

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

CARLA M. CLARK,
Appellant,

DOCKET NUMBER
DA-0752-11-0626-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 1, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Daniel E. Broussard, Jr., Alexandria, Louisiana, for the appellant.

Brandi M. Powell, New Orleans, Louisiana, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

In the petition for review, the appellant challenges the initial decision denying her appeal of the agency action indefinitely suspending her pending completion of the law enforcement and related judicial proceedings pertaining to criminal conduct for which she had been indicted by a grand jury. The appellant argues, among other things, that: 1) the administrative judge incorrectly found nexus; and 2) the administrative judge incorrectly found that the penalty was reasonable.

Nexus: The appellant asserts that the administrative judge erred in finding that “the indictment specifically state[d] that the appellant’s alleged illicit misconduct involved the misuse of agency records.” Initial Decision (ID) at 5; Petition for Review (PFR) File, Tab 1 at 4, 7. She also asserts that nexus does not exist because the alleged criminal actions took place while she was off-duty and away from her work station. PFR File, Tab 1 at 3-4. She further apparently asserts that the administrative judge erred in relying on Medical Center Director and deciding official Gracie Specks’ testimony that the appellant’s position allowed her access to patient medical records and resulted in the loss of the public’s trust because the alleged misconduct involved misuse of those records. The appellant cites evidence and her own testimony that her security clearance to access patient records was terminated 8 days after her indictment and 11 days before her indefinite suspension. She also contends that the publicity concerning the incident did not mention that she was an agency employee. PFR File, Tab 1 at 5-7.

We find that any adjudicatory error in part of the nexus determination did not prejudice the appellant's substantive rights. Although the agency concedes that the administrative judge erred in finding that the indictment stated that the appellant's alleged misconduct involved the misuse of agency records, PFR File, Tab 3 at 5, that finding was only one basis for the administrative judge's nexus determination. The administrative judge properly found that the agency could establish nexus even if the appellant's alleged misconduct occurred off-duty and away from the work site and the publicity did not mention her name. *See, e.g., Harding v. Department of Veterans Affairs*, [115 M.S.P.R. 284](#), ¶ 21 (2010), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011).

In that regard, the appellant has not shown that the administrative judge erred in finding that Specks testified that the appellant's alleged misconduct had caused the agency to lose trust in her, she was concerned about the loss of the public's trust in the agency because the alleged misconduct involved misuse of patients' medical records, and the agency had received several inquiries expressing concern regarding the possible improper distribution of patients' personal and medical information. ID at 5. Further, the appellant has not asserted that the position from which she was indefinitely suspended did not allow her access to patients' records. That the agency chose to immediately remove her from a position allowing that access while allowing her an opportunity to respond to the indefinite suspension does not establish a lack of nexus. The administrative judge properly concluded that the alleged misconduct directly conflicted with the department expected of agency employees. ID at 5. Thus, we find no basis for reversing the initial decision. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

Penalty: The appellant contests the administrative judge's implicit finding that the penalty was reasonable by disputing his finding that she failed to show that she had been treated more harshly than other employees. She also apparently asserts that the agency should have considered reassigning her to the position in

which it placed her before effecting her indefinite suspension, or placing her on administrative leave, instead of indefinitely suspending her. PFR File, Tab 1 at 5-7.

We find that the appellant has failed to show error in the administrative judge's determination. To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *See, e.g., Reeves v. U.S. Postal Service*, [117 M.S.P.R. 201](#), ¶ 20 (2011). For the consistency of the penalty factor to be considered in a penalty determination, there must be a great deal of similarity, not only between the offenses committed and the proposed comparator, but as to other factors, such as whether the employees worked in the same unit, had the same supervisor, and whether the events occurred relatively close in time. *Id.* The appellant recognizes that none of the individuals she cites as comparators was indicted by a grand jury for Medicare fraud. Those individuals, therefore, were not similarly situated to the appellant, and their allegedly more favorable treatment does not establish a claim of disparate penalties. *See, e.g., Bencomo v. Department of Homeland Security*, [115 M.S.P.R. 621](#), ¶ 20 (2011), *aff'd*, 468 F. App'x 986 (Fed. Cir. 2012). The appellant has provided no basis for her assertion that the agency should have considered reassigning her or placing her on administrative leave instead of indefinitely suspending her.

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.