

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

DUANE V. GRASSELL,  
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,  
Agency.

DOCKET NUMBER  
CH07528710573

DATE: MAY 18 1968

Duane V. Grassell, Akron, Ohio, pro se.

Daniel Karls, Esquire, Des Plaines, Illinois, for  
the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an initial decision that sustained the agency's action removing him from his position of Air Traffic Control Specialist. For the reasons set forth below, we GRANT the petition for review under 5 U.S.C. § 7701(e)(1), and AFFIRM the initial decision as MODIFIED by this Opinion and Order. The agency's action is SUSTAINED.

BACKGROUND

The appellant was removed from his position of Air Traffic Control Specialist based on a charge that he failed to complete the required Air Traffic Control Specialist Training Program. The specifications in support of the charge alleged that the appellant's training progress on Ground Control was terminated because it was less than satisfactory and cited deficiencies in the following areas: (1) Communications; (2) professional behavior; (3) separation; (4) training; and (5) operation methods and procedures. The appellant filed a timely petition for appeal with the Board's Chicago Regional Office. In his appeal, the appellant raised the affirmative defense that the agency's action was based on discrimination due to his handicapping condition.

In an initial decision dated December 3, 1987, the administrative judge sustained the agency's action finding that: (1) During a telephonic conference call with the parties on September 9, 1987, the appellant agreed with and admitted to every factual allegation of the proposal notice describing the charge against him except for those allegations relating to the first communication deficiency described in the first specification, those allegations relating to his failure to act in a professional manner described in the second specification, and those allegations relating to the second separation deficiency described in the third specification; (2) the appellant's admissions

constituted stipulations and as such satisfied the agency's burden of proving those charges by preponderant evidence; (3) the agency established by preponderant evidence that the appellant made an error in communication;<sup>1</sup> (4) the agency established by preponderant evidence that the appellant was not able to control air traffic in an efficient and an effective manner on June 6, 1987;<sup>2</sup> (5) the agency proved by preponderant evidence that a separation deficiency occurred

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<sup>1</sup> In this regard, the agency specified that the appellant made two errors in communication during a training session on June 6, 1987, when local control requested a helicopter departure from the Skybolt ramp. The agency alleged that the appellant pointed at the traffic and said "traffic there," and that he did not answer local control specifically enough so that it could make a decision for the departure of the helicopter. See Notice of Proposed Removal; Appeal File, Tab 5; Agency File Tab 3. The appellant specifically denied that he merely said "traffic there," but instead said "Cessna on the south edge of ramp." In the initial decision, the administrative judge found that even if the appellant's version of his statement was accepted as true, he admitted that the statement was not sufficient for local control to make a safe decision for the departure of the helicopter. Therefore, she concluded that the agency's specification was sustained by preponderant evidence. See Initial Decision (I.D.) at 5.

<sup>2</sup> In this regard, the agency alleged that at the end of a training session on June 6, 1987, the appellant lost control of his emotions, stomped his foot, and asked for a break. See Notice of Proposed Removal, Appeal File, Tab 5; Agency File, Tab 3. The appellant denied that he stomped his foot or lost control at the end of the training session of June 6, 1987, but that he did ask for a break because he was frustrated and stuttering. In the initial decision, the administrative judge found that the appellant's admissions established that he did not remain calm under stress, but instead became frustrated and stuttered when the situation became stressful. She also found that the appellant's admissions established that he was not able to convey the impression of a skilled professional who could handle the situation because he needed a break to "regroup." See I.D. at 6-7.

during the appellant's training session on June 13, 1987;<sup>3</sup> (6) the appellant failed to establish, by preponderant evidence, his affirmative defense of handicap discrimination; (7) the agency's removal action would promote the efficiency of the service; and (8) the penalty of removal did not exceed the tolerable bounds of reasonableness. The appellant now petitions for review of the initial decision.

In his petition for review, the appellant first argues that the administrative judge's summary of a telephonic conference call should be removed from the record. In support of this argument, the appellant contends that the administrative judge was "grossly incorrect" in including this document in the record because he was not informed of the time that the conference would take place, he was not prepared to participate in the telephonic conference, and the administrative judge failed to inform him that it would be part of the record. The appellant further contends that the notice of the telephonic conference was mailed to his

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<sup>3</sup> The agency alleged that during a training session on June 13, 1987, when two airplanes called for taxi instructions, the appellant did not ensure that he knew where these aircraft were. See Notice of Proposed Removal, Appeal File, Tab 5; Agency File, Tab 3. The appellant stated that no loss of separation occurred, but that he just lost track of where the aircraft were. In the initial decision, the administrative judge found that, in light of the appellant's admission that he lost track of where the aircraft were, this deficiency was supported by preponderant evidence. See I.D. at 7.

old address, even though he had informed the agency's representative that he had a new address.

The appellant next argues that the administrative judge erred in finding that the agency had established by preponderant evidence the charge that he did not behave in a professional manner because the agency did not introduce the training report prepared by the person who conducted the training session on June 6, 1987, and that the report should be submitted to supplement the facts.

The appellant also argues that the administrative judge erred in finding that he failed to meet his burden of proof with regard to his affirmative defense of handicap discrimination. In support of this argument, the appellant contends that the administrative judge erred in finding that he did not meet the definition of a handicapped employee and, further, that he was not a qualified handicapped employee.

Additionally, the appellant argues that the penalty of removal is unreasonable. In support of this argument, the appellant asserts that the agency continues to employ several people who did not successfully complete the air traffic controller training. He further asserts that there are vacant air traffic assistants positions for which he is qualified.

Finally, the appellant argues that he was not dealt with fairly by the Board's Chicago Regional Office because he was not given a hearing despite his request for a

hearing, and the administrative judge erroneously rejected his response to the agency's final submission to her. He also argues that the Board should have appointed an attorney to represent him because he could not find legal representation.<sup>4</sup>

#### ANALYSIS

The appellant's argument that he was prejudiced in some way by the manner in which the administrative judge scheduled or conducted the Board's telephonic conference is without merit. The Board's administrative judges are given wide discretion in processing of appeals. See 5 C.F.R. § 1201.41. Administrative judges have the authority to hold conferences for the settlement and the simplification of issues under 5 C.F.R. § 1201.41(b)(12). See *Lipinski v. Department of the Army*, 35 M.S.P.R. 186, 188 (1987). Further, administrative judges have the authority to direct parties to stipulate to facts not in dispute at a telephonic conference. See *D'Iorio v. Department of Housing and Urban Development*, 34 M.S.P.R. 351, 354 (1987) (administrative judges have the authority to compel stipulations and such authority promotes the mandate of 5 C.F.R. § 1201.41(b) that administrative judges shall take necessary action to avoid delay in the disposition of all proceedings). We

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<sup>4</sup> We note that the appellant also argues, in essence, that the agency's representative engaged in "improper conduct" during the course of this proceeding. We have considered the appellant's argument and find that it is baseless and totally without merit.

discern no error in the administrative judge's conduct in this regard.

Contrary to his assertion, the appellant was informed by the Board's administrative judge that a telephonic conference would take place. By notice dated August 28, 1987, the administrative judge informed the parties that she would be conducting a telephonic conference on September 9, 1987, at 10:00 a.m. See Appeal File, Tab 7. This notice further informed the parties that they must be prepared to discuss efforts at settlement, issues, and stipulations. See *id.* The appellant was aware of the telephonic conference, and indeed participated in it. The administrative judge summarized the telephonic conference in a memorandum for the record. See Appeal File, Tab 9. A copy of this memorandum was mailed to the appellant. See *id.* Further, the appellant submitted a response to this memorandum. See Appeal File, Tab 12. Accordingly, he has not shown that his rights were violated by the administrative judge's conduct during the conference or demonstrated why the subsequent memorandum prepared by her should be excluded from the record. See *Lipinski*, 35 M.S.P.R. at 188.

The appellant's claim that he did not timely receive the notice of the telephonic conference because it was mailed to his former address is also without merit. The notice of the conference was mailed to the appellant at his last address of record. See Appeal File, Tab 7. While the

appellant may have informed the agency's representative of his change of address, he did not inform the Board of his change of address until after the notice was mailed.<sup>5</sup> Service on an appellant at his last address of record is proper. See *Cunningham v. Department of Transportation*, 35 M.S.P.R. 674, 677 (1987). Thus, the administrative judge properly served the appellant with the notice of the telephonic conference at his last address of record. See *id.* at 3-4.

The appellant's next argument, that the administrative judge erred in finding that the agency had established by preponderant evidence the charge that he did not behave in a professional manner on June 6, 1987, amounts to no more than mere disagreement with the administrative judge's factual findings. In the initial decision, the administrative judge determined that the agency had established by preponderant evidence that the appellant was not able to control air traffic in an efficient and professional manner during the June 6, 1987, training session, based on the following: (1) The appellant's admission during the telephonic conference that he asked for a break because he was frustrated and stuttering; and (2) the appellant's admission in his written reply to the notice of proposed removal in which he stated that "[o]n that training session (6/6/87), my speaking

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<sup>5</sup> In this regard, we note that the appellant did not inform the Chicago Regional Office of his change of address until he filed a submission on September 2, 1987. See Appeal File, Tab 8.

ability completely degenerated to the point where I was unable to communicate. I had to just get off position for a few minutes and regroup." See Initial Decision (I.D.) at 6. The appellant has not shown any error in the administrative judge's factual findings. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). We note further that the appellant did not, in a timely fashion, proffer, or request production of, the training report prepared on June 6, 1987, regarding this incident. Therefore, any failure to introduce this document must be charged to the appellant.

The appellant's additional argument, that the administrative judge erred in finding that he failed to meet his burden of proving his affirmative defense of handicap discrimination, also lacks merit. In the initial decision, the administrative judge found that the appellant suffered from "subluxations at C1 and C2 of the spine with impinging nerves," "chronic post-traumatic cervico-brachial," and "radiculoneuropathies," conditions which may have been caused by an injury or injuries during his childhood, or by an automobile accident in December 1983. See I.D. at 11. She also found that the appellant failed to establish that these physical conditions substantially limited one or more of his major life activities. See *id.* at 12. She therefore

concluded that the appellant had failed to establish that he met the definition of a handicapped person under 29 C.F.R. § 1613.702(f). See *id.* Additionally, the administrative judge found that, even assuming that the appellant did establish that he met the definition of a "handicapped person," he failed to show that he was a "qualified handicapped person" to whom the agency owes a duty to accommodate. See *id.*

We also decline to disturb the agency's penalty selection. In support of his claim that the penalty of removal is unreasonable, the appellant asserts that the agency continues to employ several people who, like him, did not successfully complete the air traffic controller training. The administrative judge considered this argument in the initial decision and found that: (1) Under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Board's authority to review the agency's penalty selection is to only assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness; (2) the agency was required by its own regulations to remove the appellant from his Air Traffic Controller Specialist position because of his failure to complete his training; (3) agency officials have the discretion to make exceptions to mandatory separation of those air traffic control "developmentals" who do not progress to the full performance level; and (4) the agency did not abuse its discretion in

not offering the appellant reassignment to another position. See I.D. at 14-15.

Where an employee raises an allegation of disparate treatment in comparison to other employees, he must show that the charges and circumstances surrounding the charged behavior are substantially similar. See *Gomez v. Department of Justice*, 36 M.S.P.R. 56, 62 (1988). The appellant has failed to make such a showing. Although the appellant argues that the agency has retained employees who have not successfully completed their air traffic controller training, he has failed to establish that these employees were similarly situated to him.<sup>6</sup> Further, the Board gives due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency. Additionally, we have recognized the paramount importance of a mandatory training program for individuals seeking to work in the critical field of air traffic control. See *Rogers v. Department of Transportation*, 33 M.S.P.R. 690, 695 (1987). Therefore, we agree with the administrative judge's determination that the

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<sup>6</sup> In a submission received by the Board on February 6, 1989, the appellant identified several employees who allegedly failed their training but were retained by the agency. He asserts that this information is new and material evidence. The appellant's own submission, however, includes a letter from the agency explaining that these employees were not similarly situated to the appellant. See Petition For Review File, Tab 23, Attachment #1. Therefore, we have not considered the submission on review because even if it is new, it is not of sufficient weight to warrant an outcome different from that of the initial decision. See *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

penalty of removal does not exceed the tolerable limits of reasonableness.<sup>7</sup>

The appellant's final argument, that he was not treated fairly by the regional office, rests upon three contentions. First, he claims that the administrative judge improperly denied his request for a hearing. Second, he asserts that the administrative judge improperly rejected his submission filed after the date the record closed in this proceeding. Third and finally, the appellant contends that the Board should have appointed an attorney to represent him.

The record shows that the appellant did not timely request a hearing in this case. The appellant did not indicate in his petition for appeal that he wanted the Board to hold a hearing. See Appeal File, Tab 1. In an acknowledgment order dated August 6, 1987, the appellant was informed that he had not requested a hearing in his petition for appeal, and that if he wanted a hearing, he must file a written request for a hearing within fifteen days of the date of the Order. See Appeal File, Tab 2. He was also notified that, if he did not file a hearing request within that time limit, he would waive the right to a hearing and

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<sup>7</sup> Because mitigation is not required, the Board need not "decide whether a traditional Douglas-like approach to mitigation is compatible with the agency's 'up or out' program." *Cortright v. Department of Transportation*, 37 M.S.P.R. 565, 573 (1988) (Additional views of Chairman Levinson). See also *Pawlak v. Department of Transportation*, MSPB Docket No. CH07528410274-1 (May 4, 1989); *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989) (agency was not required to reassign employee who lost security clearance necessary for his job).

the administrative judge would decide the case on the record after giving the parties the opportunity to file written submissions. See *id.* The appellant, however, did not file a written request for a hearing within the time limit set by the acknowledgment order. The appellant did not request a hearing until the "conference." See Summary of Conference Call; Appeal File, Tab 9. The administrative judge rejected the appellant's request because he had not requested a hearing within fifteen days from the date of the acknowledgment order. See *id.* The appellant did not offer any showing that there was good cause to waive the filing time limits set by the administrative judge in the acknowledgment order.<sup>8</sup> Therefore, the administrative judge properly rejected the appellant's untimely request for a hearing. See *Thompson v. Department of the Interior*, 35 M.S.P.R. 322, 324 (1987); *Brown v. Department of the Navy*, 21 M.S.P.R. 204 (1982). The appellant, through his inaction, had effectively waived his right to a hearing. *Id.* at 324.

By order dated August 28, 1987, the administrative judge informed the parties that the record in this appeal would close twenty-five days from the date of the order, and

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<sup>8</sup> The appellant alleged that he had not received the acknowledgment order. The administrative judge rejected the appellant's allegation, however, finding that the appellant returned a form declining the Voluntary Expedited Appeals Procedure, and that that form had been mailed along with the Board's acknowledgment order. See Summary of Conference Call; Appeal File, Tab 9.

that date would be the final day for receipt of submissions of the parties. She further informed the parties that any evidence or argument received after that date would not be accepted unless it was accompanied by a showing that it involved new and material evidence unavailable before the record closed. See Appeal File, Tab 6. The appellant filed additional submissions with the administrative judge on September 28, 1987, and December 2, 1987. Both submissions were rejected by the administrative judge because they were filed after the date the record closed, and were not accompanied by a showing that the submissions involved new and material evidence which was unavailable before the record closed. See Appeal File, Tab 16, 18.

Although an administrative judge has broad authority under 5 C.F.R. § 1201.12, including the authority to waive a regulation such as 5 C.F.R. § 1201.58, concerning the closing of the record, the appellant's submissions did not contain new and material evidence which was not readily available prior to the closing of the record. See 5 C.F.R. § 1201.58(c). Nor did the appellant file a motion for an extension of time to make a late filing under 5 C.F.R. § 1201.55. Under these circumstances, we find that the administrative judge did not err in rejecting the appellant's late-filed submissions. See *Dougherty v. Office of Personnel Management*, 36 M.S.P.R. 117, 120 (1988).

Furthermore, the appellant has failed to show that these documents which he submitted with his petition for

review meet the Board's criterion for review under 5 C.F.R. § 1201.115(a) as new and material evidence. We will not, therefore, consider these documents in connection with the appellant's petition for review. See *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence); and *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from that of the initial decision).

We find no merit to the appellant's argument that the regional office should have appointed an attorney to represent him. While it is clear that the appellant has a statutory right to be represented by an attorney or other representative under 5 U.S.C. § 7701(a)(2), it is the appellant's obligation to secure representation. See *Thompson v. United States Coast Guard*, 11 M.S.P.R. 461, 462 (1982). The Board is not required by law, rule, or regulation to appoint counsel for an appellant. See *Robinson v. Veterans Administration*, 33 M.S.P.R. 483, 486 (1987); *Thompson*, 11 M.S.P.R. at 462.

Since the appellant filed his petition for review and the record closed in his case, he has submitted numerous documents to the Board, generally entitled "motion to accept

late evidence" or "motion to accept late submissions." Once the record is closed, no additional evidence or argument shall be considered except upon a showing that new and material evidence has become available which was not available prior to the closing of the record. See 5 C.F.R. § 1201.114(i). The appellant asserts that the information he has submitted is new because, for the most part, it resulted from inquiries he made after he received an "anonymous" letter dated March 7, 1988, that alleged that agency employees had conspired to insure that the appellant failed his training program. See Petition for Review (PFR) File, Tab 8, Attachment #1.

To satisfy the regulatory criteria, however, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. See *Mathews v. United States Postal Service*, 34 M.S.P.R. 645, 647 (1987). Here, we find that the appellant has failed to meet this criteria. The appellant's own statements show that information about the adequacy of his training was available to him before the record in his case closed.

For example, in a letter dated April 11, 1988, the appellant admits that when he appealed his removal to the Board's regional office, he "was aware of certain people who did not like me at the Flint ATCT and who might not give me fair or adequate training." He then cites incidents that occurred while he was employed by the agency and thus that

were known to him when he filed his petition for appeal. See PFR File, Tab 9, Attachment #3. In addition, the appellant admits that he tried to get his training records but did not raise this matter before the Board because he considered it a "moot point." He notes that after the administrative judge found against him and he "was made aware of the prohibited personnel practices which were used to quicken his removal," he "worked harder" to obtain his individual training records. Indeed, he admits that he had access to the training records prior to his removal by the agency. See PFR File, Tab 13. See also PFR File, Tabs 16 and 18.

Although the appellant attempts to argue that the agency's delay in producing his training records shows that he would not have been able to obtain them before the record closed, his mere speculation on this point does not show that the evidence concerning his training was previously unavailable despite due diligence. Therefore, we have not considered the submissions on review. See *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980); *Avansino*, 3 M.S.P.R. at 214.

Further, we find that the May 18, 1988 medical report submitted by the appellant to support his affirmative defense of handicap discrimination does not provide a basis for Board review because it does not constitute material evidence. The appellant argues that the evidence was not available until he made significant improvement resulting

from Dr. Dale Nagode's therapy. See PFR File, Tab 13. He has not, however, sufficiently explained the relationship of any improvement in his medical condition since his removal to the propriety of the agency's action in removing him. Therefore, we have not considered this submission on review. See *Russo*, 3 M.S.P.R. at 349.

**ORDER**

The initial decision is AFFIRMED as MODIFIED by this Opinion and Order. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

**NOTICE TO APPELLANT**

You have the right to request further review of the Board's final decision in your appeal.

**Discrimination Claims: Administrative Review**

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Review and Appeals  
5203 Leesburg Pike, Suite 900  
Falls Church, VA 22041

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

personally, whichever receipt occurs first. See 5 U.S.C. § 7702 (b) (1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping 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. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit

717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board