

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

MARION J. BRISON,  
Appellant,

DOCKET NUMBER  
CH-0752-10-0869-I-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: December 3, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Kenneth J. Heisele, Esquire, Dayton, Ohio, for the appellant.

Demetrious A. Harris, Esquire, Dayton, Ohio, 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

---

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

findings of material fact; the initial 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](#)).<sup>2</sup> 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The appellant filed a petition for review of an initial decision that sustained a charge (and two specifications) of inappropriate conduct toward a patient, did not sustain a charge of providing inaccurate statements under oath, and affirmed her removal. On petition for review, the appellant states that she “just acquired” two new documents from the agency that tend to discredit the inappropriate conduct charge. She also complains that the administrative judge failed to consider or reference certain evidence in the initial decision and the agency and the administrative judge improperly evaluated the relevant penalty factors described in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#) (1981).

The appellant explains on review that, in October 2011, after the initial decision was issued, the agency informed her that she had been “identified as a participant in the episode of care of a patient . . . that led to a tort claim,” and she

---

<sup>2</sup> 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.

later learned that the tort claim was filed in April 2011 and the agency settled this claim for “a mere \$8,000.” Petition for Review (PFR) File, Tab 1 at 3; *see id.* at 13-14 (agency letter and information about settlement). The appellant claims that the agency waited 6 months after the claim was filed before notifying her, she argues that there are relevant documents that could have been requested in discovery in this matter, and she surmises from the low settlement value (as compared to the \$500,000,000.00 apparently sought by the patient in question, Mr. C) that the agency “found no patient abuse or wrongdoing” by the appellant. *Id.* at 3.

Even if this documentation constitutes “new” evidence, it does not change the outcome on review. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345, 349](#) (1980). Importantly, the appellant’s assertion regarding the agency’s perception of the strength of its own case, which she claims is reflected in the low settlement value, is speculative. Moreover, the appellant could have sought information from the agency during discovery as to whether the agency was aware of any other litigation involving the appellant, Mr. C, and/or the incident that gave rise to the first charge, but she did not do so. For these reasons, we do not believe that such evidence warrants a different conclusion regarding the inappropriate conduct charge and two specifications described therein.

The appellant also contends that the administrative judge failed to consider or reference certain evidence, including, among other things, that: Mr. C was combative and his mental state calls his credibility into question; witness S.H.’s explanation for why she originally “misjudged” the incident in question; the appellant – due to her advanced age and short stature – was physically unable to harm Mr. C without harming herself; and the appellant was not sarcastic to Mr. C. PFR File, Tab 1 at 3-9.

The appellant’s arguments do not warrant reversal of the initial decision. Importantly, the administrative judge noted in the initial decision the appellant’s position that Mr. C was “combative” and “confused” and that she was “physically

incapable” of abusing Mr. C in the manner described in the charge and specifications, and he acknowledged that witness S.H. said that she “misjudged” the incident between the appellant and Mr. C. *See* Initial Appeal File, Tab 27 at 4. Contrary to the appellant’s contention, the administrative judge did not ignore such evidence. Moreover, an administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). 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, *see Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987), and we discern no error with the administrative judge’s decision to sustain the two specifications and the charge of inappropriate conduct towards a patient.

With respect to the penalty, we agree with the appellant’s contention that the deciding official appears to have improperly considered the appellant’s length of service as an aggravating factor, instead of a mitigating factor. PFR File, Tab 1 at 10; Hearing Transcript at 8 (Richardson) (explaining that he did not consider the appellant’s years of service to be a mitigating factor because “she should be fully informed and aware of [the agency’s] policies and expectations for providing care to veterans”); *see Shelly v. Department of the Treasury*, [75 M.S.P.R. 677](#), 684 (1997) (“Under [the agency’s] approach, the longer someone works, the more likely it is that a single misstep will be fatal to his or her career. We do not endorse this approach . . . .”). The appellant raised this issue in her closing argument, and the administrative judge did not discuss it in the initial decision. Therefore, we modify the initial decision in this regard. Having considered the appellant’s length of service as a mitigating factor, we have reviewed the appellant’s arguments regarding the agency’s and the administrative judge’s allegedly improper evaluation of the remaining *Douglas* factors, and,

given the serious nature of the sustained charge, we discern no error with the administrative judge's conclusion that the removal penalty was reasonable.

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

The initial decision, as supplemented by this Final Order, constitutes 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:

-----  
William D. Spencer  
Clerk of the Board

Washington, D.C.