

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

REYNALDO COLLAZO,
Appellant,

DOCKET NUMBER
AT-0752-11-0676-I-1

v.

SOCIAL SECURITY
ADMINISTRATION,
Agency.

DATE: July 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Stephen Domenic Scavuzzo, Esquire, McLean, Virginia, for the appellant.

Christopher Yarbrough, Esquire, and Selisa M. Wright, Atlanta, Georgia,
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 affirming his 30-day suspension for misconduct. We grant petitions such as this one only when significant new evidence is

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

presented to us that was not available for consideration earlier or when the administrative judge 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 administrative judge found that the agency proved one of the two charges against the appellant (i.e., Inappropriate Conduct Towards Claimant Representatives) and one of the three specifications of that charge (i.e., the allegation that the appellant made unwarranted and inappropriate statements to a claimant representative, stating, “You know I still love you,” “Why haven’t you called me lately? Do you not love me anymore?” and “Tell [another claimant representative] I still love her.”) Initial Appeal File (IAF), Tab 16, Initial Decision (ID) at 16-21; *see* IAF, Tab 4, Subtab 4B at 3. The appellant argues on review that the administrative judge erred in sustaining the suspension based on those comments because he was never told that they were inappropriate. Petition for Review (PFR) File, Tab 3 at 4.

We find this argument unavailing. As the administrative judge noted in the initial decision, the agency submitted evidence that agency employees are reminded on an annual basis that they are to observe the requirements of courtesy and consideration while dealing with coworkers or serving the public and that they are required to conduct themselves with propriety. ID at 25 (citing IAF, Tab 4, Subtab 4Q). Furthermore, under the precedent of our reviewing court, an agency is not required to specifically prohibit every type of misconduct. *See, e.g., Brown v. Department of the Navy*, [229 F.3d 1356](#), 1363 (Fed. Cir. 2000) (even though civilian employee had not received “formal notice” that he could be subject to removal for engaging in adulterous affair with Marine’s spouse, employee’s “common sense” should have forewarned him), *cert. denied*, 533 U.S. 949 (2001). Federal employees are expected to exercise good judgment, notwithstanding the lack of literal guidance from any agency rule, regulation, or

other statement of agency policy. *Boyer v. Department of the Navy*, 56 F.3d 84 (Fed. Cir. 1995) (Table) (NP).²

The appellant also argues on review that the penalty is too severe because the administrative judge sustained only a small portion of the charges against him. PFR File, Tab 3 at 4-5. In support of this argument, the appellant relies on *Miller v Department of the Navy*, [27 M.S.P.R. 227](#), 230 (1985), in which the Board mitigated the appellant's 20-day suspension to a written reprimand, finding that the sole sustained charge did not warrant the suspension in light of significant mitigating factors, which the presiding official had failed to consider. PFR File, Tab 3 at 5. Here, by contrast, in analyzing the reasonableness of the penalty, the administrative judge considered the relevant mitigating factors, specifically noting that the appellant submitted letters and e-mails praising him for his compassion and work ethic with respect to processing disability claims and that the appellant provided testimony regarding his work ethic and dedication to ensuring that claims are properly documented. ID at 25-26 (citing IAF, Tab 12, Exhibits A-C).

To the extent that the appellant argues that mitigation is required because the Board sustained only one specification and one of the two charges, we find this argument unpersuasive. Where, as here, the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). Here, the agency did not indicate that it desired to impose a lesser penalty if not all the charges were sustained. *See* ID at 25. Applying the relevant *Douglas* factors, the administrative judge found that the deciding

² Although *Boyer* is an unpublished opinion by the Court of Appeals for the Federal Circuit, we may rely on it if we find its reasoning persuasive. *Weed v. Social Security Administration*, [113 M.S.P.R. 221](#), ¶ 11 (2010).

official's penalty choice did not exceed the maximum reasonable penalty in this case and, therefore, mitigation of the penalty was not warranted here. *Id.* at 25-26. Given the administrative judge's consideration of the relevant *Douglas* factors, as discussed more fully below, we discern no reason to disturb this finding.

The appellant also contends on review that the administrative judge failed to explain why the sustained specification is sufficient to justify the suspension. PFR File, Tab 3 at 5 (citing *Kline v Department of Transportation*, [808 F.2d 43](#), 45-46 (Fed. Cir. 1986)). We disagree. In the initial decision the administrative judge provided a detailed explanation for his conclusion that the 30-day suspension did not exceed the maximum reasonable penalty in this case. Specifically, the administrative judge found that, given the appellant's position as an agency employee responsible for processing disability claims filed by claimants, including those represented by the social workers who were the subject of the comments described in the sustained specification, the appellant's misconduct was serious. *Id.* at 25. In addition, the administrative judge noted that the appellant had a relatively short tenure with the agency, having worked for the agency for about six years and two months before his suspension, and a prior 14-day suspension for inappropriate and unprofessional conduct, improper use of privileged personal customer information for a non-business purpose, and improper use of government equipment. *Id.* (citing IAF, Tab 4, Subtab 4P). As previously stated, the administrative judge also considered the evidence and testimony regarding the appellant's work ethic and compassion. *Id.* at 25-26 (citing Tab 12, Exhibits A-C). He noted, however, that under analogous circumstances, the Board has determined that a lengthy suspension does not exceed the maximum reasonable penalty, even in cases involving employees who had significantly longer tenure than the appellant and no prior disciplinary record. *Id.* at 26 (citing *Tryon v. U.S. Postal Service*, [108 M.S.P.R. 148](#), ¶ 9 (2008) (for an employee with 45 years of unblemished service, the Board determined that a

60-day suspension was the maximum reasonable penalty for a sustained charge of hugging a Postal Service customer) and *Spates v. U.S. Postal Service*, [68 M.S.P.R. 9](#), 13 (1995) (for an employee with approximately 11 years of service and no prior disciplinary record, the Board determined that a 90-day suspension was a reasonable penalty for making inappropriate comments to two female employees)). Therefore, the administrative judge found, a 30-day suspension does not exceed the maximum reasonable penalty under the circumstances presented by this appeal. *Id.*

In the supplement to his petition for review, the appellant seems to reassert his affirmative defense of laches, alleging that deciding official Barbara Grissom was aware of one of the incidents as early as June of 2009, i.e., almost two years prior to his suspension, but took no action until several charges and specifications came to her attention. PFR File, Tab 3 at 5 (citing IAF, Tab 4, Subtab 4O and Hearing Compact Disc at 6 hours and 34 minutes to 6 hours and 40 minutes). To establish the affirmative defense of laches, the appellant was required to prove both that the delay in bringing the action was unreasonable and that he was materially prejudiced by the delay. *See, e.g., Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 25 (2007). As the administrative judge correctly found, even assuming that the appellant established that the agency's delay in bringing this action was unreasonable, the appellant failed to establish that he was materially prejudiced by the delay. ID at 22. Thus, the appellant failed to prove this affirmative defense.

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.