UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

LARRY R. COLEMAN, II,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
CH-0752-21-0308-I-1

DATE: December 21, 2021

Larry R. Coleman, II, Winchester, Kentucky, pro se.

James E. Campion, Esquire, St. Louis, Missouri, for the agency.

BEFORE
Katherine Beaumont Kern
Administrative Judge

INITIAL DECISION

The appellant, Larry R. Coleman, II, timely filed this Board appeal of the decision of the United States Postal Service ("agency") to place him in an enforced leave status due to his inability to comply with postal policy requiring that he wear a face covering at work due to the COVID-19 pandemic. The appellant seeks an exemption from the policy for "religious and constitutional reasons." Initial Appeal File (IAF), Tab 1, Tab 4, p. 22. The Board has jurisdiction over this appeal. 5 U.S.C. §§ 7512(2), 7513(d); *Abbott v. United States Postal Service*, 121 M.S.P.R. 294 (2014). Because the appellant did not request a hearing, my decision is based on the written record. IAF, Tabs 1, 6, 10.

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background Facts

The appellant is currently employed by the agency as a Mail Processing Clerk at the Lexington, Kentucky Processing and Distribution Center (PD & C), where he has worked for over 25 years. IAF, Tab 1, p. 1; Tab 4, p. 33. Effective April 5, 2021, the agency placed the appellant in an enforced leave status due to the appellant's unwillingness to wear any face covering, for any duration, during the COVID-19 pandemic, in violation of "postal policy." IAF Tab 4, p. 22. The agency determined that allowing the appellant to work without wearing a face covering at any time was a direct threat to other employees, not outweighed by his religious and constitutional objections. *Id.*

The appellant did not ask for a hearing and chose to have his appeal decided on the written record, which closed on August 17, 2021.[1] IAF, Tabs 1, 6. I have considered the record as a whole in coming to this decision. Unless otherwise noted, the following facts are not in dispute.

The agency appears to have first published information concerning the "new coronavirus, known as COVID-19" in a "Stand-Up Talk" for employees on March 6, 2020. IAF, Tab 11, p. 6. Following guidance from the Centers for Disease Control and Prevention (CDC), the agency recommended steps to help prevent the spread of such respiratory viruses including frequent handwashing; avoiding touching one's eyes, nose, and mouth with unwashed hands; avoiding contact with people who are sick; staying home when sick; and covering coughs

[1] The appellant sought an extension of time to file his Close of Record submissions to August 3, 2021. Accordingly, the Close of Record submission deadline was extended to August 3, 2021, notwithstanding the provisions of 5 C.F.R. § 1201.59(c), which allow a party to respond to new evidence or argument submitted by the other party just prior to the close of record. IAF, Tab 10. The parties were granted the ability to file Closing Arguments by August 17, 2021. The appellant neither filed a Closing Argument, nor otherwise responded to the agency's closing submission. The appellant also did not respond to the order extending the Close of Record. IAF, Tab 16. The record thus closed on August 17, 2021.

or sneezes with a tissue. *Id.* At the time, the CDC did not recommend that people who were well wear face coverings to protect themselves, and recommended face coverings only for people exhibiting symptoms of COVID-19 to help prevent spreading the disease to others. *Id.* at p. 7.

The World Health Organization (WHO) first declared the COVID-19 outbreak a global pandemic on March 11, 2020. *See* https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020. By April 21, 2020, the agency modified its policy, requiring all employees to wear face coverings in the following circumstances: when there is a state or local order or directive to do so; when they deal directly with the public; when they cannot achieve or maintain social distancing of at least 6 feet in the workplace. IAF, Tab 4, p. 88. On May 6, 2020, the agency again published its policy "now requiring all employees to wear cloth face coverings or masks where a mandatory local or state directive exists . . . [and] where social distancing practices cannot be properly maintained." *Id.* at p. 44. The agency explained it has followed the guidance of the CDC throughout the COVID-19 pandemic and changed its policy based on data relating to how COVID-19 spreads and the evidence of widespread COVID-19 illness in communities across the country. *Id.* "The Postal Service made the decision to align [its] employee policy with state and local ordinances which implemented CDC recommendations by requiring face coverings." *Id.* The agency further stated that, under its policy, face coverings were required for employees, regardless of whether there is a local or state order in place, whenever social distancing practices (6 feet from others) could not be properly maintained, including in back offices and on the workroom floor. *Id.*

On July 9, 2020, the Governor of Kentucky declared a State of Emergency — after 17,919 reported cases of COVID-19 and 608 deaths statewide — mandating face coverings to slow the spread of COVID-19. IAF, Tab 11, p. 32.

The appellant alleges that on July 15, 2020, pursuant to a recommendation from his supervisor, Ms. Amy Nelson, he filed a request for a reasonable accommodation concerning his "FMLA condition." IAF, Tab 1, p. 7 (With regard to the appellant's request pursuant to the Family and Medical Leave Act, the appellant referred to his request in his appeal as a mental / physical health accommodation, with his condition not otherwise identified. *Id.* at p. 3). Record evidence reflects the appellant stated that his restrictions required that he not be assigned to a noisy, crowded, or confined space. IAF, Tab 4, p. 70.

On July 29, 2020, the agency held a Pre-Disciplinary Interview (PDI) with the appellant concerning his refusal to follow his supervisor's instructions on July 26th and 27th to wear a face covering unless he had a doctor note excusing him from the postal policy. IAF, Tab 4, pp. 81-83. The appellant was warned that his failure to correct this safety violation could result in progressive discipline, up to and including removal from the agency. *Id.* The record reflects that the appellant first raised his "religious reasons" and "constitutional rights" objections to wearing a face covering at this PDI. *Id.* at p. 83. The appellant alleges that "nothing was said" to him following the PDI and he did not receive any resulting discipline. IAF, Tab 1, p. 2.

On August 20, 2020, during a mandatory Stand-Up Talk to employees, the agency reiterated its policy that face coverings are required when there is a state or local order or directive to do so; when an employee deals directly with the public; or when an employee cannot achieve or maintain social distancing of at least 6 feet in the workplace. IAF, Tab 4, p. 79.

The agency alleges it held the first interactive meeting with the appellant regarding his request for a reasonable accommodation relating to his medical

restrictions on September 14, 2020.[2] IAF, Tab 4, p. 70. According to the appellant it was agreed at that time to move a letter case[3] to a different location from which the appellant could work. *Id.* The follow-up teleconference was scheduled for October 28, 2020. *Id.*

The appellant was sent home for refusal to wear a face covering on October 20 and 23, 2020. IAF, Tab 1, p. 7. In a letter dated October 23, 2020, the agency placed the appellant in off-duty with-pay Emergency Placement status, effective October 21, 2020, due to the allegation of failure to observe safety rules and regulations. IAF, Tab 4, p. 11. On October 28, 2020, the agency conducted a PDI concerning the appellant's refusal to follow his supervisor's instruction to put a face covering on. *Id.*at pp. 72-75. The appellant again argued that wearing a face covering violated his religious and constitutional rights and alleged that he had continuously been told by management that it "wouldn't be a problem" if he stayed away from other employees and socially-distanced. IAF, Tab 1, p. 7. In his appeal, the appellant alleged his supervisor, Ms. Nelson, removed her mask to conduct the PDI. *Id.* He alleges at the conclusion of the meeting he was given the emergency placement letter and sent home in a paid leave status. *Id.* Based on the appellant's religious objection to any face covering, a follow-up PDI was scheduled. IAF, Tab 4, pp. 66-69.

Also on October 28, 2020, the agency conducted the scheduled follow-up teleconference on the appellant's reasonable accommodation request concerning his mental and physical health. *Id.; see also* IAF, Tab 1, p. 3. The appellant alleges he returned for the scheduled teleconference, without a face covering, on

---

[2] The appellant alleges the teleconference took place on September 23, 2020. IAF, Tab 1, p. 7. This fact need not be resolved as it is not determinative to any issue in this decision.

[3] A case is a shelf or other way to house mail that needs to be sorted. *See* nalc.org/news/nalc-updates/usps-looks-to-reduce-letter-carriers-casing-equipment.

October 28th leading him to believe that management's "concern for employee safety is conditional." *Id.* at p. 8.

On October 30, 2020, the agency responded to the appellant's request for a reasonable accommodation concerning his health, noting his request to work in an area that had "little to no interaction with people for a prolonged period of time." IAF, Tab 4, p. 70. The agency agreed to move his case to the post office box section of the station, noting that "this area is secluded with hardly any foot traffic and noise." *Id.*

The agency next held a PDI on December 11, 2020, in follow-up to the appellant's October 28, 2020 representation that being required to wear a face covering violated his religious and constitutional rights. *Id.* at pp. 64-66. The appellant reiterated, "Being made to wear any kind of face covering violates my personal and religious beliefs. I personally believe it is a violation of my rights." *Id.* at p. 65. The appellant further argued that, because he can maintain 6 feet of distance while working, the face covering policy should not apply to him. *Id.* The agency asked the appellant if he would be willing to wear a face covering when entering and exiting the building, while at the time clocks, or when near another employee, to which the appellant responded, "No I will not. Any kind of facial covering violates my religious beliefs. I can use the entrance by the PO Box section, by using the lobby door and park out front so I do not have to go through a main entrance." *Id.* at p. 64. The appellant further offered to stop using his locker, to go to his car for lunch and breaks, and to find a time clock that no one else uses. *Id.* at p. 65. In his appeal, the appellant stated his "begin-tour" and "end-tour" is only shared "by about 3 others," so he did not believe encountering an employee at the time clock would be an issue. IAF, Tab 1, p. 8.

In a December 16, 2020 Stand-Up Talk, the agency informed employees that due to "an increase in staffing and an abundance of packages in our facilities in peak season," it would be increasingly difficult to maintain social distancing. IAF, Tab 4, p. 46. On December 19, 2020, the agency issued Manager and

Supervisor Guidance again requiring all employees, including supervisors and managers, to wear face coverings when social distancing of 6 feet cannot be maintained in public, or in public facing settings when required by state or local orders and directives, and when an employee who does not deal directly with the public cannot achieve or maintain social distancing in the workplace. *Id.* at p. 42. Relating to requests for accommodation, the agency stated that the District's Reasonable Accommodation Committee (DRAC), "must assess whether the employee can effectively socially distance at all times. Even if there is a state or local order in place requiring use of face coverings regardless of social distancing capabilities, constant social distancing would be an acceptable accommodation, if possible. However, in most situations, an employee cannot always achieve constant socially distancing, especially on the workroom floor or in bathrooms, break rooms, locker rooms, etc." *Id.* The letter went on to note that, "unless the interactive process with the employee identifies another accommodation that will not impose an undue hardship on the Postal Service, the employee must remain out of work. Consistent with guidance issued by the Equal Employment Opportunity Commission, this is because it would be an undue hardship on Postal Service operations to permit a potential direct threat to other employees in the form of someone not able to observe mask-wearing and infection-control practices to remain in the workplace." *Id.*

On December 22, 2020, the appellant's request was referred to the DRAC, stating: "Employee refuses to wear a mask, states it is for religious reasons." *Id.* at p. 63. The following date, the agency reached out to the appellant to request relevant information on his religious reasonable accommodation request. *Id.* at p. 58.

On January 6, 2021, Labor Relations Specialist, Angela Sachleben, met with the appellant to discuss his religious accommodation request. *Id.* at pp. 56-57. The appellant stated that he is a Christian and that he equates wearing a face

covering to consenting to the "mark of the beast" from the Bible's Book of Revelation. *Id.; see also* IAF, Tab 11, p. 3.

The appellant cites to the book of Revelation, chapter 13, of which verses 11-18 state as follows:

> Then I saw another beast, coming out of the earth. He had two horns like a lamb, but he spoke like a dragon. He exercised all the authority of the first beast on his behalf, and made the earth and its inhabitants worship the first beast, whose fatal wound had been healed. And he performed great and miraculous signs, even causing fire to come down from heaven to earth in full view of men. Because of the signs he was given power to do on behalf of the first beast, he deceived the inhabitants of the earth. He ordered them to set up an image in honor of the beast who was wounded by the sword and yet lived. He was given power to give breath to the image of the first beast, so that it could speak and cause all who refused to worship the image to be killed. He also forced everyone, small and great, rich and poor, free and slave, to receive a mark on his right hand or on his forehead, so that no one could buy or sell unless he had the mark, which is the name of the beast or the number of his name. And that no man might buy or sell, save he that had the mark, or the name of the beast, or the number of his name. Here is wisdom. Let him that hath understanding count the number of the beast: for it is the number of a man; and his number is Six hundred threescore and six.

The appellant believes that accepting the mark is an abomination to God in accordance with Revelation 14:9-12, which states:

> A third angel followed them and said in a loud voice: "If anyone worships the beast and his image and receives his mark on the forehead or on the hand, he, too, will drink of the wine of God's fury, which has been poured full strength into the cup of his wrath. He will be tormented with burning sulfur in the presence of the holy angels and of the Lamb. And the smoke of their torment rises for ever and ever. There is no rest day or night for those who worship the beast and his image, or for anyone who receives the mark of his name." This calls for patient endurance on the part of the saints who obey God's commandments and remain faithful to Jesus.

IAF, Tab 11, p. 3. In the January 6, 2021 meeting, the appellant affirmed that wearing any face covering for any amount of time is against his beliefs. *Id.* He

explained that one need not look farther than the Governor of Kentucky's order – that an establishment could be closed for allowing patrons to shop without face coverings – to see that face covering mandates are the same as having a mark on one's hand in order to buy bread. *Id.* at p. 56. The appellant refused the agency's suggestion that he wear a face covering to enter and exit the building or use a clear face shield or a face covering he could put around his neck. *Id.* at pp. 56-57. The appellant asked for a reasonable accommodation stating, "I am not willing to compromise my faith." *Id.* The agency concluded that the appellant's suggestion that he use a rarely-used entrance and take his breaks and lunch in his car, is not in compliance with postal policy. *Id.* at p. 56. In response to Ms. Sachleben's question about what the appellant would do if he met another employee at that entrance, the appellant reiterated, "I am not willing to compromise my faith. I have been open with management on my stance. My only option is to violate my faith." *Id.*

On January 20, 2021, President Biden issued an Executive Order mandating masks in Federal buildings, stating: "It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19) by relying on the best available data and science-based public health measures. Such measures include wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention (CDC). Put simply, masks and other public health measures reduce the spread of the disease, particularly when communities make widespread use of such measures, and thus save lives. Accordingly, to protect the Federal workforce and individuals interacting with the Federal workforce, and to ensure the continuity of Government services and activities, on-duty or onsite Federal employees, on-site Federal contractors, and other individuals in Federal buildings and on Federal lands should all wear masks, maintain physical distance, and adhere to other public health measures as provided in CDC guidelines." IAF, Tab 4, p. 48.

On January 29, 2021, the agency issued a written response to the appellant's request for a religious accommodation. *Id.* at p. 39. The agency explained that the appellant had been provided with an isolated work area which generally allowed him to maintain 6 feet of social distance and that he was not required to wear a "mask or any face covering" in this area. *Id.* The agency explained, however, that it could not provide him an alternate entrance and restroom access that could fully accommodate 6 feet of social distancing at all times, and therefore could not accommodate his request to not wear any type of face covering at any time. *Id.*

On February 23, 2021, the agency conducted a PDI with the appellant. IAF, Tab 4, p. 34. The appellant was given an opportunity to respond to the denial of his request for a religious accommodation. The appellant disagreed that he was likely to encounter any other employees when entering or exiting the building or walking down the hallway to the restroom (which is reportedly less than 6 feet wide). *Id.* at p. 35. The appellant felt that he could use a "closed" sign for the restroom while he was using it in order to keep other employees away. *Id.* The appellant, again, reiterated that due to his strongly held religious belief he is unwilling to wear a facial covering in the workplace for any duration in any situation. *Id.*

The appellant was offered further opportunity to explain his constitutional objection to the agency's face covering mandate. In a February 28, 2021 letter, the appellant explained that his refusal to wear a face covering is his free exercise of religion protected by the First Amendment, and that his objection to wearing a face covering is based on his strongly held religious beliefs and, by extension, his constitutional right. IAF, Tab 4, p. 32. Underscoring the strength of his conviction, the appellant stated that he has not made necessary appointments with his doctor, eye doctor, or dentist because he refuses to wear a face covering to attend those appointments. *Id.*

On March 6, 2021, the agency issued a letter proposing to place the appellant in an unpaid Enforced Leave status based on the following: "You have informed management that you cannot, and will not, wear a face mask or any face covering, while working, due to religious reasons. It is postal policy that you wear a face covering in our work location due to the COVID-19 pandemic. Moreover, at this time, no reasonable accommodation has been found that would allow you to perform your job, without posing a direct threat to self or others, while working without any face covering. There is no duty assignment available for you to safely perform without the use of a face covering. You will remain on enforced leave until you are able to return to work and perform your duties with a face covering, as long as the pandemic policy remains in effect." IAF, Tab 4, p. 84. The letter included the appellant's opportunity to respond, in writing or by scheduling an appointment with Plant Manager, Doug Caswell, within 10 days. The appellant was also informed of his right to file a grievance within 14 calendar days of his receipt of the notice. *Id.* at pp. 84-85. The appellant chose to have his representative meet with Mr. Caswell on March 11, 2021. IAF, Tab 1, p. 10.

On March 25, 2021, the agency issued a Letter of Decision, placing the appellant in a non-pay Enforced Leave status, effective April 5, 2021, and lasting until the appellant is able to return to work and perform his duties with a face covering or as long as the pandemic policy remains in effect. The appellant was allowed to submit leave slips to utilize his own leave, if he desired. IAF, Tab 4, p. 22. The decision letter stated that the appellant had informed management that he was not willing to wear any face covering, for any duration, for religious and constitutional reasons in conflict with postal policy requiring that he wear a face covering due to the COVID-19 pandemic. The agency determined that the

appellant's refusal to comply with this policy prohibited his return to duty.[4] *Id.* This appeal followed.

Applicable Law

The issue in this appeal is whether the agency properly placed the appellant in an unpaid enforced leave status based on his unwillingness, for religious reasons, to wear a face covering at any time in violation of postal policy. The Board has held that an agency's placement of an employee on enforced leave for more than 14 days constitutes an appealable suspension within the Board's jurisdiction. *Abbott*, 121 M.S.P.R. 294 (2014). Our reviewing court has held that such suspensions – those ordered because the agency believes that the employee's retention on active duty could result in damage to federal property, or be detrimental to governmental interests, or be injurious to the employee, his fellow workers, or the public – are like disciplinary suspensions in the broad sense that they are put in place to maintain the orderly working of the Government against possible disruption by the suspended employee, and similarly fall within the Board's jurisdiction. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed.Cir.1987). To sustain such a suspension, the agency must prove by preponderant evidence that the charged conduct occurred, a nexus exists between the conduct and the service efficiency, and that the penalty is reasonable. *See*

---

[4] The agency continued to review its policy with the introduction of COVID-19 vaccines. In a May 19, 2021 Stand-Up Talk, the agency affirmed its policy requiring all employees, vaccinated and unvaccinated, to wear face coverings. IAF, Tab 4, p. 21. On July 16, 2021, the Agency revised its Face Covering Policy to permit fully vaccinated employees to work without wearing a mask. IAF, Tab 9, p. 8. The relevant portion of policy stated: In accordance with guidance from the CDC and OSHA, "fully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance." *Id.* As a result of the new policy, the appellant returned to work the next day, July 17, 2021. *Id.* at p. 5.

generally Pope v. U.S. Postal Service, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981); *Abbott*, 121 M.S.P.R. 294 at 304.

The appellant asserts, as affirmative defenses, that the agency failed to reasonably accommodate his religious beliefs and otherwise discriminated against and retaliated against him based on his religion and his request for a medical accommodation. The appellant also argues that the agency failed to afford him due process in deciding on his enforced leave status. The appellant has the burden to prove his affirmative defenses by preponderant evidence.

The agency established its charge by a preponderance of the evidence.

In the instant case, the appellant was placed on enforced leave because of his refusal to wear a facial covering to protect the safety of himself and his co-workers during a pandemic. Specifically, the notice proposing to place the appellant on enforced leave states that that appellant, "cannot, and will not, wear a face mask or any face covering, while working," in violation of postal policy, and that the agency found no reasonable accommodation that would allow him to perform his job without posing a direct threat to himself or others. IAF, Tab 4, p. 84. I find that the agency proved both that the appellant would not wear any face covering and that this violated its policy.

First, the record is replete with the appellant's steadfast objection to wearing a face mask or any face covering. IAF, Tab 4, p. 82 ("Religious reasons, constitutional rights."); p. 72 ("I refuse to wear a mask because it violates my religious rights and constitutional rights."); p. 65 (Being made to wear any kind of face covering violates my personal and religious beliefs. I personally believe it is a violation of my rights."); p. 56 ("My belief comes from the book of Revelation. I equate the wearing of a face mask to the mark of the beast. . . . Yes, I am asking for a religious accommodation. . . . No face covering period. . . . I am not willing to compromise my faith.") The appellant was similarly consistent that he refused to wear a face covering of any kind, including the

agency's proposal that he wear a clear face shield or a face covering that could be put around his neck. *Id.* at pp. 65, 57. The appellant equates wearing a face covering to the mark of the beast and affirms, "It is my strongly held belief and I am not willing to violate it." *Id.* The appellant has been very clear that his Christian beliefs dictate that refusing to wear a face covering must take precedence over continuing in his position, the financial security of his family, protecting his own health, and protecting the health of his co-workers. IAF, Tab 11, p. 3. Accordingly, under no circumstance would the appellant don a face covering to protect himself or others from the spread of COVID-19.

Second, the agency has shown that the appellant's refusal to wear a face covering was in violation of postal policy. Pursuant to agency guidance, employees are required to wear a face covering in the following circumstances: (1) when there is a state or local order or directive to do so; (2) when they deal directly with the public; and (3) when they cannot achieve or maintain social distancing of at least 6 feet in the workplace. IAF, Tab 4, p. 88. I find that both the first and third circumstances apply to the appellant's situation.

As to the first circumstance, record evidence shows that the Governor of Kentucky, Andy Beshear, issued an Executive Order on July 9, 2020 stating that people in Kentucky must cover their nose and mouth with a face covering in any indoor or outdoor public space in which it is difficult to maintain a physical distance of at least 6 feet from all individuals who are not members of the same household. IAF, Tab 11, p. 32. Governor Beshear cited findings by the CDC and the Kentucky Department of Public Health that the wearing of face coverings has been found to help prevent the further spread of COVID-19. *Id.*

The appellant argued that the Governor's order was found unconstitutional in *Ridgeway Properties, LLC v. Beshear, Governor,* Case No. 20-CI-00678 (Boone Circuit Court, June 2020)). In *Ridegway,* the Circuit Court granted an emergency restraining order as to the Governor's Executive Order. That restraining order, however, was overturned by the Supreme Court of Kentucky on

November 12, 2020 – well prior to the appellant's enforced leave suspension. *See Beshear v. Acree*, 615 S.W.3d 780 (November 12, 2020). The Kentucky Supreme Court upheld the Governor's declaration of the outbreak of the COVID-19 virus as a public health emergency. *Id.* The Court explained: "COVID-19 is a respiratory disease caused by a virus that transmits easily from person-to-person and can result in serious illness or death. According to the Centers for Disease Control and Prevention (CDC), the virus is primarily spread through respiratory droplets from infected individuals coughing, sneezing, or talking while in close proximity (within six feet) to other people." *Id.* 615 S.W.3d 780, 789. Emphasizing that the Governor's orders were issued to deal with a previously unknown viral pathogen, the Court rejected the Constitutional argument that the orders were not rationally related to mitigation of its spread – finding, in fact, that at the time of the decision COVID-19 had spread to all 120 Kentucky counties and all areas of the Commonwealth even with prompt and proactive public health measures. *Id.* at 828.

The agency also made a decision to make face coverings mandatory, *regardless* of whether there is a local or state order in place, whenever social distancing practices (6 feet from others) cannot be properly maintained. Under the agency's policy, all employees must wear a face covering including in back offices and on the workroom floor. IAF, Tab 4, p. 42.

The appellant argues that because his designated work area is intended to involve minimal interaction with other employees and generally affords him 6 feet of social distancing space, the policy described above should not apply to him. The appellant's work area has been alternately described as having "hardly any foot traffic or noise," and "little to no interaction" with other employees. IAF, Tab 4, p. 70. Postal policy, however, states that 6 feet of social distancing must be "maintained" and "constant" and "at all times." IAF, Tab 4, pp. 42, 44. In addition to the potential of encountering co-workers in his work area on occasion, the agency pointed out that the appellant could encounter other

employees when entering and exiting the building, using the restroom, using the access hallway to the restrooms, or clocking in and out. IAF, Tab 4, pp. 34-35. The agency further explained that, particularly in peak holiday season, it is increasingly difficult for employees to maintain social distance. *Id.* at p. 46.

The appellant observes that "increasingly difficult" and "impossible" are not the same thing. IAF, Tab 1, p. 9. However, the appellant admitted in the January 6, 2021 meeting to discuss his religious accommodation request, that even the separate entrance he wished to use has limited use by other employees. *See* IAF, Tab 4, p. 57 ("I can use an alternate employee entrance. The lobby entrance where no one else uses except for mail handlers for box collection."); p. 55 ("Coleman stated he could use the lobby entrance which is used less by other employees. He stated this entrance is only used my mail handlers for box collection."). The appellant also argues he could place "closed" signs on the restroom while he was using it in order to avoid interaction, but had no answer for what to do if he encountered a co-worker in the hallway on his way there. *Id.* at p. 45. In sum, while the appellant alleges he would do his best to avoid coming within 6 feet of all other agency employees, his own statements show that this is not always possible and confirm that he is unwavering that his beliefs preclude him from putting on a face covering if he does. *Id.*

I therefore find the agency has proved its charge that the appellant refuses to wear a face covering in violation of postal policy. Accordingly, the agency's charge is sustained. The appellant argues that he should be excused from this policy based on his religious beliefs.

The appellant did not establish his affirmative defense of religious discrimination based on the agency's failure to accommodate his beliefs.

Under Title VII, an employer must actively attempt to accommodate the employee's religious expression or conduct, to an extent, even if the reasons for its actions were otherwise proper. *See Reed v. Department of Transportation*, 76 M.S.P.R. 126, 131 (1997) (citing *Chalmers v. Tulon Co. of Richmond*, 101 F.3d

1012, 1017-18 (4th Cir. 1996)). An agency is required to accommodate the religious practices of its employees unless it shows that a requested accommodation would create an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1). The framework for establishing a prima facie case of discrimination based on religious accommodation requires an employee to demonstrate that: (1) he has a bona fide religious belief, the practice of which conflicts with his employment; (2) he informed the agency of this belief and conflict; and (3) the agency nevertheless enforced its rule or requirement on the employee. *See Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). It has been recognized that a plaintiff's burden to establish a prima facie case "is not onerous." *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012).

Once an employee establishes a prima facie case of religious discrimination, the burden shifts to the agency to demonstrate that it cannot reasonably accommodate the appellant's religious beliefs without incurring an undue hardship upon its operations. 29 C.F.R. § 1605.2(b); *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). In order to show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis economic or non-economic cost or burden. *See Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3rd Cir. 2009); *Reed*, 76 M.S.P.R. at 133. Undue hardship may be shown where the cost of the accommodation is more than de minimis, where such accommodation would deny another employee his job shift preference, or where the accommodation conflicts with a valid collective bargaining agreement. *See Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68 (1986); *Hardison*, 432 U.S. at 84; *Hall v. United States Postal Service*, 857 F.2d 1073, 1080 (6th Cir.1988).

The appellant has stated that he has a strong, firmly held, personal and religious belief that he cannot wear a face covering in conflict with his employer's pandemic policy. In the First Amendment-related context, courts

consistently focus on the individual's belief system rather than the beliefs of a religious group with which the individual may (or may not) be associated. *See Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834, (1989). The appellant explained that face covering mandates are the same as having a mark on one's hand in order to buy bread, as warned against in the Bible. *Id.* at p. 56. Tab 1, p. 10; Tab 11, p. 3. The appellant notes that a bill introduced in a previous sessions of Congress – awarding grants to eligible entities to conduct testing and contact training for COVID-19 – was designated U.S. H.R. 6666 (errantly referred to by the appellant and the agency as H.R. 666), the number of the beast according to the passage in the book of Revelations. *Id.* Here, I review only whether the appellant's personal religious beliefs are sincerely held, not whether Christians do or should hold similar convictions. *Thomas v. Review Bd. of the Independent Employment Sec. Division*, 450 U.S. 707, 715–16, (1981) ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."). I find credible the appellant's statements that his religious belief is sincere and bona fide. Not only are the appellant's statements in this regard uncontroverted by any other evidence, but the appellant has averred that his refusal to wear a face covering during the pandemic has resulted in the loss of the ability to buy food, medicine, or receive healthcare. IAF, Tab 11, p. 3; *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (factors to consider for credibility determinations include the contradiction of the witness's version of events by other evidence or its consistency with other evidence). In addition, the appellant persuasively argues that in challenging agency policy he has demonstrated he puts his faith above his job and the financial security of his own family. IAF, Tab 11, p. 3.

I further find that the appellant's beliefs conflicted with the agency requirement that he wear a face covering and that he informed the agency of the

same. In this instance, although the appellant need not use any magic words to inform the agency of the conflict between his beliefs and his employment, the appellant did specifically ask for a "reasonable accommodation" stating that he is not willing to compromise his faith under any circumstance. IAF, Tab 4, p. 56. Further, I find that despite being notified of the conflict, the agency enforced its face covering requirement by insisting that the appellant have a face covering readily available and wear one whenever 6 feet of social distancing could not be maintained. I therefore find the appellant has established a prima face case of failure to accommodate his religious beliefs.

As explained above, once an employee establishes a prima facie case of religious discrimination, the burden shifts to the agency to demonstrate that it offered a reasonable accommodation or that it cannot reasonably accommodate the appellant's religious beliefs without incurring an undue hardship upon its operations. A reasonable accommodation "eliminates the conflict between employment requirements and religious practices." *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

First, I find the agency made a good faith effort to explore potential accommodations for the appellant's religious beliefs. The agency placed the appellant in a paid non-duty status while it evaluated accommodations, showing its serious commitment to the policy and the safety of its workforce but also its commitment to the appellant by compensating him while all options were exhausted. At the religious accommodation meeting, the agency explored whether, consistent with his beliefs, the appellant could wear a mask when he entered and exited the building, used the restroom, entered common areas or access hallways, or otherwise encountered a co-worker and was unable to maintain 6 feet of social distance. The agency also suggested alternate face coverings to masks including face shields or coverings worn around the neck. The appellant rejected these alternatives as each would require him to compromise his beliefs. IAF, Tab 4, p. 54. In turn, the agency found the

appellant's suggestion that he use a different entrance and take breaks and lunch in his car would still result in occasionally encountering other employees or the potential to do so. *Id.* at p. 65. In the end, the agency was not able to eliminate the conflict between the appellant's religious beliefs and his employment because its policy required the appellant to wear a face covering where he may encounter other employees.

The agency sufficiently established that the issuance of enforced leave was not an attempt by the agency to interfere with the appellant's religious or constitutional beliefs, but rather stemmed from the agency's obligation to keep all employees safe during the pandemic. Where, as here, the evidence establishes that an agency requirement is necessary for safety reasons, an accommodation seeking an exception to such policy poses an undue hardship. *Webb v. City of Philadelphia*, 562 F.3d 256, 260 -62 (3d Cir
posed an undue hardship to allow accommodation for a police officer who sought dress code exception to wear khimar); *Finnie v. Lee County*, 907 F. Supp. 2d 750, 780 -81 (N.D. Miss. 2012) (ruling that evidence supported safety concerns in
burden of proving undue hardship would be posed by allowing religious exception to pants-only uniform policy for detention officers). Based on the foregoing, I find the agency has shown that it would be an undue hardship to allow the appellant to continue in his position without complying with its face covering policy. *See generally, Reed*, 76 M.S.P.R. at 133 (Title VII does not require an employer to carve out a special exception to a neutral system in order to help an employee meet his Sabbath obligations when that action would occur at the expense of other employees); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 830-31 (9th Cir. 1999) (accommodation of employee who refused to provide his social security number because he believed it was the mark of the beast would be an undue hardship because employer was required to obtain that information by law.)

While the appellant correctly noted that the agency's obligation to consider other available positions within his restrictions, the appellant failed to identify any open, funded, permanent positions to which the agency could assign him for which he was qualified and that fell within his restrictions. The agency was not obligated to create such a position. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) (holding employer "was not required by Title VII to carve out a special exception to its seniority system in order to help [employee] to meet his religious obligations" of observing the Sabbath and not working on certain specified religious holidays); *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149, 1153, 1156 (10th Cir. 2000) (holding that because seniority system in the CBA gave more senior employees first choice for job assignments, it would be an undue hardship for employer to grant employee's accommodation request not to be scheduled to work on Saturdays); *Mann v. Frank*, 7 F.3d 1365, 1369-70 (8th Cir. 1993) (finding no violation of the duty to accommodate where the union refused the employer's request to assign another worker to take plaintiff's Saturday shift, which would have violated CBA's provisions governing overtime). Accordingly, I find the appellant did not prove by preponderant evidence that the agency engaged in religious discrimination by failing to accommodate his religious beliefs.

The appellant failed to prove the agency was motivated to suspend him based on religious discrimination or retaliation for seeking a medical accommodation.

The appellant also suggested that because his work station allowed him to socially-distance most of the time, the agency's decision to suspend him must be motivated by religious discrimination or retaliation for seeking a medical accommodation. *See* IAF, Tab 4, p. 66 ("I would like to state that postal documentation states that it is only required when you cannot social distance, and therefore at this point this is religious discrimination."); IAF, Tab 1, p. 11 ("When looking back at all of the documentation my stance on wearing a mask

became an issue after I filed the paperwork requesting Reasonable Accommodations for my FMLA condition.")

To the extent the appellant is alleging discrimination or retaliation based on a disparate treatment theory, the appellant must show that the prohibited consideration was a "motivating factor" in the contested personnel action. *Savage v. Department of the Army*, 122 M.S.P.R. 612, 633 (2015). In determining whether the appellant has met his initial burden to show a motivating factor, I must consider all of the evidence together as a whole. *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, 658 (2016). Even if an appellant proves that discrimination was a "motivating factor," reversal of the agency's discipline is only warranted if the agency would not have taken the same action in the absence of discriminatory motive. *Savage*, 122 M.S.P.R. 612, 635.

The appellant found it particularly disturbing, in light of his religious objections to agency policy, that he asked for additional information about his religious accommodation request on the day after Christmas, and that his unpaid enforced leave was effective on the day after Easter – the two most sacred Christian holidays. IAF, Tab 1, p. 10. While I the appellant argues these could not be coincidences (*See Id.* at p. 11), I do not find this evidence particularly compelling in light of the agency's legitimate and non-discriminatory reason to enforce a face covering policy during a pandemic, in order to protect its work force, consistent with both state and national policy and evolving scientific guidance.

Moreover, while the appellant takes issue with the agency's follow-up questions concerning his religious beliefs, I find, consistent with EEOC guidance, the agency is not only allowed to, but should ask an employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement. While the appellant also suggested that other employees were seen without their masks or with their masks pulled down, there is no evidence in the

record that this occurred where employees were not socially distant or that employees refused, like the appellant, to wear a face covering in the presence of other employees as instructed by their supervisors. The deciding official, Mr. Casewell, found that the appellant had not identified a similarly situated individual. IAF, Tab 4, p. 22. Nor has the appellant done so here.

In light of everything presented, I find the appellant has provided no credible evidence of pretext, that the agency failure to follow established procedures, or that the agency treated similarly situated employees more favorably under the same circumstances. *Gregory v. Department of the Army*, 114 M.S.P.R. 607, 624 (2010); *Chalmers*, 101 F.3d at 1018. Accordingly, I find the appellant did not show by preponderant evidence that religion was a motivating factor in the agency's action.

The appellant also argues that his religious objection to wearing a face covering became an issue only after he filed paperwork requesting a reasonable accommodation for his "FMLA condition" in July 2020. IAF, Tab 1, p. 11. The question to be resolved is whether the appellant has met his burden, considering all of the evidence as a whole, to show that the agency was motivated by his request for a medical accommodation, when deciding to deny his religious accommodation. *Savage*, 122 M.S.P.R. 612, 634; *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, 658 (2016).

The appellant alleges the timing of his first PDI for failing to wear a face covering promptly followed his request to work in an area secluded from noise and social interaction. The appellant also demonstrated that prior to receiving the agency's enforced leave decision, the proposing official was aware of both the appellant's constitutional and religious objections to wearing a face covering as well as his request for a medical accommodation concerning a work space away from noise, crowds, or confined spaces. To that end, I have considered whether the agency was motivated to enforce its face covering policy in retaliation for the appellant's medically-based reasonable accommodation request.

The evidence does not bear out that assertion. The timeline demonstrates that the appellant's first PDI for failing to follow his supervisor's instruction to put on a mask was also the same month that the Governor of Kentucky implemented a state-wide face covering policy. I credit the agency's multiple publications asserting it intends to follow local and state policy and also to adapt its safety protocol to the latest research in preventing the spread of COVID-19. Further, while the appellant alleges he was "always" told that because he could work in a socially-distant manner, the agency was "fine" with him reporting to work without a face covering (IAF, Tab 1, p. 2), the record reflects he received an accommodation affording him a remote work space in September 2020, *after* his initial PDI regarding the face covering policy. IAF, Tab 4, p. 70; Tab 1, p. 7. I therefore do not find that the timing of agency's enforcement of its policy indicates it was motivated by the appellant's request for a medical accommodation.

Further, I considered the appellant's suggestion that the agency must have been motivated to retaliate against him for his request for a medical accommodation because he never even asked for a reasonable accommodation related to his religion, stating: "At no point did I submit a request for reasonable accommodation for not wearing a mask. I submitted a request for reasonable accommodation relating to FMLA condition. This along with reference to FMLA absences suggests that this is not simply about a mask." IAF, Tab 1, p. 11. While the appellant alleges specifically that he never requested accommodations based on his religious beliefs, (IAF, Tab 1, p. 11) record evidence instead demonstrates that the appellant specifically asked for such accommodation, stating that wearing a face covering compromised his faith. IAF, Tab 4, p. 56. The agency also held a meeting to specifically discuss if the agency could accommodate the appellant's religious beliefs (IAF, Tab 4, pp. 56-60) and another meeting to allow the appellant an opportunity to discuss the denial of his request. IAF, Tab 4, p. 34. As such, ample evidence contradicts the appellant's

assertion that he never sought a religious accommodation and that the agency's efforts to accommodate him, as such, suggested a retaliatory motive based on his initial accommodation request based on medical restrictions. Because both parties addressed the appellant's ability to socially distance within his work space, due to his medical accommodation, I also disagree with the appellant's contention that raising this issue during the religious accommodation meeting strongly implies he was being discriminated against based on his FMLA covered condition. IAF, Tab 1, p. 8.

Finally, I considered the appellant's argument that when the agency asked for additional information concerning his religious accommodations, the forms all contained language concerning medical accommodations, suggesting to the appellant that the agency viewed his religious objection as a disability. *Id.; See* IAF, Tab 4, pp. 58-62. The agency demonstrated, however, that his referral to the Reasonable Accommodation Committee accurately reflected that the appellant, "refused to wear a face mask" and "states it is for religious reasons." (*See Id.* at p. 63) Moreover, agency accurately referred to the resulting meeting as a "Religious Accommodation Meeting" and correctly summarized the issue discussed as follows: "Mr. Coleman is requesting a religious exemption to the face make policies put into place by the Postal Service." *Id.* at p. 54. I find the balance of the evidence suggests that the agency, at no point, conflated the two issues.

I further find that the appellant provided no persuasive evidence of retaliation, such as evidence that similarly situated employees without a medical accommodation request were treated differently. The appellant has, in fact, provided no evidence of any employee that was offered an exemption from the face covering policy. The record instead demonstrates that the agency implemented its policy in the face of an international pandemic consistent not only with evolving scientific understanding of the spread of COVID-19 but also following the guidance set forth on local, state, and national levels. Moreover,

the agency placed the appellant in paid leave status while it considered the novel conflict between his religious beliefs and the agency's pandemic policy. In the instant matter, the appellant was paid administrative leave from October 2020 through April 2021 while the agency considered ways in which the appellant could safely work without jeopardizing the health of his co-workers. As previously noted, the agency also returned the appellant to work as soon as the policy changed, allowing vaccinated employees to work without a face covering. There is no evidence the agency mispresented its reason for taking the present action, or that agency management made statements indicating an intent to use the face covering policy as a pretext to target any particular employee or group of employees. In the end, there is simply no evidence that the deciding official had a motive to retaliate against the appellant based on his request for a reasonable accommodation. An appellant's bare allegation of discrimination, unsupported by probative and credible evidence, does not prove an affirmative defense. *See Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (Table); *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566 (2012).

Accordingly, I find that the appellant has failed to prove by preponderant evidence that the agency was motivated to suspend him in retaliation for requesting a medical accommodation.

The agency did not deny the appellant due process of law.

The appellant contends the agency denied him due process of law in predetermining its decision to place him on enforced leave. The essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The appellant states that

immediately following his second PDI for failing to follow supervisor instructions to put on a mask, he was given a decision placing him in a with-pay non-duty emergency status and sent home. IAF, Tab 1. He argues this alone violates due process because having the letter ready indicates that the agency had already made its decision. While the agency may have pre-decided that the appellant's continued refusal to wear a face covering would mean he would need to be sent home in order to protect the health and safety of his co-workers, he was afforded notice and the opportunity to respond. The concept of emergency placement itself is to remove an employee from a situation where he may endanger himself or others while the agency processes other considerations including providing the employee due process. I do not find an agency's decision to enforce a safety policy to be violative of due process, even if it was predetermined.

Further, the appellant continued in a paid status until his request for a religious accommodation could be further considered. The agency held a separate meeting to discuss such accommodation and another meeting to discuss the agency's denial of the appellant's request *before* proposing to place the appellant in an unpaid enforced leave status and – again – affording him an opportunity to respond prior to making its decision. As such, the appellant has not identified a lack of due process. The appellant similarly argues that because the proposal to place him in an enforced leave status included notice of his right to file a grievance with the union, it was, again, an indication that the agency had pre-determined its decision. The Board has held that policy of the postal service to afford an employee a pre-penalty right to file a grievance and a post-penalty right to file a Board appeal satisfied the requirements of minimum due process. *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614, 622 (2003). Finally, I considered the appellant's argument that he could not respond to the proposed enforced leave because he could not enter the building, therefore having no choice but to send his representative. IAF, Tab 1, p. 10. Given the number of meetings that

occurred by teleconference, I do not find this to rise to the level of due process concerns. In sum, I find the appellant did not establish that the agency denied him due process.

The agency has established nexus between its charges and the efficiency of the service.

An agency may take an action against an employee under 5 U.S.C. chapter 75 only for such cause as will promote the efficiency of the service. *See, e.g.*, *Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985). An adverse action promotes the efficiency of the service, satisfying the nexus requirement, where the grounds for the action relate to either the employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest. *See Fontes v. Department of Transportation*, 51 M.S.P.R. 655, 665 n.7 (1991). I find that protecting the safety and well-being of agency employees is such a legitimate government interest. The agency identified its first priority as the safety and well-being of its employees, deciding that, in the context of the current pandemic, allowing employees to work without wearing a face covering at any time social distancing cannot be observed is a direct threat to the other employees who observe the face covering policy and other infection-control practices. In accordance with postal policy, the agency suspended the appellant until such time as he could wear a face covering at work, or the pandemic-related policy could be amended. I therefore find that the agency has demonstrated the nexus between its decision to suspend the appellant and the efficiency of the service.

The appellant challenges the policy itself, arguing that the agency has not shown that the face covering policy actually protects its workforce. The appellant cites to the CDC guidance on surgical masks indicating that, while such masks protect the patient from the wearer's respiratory emissions, they do not afford the wearer the same respiratory protection. IAF, Tab 11, p. 10. Similarly,

the appellant argues that on the box of face masks itself, the company warns that wearing an ear loop mask does not reduce the risk of contracting any disease or infection. *Id.* at p. 2. As appellant's representative summarized, "Masks either work or they don't. If mask wearers get Covid, then it should be optional." IAF, Tab 1, p. 23.

Even if the CDC or other scientific authority found that masks only protect the wearer from transmitting a disease, rather than contracting it, the agency would still be within its authority to follow or create a policy requiring its employees to wear masks and, thereby, protect each other. To the contrary, according to the CDC, more current research suggests that the community use of cloth masks controls the spread of COVID by blocking up to 80% of respiratory droplets into the environment and thereby preventing transmission to others *and* also by reducing the wearers' exposure to droplets through filtration of fine droplets and particles. *See* https://www.cdc.gov/coronavirus/2019-ncov/sciencebriefs/masking-science-sars-cov2.html. (Updated May 7, 2021; Last Checked December 1, 2021). Moreover, the appellant's argument fails to recognize that agencies are entitled to rely on CDC and OSHA guidance to decide policy based on its responsibility to its workforce as a whole. Such policymakers and administrators have every right to, in turn, expect loyal and professional service from subordinates who do not bear the burden of such responsibility. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). In other words, the appellant has no constitutional right to challenge agency policy based on his own research. There is a line between an employee who seeks an accommodation to his religious faith and an employee who asserts an unqualified right to disobey orders that he disagrees with due to social, political, philosophical, or personal preference. *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931 (7th Cir. 2003); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* 731 F.3d 1106 (10th Cir. 2013). While the appellant's request for an accommodation due to his religious objections deserves careful consideration, his blanket challenge to agency policy

does not. I find the agency has demonstrated that the charge, here, is aimed to protect its work force and promotes the efficiency of the service.

The penalty does not exceed the tolerable limits of reasonableness.

Because the agency established its charge and a nexus to the efficiency of the service, the remaining issue is the propriety of the agency's decision to place the appellant in an enforced leave status. It is well established that the determination of the proper action to be taken to promote the efficiency of the service is a matter peculiarly and necessarily within the discretion of the agency. *Miguel v. Department of Army*, 727 F.2d 1081, 1083 (Fed.Cir.1984). When the agency's selection of a penalty is not unreasonable, it must be accorded deference by the Board. *See Alberto v. Department of Veterans Affairs*, 98 M.S.P.R. 50, ¶ 12 (2004) (holding the Board has no basis to substitute its judgment for that of the agency.)

Ordinarily the reasonableness of the penalty is determined by reviewing the *Douglas* factors. *Douglas*, 5 M.S.P.R. at 305. However, the traditional analysis for mitigating the penalty under *Douglas* does not apply to enforced leave or indefinite suspensions because of the non-disciplinary nature of the agency's action. *Brown v. Department of Interior*, 121 M.S.P.R. 205 (2014). Instead, because this case does not involve any alleged misconduct on the part of the appellant, the correct standard to be applied in determining the penalty for an adverse action is whether the penalty exceeded "the tolerable limits of reasonableness." *Id.* Generally, in instances where an employee is suspended because he cannot safely perform the essential functions of his position, the Board will examine whether this is true with or without reasonable accommodation. *Brown*, 121 M.S.P.R. 205 at 214.

The agency has demonstrated that even if the appellant takes his breaks and his lunch in his car, puts a closed sign on the door when using the restroom, and clocks in and out when no one else is doing so, there is still significant daily

potential to encounter other employees at work. As explored more fully below, neither the agency, nor the appellant, arrived at an accommodation that would eliminate the safety concerns arising from an employee that refuses to wear a face covering when social distancing cannot be maintained. In this light, enforced leave was necessary to maintain the orderly working of the Government against possible disruption by the suspended employee. *See Pittman,* 832 F.2d 598 (Fed.Cir.1987). I find a preponderance of the evidence demonstrates that the appellant could not perform the essential functions of his position and guarantee that he could maintain 6 feet of social distancing at all times, and that no available accommodation could change this.

Moreover, while the appellant argued that the agency allowed and extended the telework capability of several agency positions during the pandemic, he did not explain, nor does common sense suggest, how a mail processing clerk could perform his duties from home. IAF, Tab 11, p. 29. The agency set forth, and the appellant did not dispute, that the only telework eligible position that the appellant requested to be considered for was as Time and Attendance Lead Clerk – a position for which the appellant not only lacked any experience, but which was also filled and not full time telework eligible. IAF, Tab 13, pp. 10-11. It is undisputed that during the appellant's enforced leave, the agency has had no vacant permanent positions to which it could assign the appellant within his restrictions.

The agency also demonstrated that it tailored the appellant's enforced leave to last only during the time its policy required employees to wear face coverings. It is further undisputed that once the appellant was again fit for duty, he was restored immediately to his position. As previously noted, once face coverings were not required based on his vaccination status, the appellant was returned to work. *See Norrington v. Department of the Air Force*, 83 M.S.P.R. 23, 26 (1999). In this way, the agency showed it used the least restrictive means to accomplish its goal of protecting all employees, and also placed an ascertainable end on the

appellant's suspension. *See Martin v. Department of the Treasury, U.S. Customs Service*, 12 M.S.P.R. 12, 17 (1982). For all of these reasons, I find the agency demonstrated that placing the appellant on enforced leave was within the tolerable limits of reasonableness, and the only way to enforce the policy put in place to protect the health and safety of its workforce.

Accordingly, I sustain the agency's decision to place the appellant on enforced leave between April 5, 2021 and July 17, 2021.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Katherine Beaumont Kern
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **January 25, 2022** unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its

receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions

for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

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

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

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

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the

earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

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

follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

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

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

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

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

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation

for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

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

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