

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

SOCIAL SECURITY
ADMINISTRATION,
Petitioner,

DOCKET NUMBER
CB-7521-11-0003-T-1

v.

DATE: July 17, 2012

RAY J. MCQUARY,
Respondent.

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lisa M. Krach, Esquire, and Andrew Maunz, Esquire, Baltimore, Maryland,
for the petitioner.

Peter H. Noone, Esquire, and Robert Fedder, Esquire, Belmont,
Massachusetts, for the respondent.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The respondent has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative law judge (ALJ). We grant petitions such as this one only when significant new evidence is presented

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

to us that was not available for consideration earlier or when the ALJ made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The petitioner filed a complaint with the Board seeking to suspend the respondent ALJ for 10 days based on the charge of Conduct Unbecoming an ALJ. Initial Appeal File (IAF), Tabs 1, 2. Following a 2-day hearing, the assigned ALJ issued a thorough and well-reasoned initial decision finding that the petitioner had proven the charge and that good cause existed to discipline the respondent. *Id.*, Tab 75, Initial Decision (ID) at 18-21. As to the respondent's affirmative defenses,² the ALJ found that he had not established any causal connection between his prior EEO activity and the proposed suspension, *id.* at 22-26, and that he had also not established that the petitioner intentionally discriminated against him on the basis of age or disability/hostile work environment. *Id.* at 26-29. Finally, the ALJ concluded that a 5-day suspension was a reasonable penalty. *Id.* at 40.

In his petition for review, the respondent argues that the ALJ erred in finding that the charge was sustained and that it constituted good cause to suspend him, Petition for Review (PFR) File, Tab 3 at 16-21, 21-24, failed to conduct a proper penalty analysis and incorrectly found that a 5-day suspension was reasonable, *id.* at 24-31, and erred in finding that he did not establish his affirmative defenses.³ *Id.* at 31-37.

² In deciding this case, the assigned ALJ considered only those affirmative defenses "as advocated in Respondent's Post-Hearing Briefs," specifically, retaliation for protected equal employment opportunity (EEO) activity and discrimination based on age, disability, and hostile work environment. ID at 21-22, 22-29. The respondent has not challenged the ALJ's failure to address any other affirmative defenses.

³ Well after the close of the record on review, the petitioner asked the Board to replace unredacted copies of Exhibit C in the petitioner's complaint with redacted copies, in the event that materials related to the case are subject to a Freedom of Information Act (FOIA) request. PFR File, Tab 9. We decline to grant the petitioner's request to

The ALJ found the underlying specification sustained because the evidence showed that, on the date in question, the respondent entered a hearing room in which Chief ALJ Williams was holding a hearing and proceeded to complain to him about scheduling issues. ID at 18. The respondent does not deny these facts. IAF, Tab 68, Respondent's Proposed Findings of Fact, ##35, 37, 38, 40. His claims that he did not berate, yell at, or threaten the Chief ALJ, even though he was frustrated and agitated, *id.*, ## 38-42, have no bearing on the propriety of the ALJ's finding that the respondent committed the acts set forth in the specification because the petitioner did not allege that the respondent berated, yelled at, or threatened the Chief ALJ. Similarly, the respondent's arguments that the ALJ was required to, but did not, make any findings that his conduct detracted from his character or reputation is without merit because, having found that the respondent's conduct was improper and unsuitable, the ALJ was not also required to find that it detracted from his character or reputation. PFR File, Tab 3 at 17-21; *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 42 (2010) (conduct unbecoming is "improper, unsuitable **or** detracting from one's character or reputation" [emphasis added]), *aff'd*, [635 F.3d 526](#) (Fed. Cir. 2011). In addition, the ALJ also correctly concluded that, while the context within which the respondent entered Williams' hearing room might be relevant to a penalty determination, none justified or excused the respondent's conduct. ID at 19; PFR File, Tab 3 at 17-21.

Regarding the existence of good cause, we have carefully considered the respondent's arguments that the petitioner failed to prove that his conduct undermined public confidence in the administrative adjudicatory process, that his actions did not impede the completion of the hearing he interrupted or detract

substitute different documents for those that are part of the official record. We note, however, that, consistent with Board policy, if an FOIA request is made that would include that document, we will refer it to the agency, as its originator, for release determination.

from the participants' perception of the administrative adjudicatory process, and that his behavior was not intentional or deliberate, but rather was consistent with his diagnosed and legitimate condition of Post Traumatic Stress Disorder (PTSD). PFR File, Tab 3 at 21-24. There can be no doubt that the respondent's conduct in interrupting another ALJ's hearing while it was in progress violated generally accepted rules of conduct. *Social Security Administration v. Carter*, [35 M.S.P.R. 485](#), 491 (1987), *aff'd*, 856 F.2d 202 (Fed. Cir. 1988) (Table). Conduct that is inconsistent with maintaining respect for the administrative adjudicatory process constitutes good cause for disciplinary action against an ALJ. *Long*, [113 M.S.P.R. 190](#), ¶ 42. Furthermore, as the ALJ found, that the hearing the respondent interrupted was ultimately completed without further incident, that the respondent's entrance into Williams' hearing room was not intentional, and that the respondent suffers from PTSD do not go to the issue of whether his actions constitute good cause to discipline him. PFR File, Tab 3 at 22-23. Rather, as the ALJ found, those factors are a consideration in assessing an appropriate penalty. ID at 35-38.

Regarding the penalty, the ALJ thoroughly and carefully considered all of the pertinent *Douglas* factors and fairly concluded that, although the respondent's conduct was serious, mitigating factors supported reducing the proposed 10-day suspension to a 5-day suspension. Beyond his disagreement with the extent of the mitigation, the respondent has not shown that the ALJ committed legal error in arriving at his decision on the penalty. *See Koehler v. Department of the Air Force*, [99 M.S.P.R. 82](#), ¶ 4 n.1 (2005).

On review, the respondent does not challenge the ALJ's finding that the individual who was responsible for proposing the respondent's suspension by signing the Statement of Charges and Specifications did not know of the respondent's protected activity. ID at 24. The respondent argues, however, that Williams' animus toward him must be imputed generally to the petitioner and the ALJ failed to consider his contention that Williams' involvement in the

investigation that was conducted into this incident and his insistence that he be included in any disciplinary considerations, even though he had no authority to impose discipline, constitutes evidence in support of the respondent's claim of reprisal. PFR File, Tab 3 at 32. However, the ALJ did consider the respondent's claim that Williams improperly influenced the investigation by requesting statements from the witnesses and improperly influencing their content, ID at 24-25, but found that all of the witnesses testified that Williams did not influence them in any way regarding the content of their statements. *Id.* at 25-26. Beyond disagreeing with the ALJ's conclusion that the respondent did not establish his claim of reprisal for protected EEO activity, the respondent has not shown error by the ALJ.⁴

The respondent's assertions regarding discrimination are based largely on his claim that Williams' personal animus against him tainted the investigation and resulted in the improper action. PFR File, Tab 3 at 35. Beyond his mere disagreement with the ALJ's findings, however, the respondent has not shown that the ALJ erred in rejecting his claim that Williams negatively affected the integrity of the investigation. *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions). Likewise, regarding the respondent's claim that the agency was motivated by his PTSD, he has provided no reason for us to reweigh the evidence or substitute our assessment of the record evidence for that of the ALJ. *Broughton*, 33 M.S.P.R. at 359.

⁴ That the ALJ failed to mention certain evidence cited by the respondent does not mean that he did not consider it in reaching his decision. *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).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the ALJ made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review.

ORDER

The Board authorizes the petitioner to suspend the respondent for 5 days for good cause shown, pursuant to [5 U.S.C. § 7521](#). Except as modified by this Final Order, the initial decision of the administrative law judge is the Board's final decision.

NOTICE TO THE RESPONDENT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read

this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information 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, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.