

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

JULIA B. HUBER,
Appellant,

DOCKET NUMBER
DA-0752-11-0480-I-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: August 29, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

R. Chris Pittard, Esquire, San Antonio, Texas, for the appellant.

Heather A. Masten, Esquire, and Joel Andreason, Randolph Air Force Base, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In her petition for review, the appellant generally challenges the findings of fact. The initial decision, however, reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Under these circumstances, we see no reason for the Board to disturb her conclusions. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987); *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997) (the Board will give due deference to the credibility findings of the administrative judge and will not grant a petition for review based on a party's mere disagreement with those findings).

The appellant argues that the administrative judge ignored settled law regarding the agency's alleged violation of its own regulation for employee discipline. Petition for Review (PFR) File, Tab 1 at 5. Citing *Blow v. City of San Antonio*, [236 F.3d 293](#), 296 (5th Cir. 2001), she asserts that the administrative judge should have inferred retaliatory intent from the agency's alleged failure to follow the procedures set forth in Air Force Instruction (AFI) 36-704, Discipline and Adverse Actions. *Id.*; *see* AFI 36-704 (July 22, 1994) (located at Initial Appeal File (IAF), Tab 4, Subtab 4ap). The appellant suggests that the agency's "*intentional and deliberate departure* from stated disciplinary policies" itself justifies an inference that the agency retaliated against her. PFR File, Tab 1 at 5 (emphasis added). The *Blow* court instead stated that its inference of discrimination turned on "the falsity of the employer's *explanation*" for its departure from normal hiring policies. *Blow*, 236 F.3d at 297 (emphasis added). Moreover, whether to draw such an inference is discretionary. *See Reeves v. Sanderson Plumbing Products, Inc.*, [530 U.S. 133](#), 147-49 (2000).

Where the agency has articulated a non-discriminatory reason for its action, as it has here, inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal retaliation. *Marshall v. Department of Veterans Affairs*, [111 M.S.P.R. 5](#), ¶ 16 (2008); *see also Simien v. U.S. Postal Service*, [99 M.S.P.R. 237](#), ¶ 26 (2005). She has to show that the agency's stated reason was not the real reason for the action, and that the real reason was unlawful retaliation. *See St. Mary's Honor Center v. Hicks*, [509 U.S. 502](#), 515-16 (1993). The appellant, however, offered nothing more than her speculation that the agency failed to follow its stated procedures for employee discipline. She has not shown that the agency's stated reason for her removal, her proven misconduct, was not the real reason for her removal. Moreover, she identified no reason to challenge the administrative judge's finding that the proposing official, Sheryl Faust-Beck, testified credibly that her discrimination complaint had not been a factor in the removal decision. *See* IAF, Tab 18, Initial Decision at 28; *see Faucher v. Department of the Air Force*, [96 M.S.P.R. 203](#), ¶ 8 (2004) (the Board may overturn an administrative judge's demeanor-based credibility determinations when the judge's findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole). We thus find no merit in her argument.

The appellant opines that the administrative judge failed to adequately consider several issues in the penalty analysis. PFR File, Tab 1 at 4. The Board's function, however, is not to displace management's responsibility in the penalty selection, but instead to assure that managerial judgment has been properly exercised. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 301-02 (1981). Where, as here, the agency's charges are sustained, the Board will only review the penalty selection to determine whether it is so excessive as to be an abuse of discretion or is otherwise arbitrary, capricious, or unreasonable. *Id.* at 302. The Board will review an agency-imposed penalty to determine if the agency conscientiously considered all of the relevant mitigating factors and

exercised management discretion within the tolerable limits of reasonableness. *Id.* at 306.

As for whether the individual incidents were serious enough to warrant removal, the deciding official, Colonel David DeMartino, explained that the appellant's removal was based on a "body of work," or pattern of misconduct, over an extended period of time. Hearing Testimony (HT) (testimony of DeMartino). The written record likewise states that the penalty "would not be justified for a single instance of misconduct; however, it is consistent with the penalty for multiple instances of misconduct." IAF, Tab 4, Subtab 4c at 3. The first and most important *Douglas* Factor requires the deciding official to consider whether an offense has been frequently repeated. *Douglas*, 5 M.S.P.R. at 305; *see, e.g., Zayer v. Department of Veterans Affairs*, [90 M.S.P.R. 51](#), ¶ 9 (2001) (affirming removal of appellant for repeated instances of disrespectful conduct).

The first *Douglas* factor also requires that the agency consider the nature of the offenses. *Douglas*, 5 M.S.P.R. at 305. Colonel DeMartino explained that if an employee that commits "these kinds of offenses, especially Failure to Follow Instructions and Careless Workmanship," she "cannot be depended on." IAF, Tab 4, Subtab 4c at 2. Additionally, the appellant's failure to follow instructions was often deliberate. *See, e.g., id.*, Subtab 4n, 4aa, 4ad; HT (testimony of Huber, Faust-Beck). The Board has found that an employee's deliberate refusal to follow supervisory instructions is serious misconduct. *See Redfearn v. Department of Labor*, [58 M.S.P.R. 307](#), 316 (1993). The Board has likewise found that rude and discourteous behavior will warrant removal. *See Zayer*, [90 M.S.P.R. 51](#), ¶ 10; *Kirkland-Zuck v. Department of Housing & Urban Development*, [90 M.S.P.R. 12](#), ¶¶ 19, 21 (2001) (affirming removal for several incidents of disrespectful conduct toward supervisors, coworkers, and non-agency personnel), *aff'd*, 48 F. App'x 749 (Fed. Cir. 2002).

As for whether all the incidents taken together warranted removal, the agency considered that the appellant's misconduct "continued frequently over a

sustained period of time . . . [and] there was no significant break in the misconduct.” IAF, Tab 4, Subtab 4c at 4. Colonel DeMartino explained, “I asked myself ‘how many times can an employee ignore a supervisor or be discourteous before expecting to be fired?’” *Id.* Colonel DeMartino testified that the penalty was consistent with other agency-imposed penalties for cases involving multiple charges or repeated offenses. HT (testimony of DeMartino); *see also* IAF, Tab 4, Subtab 4c at 3.

As for whether the agency improperly declined to apply the progressive discipline policies set forth in AFI 36-704, that document gives managers considerable flexibility. Managers are to “[a]void mechanical use” of the Guide to Disciplinary Actions, because “[t]he guide is an expression of typical causes and typical penalties only . . . [and] causes of action and penalties in the guide may not meet the demands of all situations.” AFI 36-704 § 33; *see also Taylor v. Department of Veterans Affairs*, [112 M.S.P.R. 423](#), ¶ 10 (2009) (if the table of penalties does not state that it is mandatory, it is merely a guide). Progressive discipline is but one element of “constructive discipline.” AFI 36-704 ¶ 34. The AFI 36-704 “doesn’t establish mandatory procedures” for constructive discipline, and instead “gives general guidance to supervisors and managers.” *Id.* ¶ 7. Even in applying a progressive discipline, supervisors “need not include suspensions in a progression if the preceding reprimands clearly show that removal could result from repetitive improper behavior.” *Id.* ¶ 34; *see also Roberson v. Veterans Administration*, [27 M.S.P.R. 489](#), 493 (1985) (an agency’s use of warnings and counseling sessions rather than formal disciplinary action does not preclude the agency from removing an employee when it becomes clear that his performance will not improve).

Finally, even if the agency did not formally counsel the appellant in writing for individual incidents, Faust-Beck testified that she repeatedly addressed matters related to conduct with the appellant. HT (testimony of Faust-Beck); *see also* IAF, Tab 4, Subtabs 4n, 4r, 4y, 4aa, 4ad. The appellant herself admitted that

Faust-Beck spoke with her regarding her conduct. HT (testimony of Huber). We thus find the appellant's arguments regarding the penalty determination to be without merit.

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 AFFIRM the initial 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.