UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MAURICE TROOP,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DA-0752-11-0572-I-1

DATE: December 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

William C. Abney, Jr., Esquire, Oklahoma City, Oklahoma, for the appellant.

Joan M. Green, Esquire, Oklahoma City, Oklahoma, 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

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).[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

On review, the appellant contests the credibility findings the administrative judge made when sustaining the first eight specifications, the tenth specification, and the twelfth specification the agency listed in support of its charge of inappropriate conduct. Petition for Review (PFR) File, Tab 1 at 7. Further, the appellant argues that the administrative judge failed to adequately support and explain her findings regarding the second specification the agency listed in support of its charge of providing inaccurate information. *Id*. at 8. The appellant also argues that the administrative judge failed to adequately support and explain her penalty determination. *Id*. For the following reasons, the appellant's

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[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.

arguments do not provide a basis for overturning the administrative judge's initial decision.

Under the first eight specifications and the tenth specification the agency listed in support of its charge of inappropriate conduct, the agency alleged that the appellant made various derogatory comments.[3] Initial Appeal File (IAF), Tab 7, Subtab g at 1-3. Additionally, under the twelfth specification the agency listed in support of its charge of inappropriate conduct, the agency alleged that, on several occasions during meetings, the appellant discussed a "let it break" policy. *Id*. at 3. Under this policy, the appellant informed his supervisors that, in order to receive the additional positions he had requested, he would instruct his subordinates to not carry out certain tasks within the hospital. *Id*.

On review, the appellant asserts that the administrative judge erred in finding credible the testimony of agency witnesses who had testified regarding the derogatory statements that the appellant had allegedly made. PFR File, Tab 1 at 7; IAF, Tab 16, Initial Decision (ID) at 4-15. In addition, the appellant contests the administrative judge's finding that the appellant's testimony regarding the "let it break" policy was less credible than the testimony of agency witnesses on this issue. PFR File, Tab 1 at 7; ID at 16-21.

The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Here, the administrative judge properly considered inconsistencies between the appellant's testimony and other testimony and record evidence when making credibility

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[3] While the agency also alleged that the appellant made derogatory comments under the ninth specification listed in support of this charge, the administrative judge did not sustain this specification. Initial Appeal File (IAF), Tab 7, Subtab g at 2, Tab 16, Initial Decision (ID) at 14.

findings regarding the issue of whether the appellant had made the derogatory statements listed under the agency's charge of inappropriate conduct. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987); ID at 4-15. Further, while the administrative judge did not make specific credibility findings when determining that the agency had established that the appellant had a "let it break" policy, the administrative judge thoroughly reviewed the evidence and the hearing testimony regarding this issue, and the appellant has not provided a reason to disturb the administrative judge's well-reasoned finding. ID at 16-21; *see Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

In the second specification the agency listed in support of its charge of providing inaccurate information, the agency alleged that the appellant provided inaccurate information on his OF-306, Declaration for Federal Employment. IAF, Tab 7, Subtab 4g at 4. Contrary to the appellant's assertion, the administration judge thoroughly explained her findings and her decision to sustain the specification. PFR File, Tab 1 at 8; ID at 26-27. The appellant's mere disagreement with the administrative judge's well-reasoned findings regarding this specification does not provide a basis to disturb the initial decision. *See Crosby*, 74 M.S.P.R. at 106; *Broughton*, 33 M.S.P.R. at 359. Further, the appellant has not otherwise provided a reason for disturbing the administrative judge's decision to sustain the agency's charges.

In addition, the administrative judge properly found that the penalty of removal was reasonable. Where, as here, the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is in the parameters of reasonableness. *Viens v. Department of the*

Interior, 92 M.S.P.R. 256, ¶ 16 (2002). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that management judgment has been properly exercised. *Id*. Thus, the Board will disturb the agency's chosen penalty only if it finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness. *Id*.

In evaluating the penalty, the Board will consider, first and foremost, the seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. *Id*., ¶ 17. Here, the administrative judge correctly found that, given the seriousness of the appellant's misconduct and the fact that he was a supervisor, the deciding official's decision to remove the appellant could not be deemed unreasonable. ID at 31; *see Cisneros v. Department of Defense*, 83 M.S.P.R. 390, ¶ 19 (1999), *aff'd*, 243 F.3d 562 (Fed. Cir. 2000) (Table) (an agency is entitled to hold a supervisory employee to a higher standard of conduct than other employees). Further, the administrative judge properly found that the deciding official gave adequate consideration to the relevant *Douglas* factors in making his penalty determination. *Id*. at 31-32. As noted by the administrative judge, the agency submitted a written list of the *Douglas* factors that the deciding official considered prior to removing the appellant. ID at 30; IAF, Tab 7, Subtab 4e. In addition, during the hearing, the deciding official testified regarding the *Douglas* factors he considered prior to making his penalty determination. IAF, Tab 14, Hearing CD, Testimony of David Wood. These included the nature and seriousness of the appellant's misconduct and the appellant's position as a supervisor. *Id*. Thus, the appellant's arguments that the agency misapplied the *Douglas* factors and that the administrative judge failed to support her penalty determination lack merit. PFR File, Tab 1 at 8.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.