

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

65 M.S.P.R. 644

Docket Number PH-0752-92-0216-B-1

**LOUIS ALIOTA, Appellant,**

**v.**

**DEPARTMENT OF VETERANS AFFAIRS, Agency.**

Date: December 21, 1994

Peter B. Broida, Esquire, Cohen, Broida & Associates, Arlington, Virginia, for the appellant.

Barry Tapp, Esquire, and Thomas J. McKeever, Jr., Esquire, Washington, D.C., for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

**OPINION AND ORDER**

The appellant has petitioned for review of the May 20, 1994 initial decision that affirmed his 60-day suspension and geographical reassignment. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, to consider the appellant's motion regarding interim relief.

**BACKGROUND**

The agency suspended the appellant from his position as Chief, Pharmacy Service, GS-12, at the Veterans Affairs Medical Center in Erie, Pennsylvania for engaging in unlawful, unauthorized and improper conduct. The agency action was based on the following specifications: The appellant had diverted funds for his personal use, thereby engaging in conduct unbecoming a Federal employee and creating the appearance of using his office for personal gain; he had accepted a check from a private source which constituted a conflict of interest; and he gave a fee to a subordinate employee who was not entitled to that fee, thereby placing the employee in a position that violated agency policies and Federal regulations. The agency stated that the appellant had contracted

for the agency with the Bristol-Meyers U.S. Pharmaceutical Group (B-M) to conduct a clinical study, that he requested B-M reissue a check for \$9,000, which had been issued to the Lake Area Health Education Center (LAHEC), in his name, and then endorsed and deposited the \$9,000 check in his personal account, and that he paid an assistant pharmacist \$4,500 for the amount of time that he worked on the BÄM study. By separate notice, the agency geographically reassigned the appellant to the Clinical Pharmacist, GS-12, position at the Veterans Affairs Medical Center in Northport, New York. See *Aliota v. Department of Veterans Affairs*, 60 M.S.P.R. 491, 493-494 (1994).

In her July 27, 1992 initial decision, the administrative judge sustained the charge, finding that it was clear from the evidence that the appellant entered into an agreement with B-M and that he accepted a check from B-M as a consultation fee. Initial Appeal File (IAF), Tab 12 (Initial Decision (ID)) at 6. She further found that there was no evidence to support the appellant's contention that he received approval for accepting the check from Jack Graham, the Director of the Medical Center, who denied giving such approval. *Id.* After considering the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), she found that Graham's credibility was questionable because of his animosity towards the appellant, but that no single factor was determinative; rather, she concluded that the charge was supported by the totality of evidence. In this connection, she noted that 18 U.S.C. § 209 and agency regulations prohibited employees from receiving compensation from nongovernmental sources, regardless of whether Graham may have approved the appellant's arrangement with B-M. ID at 7-9.

The administrative judge further found that the demotion and reassignment constituted a unified penalty thus bringing the reassignment within the Board's jurisdiction, and she mitigated the penalty to the suspension action based on her finding of disparate treatment. ID at 10-15. She further rejected the appellant's claims of reprisal for filing equal employment opportunity (EEO) complaints, grievances, and whistleblowing activities, as well as his discrimination and laches claims. ID at 15-18. Finally, she ordered interim relief. ID at 18.

The appellant filed a petition for review, arguing, *inter alia*, that the administrative judge had failed to resolve the credibility issues regarding Graham's alleged condonation of his conduct precluding the imposition of any penalty. The agency cross-petitioned, challenging the Board jurisdiction over the reassignment and the mitigation of the penalty. It further contended that the appellant was not entitled to interim relief because he was not a prevailing party. In his response, the appellant requested that the petition be dismissed for failure to afford him interim relief. See *Aliota*, 60 M.S.P.R. at 494.

On review, we granted both petitions and remanded the appeal for determination of whether Graham condoned the appellant's actions regarding B-M, finding that the administrative judge erred by not determining Graham's credibility, even though she found the condonation issue relevant to the penalty issue. 60 M.S.P.R. at 497. We rejected the appellant's allegation that the penalty was unreasonable because neither Graham nor the subordinate employee was disciplined. In this connection, we found that they were not similarly situated because Graham was not accused of receiving an improper payment and the subordinate employee did not serve in a position requiring

the same high degree of trust as the appellant's. *Id.*, at 497-498. In regard to the alleged prohibited personnel practices, we found that they related to the alleged involvement of Graham, who was neither the proposing nor deciding official, and, moreover, that both officials had testified that Graham's malice towards the appellant had not affected their opinions on the suspension. Thus, we found that the appellant's arguments were insufficient to establish that his attitude played any role in the demotion and reassignment actions. *Id.* at 497. We agreed with the administrative judge's finding of jurisdiction over the reassignment because it and the suspension were a unitary penalty. *Id.* at 496. Finally, we rejected the agency's contention that the administrative judge erred in awarding the appellant interim relief because he was not a prevailing party, finding that the appellant prevailed by virtue of the mitigation of the penalty. *Id.* at 496.

On remand, the administrative judge noted that we had disagreed with her finding of disparate treatment on which she based her prior decision to mitigate the agency's penalty. Remand Appeal File (RAF), Tab 5 (Remand Initial Decision (RID)) at 2. In regard to the condonation issue, she found that, despite Graham's animosity towards the appellant, Graham's testimony that he did not approve the acceptance of B-M money by the appellant was believable. She noted the appellant's testimony that, in June 1988, Graham told him that he was going to close LAHEC because of the conflict of interest and that, since the appellant signed the contract with B-M, why not have the company pay him. She found, however, that this statement did not amount to approval and that it was incredible that he would have believed that Graham's off-hand remark condoned his acceptance of money from B-M, given their strained relationship. RID at 5. She further noted that, when the \$9,000 check from B-M arrived at the medical center and Graham directed John Brophy to return it, the appellant testified that he did not speak to Graham about that directive or mention Graham's approval, but simply requested B-M to reissue the check in his name. The administrative judge found it unusual that the appellant would do so without speaking to Graham about the matter. RID at 5-6.

She further found that the appellant's testimony was not corroborated on several issues. He testified that he was in the process of writing a paper when B-M dropped the study, but had either lost or wiped out the disk. He testified that, around August 1988, he typed a memorandum to Graham regarding the B-M check for \$9,000, because he wanted to know what had happened to the check but did not discuss the matter with Graham or follow up to determine whether he had received it. The administrative judge found that, given the significance of Graham's inquiry, it was probable that he would have followed up on the memorandum. RID at 6. She further found it unlikely that all copies of the memorandum would have been lost, except for the appellant's personal copy. In this connection, she noted the appellant's testimony that, besides keeping a copy at home, he put the memorandum in Graham's personal mailbox or delivered it to his secretary, as well as put a copy in the director's correspondence and one in the B-M folder in the pharmacy. RID at 6. She further noted Graham's testimony that he had never seen the memorandum until the inspector general's report on the conflict of interest, and that, if he had, he would have told the appellant to return the money, and that he had the agency files searched but no one was able to find a copy. RID at 6-7. She further noted that the agreement did not corroborate the appellant's assertion that

he had an agreement with B-M to receive personal compensation for his work on the project but, rather, required that payment be made to the agency. Finally, she believed Graham's testimony that he did not condone the appellant's acceptance of the money because he took immediate steps to verify the information he received regarding the

matter, which would have been unnecessary had he already known about it, and then immediately informed the agency's District Counsel who then told the agency IG. Id. Accordingly, she concluded that Graham had not condoned the appellant's acceptance of money from B-M. RID at 7.

Reiterating her findings from her prior initial decision, she sustained the charge and rejected the appellant's affirmative defenses of reprisal for EEO complaints, grievances or whistleblowing, as well as his claims of sex and age discrimination, and laches. See RID at 9-12. Finally, she found that the penalty of a 60-day suspension and a geographical reassignment was reasonable and promoted the efficiency of the service. See RID at 12-14. Accordingly, she affirmed the agency actions and did not order interim relief. RID at 14.

## ANALYSIS

*The appellant was not entitled to interim relief after the administrative judge issued the second initial decision.*

At the outset, we note that the appellant seeks sanctions or other appropriate relief because the agency has ordered his geographic reassignment to the Buffalo Veterans Administration Medical Center, effective October 2, 1994, and terminated his administrative leave status on the basis that the "interim relief order no longer is in effect." [1] Petition for Review (PFR) File, Tab 8 at 2. The appellant argues that he is entitled to such relief, under 5 C.F.R. § 1201.111(c), which requires that interim relief stay in effect until the issuance of a final order, because we did not vacate the prior initial decision ordering interim relief and no final decision has been issued. In its response, the agency contends that there is no basis for interim relief since the administrative judge did not find that mitigation was warranted on remand. In sum, the agency argues that the appellant does not meet the requisite "prevailing party" requirement. PFR File, Tab 9. We agree.

Under Board regulations, an agency must submit evidence of interim relief upon order of the Clerk of the Board, where the appellant files a petition for review of an initial decision ordering interim relief. See 5 C.F.R. § 1201.115(c). Here, as the agency states, the remand initial decision does not order such relief and thus there is no basis for imposing sanctions under section 1201.115(c). Moreover, although section 1201.111(c) provides that, under 5 U.S.C. § 7701(b)(2), the initial decision will provide "appropriate interim relief effective upon the date of the initial decision and remaining in effect until the date of a final order ... on any petition for review," such relief is conditional upon the appellant being the prevailing party. Similarly, section 7701(b)(2), as amended, provides that, "if an employee ... is the prevailing party, [he or she] shall be granted the relief provided in the decision pending the outcome of any petition for review."

Section 6 of the Whistleblower Protection Act of 1989 (the Act) amended 5 U.S.C. § 7701(b) to provide interim relief. See P.L. 101-12, { 6, 103 Stat. 16, 33 (1989). Previously, appellants had to wait until the Board issued its final decision before they could receive relief. The legislative history of the Act indicates that Congress amended the statute to prevent needless delay in affording relief to prevailing parties, thereby protecting them from hardship during the pendency of their appeals. See *Dennis v. Department of Veterans Affairs*, 62 M.S.P.R. 462, 466 (1994); H.R. Rep. No. 274, 100th Cong., 1st Sess. 29, 35, 39 (1987). Congress noted that the full Board sustained the administrative judge's initial decision in two out of three cases. H.R. Rep. No. 274, at 29. Therefore, we find that interim relief is limited under the statute and regulations to appellants receiving a favorable initial decision.

Although the appellant prevailed in the July 27, 1992 initial decision, he was no longer entitled to interim relief once the administrative judge sustained the unitary penalty in the second initial decision. Cf. *Aliota*, 60 M.S.P.R. at 496 (administrative judge properly ordered interim relief because, by virtue of having had the penalty mitigated, the appellant was the prevailing party). That our prior decision on review did not vacate the initial decision but simply remanded the appeal for further findings regarding the reasonableness of the penalty does not require that interim relief be continued beyond the issuance of the remand initial decision. Even though the initial decision was not vacated, we disagreed, on review, with the administrative judge's finding of disparate treatment upon which her mitigation was based. When, on remand, the administrative judge found adversely to the appellant in regard to the condonation issue and sustained the agency imposed penalty, she completely vitiated her prior initial decision mitigating the penalty. Thus, there remained no basis for an award of interim relief, even though we did not vacate the prior initial decision and there was no final Board decision. Therefore, we find that the administrative judge properly declined to order interim relief and the agency was not required to continue affording the appellant such relief.

*The appellant's petition does not show adjudicatory error.*

The appellant first contends that the administrative judge misinterpreted our decision on review by reevaluating the mitigated penalty in her initial decision and sustaining the agency imposed penalty. He notes that our decision on review did not vacate the initial decision but remanded the appeal for the administrative judge to determine the condonation issue, and states that our decision did not require her to reconsider mitigation other than to consider whether further mitigation was appropriate. We disagree. PFR at 2-4. As we discussed above, we disagreed with the administrative judge's finding of disparate treatment in her prior initial decision. Accordingly, since her mitigation of the penalty was based on her finding of disparate treatment, we remanded the appeal for reconsideration of the penalty upon her determination of the condonation issue. We therefore find no reason for the administrative judge not to have reinstated the original penalty if she found that the agency had not condoned the appellant's activity, and that the penalty was otherwise within the bounds of reasonableness. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

The appellant secondly challenges the administrative judge's finding that Graham did not condone the appellant's acceptance of the payment from B-M. See PFR at 4-25.

The appellant argues that the administrative judge found, in her prior initial decision of July 27, 1992, that Graham was not credible and thus that she should have credited the appellant's testimony that he was directed by Graham to receive payments directly from B-M. *Id.* at 4-14. The appellant further argues that his testimony in this respect was corroborated by his contemporaneous notes which the administrative judge did not consider, as well as other record evidence, including his memorandum to Graham confirming his arrangement with B-M. *Id.* at 15-20. We find that these arguments represent mere disagreement with the administrative judge's credibility determinations and do not establish a basis for Board review. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam).

Although the administrative judge found in her prior initial decision a significant doubt in regard to Graham's credibility because of his personal animosity towards the appellant, she nevertheless did not find it necessary to resolve the condonation issue based on her finding that the charge was supported by preponderant evidence in any event. In her remand decision, the administrative judge again noted Graham's personal animosity towards the appellant in evaluating their conflicting testimonies. As we discussed above, she carefully considered this factor together with other Hillen factors and explained why she found Graham's version to be more credible than the appellant's. We thus find no error in this regard. We further find that the administrative judge's failure to mention the appellant's contemporaneous notes in connection with her findings regarding his memorandum to Graham does not show that she erred in finding that it was unlikely that all copies thereof would have been lost. See *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986).

As his third point, the appellant contends that the administrative judge "did not properly address the penalty issue." See PFR at 25-37. In this regard, he contends that the administrative judge did not consider the factors set forth in *Douglas*, and that a geographical reassignment would constitute a great hardship to him and his family. *Id.* Nonetheless, the initial decision indicates that the administrative judge properly applied the Douglas factors in this case. See RID at 12-14. Moreover, we have upheld even more severe penalties than the one imposed by the agency in this case under similar circumstances involving conflict of interest charges. See *Reynolds v. Department of Agriculture*, 54 M.S.P.R. 111, 114-115 (1992) (removal was within tolerable limits of reasonableness in case of veterinary medical officer charged with engaging in financial transactions with management of establishment regulated by the agency, and failing to report conflict of interest); *Schumacher v. United States Postal Service*, 52 M.S.P.R. 575, 580-583 (1992) (removal was a reasonable penalty for an employee who had secured outside employment with the United Parcel Service). Therefore, we find that the administrative judge properly found that the agency imposed penalty was reasonable.

Finally, the appellant requests that we reconsider the findings regarding disparate treatment and the appellant's claims of whistleblowing and reprisal, asserting that the deciding official was aware of Graham's animus towards him and thus was also tainted by improper motives. PFR at 38-40. For the reasons below, we decline to reconsider those findings.[2]

Under the doctrine of the "law of the case," the Board will not reopen what has previously been decided in an appeal. See *Rozar v. Office of Personnel Management*, 61 M.S.P.R. 136, 139 n.\* (1994). Although there is a well established exception that allows reexamination of an issue when controlling authority has made a contrary decision of law applicable to such issues, see 1B James W. Moore et al., Moore's Federal Practice | 0.404[4.--4] n.29 (2d ed. 1993), we find that the Board decisions cited by the appellant do not represent a change in Board law and do not constitute a basis for reconsidering the law of the case. Cf. *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.) (court of appeals held that intervening decision of intermediate state appellate court was controlling authority which would warrant reconsideration of the law of the case because it cast doubt upon the prior ruling of the court of appeals), *modified*, 860 F.2d 357 (9th Cir. 1988). The record also indicates that Graham's alleged animosity toward the appellant had no influence on the agency's decision. In this connection, we note that the agency reassigned Graham to another office in March 1991, see Hearing Transcript (HT) at 162, ten months before the agency issued its decision concerning the instant action on January 13, 1992. See IAF, Vol. 1, Tab 4, Subtab A. Further, the agency transferred the deciding official, Sanford Garfunkel, to the appellant's region in August 1991 to replace Graham, who had left five months earlier, and Garfunkel testified that he had never met Graham, or had any dealings with him. See HT at 96. Consequently, we find that Graham's alleged animus did not influence the agency's action in this case. Cf. *Marchese*, slip op. at 6-7 (Board remanded appeal for determination of whether agency officials who decided to abolish appellant's position possessed constructive knowledge of his protected disclosure because the record indicated that the deciding official's recommendation was influenced by another agency official's displeasure at appellant's disclosure).

Moreover, even if the appellant were to establish that Graham's malice was a contributing factor in the agency's decision to impose discipline on the appellant, Garfunkel testified that he would have reached the same decision regardless of Graham's animosity.[3] See HT at 96. Garfunkel further testified that, even if Graham had initiated the agency's action against the appellant due to personal animus, it would not have changed Garfunkel's decision because he considered the appellant's acceptance of the check from B-M to be "an illegal act," and a "very serious conflict of interest." See HT at 87-88. Consequently, we find that the agency has shown by clear and convincing evidence that it would have taken the actions in any event because of the appellant's misconduct, and we conclude that the appellant has not established his affirmative defense of whistleblower reprisal. See *Page v. Department of Justice*, 59 M.S.P.R. 452, 455-457 (1993).

### 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 Federal Operations  
P.O. Box 19848  
Washington, DC 20036

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,  
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  
Robert E. Taylor, Clerk  
Washington, D.C.

### Footnotes

[1] We note that the appellant's submission was filed after the record closed on review. PFR File, Tab 8. Although we believe that the appellant should have raised the issue of interim relief in his petition for review since the administrative judge declined to order such relief in the remand initial decision, we will consider the appellant's submission, as well as the agency response, PFR file, Tab 10, under the circumstances since the agency only notified the appellant that it would proceed with his geographic reassignment after the record closed. 5 C.F.R. § 1201.114(i). See also, 5 C.F.R. § 1201.116(a). However, we will consider neither the agency's submission received September 28, 1994, PFR File, Tab 11, nor the appellant's submissions dated October 7, 1994, PFR File, Tabs 13, 14. See 5 C.F.R. § 1201.114(i).

[2] In support of his reconsideration request, the appellant filed several submission after the close of the record on review. See PFR File, Tab 5, 7, 9, 15. Because the appellant has not shown that these submissions are based on evidence that was not available before the close of the record, we will not consider them. Similarly, we will not consider arguments raised therein. See *Ray v. Department of Labor*, 60 M.S.P.R. 624, 628 (1994). We recognize however, that citations to Board decisions are not evidence and may be appropriate for our consideration, even if submitted after the close of the record, where such decisions were issued subsequently or were otherwise not available to the parties. See *Parker v. U.S. Postal Service.*, 59 M.S.P.R. 603, 607 n. 2 (1993). Consequently, we have considered the Board decisions cited by the appellant in these submissions. See, e.g., *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 109—110 (1994); *Sanders v. Department of the Army*, 64 M.S.P.R. 135, 141 (1994); *Carter v. Small Business Administration*, 61 M.S.P.R. 656, 667 (1994); *Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 6091, 606-609 (1994). We conclude that there is nothing in these decisions that is inconsistent with our decision in the instant appeal.

[3] Since the deciding official testified that the agency would have taken the same action regardless of Graham's malice toward the appellant, the amendment to 5 U.S.C. § 1221(3)(1) under Public Law 103-424, § 4, 108 Stat. 4361 (Oct. 29, 1994), to allow an appellant to establish through circumstantial evidence that a protected disclosure was a "contributing factor" in a personnel action, would not change our finding that the appellant did not establish his allegation of whistleblower reprisal.