

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

TRONG Q. NGUYEN,  
Appellant,

DOCKET NUMBER  
SF-0752-11-0502-I-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: August 31, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

David S. Handsher, Esquire, San Francisco, California, for the appellant.

J. Douglas Whitaker, Esquire, Omaha, Nebraska, 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 that was not available for consideration earlier or when the administrative judge

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 argues, as he did below, that the Board's decisions in *Conyers v. Department of Defense*, [115 M.S.P.R. 572](#), ¶ 32 (2010), and *Northover v. Department of Defense*, [115 M.S.P.R. 451](#), ¶ 30 (2010),<sup>2</sup> support a finding that the agency denied him a meaningful opportunity to reply to the merits of the charge, specifically, the reasons why the United States Attorney's Office (USAO) believed that his credibility prevented him from being used as a witness. The administrative judge properly distinguished *Conyers* and *Northover* because the issue in those cases was the scope of the Board's review of an agency's own determination regarding an employee's eligibility for a noncritical sensitive position. In this case, however, the determination that the appellant is precluded from testifying in criminal prosecutions, a requirement of his position, was made not by his employing agency but by the USAO, a component of the Department of Justice (DOJ), a separate agency not a party to this matter.

Albeit in a compliance setting, the Board has stated that it lacks authority, as does the Department of Homeland Security (DHS), over the USAO, that it cannot address the limitations that a component of DOJ has placed on an employee, and that DHS must adhere to those limitations as well. *Doe v. Department of Justice*, [95 M.S.P.R. 198](#), ¶ 16 (2003).<sup>3</sup> The appellant urges that, unlike him, the appellant in *Doe* retained his grade and that there was no deprivation of his property interests, and that therefore *Doe* is inapplicable to this situation. The appellant has not shown, however, how that factor detracts from

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<sup>2</sup> These decisions were reversed by the Court of Appeals for the Federal Circuit on August 17, 2012. *Berry v. Conyers*, No. 2011-3207, 2012 WL 3542237 (Fed. Cir. Aug. 17, 2012).

<sup>3</sup> Contrary to the appellant's claim, the administrative judge properly cited this case. The Board exercised its discretion in 2004 to so change the case caption.

the Board's statement regarding its, and DHS's, authority over determinations of the USAO. As the administrative judge correctly found, neither *Conyers* nor *Northover* overruled *Doe*, and it remains good law. Initial Appeal File, Tab 36, Initial Decision (ID) at 23. Similarly, the appellant's reliance on *Lamour v. Department of Justice*, [106 M.S.P.R. 366](#) (2007), and *Siegert v. Department of the Army*, [38 M.S.P.R. 684](#) (1988), is misplaced in that those cases also involve decisions made by the agency which is a party to the appeal. In sum, the administrative judge properly found that the agency provided the appellant with notice and an opportunity to respond to the charge against him, and did not deny him the essential requirements of due process by not allowing him to contest the USAO's determination. ID at 9, 22-25; cf. *McGean v. National Labor Relations Board*, [15 M.S.P.R. 49](#), 53 (1983) (even if the District of Columbia Court of Appeals acted on an unverified complaint in suspending attorney, an attorney advisor with the agency, such error did not subject the court's decision to collateral attack, and accordingly the Board was without authority to review the merits of the court's determination in deciding whether agency properly removed employee from his position).

Nor has the appellant shown that the administrative judge erred in finding that he was not subjected to double punishment. The administrative judge correctly found that the appellant was suspended for 14 days in 2008 based on specific acts of misconduct but demoted based on the USAO's 2010 determination that he was unable to testify in criminal proceedings. ID at 28. The cases cited by the appellant in support of his claim of double punishment are all instances where the agency imposed a second disciplinary action, at least in part, on the same misconduct that formed the basis for an earlier disciplinary action. See, e.g., *Gartner v. Department of the Army*, [104 M.S.P.R. 463](#) (2007) (leave-related infractions covered some of the same dates); *Westbrook v. Department of the Air Force*, [77 M.S.P.R. 149](#) (1997) (two charges and their underlying facts were the basis for two separate actions). Here, however, the

basis for this demotion, the OASU's determination, had not occurred in 2008 and so could not have supported the earlier action. Thus, we discern no error in the administrative judge's finding that the appellant was not subjected to double punishment. *See Harrison v. U.S. Postal Service*, [26 M.S.P.R. 37](#), 39 (1985) (removal not barred by prior suspension that was effected on different basis).

The appellant has requested oral argument before the Board on the basis that "a decision in this case" will clarify issues presented that the Board has not specifically addressed concerning a broad range of employees government-wide, specifically those who are *Giglio*-impaired<sup>4</sup>; that the issues are of constitutional significance as to the standards and procedures to be applied when an outside authority addresses factors that may impinge on those employees' property interests; and that the issues include a more specific definition of what constitutes double punishment. Petition for Review File, Tab 2 at 6. The appellant has not explained, however, or even suggested, how oral argument would assist the Board in deciding his case. *See Social Security Administration v. Carr*, [78 M.S.P.R. 313](#), 320 (1998), *aff'd*, [185 F.3d 1318](#) (Fed. Cir. 1999). Therefore, we DENY the appellant's request.

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.

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<sup>4</sup> The effect of the USAO's letter was that the appellant was "*Giglio*-impaired." *Giglio v. United States*, [405 U.S. 150](#) (1972) (the testimony of a federal law enforcement officer can be impeached based upon a showing that he possesses poor character for truthfulness, and the government must disclose in any criminal prosecution those officers whose sworn testimony may lack credibility).

**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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.