

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

HORACE O. BRENT, SR.
Appellant,

DOCKET NUMBER
CH-0752-10-0944-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: December 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Steven J. Plotkin, Esquire, Evanston, Illinois, for the appellant.

Heather L. McDermott, Esquire, Chicago, Illinois, 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 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The appellant asserts that the agency could not remove him for absence without leave (AWOL) because he was receiving compensation benefits in the form of an April 21, 2010 schedule award from the Office of Workers' Compensation Programs (OWCP) during the time of the charged absences. The appellant claims that the definition of benefits or compensation includes money paid from the Employees' Compensation Fund for, among other things, lost wages, a loss of wage-earning capacity, or a permanent physical impairment.

An adverse action based on a charge of AWOL generally cannot be sustained if OWCP determines that an employee is entitled to "compensation benefits" as a result of a work-related injury for the entire period of the charged AWOL. *Bair v. Department of Defense*, [117 M.S.P.R. 374](#), ¶ 11 (2012). Nevertheless, an agency need not carry an employee receiving workers' compensation benefits on its employment rolls indefinitely. *Id.*, ¶ 12. Under [5 U.S.C. § 8151](#)(b)(1), a compensably injured employee who fully recovers

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.

within 1 year after the date of commencement of compensation has an unconditional right to return to his former or equivalent position. *Id.* Terminating such an employee based on leave use during this 1-year period would be inappropriate insofar as it would effectively deprive the individual of this statutory right to job restoration. *Id.* However, Congress did not provide this job security to compensably injured employees who do not fully recover within the statutory 1-year time frame. *Id.*, ¶ 13. Consequently, an action to remove a compensably injured employee after expiration of the statutory 1-year period does not run afoul of the unconditional right to restoration under the statute. *Id.*

The record reflects that from December 11, 2004, until April 22, 2005, the appellant received disability wage-loss compensation for the same December 9, 2004 injury on which his later schedule award was based. Initial Appeal File (IAF), Tab 17, Exhibits A-4 – A-7, A-13 – A-15, and C. The record, thus, shows that the statutory 1-year period began on December 11, 2004. Because the 1-year period of time during which the appellant would have been entitled to return to his position under [5 U.S.C. § 8151\(b\)\(1\)](#) had expired long before the August 14, 2010 effective date of the appellant's removal, the agency's action was not inconsistent with his statutory right to restoration and is not nullified on that basis. In any event, to the extent that the charging document may be construed as basing disciplinary action on a failure to follow leave procedures, the agency was authorized to bring such charges. *See Bair*, [117 M.S.P.R. 374](#), ¶ 11.

The appellant further asserts that the charge should not have been sustained because the administrative judge found that the agency did not prove all of the charged absences, and that his due process rights were violated because he was therefore “convicted” of something different from the charge in the proposal notice. However, when more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, [918 F.2d 170](#), 172 (Fed. Cir. 1990). The appellant's apparent claim that his due process

rights were violated because the administrative judge did not sustain all of the charged absences is unavailing. Such an allegation does not demonstrate that the agency denied the appellant prior notice and an opportunity to respond to the charges upon which the action was ultimately based. *See Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985).

The appellant further claims that the testimony of the agency's witnesses was inconsistent as to whether he called in to request leave under the Family and Medical Leave Act of 1993 (FMLA), whether the witnesses received medical documentation from him, and whether they examined certain files before characterizing his leave as unscheduled and proposing his removal. He contends that these inconsistencies were a subtext for retaliation for a prior successful Board appeal in 2005, given that the proposing officials were aware of the prior appeal. However, the appellant has not shown error in the administrative judge's finding that the agency proved its AWOL charge because the appellant was absent from the workplace on many of the charged dates without approved leave or requesting leave without pay, regardless of whether he called in to request FMLA leave, for which he was not eligible. Moreover, the administrative judge found that, to the extent that credibility findings were required to analyze the AWOL charge, the agency's witnesses were credible based on their demeanor, testifying clearly and thoughtfully, the consistency of their testimony with the record evidence, and their lack of bias. The appellant has not provided sufficiently sound reasons for overturning the administrative judge's findings. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002). Further, the administrative judge recognized that the deciding official knew of the appellant's 2005 Board appeal but found that the timing of the 2010 removal did not point to a retaliatory motive and there was no other evidence of such a motive. The appellant has shown no error in these findings.

Finally, the appellant contends that he filed his application for disability retirement in July 2010, after the agency proposed his removal in June 2010 but

before his August 2010 removal, and that, after the issuance of the initial decision, the Office of Personnel Management (OPM) found that he was eligible for disability retirement. The appellant submits OPM's June 7, 2011 decision granting him disability retirement benefits and contends that this is new and material evidence. We have considered this evidence but find that it does not indicate the effective date of OPM's determination, including whether it is retroactive to the period of the charged AWOL.

Even assuming that OPM's determination covers the period of the appellant's absences charged to AWOL, this would not necessarily excuse the AWOL charge, let alone show that the agency had an obligation to grant him some type of leave to cover those absences. An agency may prove an AWOL charge by showing that the employee was absent and that his absence was not authorized, or that his request for leave was properly denied. *See, e.g., Little v. Department of Transportation*, [112 M.S.P.R. 224](#), ¶ 6 (2009). The administrative judge found the AWOL charge proven because the appellant was absent on the days in question, did not have available sick or annual leave, was not eligible for leave under the FMLA, and did not request leave without pay. IAF, Tab 30 at 4-8; *see White v. Department of Housing & Urban Development*, [95 M.S.P.R. 299](#), ¶ 16 (2003) (an agency's obligation to grant a leave request when the employee has presented acceptable evidence of incapacitation applies when the employee has sufficient leave to cover the period in question). The appellant has not challenged these findings on review.

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.