

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

MORGAN T. BOLEN,
Appellant,

DOCKET NUMBER
SF-0752-11-0458-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: August 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Kevin D. Mack, Esquire, Sacramento, California, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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 correctly found that the agency proved the charges by preponderant evidence.

The appellant argues on review that the administrative judge erred in finding that the agency proved the sustained charges and specifications by preponderant evidence. *See generally* Petition for Review (PFR) File, Tab 1. We have reviewed the appellant's assertions, the record, and the administrative judge's analysis and findings. His findings are thorough and well-supported; each based on, and citing to, agency records and hearing testimony with well-reasoned credibility determinations and reliance on witness demeanor as appropriate. *See* Initial Appeal File (IAF), Tab 30 (Initial Decision) at 21-40. The appellant's petition, in which he essentially repeats arguments he raised before the administrative judge,² does not meet the Board's criteria for review. *See Gager v. Department of Commerce*, 99 M.S.P.R. 216, ¶ 5 (2005). Nevertheless, we address his claims below.

The appellant's alleged failure to turn over government property.

With respect to specification one of the Misrepresentation charge, the appellant alleges that he did not deceive the agency regarding the government property in his possession on September 3, 2010, because he informed Special Agent (SA) Buehler that, in addition to the items he had turned over to him, there were other items in the appellant's garage that belonged to the government; however, SA Buehler chose not to pick up that equipment. PFR File, Tab 1 at 6-

² The appellant's petition for review is largely the same as the appellant's closing memorandum. *Compare* PFR File, Tab 1 *with* IAF, Tab 29.

7. The appellant argues that SA Buehler's decision not to collect the items in his garage should not inure to his detriment. *Id.* at 7.

In sustaining this specification, the administrative judge found that the fact that the appellant turned over several items to SA Buehler on September 3, 2010, in addition to his Government laptop is circumstantial evidence establishing that the appellant understood he was to turn in all electronic equipment to SA Buehler (including the Kindle) and not just his Government laptop. Initial Decision at 23. The administrative judge also found the appellant's testimony that he used the Kindle regularly and found it a useful tool in performing his duties persuasive circumstantial evidence that he did not simply forget to turn his Kindle over to SA Buehler. *Id.* at 23-24. The administrative judge did not credit the appellant's assertion that he stored his Kindle in his garage with his uniform and other items from his vehicle, finding this claim inconsistent with the appellant's testimony regarding how valuable he found the Kindle. *Id.* at 24. The administrative judge also found it illogical that anyone would store an expensive electronic device in their garage. *Id.* In addition, the administrative judge found that the appellant, who viewed his supervisor, Ms. Van Lancker, as a micromanager, knew that she would closely review his purchases and deliberately had his subordinate, Assistant Special Agent in Charge (ASAC) Range, purchase the Kindle to avoid her scrutiny. *Id.* Therefore, the administrative judge found, the agency proved the essence of this specification. *Id.* We discern no reason to disturb this explained finding.

The appellant's personal use of the Government tracker.

The appellant's primary argument on review is that the administrative judge erred in finding that he used a Government tracker to conduct covert surveillance on his wife.³ PFR File, Tab 1 at 1-4, 10-13, 21. The appellant

³ The appellant makes this argument in support of his claim that the administrative judge erred in finding that the agency proved the allegations involving statements one

asserts that the record supports his claim that he used the tracker for the limited purpose of testing the efficiency of the tracker. *Id.* at 2.

In finding that the appellant used the Government tracker for personal reasons, the administrative judge reviewed the relevant documentary evidence and hearing testimony, including the testimony of the appellant, his wife, and Law Enforcement Assistant Rhonda Riker. Initial Decision at 7, 34-36. Ms. Riker testified that the appellant told her that: He was placing a tracker on his personally owned vehicle (POV) to track his wife's whereabouts for the purpose of determining both if she was having an affair and where she was spending money; and even though the appellant's wife caught him the first time he tried to place a tracker on their POV, he later went back and successfully placed a tracker on their POV without her knowledge. *Id.* at 34. By contrast, the appellant and his wife testified that the appellant's wife was fully aware of the appellant placing a tracker on their POV and had no concerns other than fearing that it could be used against him at work. *Id.* at 35.

Applying the factors for making credibility determinations set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), the administrative judge credited Ms. Riker's testimony over that of the appellant and his wife and found that the appellant's wife was unaware that the appellant placed a tracker on their POV a second time. Initial Decision at 35-36. The appellant's argument that the administrative judge erred in finding that he used the tracker to covertly surveil his wife is essentially mere disagreement with the administrative judge's explained findings and credibility determinations and, as such, provides no basis to disturb the initial decision.

and two of specification two of the Misrepresentation charge and the first three specifications of the Improper Use charge. See PFR File, Tab 1 at 10-13, 21.

The Patsy Cline parody video.

The appellant also challenges the administrative judge's finding that the agency proved the allegations involving the Patsy Cline parody video. PFR File, Tab 1 at 13-15, 21-22; *see* Initial Decision at 28, 36-37. Specifically, the appellant reiterates his argument from below that he intended to use the video for training purposes, as it could show how items could be hidden by a woman. PFR File, Tab 1 at 14, 22; IAF, Tab 4, Subtab 4j at 20. The administrative judge found this argument unpersuasive because the appellant did not claim that he forwarded the video to any agency officials in charge of training. Initial Decision at 37. The administrative judge found persuasive the testimony of William Woody, Director of Law Enforcement Security at the time of the events in question, that the video would have no meaningful training value. *Id.* The appellant's argument on review that he intended to use the video for training purposes is mere disagreement with the administrative judge's reasoned findings.

The appellant's personal use of his Government laptop.

The appellant also challenges the administrative judge's findings that the agency proved the allegations involving the extent of the appellant's personal use of the Government laptop. PFR File Tab 1 at 15-18, 22; *see* Initial Decision at 28-29, 37-40. The appellant argues that he used the Government laptop for personal items and business but consistently excised work-related files from the computer as required by the agency, thereby leaving only personal files on the computer and creating the impression that the personal use of the computer was not minor. PFR File, Tab 1 at 16-17. He contends that the agency could not prove that he used the laptop primarily for personal activity, nor could the administrative judge gauge whether the appellant's personal use of the Government laptop was minor, absent a comparison of the appellant's work-related use of the laptop with his personal use of the laptop. *Id.* at 17-18.

The administrative judge found that the appellant falsely stated his personal use of the Government laptop was minor, Initial Decision at 28, and that, while

the agency tolerated some limited personal use of its computers, the appellant's extensive, repeated use of his cold computer for personal purposes was not in accordance with the agency's policy as he far exceeded what by any reasonable standard could be considered "limited" personal use. *Id.* at 39. The administrative judge found unpersuasive the appellant's assertion that he excised work-related documents from his Government laptop so that if anyone hacked into his computer they would not realize it was a Government laptop. *Id.* The administrative judge found that, contrary to the appellant's claim, his Government laptop contained work-related documents. *Id.*

The administrative judge also rejected the appellant's argument that the agency did not prove specification five of the Improper Use charge because it did not prove he used his computer "primarily" for personal reasons. Initial Decision at 39-40. The administrative judge noted that an agency need only prove the essence of its charge, and he found that the agency proved the appellant engaged in prohibited and improper use of his Government laptop by his extensive use of it for personal reasons. *Id.* at 40. The administrative judge further found that, even if the appellant regularly used his cold computer for official purposes, he violated agency rules prohibiting personal use of agency computer equipment for anything other than occasional, minor use. *Id.* We see no reason to disturb these explained findings.

ASAC Range's purchase of items for the appellant using the appellant's government credit card.

The appellant also challenges the administrative judge's findings that the agency met its burden of proof with respect to the portion of specification two of the Misrepresentation charge alleging that the appellant was not forthcoming or truthful during his October 7, 2010 interview when he stated that he never had ASAC Range purchase anything for him on his government credit card other than the Kindle. PFR File, Tab 1 at 18-19. The appellant reiterates his argument from below that this statement was accurate because, although ASAC Range purchased

items for the appellant in addition to the Kindle, he did not “ask” ASAC Range to do so. *Id.*; IAF, Tab 4, Subtab 4j at 15. Rather, the appellant contends he only agreed in response to ASAC Range’s inquiry that ASAC Range could purchase the items for him. *Id.* The appellant further asserts that he had no reason to avoid supervisory review of these purchases because he had the authority to purchase the items in question and had no duty to report the purchases to his supervisor. PFR File, Tab 1 at 19.

The administrative judge rejected the appellant’s argument that the agency failed to prove these allegations because he did not ask ASAC Range to purchase any items for him as “nothing more than semantics” and found that, even accepting the appellant’s version of events as true, the appellant nevertheless responded affirmatively to ASAC Range’s queries and directed him to purchase the items on the appellant’s behalf. Initial Decision at 30. The administrative judge further found that the appellant had ASAC Range make these purchases to avoid Ms. Van Lancker’s scrutiny and that the appellant intentionally misled SA Huegerich about ASAC Range’s purchase of these items in an effort to deceive the agency regarding the extent of his efforts to evade Ms. Van Lancker’s supervisory controls. *Id.*

We believe that the appellant has mischaracterized the allegation at issue here. Contrary to the appellant’s contention, the agency did not allege that the appellant was not truthful or forthcoming during his October 7, 2010 interview when he denied that he ever “asked” ASAC Range to purchase anything for him besides a Kindle. Rather, the agency alleged that the appellant was not truthful or forthcoming during the interview when he denied “having” ASAC Range purchase anything for him besides the Kindle. IAF, Tab 4, Subtab 4q at 6. By responding affirmatively to ASAC Range’s queries and directing him to purchase the items on the appellant’s behalf, the appellant had ASAC Range purchase the items for him and was, therefore, not truthful or forthcoming when he denied doing so. With respect to the appellant’s argument that he had no reason to avoid

supervisory review of these purchases because he had the authority to purchase the items in question, as the administrative judge noted in the initial decision, the appellant testified that he believed Ms. Van Lancker was a micromanager who overly scrutinized his actions. *See* Initial Decision at 19. Given these circumstances, we see no reason to disturb the administrative judge's finding that the appellant intentionally misled SA Huegerich about ASAC Range's purchase of these items in an effort to deceive the agency regarding the extent of his efforts to evade Ms. Van Lancker's supervisory controls.

The appellant's denial that he tested trackers in 2009.

The appellant also challenges the administrative judge's finding that the agency proved the portion of specification two of the Misrepresentation charge alleging that the appellant was not truthful or forthcoming during his Internal Affairs interview when he denied testing the Government trackers when they were originally purchased and arrived in January 2009. PFR File, Tab 1 at 19-21; Initial Decision at 31. On review, the appellant again denies testing the trackers in January 2009 and asserts that, even if he did use the tracker in January of 2009, that does not mean that he lied when he denied having done so, as a "good faith lack of recollection is a plausible explanation" for his denial. PFR File, Tab 1 at 20. In addition, he contends that he had no reason to deceive the agency regarding whether he tested the trackers in January 2009. *Id.*

In the initial decision, the administrative judge noted that the appellant eventually admitted during the interview and at the hearing that, shortly after he received the trackers in January 2009, he tested a tracker when he drove his government owned vehicle to Camp Roberts. Initial Decision at 31. The administrative judge found that the appellant would have recalled this test given the frustration he experienced when he later attempted to review the tracking data on his computer. *Id.* The administrative judge found that the appellant intentionally denied having previously tested a tracker in order to deceive the agency about why he placed a tracker on his POV in July 2010. *Id.* The

appellant's arguments on review are thus essentially mere disagreement with the administrative judge's explained findings and, as such, provide no basis to disturb the initial decision.

The administrative judge's findings regarding nexus and penalty are correct.

The appellant does not offer any specific argument on review challenging the administrative judge's findings that there is a nexus between the charges and the efficiency of the service and that the removal is a reasonable penalty for the sustained misconduct. Based on our review of the record, we discern no reason to disturb these findings.

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.