

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

CYRIL L. EDWARDS,
Appellant,

DOCKET NUMBER
NY-0752-09-0137-C-2

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: July 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

William E. Burkhardt, Jr., Esquire, Rochester, New York, for the appellant.

Jennifer L. Janeiro, Esquire, Dallas, Texas, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

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 agency bears the burden of proving compliance with a Board order, and assertions of compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *Clark v. Department of the Air Force*, [112 M.S.P.R. 342](#), ¶ 6 (2009). In support of its position that the appellant is not entitled to a FY 2009 Pay-for-Performance (PFP) bonus, the agency submitted its FY 2009 Pay-for-Performance Program Administrative Rules for EAS employees. First Compliance Appeal File (FCAF), Tab 3 at 28-35. Those rules provide, in pertinent part, that an evaluator may exclude an employee from PFP when documented action is pending or has been taken for conduct clearly unacceptable to the organization, and that such determinations by the evaluator must be supported by appropriate documentation and have concurrence by the next higher level PCES executive and the Area Human Resources Manager. *Id.* at 33. The appellant's evaluator, Rhonda Benton, Rochester Plant Manager, testified that she considered the 60-day suspension imposed by the Board for the appellant's having misused his government credit card to be discipline for conduct clearly unacceptable to the organization, Hearing Transcript (HT) at 13, 27; FCAF, Tab 10 at 25, and that, as required by the agency's Rules, she sought and received the concurrence of the District Manager and the Human Resources Manager to exclude the appellant from the FY 2009 PFP bonus. HT at 11; 14-17; FCAF, Tab 10 at 20-25.

In arguing that he is entitled to the bonus, the appellant relies on a statement in the Board's decision in *Galatis v. U.S. Postal Service*, [111 M.S.P.R. 484](#), ¶ 9 (2009), that, under the Back Pay Act, an appellant is entitled to a bonus if all comparably situated employees received them unless some other circumstances disqualifies him. The parties stipulated that all eight employees who encumbered the position the appellant had encumbered prior to his improper

demotion received an average FY 2009 PFP rating of 5, and that, if he had received that rating, he would have received a bonus equal to a 3% increase in pay. FCAF, Tab 31, stipulations 3, 5. In *Galatis*, the Board found that the agency had cited no authority for disqualifying the appellant from receiving the bonus and ordered the agency to award it to him. *Galatis*, [111 M.S.P.R. 484](#), ¶¶ 9, 12. In this case, however, as set forth above, the agency did cite authority for disqualifying the appellant from receiving the FY 2009 PFP bonus, specifically, its FY 2009 PFP Rules and the appellant's evaluator's determination that his misconduct, which the Board determined was punishable by a 60-day suspension, was conduct clearly unacceptable to the organization. *Cf. Clark*, [112 M.S.P.R. 342](#), ¶¶ 10-14 (where the Board mitigated the appellant's demotion and 60-day suspension to a still significant 30-day suspension, the agency was in compliance with the Board's order when it denied him an Exemplary Performance Award reserved for the agency's top employees). Therefore, *Galatis* does not support the appellant's position but rather supports the agency's position, properly upheld by the administrative judge, that the appellant's misconduct disqualified him from receiving the FY 2009 PFP bonus.

The appellant has not supported his remaining arguments, which he labels as "harmful error." For example, he claims that the agency was required to, but did not, provide him with a copy of Benton's recommendation before she submitted it for concurrence, as required by the agency's Management Instruction EL-470-2001-3, Fiscal Year 2001 Pay for Performance Program. FCAF, Tab 10 at 115. No such requirement appears in the agency's 2009 PFP Rules. The appellant has advanced no reason for finding error in the agency's application of PFP Rules for FY 2009 inasmuch as that is the fiscal year for which he seeks a PFP bonus. Moreover, even if the agency had applied the FY 2001 PFP Program and required Benton to share her recommendation with the appellant before she submitted it for concurrence, he has not shown that he would have been awarded the FY 2009 PFP bonus. *Cf. Vena v. Department of Labor*, [111 M.S.P.R. 165](#), ¶ 9

(2009) (an adverse action will not be sustained if an employee demonstrates that, in the absence of the agency's procedural error, the outcome could have been different). Nor, contrary to the appellant's claim, are there any due process implications raised by Benton's failure to share the recommendation with him. The case he has cited in support of that argument, *Franklin v. U.S. Postal Service*, Docket No. AT-0752-10-1024-I-2 (Initial Decision, Apr. 20, 2011), does not advance his cause inasmuch as Board initial decisions are of no precedential value and cannot be cited or relied on as controlling authority. *Rockwell v. Department of Commerce*, [39 M.S.P.R. 217](#), 222 (1988).

In arguing that the agency's decision impermissibly relied solely on his prior discipline, the appellant cites to a number of initial decisions which, he suggests, stand for the proposition that an agency may not lawfully base a present adverse employment decision on an employee's prior discipline. As noted above, initial decisions are not precedential. *Rockwell*, 39 M.S.P.R. at 222. Moreover, the instant case is not an adverse action appeal, but rather a compliance case, and therefore, the relevance of the cited cases insofar as they concern the reasonableness of an agency-imposed penalty is questionable. Nor has the appellant shown that Benton misinterpreted the standard of conduct that was "clearly unacceptable to the organization." He suggests that it does not necessarily include any prior discipline. Benton testified, however, that she reasoned that the Board found the appellant's actions severe enough to warrant a 60-day suspension, and that that was clearly unacceptable conduct for the agency. HT at 12. That the appellant would interpret the phrase differently than did Benton does not constitute a misinterpretation that constitutes harmful error by the agency or otherwise demonstrate its noncompliance with the Board's order.

Finally, the appellant urges that Benton was not an appropriate evaluator of his performance because she did not supervise him as an EAS employee during FY 2009. In fact, no one supervised the appellant as an EAS employee during FY 2009. Benton supervised him when the agency demoted him to a Mail Handler,

effective January 30, 2009, through the end of FY 2009, and thereafter until the agency complied with the Board's August 25, 2010 Opinion and Order. Benton testified that the Human Resources Manager told her that, under the circumstances, she was responsible for giving the appellant his PFP review for FY 2009, HT at 10, and that she did so. The appellant has not shown that the agency erred in assigning Benton as his evaluator or that any such error caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Vena*, [111 M.S.P.R. 165](#), ¶ 9.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge 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. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.