent the e-mails to Mr. Belsches as a solicitation for advice. TR II/5-6. When it was pointed out to her that the word "advice" did not appear in the e-mails, Complainant testified that Mr. Belsches "knew" that she was seeking his advice. TR II/6. Specifically as to the October 22, 2004 e-mail, she testified that she was not seeking advice on the draft regulations; rather she was letting him know how his hard work had paid off. TR I/212-14; TR II/6-7.

3. E-mail of December 1, 2004

On December 1, 2004 at 9:04:06 AM, Complainant sent Mr. Belsches an e-mail, with a subject line that read "Fwd: Raymond and Francisco." The e-mail was sent only to Mr. Belsches and had no message, just an attachment. Exh. J-G; Jt. Stip. P. The attachment was a copy of an e-mail from another EEOCO employee to Mr. Grijalva dealing with the physical placement of the EEOCO's case tracking system equipment. TR I/65-66; Exh. J-G. According to Mr. Grijalva, the equipment had been moved from a "vulnerable" position because it contained "sensitive, confidential information." TR I/66.

While Ms. Proctor had testified that the reason that she had sent Mr. Belsches this e-mail was to seek his advice on her work situation (TR II/1-2), she acknowledged in her testimony that nowhere in the e-mail was there a request for advice, that in fact the word "advice" did not even appear nor was there a question mark in her message or subject line. TR II/7.

4. E-mail of March 2, 2005

On March 2, 2005 at 2:37:07 PM, Ms. Proctor sent Mr. Belsches an e-mail, the subject line of which was "Fwd: Re: status;" there was no message. Exh. J-H; Jt. Stip. Q. Mr. Belsches was the sole recipient. Exh. J-H. The attachment to the e-mail was a series of e-mails that started with a complainant inquiring of an EEOCO staff member as to the status of her complaint; the staff member's reply; and then an interchange between that staff member and Ms. Proctor. Exh. J-H. The e-mail exchange contained

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not care who had provided the information about what was on Ms. Proctor's computer. Further, finding out that the Proposal was not accurate did not change his decision to remove Ms. Proctor because he saw the error as "a process question only." TR I/153.

the name of the complainant and information about the status of her charge. TR I/67. Ms. Proctor testified that the complainant's name and case number were confidential. TR II/20.

Complainant testified that nowhere in the e-mail did she ask for Mr. Belsches' advice and she acknowledged that nowhere in the e-mail did the word "advice" or even a question mark appear. TR II/8.

5. E-mail of March 3, 2005

On March 3, 2005, at 9:35:17 AM, Complainant sent an e-mail to Mr. Belsches, the subject of which was "Fwd: CONGRESSIONAL RESEARCH SERVICE." Exh. J-I; Jt. Stip. R. Mr. Belsches was the only recipient. Exh. J-I. The e-mail stated "WHAT DO YOU THINK ABOUT THIS WOOKIE?" *Id.* Attached to the e-mail was a second e-mail[10] as well as a copy of the quarterly report provided to the Congressional Research Service (CRS) on the status of all EEO cases against CRS pending in the EEOCO. It contained such information as the names of complainants, case numbers, bases of charges,[11] and where things were in the process. TR I/69-71; Exh. J-I. Normally this report would only be furnished to the head of the Congressional Research Service and several top level people on his staff. TR I/72, 141. Ms. Proctor testified that the quarterly CRS report was the type of internal report that was confidential. TR II/21.

Ms. Proctor testified that she did not realize that she had sent the CRS report that was attached to the e-mail that she was forwarding to Mr. Belsches. TR II/9. Yet, the forwarded e-mail referred to the attachment and even asked the reader to open it in WordPerfect. *Id.* When asked directly whether her request to "Wookie" as to what he thought about "this" referred to the attached e-mail, she testified "correct, yes. No." *Id.*

6 and 7. E-mails of March 31, 2005

On March 31, 2005, at 3:17:31 PM, Complainant sent an e-mail to Mr. Belsches. Exh. J-J; Jt. Stip. S. The subject was "Fwd: Re: [complainant's name and case #];" Mr. Belsches was the only recipient. The message of the e-mail was: "fyi;" attached to it were several internal LoC e-mails.[12] Exh. J-J; Verif. Stmnt. ¶24. The e-mail identified a complainant, including supplying both his name and case number. TR I/75-76; Exh. J-J.

[10] The second e-mail was one that Complainant had sent to Mr. Grijalva regarding, among other things, the Office's interns not saying "hello" or "good morning." Exh. J-I at 2 (3/3/2005, 9:34:33 AM e-mail).

[11] For example, it provided specific details of one complainant's mental disability: "Disability (Bipolar Mental Disorder) obsessive compulsive disorder, and manic depression." Exh. J-I at 6.

[12] Joint Exhibit J is seven pages long and contains three e-mails to Mr. Belsches. While admitting to having sent Mr. Belsches pages 1 and 4-7, Ms. Proctor denies having sent pages two and three. TR II/10.

After reviewing the e-mails on Ms. Proctor's computer, Mr. Grijalva removed her access to EEO matters by reassigning her to the Affirmative Action Special Programs Office on April 6, 2005. TR I/79; Verif. Stmnt. ¶21.

During her cross-examination testimony, Complainant claimed repeatedly that at the time she sent the above referenced e-mails she did not understand that the information contained therein was confidential. TR II/1-3. When questioned about her deposition testimony, she recalled that she had answered "yes" when asked whether, prior to Mr. Grijalva's arrival in the office, she knew that everything in the EEOCO was confidential. TR II/3. Ms. Proctor also confirmed her deposition testimony wherein she had acknowledged that upon Mr. Grijalva's arrival she continued to recognize the confidentiality of everything in the EEOCO. TR II/3-4.

Later in her testimony, Complainant acknowledged that at the time the seven e-mails were sent, she knew that information of the type contained in those e-mails was confidential. TR II/24-25.

Proposal to Remove

After reviewing these e-mails, Mr. Grijalva made the decision to remove Ms. Proctor. TR I/79. He concluded that removal was in order because the dissemination of confidential information was a breach of trust that was further heightened by Ms. Proctor's failure to be honest with him about what she had done. TR I/80-81.

On April 26, 2005, Mr. Grijalva issued Complainant a Notice of Proposed Adverse Action (Notice or Proposal to Remove). TR I/79; Exh. L-8. He proposed that, in accordance with LCR 2020-3 (Adverse Actions), Ms. Proctor be removed from her position of Equal Employment Opportunity Assistant,[13] GS-361-08, in the Equal Employment Opportunity Complaints Office, Office of Workforce Diversity, no earlier than 25 days from the date of the Notice.

The Notice of Proposed Adverse Action provided the following details in support of Complainant's removal.

- On April 4, 2005 Talmadge (Dean) D. Flowers, a staff employee, informed Mr. Grijalva that he had received an e-mail from Welton Belsches, a former Library employee (who had been Complainant's supervisor). This e-mail appeared to be
- in response to an e-mail that Complainant had sent to EEOCO staff members Thelma Brown and Jean Johnson, as well as Mr. Belsches. It appeared that Mr. Belsches had mistakenly sent Mr. Flowers a response to the e-mail from Complainant. The e-mail to Mr. Belsches contained sensitive case information including a complainant's name and the case number. Notice at 2.

[13] Based on the parties' Joint Stipulations, Complainant's title was Equal Employment Opportunity Assistant. However, her position description and several documents, including the Notice of Proposed Removal, refer to her as an Equal Opportunity Assistant.

- After concluding that the information supplied by Mr. Flowers merited further review and inquiry, Mr. Grijalva met with Ms. Proctor that same day, April 4, 2005. He showed her the e-mail that Mr. Flowers had received and asked whether she had forwarded the information to Mr. Belsches, and, if so, why. Complainant admitted that she had sent the sensitive information to Mr. Belsches, but claimed that she had not intended to send him the information and had done so by mistake. *Id.*
- Mr. Grijalva asked Complainant if she had previously sent other EEO information to Mr. Belsches or any other individuals. Ms. Proctor replied that there was only this one instance. Mr. Grijalva reminded her of the need to be honest and truthful. She claimed that this was an isolated instance and that it happened by mistake. At Mr. Grijalva's request, Ms. Proctor provided him with a copy of the e-mail she had sent to Mr. Belsches. *Id.*

The Proposal specifically cited LCR 2023-1 (Personal Conduct) and LCR 2023-2 (Conduct in Official Positions).

Mr. Grijalva did not consider anything, including Ms. Proctor's seventeen years of service, to be a mitigating factor in determining what action to take. TR I/98-99. He concluded that there was no way that she could be rehabilitated. TR I/99.

Mr. Grijalva testified that race "had absolutely nothing to do with" the proposal to terminate. TR I/125.

In the Proposal to Remove, Mr. Grijalva did not mention, attach, or rely on LCR 2010-3.1, Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Relations Under the Equal Opportunity Program (Exh. J-E). Exh. L-8. This regulation provides guidance as to the confidentiality of information relating to the processing of EEO matters and advises employees that violation of the regulation can lead to disciplinary action. LCR 2010-3.1, however, was raised in the Decision letter. Exh. J-B at 2.

Ms. Proctor responded to the Notice orally and in writing. TR I/146; *see* Written Reply. On June 1, 2005, her attorney sent a letter to Mr. Sandate wherein she argued that the Proposal to Remove could not be sustained because Ms. Proctor had not violated LCR 2023-1 or LCR 2023-2, the two regulations cited in the Proposal to Remove; there was no showing that termination would promote the efficiency of the service; and under *Douglas v. Veterans Administration*, there were mitigating factors that dictated a far less severe penalty.

Decision to Remove

Mr. Sandate concluded that sensitive, confidential information had been supplied repeatedly to someone who should not have received such information and that Ms. Proctor had over and over again denied supplying such information. TR I/146. He found that what Ms. Proctor had done was a most serious breach of trust. TR I/147-48.

He considered her entire work history in determining what action should be taken. TR I/146. He considered her years of service with LoC. TR I/148. He considered that she had never been subject to any other adverse action. TR I/148-49.

On June 20, 2005, Mr. Sandate issued his decision sustaining the Proposal to Remove Ms. Proctor from the Federal service. Jt. Stip. V; *see* Exh. J-B (Removal Decision). He had concluded that the lack of trust in Ms. Proctor precluded suspension because the trust that had been breached could never be rebuilt. TR I/150.

Discrimination Charge and Appeal of Removal

On June 24, 2005, Ms. Proctor filed an Allegation of Discrimination on the basis of race, sex, national origin, and sexual harassment (female; hostile work environment).[14] She named Ricardo Grijalva and Gilbert M. Sandate as the alleged discriminating officials; the alleged discriminatory action was her termination from the position of Equal Employment Opportunity Assistant. As to the alleged hostile work environment, Complainant pointed to what she saw as inappropriate actions on the part of her supervisors, including such things as derogatory comments, taking away job duties, threatening her job and termination. The relief sought was reinstatement with back pay; transfer to another section in the Library; restoration of leave used as a result of the hostile work environment; attorney's fees and compensatory damages. MSJ, Exh. 1, EEOCO Complaint Form at 3.

On the same day, Ms. Proctor filed a Notice of Appeal and Request for Hearing of the June 20, 2005 decision to remove her from the rolls of the Library of Congress.

## DISCUSSION

### The Parties' Arguments

#### Library of Congress

In removing Complainant, the Library cited LCR 2023-1, Personal Conduct and Personal Activities of the Staff of the Library of Congress, and LCR 2023-2, Conduct in Official Positions.[15] Proposal to Remove at 1. It is the Library's position that Complainant unlawfully disclosed confidential EEOCO information through a series of e-mails to a former employee, Welton Belsches, who had no right to the information. TR

[14] Complainant, in her EEO complaint form, checked off the box marked "sexual harassment," and wrote in "female; hostile work environment." However, she did not raise any allegations that her supervisors sexually harassed her and eventually withdrew the hostile work environment claim.

[15] LCR 2023-1 states the Library's policy regarding the standards of conduct expected of employees and establishes general guidelines for employees in order to avoid conflicts of interest. LCR 2023-2 states the type of conduct that is appropriate and not appropriate for Library employees including the use of Library property. *See* pages 5-7, *supra.*

I/15. This breach of confidentiality raised new questions about the operations of the EEOCO, thereby damaging the reputation of the Office and endangering its ability to carry out its mission for the LoC and its employees. Moreover, the Library argues that once Complainant's supervisor, Ricardo Grijalva, learned that she had sent out one of the e-mails and confronted her about it, she lied to him about the additional e-mails to Mr. Belsches. *Id.* The LoC claims that it has proved its charge against Complainant by a preponderance of the evidence. TR II/83.

In addition, the Library contends that, as a result of the dissemination of the e-mails and the misrepresentation of facts, Ms. Proctor's supervisors lost confidence and trust in her. TR II/77-78. Consequently, in LoC's view, the penalty of removal was the only reasonable option. The Library further argues that it considered all the relevant *Douglas* factors in reaching this conclusion. TR II/78. Finally, the Library contends that Complainant failed to prove that these actions were taken as a result of discrimination based on gender, national origin or race. TR II/81-82.

Complainant

Complainant contends that the Library cannot establish by a preponderance of the evidence that she committed the infractions as alleged in the Notice or that the discipline imposed was reasonable. TR II/83. She argues that she never lied to her supervisor—that she truthfully answered "no" to Mr. Grijalva's inquiry as to whether she had sent any other e-mails with weekly reports to Mr. Belsches. Ms. Proctor admits that she sent six of the e-mails and claims that she accidentally sent the e-mail dated April 4, 2005. She further contends that she did not know that the confidential information was included in the e-mails that she forwarded. Ms. Proctor also argues that the Library failed to cite to a regulation which supports the removal. Moreover, she also claims that she was never advised that "giving out this information" would lead to removal. TR II/94.

Complainant also takes the position that the *Douglas* factors were not appropriately considered. TR II/96. She contends, for example, that neither the proposing nor deciding official took into account her performance or her potential for rehabilitation. TR I/21. Finally, she argues that the decision to remove her was made as a result of discrimination based on her gender, national origin and race. TR I/20.

Legal Standard

In a removal case based on misconduct, the Library has the burden of proving by a preponderance of the evidence that the alleged misconduct took place as charged, that disciplinary action promotes the efficiency of the service, and that the penalty of removal is appropriate. *Douglas v. Veterans Admin.*, 5 MSPR 280, 302 (1981); *see* 5 U.S.C. §7513; 5 C.F.R. §1201.56(a)(1). Preponderance of the evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. §1201.56(c)(2).

Review of an agency decision as to discipline is in the context of "appropriate deference to the primary discretion . . . entrusted to agency management." *Douglas*, 5 MSPR at 301. For an agency's determination to withstand review, the agency must show that it has considered all relevant mitigating factors. The question on review is whether the agency's "managerial judgment has been properly exercised within tolerable limits of reasonableness." *Id.* at 302.

Complainant in this case has raised as an affirmative defense the argument that the removal action involved discrimination based on her gender, national origin, and race. As to such a defense, she bears the burden of proof by a preponderance of the evidence. 5 C.F.R. §1201.56(a)(2)(iii); *Lambe v. Dept. of Defense*, 2005 MSPB Lexis 7309 at 28 (2005).

Charge of Conduct Unbecoming a Federal Employee

In the instant case, the Library charged Ms. Proctor with violating LCR 2023-1, Personal Conduct and Personal Activities of the Staff of the Library of Congress, and LCR 2023-2, Conduct in Official Positions. The proposal specifically states:

> Library employees are bound by the guidelines set forth in 2023-1, which requires the maintenance of high standards of honesty, integrity and conduct, which is essential to assure the proper performance of the Library's business and the confidence of citizens in their Government. Your position in particular requires you to maintain an even higher level of confidentiality than is expected of other Library employees. You failed to adhere to these standards of acceptable conduct. Your actions demonstrates [sic] a blatant disregard for your obligations to discharge your duties with honesty, integrity and confidentiality. By your actions you compromised that integrity and confidentiality, and you violated the trust which is inherent in your position.

Exh. L-8 at 4 (emphasis added).

In essence, the charge claims that Complainant engaged in conduct unbecoming a Federal employee.[16] More specifically, the Proposal to Remove states that "by sending e-mail messages containing confidential information, to persons who are not

[16] LoC claimed in its Response to Appellant's Discovery Request that Complainant was charged with "breach of trust." MSJ, Exh. Y at 11. I find that the "breach of trust" is a component of the broader charge of "conduct unbecoming a federal employee" based on LCR 2023-1, which states that the "maintenance of high standards of honesty, integrity, impartiality, and conduct by staff members is essential to assure the proper performance of the Library's business and the maintenance of confidence by citizens in their Government." LCR 2023-1. The regulation prohibits employees from engaging in, *inter alia*, "conduct which adversely reflects on the Library, the Government or their suitability for employment." *See Faciane*, 2005 MSPB Lexis 7982.

authorized to receive such information, you abused your position of trust in a manner that significantly compromised the integrity of the mission" of the EEOCO and the Office of Workforce Diversity…." Exh. L-8 at 3.

Complainant argues that the Library did not cite a regulation that supports removal, *i.e.,* that the Proposal references no specific act that is a true violation of either regulation cited in the Proposal. Written Reply at 8-9. In proposing discipline, an agency must notify the employee of the charged conduct "'in sufficient detail to permit the employee to make an informed reply'." *LaChance v. MSPB*, 147 F.3d 1367, 1371 (Fed. Cir. 1998) (*quoting Pope v. USPS*, 114 F.3d 1144, 1148 (Fed. Cir. 1997)); *Otero v. USPS*, 73 MSPR 198, 202 (1997); *see Ragolia v. USPS*, 52 MSPR 295, 301 (1992). An agency "need not affix any specific label to its charges, but can instead describe actions that constitute misbehavior in narrative form," including the use of "a broad label such as 'improper conduct'" if the specifications allow for a meaningful reply. *Faciane v. USPS*, 2005 MSPB Lexis 7982, *aff'd,* 2006 U.S. App. Lexis 5999 (Fed. Cir.) (nonprecedential) (MSPB "properly concluded that the agency was not required to show" violation "of a specific rule, regulation, or policy"). If a charge appears too vague, the MSPB or, in this case PAB, may review the specifications to see what conduct the agency relied on as the basis for its action. *See LaChance*, 147 F.3d at 1371; *Otero*, 73 MSPR at 204. In this case, Complainant's written reply and her testimony at the hearing demonstrated that she clearly understood the allegations that were being raised against her. Written Reply at 3-8; TR I/213-53.

Specifically, the Library alleges that Complainant "intentionally utilized this sensitive information for the purposes of improper, surreptitious dissemination via e-mails to an individual who does not have a [sic] inherent right to such records." Exh. L-8 at 3. LoC also alleges that Ms. Proctor misused her Government computer[17] when she e-mailed multiple counts of sensitive EEO information to Mr. Belsches; that information disclosed confidential EEO case data. *Id.* The third specification is that Complainant:

> made intentional false misrepresentations [*sic*] of fact when you assured me that the e-mail that Mr. Belsches forwarded to Mr. Talmadge [*sic*] was an isolated incident and had not previously occurred. In fact, you blatantly lied to me about your concealed activities having full knowledge of your inappropriate misconduct.

*Id*. As further discussed below, the Library has proven its charge by a preponderance of the evidence.

1. Complainant Improperly Distributed Confidential Information.

The Library has proven that Complainant improperly distributed confidential information as stated in its Proposal to Remove. It is undisputed that Ms. Proctor sent

[17] LCR 2023-2 §3 prohibits employees from directly or indirectly using or allowing the use of Library or Government property of any kind "for other than officially approved activities."

seven e-mails from her LoC computer to Mr. Belsches during the period between October 22, 2004 and April 4, 2005. Jt. Stips. O-T. These e-mails contained a variety of information including the names and case numbers of EEO complainants (e-mails dated 3/2/2005, 3/31/2005, and 4/4/2005), location of the computer which accessed information about EEO complaints (e-mail dated 12/1/2004), a chart of EEO complainants and the bases of their complaints (*e.g.,* race, gender, national origin, sexual harassment, disability) in the Congressional Research Service (e-mail dated 3/3/2005), and a discussion about proposed substantive changes in Library regulations which had not been finalized (e-mail dated 10/22/2004).

Complainant raises two arguments regarding these e-mails. First, she argues that the information was not confidential, and second, that she did not intentionally send that particular information to Mr. Belsches. Ms. Proctor initially contended that the information contained in the e-mails, in particular the names and case numbers of complainants, was not confidential. However, one of the e-mails that she sent to Mr. Belsches contained not only the names of EEO complainants but also the bases upon which they had filed their complaints, such as race and disability. Ex. J-I (e-mail dated 3/3/2005). This was clearly confidential information that should not have been disseminated to anyone outside of the Library, including former employees.[18] Regardless of Complainant's initial arguments regarding whether the information was confidential, during the hearing (and earlier at her deposition) she testified that she now realizes that what she did was improper and that the information she disseminated, including the names and case numbers, was confidential or sensitive and should not have been distributed to Mr. Belsches. TR I/220, 224, 229, 237, 240; TR II/1-4, 20, 24-25; MSJ Exh. 2 (Proctor Dep.) at 33.

In her closing, Complainant argued that "[t]here has to be some regulation that they can cite to" that says you can be fired for "giving out this information." TR II/94. However, there is no requirement that every disciplinary action must be based on a law or regulation. In fact, the MSPB has held in this regard that:

> there is no requirement that an employee must violate a specific written policy before he can be disciplined under chapter 75. The sole criterion under chapter 75 is that the adverse action be "for such cause as will promote the efficiency of the service."

*Fontes v. Dept. of Transportation*, 51 MSPR 655, 663 (1991) (employee could be disciplined based on charges of specific behavior characterized as acceptance of a gratuity and conflict of interest, although agency did not introduce specific standards of conduct which he allegedly violated).

[18] Complainant also argued that e-mailing Mr. Belsches confidential EEO information was inconsequential because he already knew about these cases. However, this is irrelevant because he no longer was a Library employee ant therefore was not authorized to have access to current confidential information. Moreover, there was concern about Mr. Belsches' own handling of EEOCO information while at the Library.

Further, Ms. Proctor claims that she accidentally sent the e-mail containing the weekly report to Mr. Belsches when she had only intended to send it to individuals in the Office. TR I/239. She maintains that while she was looking at the prepared e-mail, Mr. Grijalva startled her by referring to Mr. Belsches as her "godfather," and she accidentally added Mr. Belsches to the address list and sent the e-mail. TR I/238-41, 243. However, as discussed below, Complainant's explanation is not credible.

Accordingly, I find that the Library did prove that Complainant improperly, repeatedly distributed confidential information.

2. Complainant Misused her Government Computer.

The Library also alleges that Complainant "misused her Government computer by sending multiple counts of sensitive EEO information to Mr. Belsches to provide him with disclosure of confidential EEO case data and information." Notice at 2.

LoC regulations state:

> Staff members shall not directly or indirectly use, or allow the use of Library or Government property of any kind… for other than officially approved activities.

LCR 2023-2 §3. Clearly, the dissemination of the confidential information to Mr. Belsches was not an officially approved activity and Complainant has not argued that it was. In fact, Ms. Proctor testified that she now realizes that she should not have sent the information to Mr. Belsches. TR I/220, 224, 229, 237, 240; TR II/1-4, 20-22, 24-25. Further, it is clear that her actions were carried out using the LoC computer.

While Complainant argues that she did not intend to send the e-mail dated 4/4/05, she does not deny intentionally sending the other six e-mails. TR I/213-37. Even assuming that she did not intentionally send the e-mails, an agency need not prove intent to sustain a charge of unauthorized use of Government property. *See Wolak v. Dept. of Army,* 53 MSPR 251, 256 at n.8 (1992); *Sternberg v. Dept. of Defense,* 52 MSPR 547, 558 (1992). Accordingly, the Agency has proven that the Complainant misused her Government computer.

3. Complainant Misrepresented Facts about Sending E-mails.

The Library also alleges that Complainant:

> made intentional false misrepresentations [*sic*] of fact when you assured me that the e-mail that Mr. Belsches forwarded to Mr. Talmadge [*sic*] was an isolated incident and had not previously occurred. In fact, you blatantly lied to me about your concealed activities having full knowledge of your inappropriate misconduct.

Notice at 3. Complainant contends that she truthfully answered Mr. Grijalva because he asked "if she had ever sent any emails [sic] regarding the weekly status reports to Mr. Belsches." Written Reply at 7; *see* TR I/243-45. However, Mr. Grijalva testified that he asked Complainant if she had sent "any EEO confidential information to anybody else other than Mr. Belsches." TR I/88; *see* n.8, *supra*. Even assuming that Complainant's version is true and Mr. Grijalva asked her several times throughout the next few days whether she had sent any other weekly reports to Mr. Belsches, she clearly omitted the fact that she had e-mailed other documents as well as other information to Mr. Belsches.

Complainant also testified that she was informed that the Office of Inspector General (OIG) was going to pull her computer and was asked whether she had any objections. She further testified that she did not believe they would find anything because she did not feel that she had done anything wrong. TR I/246. According to Mr. Grijalva, when he asked Ms. Proctor what he would find on her Government computer, she replied that she "never sent any other e-mails. This is the only one I sent out and I sent this out by mistake." TR I/53. In this regard, I find that Mr. Grijalva's testimony was more credible than Complainant's and that Complainant failed to be forthright in her response to her supervisor by misrepresenting the facts.

Complainant does not dispute that the search of her computer revealed that she had sent six additional e-mails to Mr. Belsches containing varying internal information pertinent to the EEOCO's operations. She attempts to split hairs and argue that she truthfully answered Mr. Grijalva's question regarding the other e-mails. However, the point is that Complainant failed to be completely forthright in her response to her supervisor. Even if the follow-up question was narrowly framed, when asked what else would be found on her computer, at a minimum Ms. Proctor should have admitted to sending the other e-mails to Mr. Belsches. Moreover, Mr. Grijalva testified that he knew something was "wrong with this picture" during this initial discussion because she "hesitated when she responded," she appeared "nervous," and was "playing with her ring." TR I/53-54. The fact that she still insists that she did nothing wrong in not telling Mr. Grijalva about the other e-mails supports the conclusion of her supervisors that the breach of trust could not be repaired. On this record, the LoC could and did reasonably determine that it could not trust Complainant to truthfully provide information in the course of fulfilling her duties.[19]

Accordingly, the Agency has proved its charge of "misrepresentation of facts." The Library's charge is sustained in all respects.

[19] Complainant argues that nothing in her job description required that she protect confidential information. TR I/250-51. However, the nature of the Office in which she worked required handling confidential information on a daily basis. Complainant does admit that the information that came into the EEOCO was confidential. TR II/3, 20-22.

Credibility Findings

The foregoing conclusions are based upon the determination that Complainant was not credible regarding several aspects of her testimony. In assessing the credibility of a witness, the administrative judge must consider factors such as:

> (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) the witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

*Colbert v. USPS*, 93 MSPR 467, 470 (2003) (*citing Hillen v. Dept. of Army*, 35 MSPR 453, 458 (1987)).

In particular, Complainant's story regarding how she "accidentally" sent the weekly report e-mail simply is not plausible. She would have us believe that Mr. Grijalva so startled her by using the term "godfather," that she accidentally addressed the e-mail to Mr. Belsches and pressed the "send" button. Furthermore, at some point when she was addressing the e-mail to Mr. Belsches she typed in "fyi," as she had done in her other e-mails to Mr. Belsches. This would have taken several additional intentional steps and not just a slip of the finger as she would have us believe. What makes her story even less credible is that initially she failed to mention the other e-mails, and then later admits that the other six e-mails she sent to Mr. Belsches were not accidental. TR I/213-37. Complainant's version as to how Mr. Belsches received the last e-mail just cannot be believed.

Complainant also is not credible because she claims that she sent these e-mails to Mr. Belsches in order to seek advice, while none of the e-mails request advice or intimate that advice is being sought. Further, she admits that she never discussed these e-mails with Mr. Belsches and never sought advice regarding these specific incidents. TR II/10-11. Mr. Belsches confirmed that he never spoke with Ms. Proctor about the content of various e-mails, other than to tell her to keep records of perceived mistreatment. TR II/31, 33, 35, 38.

Additionally, Complainant's credibility is diminished because her responses to questions regarding the confidentiality of information were evasive and less than forthright at the evidentiary hearing. For example:

> Q: Isn't it true that at the time you sent those e-mails, you understood that a complainant's, an EEO complainant's name is confidential?
> A: Not at the time I wasn't thinking clearly…
> Q: So it's your testimony that at the time you sent the e-mails, you did not understand that an EEO complainant's name is confidential? Is that your testimony?

A: No. What I'm saying is, it wasn't about the person's name or case number. . . .
Q: So at the time you sent the e-mails, you didn't understand that the information was confidential?
A: No, it wasn't about the e-mails. It was about how I was being treated.

TR II/1-3. This testimony together with her demeanor gave the definite appearance that Complainant was not being forthright regarding the e-mails.

Further, according to Complainant's version of the events that occurred after Mr. Grijalva first confronted her about the e-mail dated 4/4/05, she alleges that she truthfully responded to Mr. Grijalva. She testified that for the next few days, Mr. Grijalva approached her almost every hour and asked only if she had sent any other e-mails with weekly reports:

[H]e showed me this e-mail and asked me, have I sent Welton any other weekly reports. . . . And when I read it, I was like, no, I didn't. . . .

TR I/243.

So, he came out several times throughout the whole day, like every half an hour to every hour, he would come out of his office and ask me, Sandy, are you sure you haven't sent Mr. Belsches any other weekly report? And I would say no.

TR I/245.

Mr. Grijalva, on the other hand, testified that he asked Complainant the broader question about whether she had sent any other e-mails with confidential information:

I had written two questions on a post-it note. I asked her the two questions. I handed her the [4/4/05] e-mail and I said, did you send this e-mail to this individual? The second question was, if you did, did you send other confidential EEO information to people outside the agency, people who aren't entitled to know?

TR I/52. In fact, Mr. Grijalva testified that he made the decision to confiscate Complainant's computer to determine whether she had actually sent any other e-mails, because he sensed that she was not being honest. TR I/54. Furthermore, Mr. Grijalva stated that after learning about the 4/4/05 e-mail, he pulled his entire staff into a meeting and asked them the same question:

I'm going to ask each one of you, one at a time, in front of everybody, <u>whether you disseminated confidential information to anyone outside this Library who is not an employee or who should not be getting it</u>. And I need for you to be completely candid and honest with me.

> So I asked Dean and looked him in the eye, and he said no. . . . I asked Jean, and she said, no, I've never done that. . . . I asked Ms. Brown, she said the same thing.

TR I/77-78 (emphasis added). It is implausible that after this meeting, Complainant still perceived that Mr. Grijalva was only asking her about e-mails containing weekly reports. Nevertheless, she continued to deny that she had sent any other e-mails. I find Mr. Grijalva's testimony to be more credible than Complainant's.

Efficiency of the Service

The Library must also demonstrate that the disciplinary action will promote the efficiency of the service. *Douglas,* 5 MSPR at 303. The Decision letter states that:

> The imposition of this penalty is fully supported by a preponderance of the evidence and will promote the efficiency of the service since such egregious behavior raises serious doubts regarding your reliability, trustworthiness, and continued fitness for duty.

Decision letter at 4. An adverse action promotes the efficiency of the service, and thus satisfies the nexus requirement of 5 U.S.C. §7513, if the "grounds for the action relate to either the employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest." *Benitez v. Dept. of Defense*, 2006 MSPB Lexis 381 at 22-23. The agency need only show that the penalty imposed will increase the efficiency of the service—by showing a nexus between the challenged conduct and the efficiency of the service—and that it is not arbitrary and capricious. *Graybill v. USPS*, 782 F.2d 1567, 1574 (Fed. Cir.), *cert. denied,* 497 U.S. 963 (1986).

In this case, Mr. Grijalva testified that Complainant's misconduct:

> compromised our integrity, it compromised our ability to operate with efficiency, it compromised the ability for us to operate with trust, the trust that's given to us by our customers, our complainants, our applicants, our colleagues, the unions that we work with. It places our office in disrepute. When our office, the integrity of our office is compromised, then so is our mission.

TR I/81-82. Mr. Sandate testified that in making his decision he was most concerned that the "erosion of trust" between Complainant and her supervisor, Mr. Grijalva, was extensive enough that he "could not see how bringing Ms. Proctor back to that office in some capacity following whatever length of suspension, that that trust factor could ever be rebuilt." TR I/150.

The MSPB long has recognized that "removal for engaging in dishonest activity promotes the efficiency of the service since such behavior raises serious doubts

regarding the employee's reliability, trustworthiness, and continued fitness for employment." *Lewis v. GSA*, 82 MSPR 259, 265 (1999). Given that trust between a supervisor and a subordinate is an essential part of a working relationship, and particularly in light of the sensitive nature of the work of EEOCO, it is reasonable to conclude that Ms. Proctor's misrepresentation led to Mr. Grijalva's constant questioning of her veracity and ultimately, to an irreparable breach of trust.

The Library's opening statement stressed the serious consequences that flowed from the leaking of information from the EEOCO. Such leaks from within:

> undermine[d] the administration of Title VII within the institution…. Because if confidential and sensitive information is leaked from inside the EEO office, the office itself will lose the trust of employees and management alike. And without that trust, the office cannot function.

TR I/14. Further, Mr. Grijalva testified that:

> It is so important to hold confidentiality in our office that employees who come in to either file a complaint, or whether they don't file a complaint, have to be secure in the knowledge, knowing that we are going to safeguard that information. . . . Employees know that whatever information we are going to acquire from them, whatever information we get, that information is going to be safeguarded. . . . We can't function effectively …once people know that we have released information, that we have breached that trust. It compromises the integrity of our office, but most importantly, the mission of what we are supposed to do.

TR I/25, 27. Clearly, questions regarding whether Complainant is able to maintain confidentiality would be harmful to the EEOCO and its ability to pursue its mission.

The MSPB upheld EEOC's finding a nexus between the penalty of removal and an employee's breach of confidentiality and EEOC's consequent loss of trust in the employee in *Clark v. EEOC*, 42 MSPR 467 (1989). In that case, EEOC had charged the employee with the unauthorized "removal and misuse of official government records" (employee provided documents from ongoing investigations to his attorney) along with a subsequent failure to follow his supervisors' directions once they became aware of his actions. The MSPB concluded that the confidentiality of investigative documents is essential to the agency's mission; if the agency could not ensure confidentiality, its ability to carry out its mission would be seriously threatened. *Id.* at 476. Misuse of confidential documents thus results in the loss of agency credibility, while misconduct on the part of the employee adversely affects the agency's trust in that employee and his or her performance. *Id.* at 475-76.

The situation in *Clark* is very similar to the one here at issue. Accordingly, LoC has established that Complainant's removal promotes the efficiency of the service.

The Penalty of Removal

Once an agency determines that an employee has engaged in wrongdoing, the employing agency has the responsibility for determining the appropriate penalty. Many agencies have a table of penalties, which lists examples of misconduct and a recommended range of penalties based on whether it is the employee's first, second, or third offense, with increasing penalties for each offense. While not required, a table of penalties provides guidance to employees and managers and a useful framework for determining the reasonableness of a penalty upon review. If the Library had a table of penalties, it would have facilitated the determination as to the appropriateness of the penalty under the circumstances here presented.

The penalty assessed by agency management is entitled to deference; ordinarily "'the penalty for employee misconduct is left to the sound discretion of the agency'." *LaChance v. Devall*, 178 F.3d 1246, 1251 (Fed. Cir. 1999) (quoting *Miguel v. Dept. of Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984)). Such a decision will not be disturbed if the discipline authority has been "legitimately invoked and properly exercised." *Douglas*, 5 MSPR at 301. Review of an agency decision involves making sure that the penalty is proportional to the charges, consistent with the principle of like penalties for like offenses, and is otherwise reasonable under the circumstances. *Id.* at 302. The burden is on the agency to establish the propriety of the penalty imposed by a preponderance of the evidence. *Id.* at 308. Like the PAB, the MSPB will modify or mitigate an agency-imposed penalty only where it finds "the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the bounds of reasonableness." *Brown v. Dept. of Treasury*, 91 MSPR 60, 64 (2002).

The Library, therefore, like other agencies, must make clear in its adverse action decisions what factors led to the determination of a particular penalty. By statute, written notice of proposed adverse actions must include the "specific reasons" for the proposed action and the decision on such a proposal must also specify in writing the reasons on which it is based. 5 U.S.C. §§7513(b)(1) and (b)(4); *Douglas,* 5 MSPR at 304. While neither the merit system statutory provisions nor the implementing regulation (5 CFR §752.404(f)) requires an agency's decision letter to contain information demonstrating that the agency has considered <u>all</u> relevant mitigating factors and reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such detailed consideration may be entitled to greater deference upon review. *Douglas*, 5 MSPR at 304.

The Executive Branch implementing regulation for adverse actions states that the agency's decision may not consider "any reasons for action other than those specified in the notice of proposed action." 5 CFR §752.404(f). While the MSPB has held that an agency may not rely on misconduct that was not included in its proposal notice, it does not consider such reliance to be fatal; in these circumstances, the MSPB has remedied the error by undertaking its own analysis of the relevant *Douglas* factors in light of the proven misconduct to determine the appropriate penalty. *Biniak v. SSA*, 90 MSPR 682, 687 (2002). The clarity with which the employee "was placed on notice of the

wrongfulness" of the type of misconduct can be a factor in whether the agency imposed penalty is sustainable. *Id.* at 689; *see Devall v. Navy*, 83 MSPR 434, 437 (1999). The administrative judge must ensure that his decision contains a reasoned explanation of the deciding official's action with respect to sustaining or modifying the penalty to demonstrate that there was proper consideration of all relevant factors and reasonable exercise of judgment in this regard. *Douglas*, 5 MSPR at 308.

Consideration of *Douglas* Factors

In *Douglas*, the MSPB enumerated the factors that may be relevant to a determination of discipline in a particular case: 1) 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; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Douglas*, 5 MSPR at 305-06. In deciding whether the penalty is reasonable, the Board need not consider every *Douglas* factor, only the relevant ones. *Lewis v. GSA*, 82 MSPR at 263.

In practice, consideration of relevant *Douglas* factors can result in a conclusion that they do not serve to mitigate in the particular circumstances. For example, in *Lewis*, the MSPB sustained the removal of an employee who was charged with misuse of a Government telephone (placing 153 long distance calls to a lottery office) and asking a third party to misrepresent that they were official calls. *Lewis*, 82 MSPR at 261. The employee was responsible for representing the agency in a variety of outreach programs as well as public relations matters. *Id.* at 264. He had also served as a liaison with other agencies. These responsibilities required him to exercise discretion; the employee's conduct constituted a serious breach of his trustworthiness and reflected adversely on the agency. These actions not only included the repeated misuse of the government phone but also the employee's urging a third party to lie and conceal the misconduct. Thus, the employee misused Government property, was not forthright about his misconduct and tried through deception to hide what he had done.

While there was no hearing, the deciding official, through a sworn affidavit, stated that he considered the serious nature of the offense, the employee's role as an agency representative and the adverse impact the employee's actions had on the agency's ability to efficiently meet its mission. *Id.* at 264. The underlying decision letter in *Lewis* had stated only that there were "no mitigating factors sufficient to outweigh, under these circumstances, a proposal of removal and [to] justify a lesser penalty." *Id.* at 263. The MSPB held that the loss of trust was a significant aggravating factor given the nature of the employee's responsibilities. *Id*. at 265.

In *Smith v. Dept. of Veterans Affairs*, 93 MSPR 424 (2003), the employee was a clerk in one of the agency's medical facilities but had been detailed to a position where she had access to patient information and was authorized to run inquiries regarding patients. 93 MSPR at 425. In that case, the employee disclosed sensitive and confidential information to a co-worker about a veteran who was both an employee and a patient at the facility.

The deciding official stated that he considered several of the *Douglas* factors including the employee's years of service, lack of prior discipline, fully successful performance appraisals, potential for rehabilitation and also the agency's table of penalties. *Id.* at 431. Such a serious breach of confidentiality, however, in his view compromised the employee's potential to ever regain the trust of her supervisors and coworkers. The deciding official further stated that he himself had lost confidence in the employee's ability to perform her job, and the MSPB found that removal was a reasonable penalty in that circumstance. *Id.*; *see Devall*, 83 MSPR at 438 (loss of trust outweighed 13 years of unblemished service).

In the case at hand, the Decision letter states:

> Full and careful consideration was given to all relevant factors under *Douglas v. Veterans Administration*. However, your rehabilitation is unlikely, considering, first and foremost, the nature and seriousness of the proven misconduct; its relation to your official duties, position and responsibilities; and the intentional and repeated offenses. I have also considered your 15-plus years of Federal service, however, balancing that service time against the seriousness of the offense, it is not considered a mitigating factor. The loss of trust is a significant aggravating factor considering the nature of your responsibilities as it has an adverse impact on the Library's ability to efficiently meet its mission.

Ex. J-B, Decision letter at 4.

The letter also goes on to state that the penalty of removal "will promote the efficiency of the service since such egregious behavior raises serious doubts regarding your reliability, trustworthiness, and continued fitness for duty." *Id.*

Furthermore, both the proposing official and the deciding official testified that they considered the *Douglas* factors and did not find any of them to be mitigating factors. TR I/80-82, 98-99 (Grijalva); TR I/146-51 (Sandate). While the deciding official is not required to be specific, the more details he provides the more likely his decision will be given deference. *Douglas*, 5 MSPR at 304. As discussed below, both Mr. Sandate and Mr. Grijalva testified regarding the factors they considered in determining the appropriate penalty for Complainant.

In evaluating a penalty determination, the first and foremost consideration is the nature and seriousness of the misconduct and its relation to the employee's duties, position and responsibilities. *Hylick v. Dept of Air Force*, 85 MSPR 145, 153 (2000). Mr. Sandate testified that he considered the nature of the conduct in relation to Complainant's duties and responsibilities. In his view, as an Equal Employment Opportunity Assistant, Complainant was responsible for "maintaining, archiving, collecting and preserving the confidentiality of EEO case related information," making this "of all things, . . . the most serious breach of that trust." TR I/147-48. Mr. Grijalva also testified as to the importance of maintaining confidentiality in the EEOCO and that failure to do so would compromise the integrity of the office. TR I/25.

Another *Douglas* factor for consideration is the "employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability." *Douglas*, 5 MSPR at 305. Mr. Sandate stated that he considered Complainant's more than 15 years of service to the Library, but that did not outweigh the seriousness of the violation. TR I/148. As to the other components of this consideration, Complainant's work record was not a mitigating factor because she clearly had problems getting along with other employees in performing her duties and responsibilities. As Mr. Sandate testified, "I also considered the numerous complaints that we had received about Ms. Proctor's interpersonal skills and poor customer service. I considered it in its totality in making my decision." TR I/180. While Complainant did not have any disciplinary actions taken against her, her performance did not serve as a mitigating factor in this instance because there were questions concerning her performance and customer service skills.

Complainant alleges that the Library failed to mention in the Proposal to Remove her prior discussions with Mr. Grijalva regarding complaints about customer service, and that therefore, this could not be considered in assessing a penalty. In her view, the Library's consideration of this constituted harmful error because she was denied the opportunity to defend herself against the charges "as ultimately framed." MJH at 41-43. Harmful procedural error is defined as error—whether regulatory or statutory—which likely had a harmful effect on the outcome of the case before the agency. *Shaw v. Dept. of Air Force*, 80 MSPR 98, 118 (1998). The employee bears the burden of proving harmful error by a preponderance of the evidence. *Godesky v. HHS*, 101 MSPR 280, 287 (2006) (citing 5 C.F.R. §§1201.56(a)(2)(iii)), (b)(1). As discussed above, the Library's reliance on misconduct not included in its proposal notice is not fatal, since it can be remedied by the trier of fact conducting his own analysis of the relevant *Douglas* factors in light of the proven misconduct to determine the appropriate

penalty. *Biniak,* 90 MSPR at 687. Accordingly, in this case, the Library's consideration of Complainant's performance was not inappropriate and it did not serve to mitigate her penalty since there were problems raised regarding her customer service and interpersonal skills. Thus, the Library appropriately found that Complainant's work history was not a mitigating factor.

*Douglas* also requires consideration of the "effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties." In this regard, Mr. Sandate testified that he considered whether or not Complainant was a trustworthy employee and stated that "it became clear . . . that there was a loss of trust, an erosion of trust between supervisor and employee." TR I/150. Complainant's ability to work with her supervisors was harmed since they could no longer trust her. Thus, any statements made by Complainant would be questioned.

Mr. Sandate also testified that he took into consideration the potential harm to the Library, particularly "the potential long term damage to the reputation of that office." TR I/148. Mr. Grijalva testified that when he told Daniel P. Mulhollan, Director of the Congressional Research Service, that information regarding EEO complaints had been released, Mr. Mulhollan "freaked out, completely went ballistic." TR I/74. Mr. Grijalva's interpretation of Mr. Mulhollan's reaction was that he was concerned that the release of the EEO information was related to a pending class action case. Mr. Mulhollan also told Mr. Grijalva that this was "a total irresponsible act on your part." TR I/74. Mr. Grijalva further testified that Complainant's actions compromised the EEOCO's:

> integrity, it compromised our ability to operate with efficiency, it compromised the ability for us to operate with trust, the trust that's given to us by our customers, our complainants, our applicants, our colleagues, the unions that we work with. It places our office in disrepute. When our office, the integrity of our office is compromised, then so is our mission.

TR I/81-82.

The seven e-mails that Complainant sent came on the heels of concerns regarding a leak in the EEOCO. TR I/83. In fact, Mr. Sandate testified that there was concern that the very person to whom Complainant had been sending this information was the person responsible for the leaks: "Almost from the time that I arrived, what I was hearing, just in terms of connecting the dots about leaking information, was the name Welton Belsches associated with that." TR I/172. This testimony regarding Mr. Belsches as the source of leaked EEO information was consistent with the fact that OGC did not share information regarding settlement agreements with EEOCO until after Mr. Belsches left. TR I/35-37. Moreover, it adds to the seriousness of Complainant's action in sharing confidential information with Mr. Belsches. Mr. Sandate was legitimately concerned that the efforts made to repair the EEOCO's reputation would be undone. TR I/148-49.

Mr. Sandate also testified that he considered whether or not Ms. Proctor had any prior adverse actions and whether she could be moved to another office; neither of these was a mitigating factor. TR I/149-51. Both Mr. Grijalva and Mr. Sandate testified that they considered alternative sanctions such as suspension, but that given the efforts that had been taken to improve the reputation of the Office, that would not be sufficient. TR I/148. Mr. Sandate testified that:

> I considered the possibility of suspension. But where I kept coming out and looking at was this. In looking at the efforts that we had undertaken, that I had undertaken, that members of our staff had undertaken, to try to improve the professional reputation of that office, and in considering the potential long term damage to the reputation of that office, should in fact this information make its way to parts unknown, who knows, perhaps to members of Congress, in the end, I made a determination that despite the years, the length of service in the Library of Congress that it was not a mitigating factor in my decision to uphold that proposal to remove from Federal service.

TR I/148. They also both testified that they did not believe that Ms. Proctor could be rehabilitated. TR I/82-99, 150-51, 180.

Accordingly, the Library has appropriately considered all the relevant *Douglas* factors in making its determination to remove Complainant from Federal service.

Reasonableness of Penalty

Complainant here argues that she should not have been removed on her first offense because "subject to discipline implies progressive discipline." TR II/96. She contends that "if the Library was to follow its own policy, as described by Mr. Belsches, they would have followed progressive discipline." *Id.* Further, Complainant argues that the regulation as to confidentiality, even if it had been properly cited in the Proposal to Remove, "does not say, you shall be immediately terminated upon finding out this information." *Id.* It is undisputed that prior to her removal, Complainant had received no other written reprimands. Jt. Stip. Y. However, contrary to her arguments, progressive discipline is one factor to be weighed in the circumstances—not an absolute requirement.

In fact, the MSPB upholds removal for a first offense in appropriate cases. Specifically, the MSPB has found removal appropriate for a first offense where the employee's actions destroyed the agency's confidence in her ability to perform her duties, and the misconduct effectively undermined the agency's mission. *Allen v. Dept. of Commerce*, 58 MSPR 568, 572 (1963) (removal for intentionally falsifying census report sustained because by engaging in the conduct, employee destroyed agency's confidence in her ability to perform her duties and undermined agency mission to gather accurate and reliable census information). As discussed in *Smith v. Department. of Veterans Affairs*, removal was reasonable where an employee disclosed sensitive and confidential patient information. The deciding official testified that he took into account the employee's 9-plus years of service, lack of any prior discipline and her fully successful performance appraisals. Nevertheless, the breach of confidentiality irreparably compromised the employee's potential to ever regain the trust of her

supervisors and coworkers.[20] 93 MSPR at 431; *see Gray v. USPS*, 97 MSPR 617, 622 (2004) (employee engaged in misconduct by working at a second job while on sick leave pursuant to Family and Medical Leave Act; deciding official found that employee's behavior was "not honorable" and that he had lost ability to trust the employee). Removal therefore can be an appropriate penalty where the employee's conduct violated basic trust and honesty that was required of the employee's position.

In *Clark v. EEOC*, the MSPB upheld the employee's removal "notwithstanding. . . [his] outstanding performance rating, his years of service and role in the community." 42 MSPR at 478. The MSPB reached its holding because the employee knew documents were confidential, released them to the public, and when caught did not return the documents. Likewise here, Ms. Proctor knew the information was confidential, released it to the public, and when caught, did not tell the truth.

In this case, Complainant's actions breached her supervisor's trust and confidence in her such that anything she said to him would be under scrutiny. She surreptitiously sent e-mails containing confidential information regarding EEO complaints and internal EEOCO operations, and then lied about the additional e-mails that she had sent to Mr. Belsches. Further, she continued to insist that she had done nothing wrong by omitting information that was relevant to her supervisor's inquiries. On this record, management's conclusion that removal was the appropriate penalty is sustained.

Accordingly, the Library has proven by a preponderance of the evidence that Complainant engaged in conduct unbecoming a Federal employee by disseminating confidential information, misusing her Government computer and making intentional misrepresentations of fact. The Library has also appropriately considered all the relevant *Douglas* factors and imposed a penalty—removal—within the bounds of reasonableness in this case.

Affirmative Defense: Discrimination

Complainant alleges that the Library removed her because of her gender, race and national origin. Under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), to prove a claim of prohibited employment discrimination, the employee first must establish a *prima facie* case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *Godesky*, 101 MSPR at 285. After a hearing is conducted and the record is complete, it is appropriate to review all the evidence and make a finding on the ultimate issue—whether the action under appeal was discriminatory. *See Simien v. USPS*, 99 MSPR 237, 248 (2005) (citations omitted).

[20] In that case, there was a table of penalties which listed removal as an appropriate penalty for a first offense of unauthorized disclosure of confidential information. *Smith*, 93 MSPR at 431.

Complainant alleges that she would not have been removed if she were Hispanic—that the removal "was another act in this ongoing pattern" of favoritism towards Hispanics. TR II/99. In her opening statement, Complainant's attorney states that she raised the discrimination claim because "[t]he allegations are so far-fetched, and the fact that we have to be here today is so unjustifiable as to conclude that it was discriminatory." TR I/20. This theory echoes her statement in the Opposition to the LoC's Motion for Summary Judgment, that Complainant "has produced evidence that the decision to terminate her and the Library's behavior is so outrageous that the only likely explanation is that it was based on a prohibited motive." Opp. at 12.

Complainant did little during the evidentiary hearing to try to prove this theory that she was discriminated against. She tried to raise the inference of discrimination in her response to the Library's Motion for Summary Judgment, while noting that there were no appropriate comparators[21] for purposes of suggesting discriminatory intent. Opp. at 10-11. She argued that the Office evidenced an "obvious bias in favor of Hispanics," and that one could draw "an inference of discrimination in the way in which she was terminated." *Id.* Counsel provided detail by quoting from Complainant's Response to Interrogatories:

> Since Mr. Sandate's arrival, he has brought in several Hispanics for temporary and permanent employment. . . . I believe that he was using an opportunity to bring in more Hispanics by terminating me unjustly. Mr. Sandate routinely showed favoritism to Hispanics. He sent Hispanics . . . on travel before they officially reported to work . . . with the Library of Congress funds. He did not send Black employees on travel even though they were permanent employees. Mr. Sandate continued to hire Hispanics even when there was no official job for them.

*Id.* She referenced a confirming opinion from Ms. Brown, an African-American female, to the effect that supervisors "'keep bringing in these young Hispanics and they seem to be favoring them over those of us that know what we are doing, and have been in the office for years'." *Id.* (quoting from Exh. 4 ¶14). However, Ms. Brown did not testify regarding this allegation at the hearing.

In her closing argument, Complainant contended that the fact that her actions were being compared to those of employees who had committed criminal acts presented "serious issues." TR II/86-87. She pointed to the fact that Mr. Grijalva had only proposed one other removal—for an individual who had committed criminal acts. Further, she noted that Mr. Sandate, in reviewing the Proposal to Remove, had

[21] Indeed, as Complainant pointed out in her Motion for Judgment Without a Hearing: "It should be noted that the Library responded in written discovery that no Library employees had been disciplined for an alleged breach of confidentiality." MJH at 29 n.5 (citing Appellee's Response to Appellant's Discovery Requests, Attachment Y at 5, admission 12).

compared Complainant to two individuals who had committed criminal acts.[22] *Id.* Since Complainant's misconduct did not rise to the level of criminal activity, she contends that the penalty of removal is unreasonable.[23] While a table of penalties and comparators for discipline would have been helpful, their absence does not establish pretext in light of the evidence supporting removal in this case. *See* discussion, *supra,* at 37-49.

Complainant also attacked the mistake in the Proposal to Removal, based upon an error as to the role of Mr. Keeler in examining the contents of her computer, and suggested that a decision to remove had been made before the internal process was complete. *See* Closing Argument (TR II/86); Opp. at 15-17. By and large there was no testimony offered in support of the theory that the removal decision was made prior to the process' completion. As a result, these theories were not borne out in the evidentiary hearing. That someone other than Mr. Keeler reviewed the contents of the computer does not negate what was found in that process. Moreover, Complainant had ample opportunity to present her view on the contents of the e-mails and the allegations of misconduct that she faced.

Despite the claim of bias in favor of Hispanics, the only mention of race during Complainant's testimony was in relation to her work space. She complained that she—a permanent employee—did not get an office but two Hispanic interns (*i.e.*, temporary employees) received offices. TR I/217-18. She further testified that Mr. Belsches advised her to file a complaint against Mr. Grijalva and Mr. Sandate. TR I/216. Mr. Belsches himself testified that during the time he had supervised Complainant (more than 13 years), on several occasions she had requested to be moved into a regular office which, he said, "of course we weren't able to do. . . ." TR II/32. Further, there was no evidence—documentary or testimony—as to the nature of work and responsibility of the interns, in comparison to that of Complainant. There is evidence that she greeted individuals who entered the Office, and thus, had reason to be situated in somewhat open space. TR I/206. Furthermore, in her deposition, while alleging that Mr. Grijalva made racist comments, Ms. Proctor was unable to supply one example. Proctor Dep. 157-58.

Further contradicting Complainant's argument that she was discriminated against in her work arrangement is the fact that—like Complainant—her replacement was also African-American. TR I/125. In addition, Mr. Sandate testified that he had hired non-

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[22] One of these individuals accessed the National Finance Center computer system to set up an allotment for another employee to whom she owed money. TR II/64. The other had manipulated the computer system to create leave for her daughter. TR II/66.

[23] While the Library attempted to compare Complainant to these employees, I do not find that they meet the legal definition of similarly situated employees for Title VII purposes. They did not commit acts similar to Complainant's misconduct, nor were they supervised by Mr. Grijalva. Moreover, they are identified as Caucasian and African-American; neither is identified as Hispanic. *See Godesky*, 101 MSPR at 285; *Richard v. Dept. of Defense*, 66 MSPR 146, 155 (1995) (cited with approval in *Riley v.* USPS, 34 Fed. Appx. 777, 781 (Fed. Cir. 2002) (nonprecedential)); *see* n.21, *supra.*

Hispanics during his tenure. TR I/186-90. Finally, both Messrs. Sandate and Grijalva provided testimony denying that they made decisions based on race or gender or nationality. TR I/82, 151, 186-87.

While the allegations raised by Complainant in her Opposition to the Motion for Summary Judgment may have been sufficient to defeat the Motion, she failed to prove that she was discriminated against by a preponderance of the evidence. After weighing all the evidence, I find that Complainant failed to establish that the Agency's legitimate nondiscriminatory reasons for removal were a pretext for discrimination.

## CONCLUSION

The Library proved by a preponderance of the evidence that the Complainant engaged in conduct unbecoming a Federal employee when she improperly and repeatedly distributed sensitive and confidential information through e-mails, misused her government computer to do so, and misrepresented facts regarding the e-mails that she sent when questioned by her supervisor. Furthermore, the Agency established that removal promotes the efficiency of the service, properly considered the *Douglas* factors and acted reasonably under the circumstances in imposing the penalty of removal. Finally, Complainant failed to establish an affirmative defense that she was removed because of her gender, race or national origin. Accordingly, the penalty of removal is sustained.

**SO ORDERED.**