

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

CARLTON P. PARKS,
Appellant,

DOCKET NUMBER
DC-0752-11-0816-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: July 31, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Lorna J. Jerome, Esquire, Washington, D.C., for the agency.

BEFORE

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

FINAL ORDER

The agency 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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 appellant has filed a motion to dismiss the agency's petition for review. If an agency fails to establish its compliance with the interim relief order, the Board has discretion to dismiss the agency's petition, but need not do so. *See Stack v. U.S. Postal Service*, [101 M.S.P.R. 487](#), ¶ 6 (2006); [5 C.F.R. § 1201.115\(b\)\(4\)](#). Although the agency did not timely comply with the interim relief order, the agency subsequently submitted both a certification that the appellant was placed back on the agency's rolls the week of December 12, 2011, and a certification that the appellant's return or presence in the workplace would be unduly disruptive. Petition for Review (PFR) File, Tabs 3, 4. Thus, while untimely filed, the agency has established compliance with the interim relief order. Under the circumstances in this case, we find that the shortcomings in the agency's certification of compliance are not sufficiently serious to warrant the sanction of dismissal. Therefore, we deny the appellant's motion to dismiss.

The agency has filed a petition for review arguing that Specification 2 should be upheld based on the fact that the amended notice of proposed removal placed the appellant on notice of the charge against him, and he never contested its veracity. PFR File, Tab 1 at 14. The agency contends that the amended notice clearly put the appellant on notice that he was being charged with sending in excess of 35,000 nonwork related inappropriate instant messages to Ms. Upton and Ms. Meads during work hours. *Id.* at 13. The agency asserts that "the 'Letter of Incident Report' dated March 30, 2011, revealed that of the 35,000 plus instant messages 'nearly all [were] of an explicitly sexual nature' and 'few if any could be interpreted as relating to official business.'" *Id.*

Specification 2 alleges only that during the specified period (over 9 months) the appellant sent instant messages in excess of 35,000 while on official time. The agency does not allege that the messages were inappropriate or even

that they were not work related. However, when we look to the record evidence and the hearing testimony to determine what specific misconduct the agency is alleging in Specification 2, we find that the agency is alleging that the appellant sent over 35,000 inappropriate instant messages to Ms. Upton and Ms. Meads. Our interpretation of Specification 2 is supported by the testimony of Commander Carl Messale, the deciding official, who testified that “[t]he 35,000 were just between Mr. Parks and [Ms. Upton and Ms. Meads]” and that “well over half to 66 percent, somewhere in there, had graphic, inappropriate behavior.” Hearing Transcript (HT) at 44, 54. The agency’s arguments on review also support our interpretation of Specification 2. Specifically, the agency explicitly argues on review that the appellant sent over 35,000 instant messages to Ms. Upton and Ms. Meads. *See* PFR File, Tab 1 at 13, Tab 11 (the “[a]ppellant’s misconduct included sending, at the minimum, 17,000 instant messages of a sexually graphic nature to a Contractor (Ms. Upton) while on official time”).

However, in the March 30, 2011 Letter of Incident, Incident Investigator John T. Sugimoto thoroughly reviewed the 35,481 instant messages included on the agency’s compact disc and determined that out of the 35,481 instant messages sent by the appellant during the relevant period, the appellant sent 6,185 instant messages to Ms. Upton (she sent him approximately 6,169) and 537 instant messages to Ms. Mead (she sent him approximately 534 instant messages). Initial Decision (ID) at 3; Initial Appeal File (IAF), Tab 9, Enclosed Compact Diskette (CD), and Subtab G. Our review of the CD is consistent with Sugimoto’s determination that the majority of the 35,481 instant messages were not sent to Ms. Upton and Ms. Meads. IAF, Tab 9, CD. Consequently, the agency’s own record evidence fails to show that the appellant sent over 35,000 instant messages to Ms. Upton and Ms. Meads as the agency alleged and Commander Messale testified. IAF, Tab 9, CD.

Thus, based on the agency’s arguments on review, we discern no reason to reweigh the evidence or substitute our assessment of the record evidence for that

of the administrative judge. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997) (finding no reason to disturb the administrative judge's findings when the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same); *see Haebe v. Department of Justice*, [288 F.3d 1288](#), 1302 (Fed. Cir. 2002) (the Board may overturn credibility determinations that are implicitly or explicitly based on demeanor only when it has "sufficiently sound" reasons for doing so).

The agency also argues that removal is a reasonable penalty based solely on Specification 1 because the appellant's misconduct was egregious, he was on notice that his misconduct could result in discipline up to removal, his misconduct was frequent and repeated, and he involved another employee, albeit a contractor, in his misconduct. PFR File, Tab 1 at 14. The agency contends that removing a supervisor for repeated sexually graphic communications is not outside the bounds of reasonableness and that the administrative judge erred in mitigating the removal to a 45-day suspension. *Id.*

We find that several factors warrant the conclusion that the removal penalty is too severe. First, we find no basis upon which to disturb the administrative judge's determination that the deciding official incorrectly concluded that the appellant lacked remorse for his misconduct and gave significant weight to that purported lack of remorse to conclude that the appellant lacked rehabilitative potential. ID at 24. The deciding official largely based his analysis on the appellant's failure to use the precise words that he believed the appellant should have used to express his remorse. HT at 29-30. The administrative judge, however, set forth a reasoned analysis as to why she found this determination inconsistent with the record. ID at 24. This finding was based on a credibility determination that included observations of the appellant's demeanor, and it is entitled to deference. *See Haebe*, 288 F.3d at 1301. And, second, there is enough similarity between the nature of the conduct and other

factors to lead to an inference that the agency treated similarly-situated employee Anthony Palumbo and the appellant differently. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶¶ 14-15 (2010). Accordingly, in light of the appellant's 29 years of discipline-free government service, the administrative judge's determination that the appellant showed significant potential for rehabilitation, and the fact that the appellant's removal penalty seems harsh in light of Palumbo's letter of reprimand, we find that removal is unreasonable and a 45-day suspension is the maximum reasonable penalty.

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.