

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

BRIAN MICHAEL KANE,
Appellant,

DOCKET NUMBER
NY-0752-10-0213-I-2

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: November 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Brian Michael Kane, Rockaway Park, New York, pro se.

Maureen O'Sullivan Briody, Esquire, New York, New York, 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, which affirmed the appellant's demotion. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

DISCUSSION OF ARGUMENTS ON REVIEW

The agency demoted the appellant from an EAS-20 Manager of Customer Services position to an EAS-17 Supervisor, Customer Services position in the agency's Rockaway Park Station in Rockaway, New York, effective January 2, 2010. Initial Appeal File (IAF) I-1,³ Tab 9 at 106, 108. The agency based the action on the sustained charge of Conduct Unbecoming a Postal Manager. *Id.* at 108.

The administrative judge affirmed the agency action and found that the appellant failed to establish his affirmative defense of disability discrimination. Initial Decision (ID) at 14-25. The appellant filed a timely petition for review of

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

³ "IAF I-1" refers to the initial appeal file. "IAF I-2" refers to the appellant's refiled appeal file.

the initial decision. Petition for Review (PFR) File, Tab 1. He argues that the administrative judge erred in denying him discovery and asserts that his inability to conduct discovery resulted in his inability to establish his disability discrimination defense. *Id.* at 4-5. Specifically, the appellant asserts that his untimeliness in initiating discovery was the result of his then attorney's incompetence, and thus the time limit should be waived. *Id.* The appellant also argues that the agency's imposed penalty was too harsh and that the administrative judge erroneously found that the appellant did not establish his disability discrimination affirmative defense. *Id.* at 6-13. The agency did not file a response in opposition to the petition for review.

An administrative judge has broad discretion in ruling on discovery matters, and the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion. *McEnery v. Merit Systems Protection Board*, [963 F.2d 1512](#), 1514 (Fed. Cir. 1992); *Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table); [5 C.F.R. § 1201.41](#). The administrative judge here did not abuse his discretion. The appellant does not dispute that the administrative judge ordered that a party wishing to engage in discovery needed to initiate discovery no later than 25 days after the issuance of the acknowledgment order issued June 7, 2010. IAF I-1, Tab 2. Thus, a party seeking discovery was required to do so no later than July 2, 2010. The only excuse the appellant has offered for his untimely discovery request is that his selected representative at the time his initial discovery was due was incompetent. IAF I-2, Tab 5; PFR File, Tab 1 at 4. The Board has long held that an appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

An appellant, however, is not bound by his attorney's actions when he has proven that his diligent efforts to prosecute an appeal were thwarted, without his knowledge, by his attorney's deceptions and negligence. *Dunbar v. Department*

of the Navy, [43 M.S.P.R. 640](#), 643-45 (1990). That was not the case here. Here, the appellant requested an extension of time to respond to the order regarding his affirmative defenses, which was granted, but did not seek an extension with respect to discovery. IAF I-1, Tabs 11, 12. Further, the administrative judge clearly notified the appellant of the time limits for initiating and completing discovery. IAF I-1, Tab 2 at 2-3, Tab 15. Indeed, the administrative judge ordered that discovery be completed while the case was suspended. *Id.*, Tab 15. The suspension ended on August 12, 2010, and yet the appellant did not initiate discovery until September 6, 2010. *Id.*, Tab 19 at 4. Based on the foregoing, we do not believe the administrative judge abused his discretion in denying the appellant's motion to compel discovery.⁴

The administrative judge found that the appellant suffered from a disability but failed to demonstrate that the agency engaged in discrimination. ID at 24. The administrative judge correctly found, and the appellant does not contest, that the appellant did not object or claim that his return to his previous worksite violated his medical restrictions at the time of his assignment. ID at 24. The appellant nevertheless complains that the agency failed to properly accommodate his condition because it returned him to his former duty station without considering placement in other locations. PFR File, Tab 1 at 5. An after-the-fact assertion that the agency failed to provide an accommodation that an appellant did not request prior to the misconduct is not a basis for finding disability

⁴ Notwithstanding the administrative judge's denial of the appellant's motion to compel, the record contains a significant amount of information from both parties on the appellant's disability discrimination claim, including testimonial evidence from several witnesses who specifically addressed the disability discrimination issue at the 2-day hearing. IAF I-1, Tab 9 at 102-04, 112, 145-48, 150-54, 163, 165, 190, 192-96; Tab 22, Subtabs B-D, I-N, R-T, X; Hearing CD. The administrative judge also allowed the parties to provide written closing arguments after the hearing. The appellant used this opportunity to once again summarize his arguments, including those regarding disability discrimination. IAF I-2, Tab 22.

discrimination. *Clawson-Cano v. Department of Agriculture*, EEOC Appeal No. 0120121727, 2012 WL 3614534, at *5 (E.E.O.C. Aug. 17, 2012) (reasonable accommodation requests are prospective in nature and do not form a basis for excusing past behavior even if the alleged disability caused the misconduct). The administrative judge here found that the appellant was not a qualified individual because the agency could not have accommodated the appellant's off-duty misconduct. ID at 24-25; see *Fitzgerald v. Department of Defense*, [85 M.S.P.R. 463](#), 469 (2000) (an agency is never required to excuse a disabled employee's misconduct even if the appellant's disability causes the misconduct). The appellant also has not shown that he requested an accommodation different than the one he received, and, therefore, even if he were a qualified individual with a disability, the agency met its obligation. See *Clawson-Cano*, EEOC Appeal No. 0120121727, 2012 WL 3614534, at *5. Accordingly, we agree with the administrative judge that the appellant failed to meet his burden of establishing his affirmative defense of disability discrimination.

We have also considered the appellant's assertion that the agency exceeded the bounds of reasonableness in its imposed penalty under the circumstances. The appellant argues on review that the Board should mitigate the penalty on the basis that the administrative judge and the deciding official failed to adequately weigh the *Douglas* factors. PFR File, Tab 1 at 8-12; see *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305 (1981). Specifically, the appellant asserts that the deciding official did not properly consider his potential for rehabilitation, mitigating circumstances including his medical condition, and the alleged disparate treatment of a comparator employee. *Id.*

If, as here, the agency's charge is sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. See *Scheffler v. Department of the Army*, [117 M.S.P.R. 499](#), ¶ 14 (2012). The Board must give due weight to the agency's primary discretion

in maintaining employee discipline and efficiency. *Id.* The Board will mitigate a penalty only if the Board finds that the agency did not weigh the relevant factors or that the penalty clearly exceeds the bounds of reasonableness. *Id.* The deciding official in this case explained his consideration of the *Douglas* factors in his decision letter as well as at the hearing. *See* IAF I-1, Tab 9, Subtab 4j at 107; Hearing CD, Aug. 22, 2012.

The administrative judge thoroughly analyzed the appellant's claim of disparate treatment and found that the proffered comparator's misconduct was not similar insofar as the appellant's was much more egregious. ID at 28. The administrative judge further found that, while there was some media attention regarding the comparator's misconduct, unlike the appellant, she was not publicly identified as a postal employee. *Id.* The administrative judge also noted that the deciding official considered medical evidence and whether the appellant had potential for rehabilitation and found that neither factor provided a basis for mitigation. *Id.* at 27; *see also* IAF I-1, Tab 9 at 108; Hearing CD, Aug. 22, 2011.

The Board will not disturb an administrative judge's conclusions if an appellant's petition for review fails to identify any internal inconsistency or inherent improbability in the administrative judge's fact findings or other basis sufficient to overcome the special deference which reviewing bodies must necessarily accord the factual determinations of the original trier of fact, and where the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987). Despite the appellant's assertions on petition for review, he has not provided any specific facts or evidence to demonstrate how the administrative judge erred in sustaining the penalty. Consequently, we agree with the administrative judge's finding that the deciding official's exercise of discretion appears reasonable under the circumstances, given the seriousness of the sustained misconduct and the high standard of conduct expected from

supervisory personnel. *See Edwards v. U.S. Postal Service*, [116 M.S.P.R. 173](#), ¶ 14 (2010).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

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.