

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

TINA JEANNINE OLIVER,
Appellant,

DOCKET NUMBER
SF-0752-11-0651-I-2

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: December 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Tina Jeannine Oliver, Vancouver, Washington, pro se.

Kenneth Piumarta, Esquire, Portland, Oregon, 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The appellant submits hundreds of pages of documents with her petition for review, alleging that she was unable to submit them on appeal below because her former attorney advised her that the evidence was “unnecessary” and because her attorney withdrew from the case, leaving her unprepared to prove her affirmative defenses. Petition for Review (PFR) File, Tab 1; *see id.* at 11-17. She also alleges that her attorney misinformed her regarding the viability of her whistleblowing claim. *Id.* at 16. However, these arguments are without merit. The Board has held appellants responsible for the errors of their chosen representatives. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981). Further, at no time on appeal below did the appellant inform the administrative judge that she needed additional time to prepare for the hearing and to submit evidence. *See* Hearing Compact Disc (HCD). Because the appellant failed to show that this evidence was unavailable prior to the close of the record on appeal below, despite her due diligence, the Board need not consider it on review. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); [5 C.F.R. § 1201.115\(d\)](#).

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.

The appellant alleges, inter alia,³ that she was denied the opportunity to call rebuttal witnesses and to cross-examine an agency witness who the agency withdrew as a witness at the hearing. PFR File, Tab 1 at 8-11. However, the appellant did not name any rebuttal witnesses prior to the hearing and did not object to the agency's decision to withdraw its witness at the hearing. *See* MSPB Docket No. SF-0752-11-0651-I-2, Initial Appeal File, Tab 5; HCD.

On review, the appellant asserts that the charge of preparing food contrary to a patient's diet orders is without merit because the administrative judge did not sustain the charge of misrepresentation of a nurse's approval. PFR File, Tab 1 at 21. However, absent a finding that the appellant obtained nurse approval to change the patient's diet orders to permit raw vegetables, the administrative judge's finding that the agency failed to prove that the appellant misrepresented a nurse's approval regarding changes to the patient's diet orders has no bearing on whether the agency proved that the appellant prepared food contrary to the patient's diet orders.

The appellant challenges the administrative judge's decision to credit the testimony of agency witnesses that raw vegetables may not be served to mechanical diet patients under the Diet Manual. PFR File, Tab 1 at 18-19. However, she fails to provide a sufficiently sound reason for overturning the

³ Although the appellant alleges that the administrative judge ignored her concerns regarding the authenticity of documents submitted by the agency, nothing in the hearing record reflects that she raised this argument at the hearing. *See* PFR File, Tab 1 at 8; HCD. To the extent that the administrative judge mistakenly attributed a nurse's recollections regarding the items on the patient's tray to a clinical supervisor, the alleged error does not prejudice the appellant's substantive rights. *See* PFR File, Tab 1 at 18; Initial Decision (ID) at 5; MSPB Docket No. SF-0752-11-0651-I-1, Initial Appeal File (IAF), Tab 6 at 23; *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). Further, whether the operations manager correctly stated that the patient had a calorie count tray is immaterial to whether the appellant prepared raw vegetables for a mechanical diet patient. *See* PFR File, Tab 1 at 18-19.

administrative judge's demeanor based credibility determinations. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (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). The Board will not overturn an administrative judge's findings of fact and credibility determinations absent persuasive evidence of error, which is not present here. *See Madison v. Defense Logistics Agency*, [48 M.S.P.R. 234](#), 238 (1991).

On review, the appellant alleges that "not being provided with additional notice regarding the Douglas factors in her case caused an [sic] harmful effect on the outcome of the appellants' case. Given the opportunity to respond the appellant would have then been able to provide documents and/or evidence that proved the conclusions of [the deciding official] unsubstantiated." PFR File, Tab 1 at 22-23. However, she fails to show any error in the administrative judge's finding that the ex parte communications, i.e., the deciding official's worksheet analyzing the relevant factors under *Douglas v. Veterans Affairs*, [5 M.S.P.R. 280](#), 305-306 (1981), and/or the deciding official's communications with the "nursing chain of command" regarding whether the appellant obtained nurse approval to change the diet orders of the patient at issue, were not so substantial and likely to cause prejudice as to rise to the level of a due process violation.⁴ *See* ID at 22-25; *Ward v. U.S. Postal Service*, [634 F.3d 1274](#), 1279-80 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#), 1376-77 (Fed. Cir. 1999); *Gray v. Department of Defense*, [116 M.S.P.R. 461](#), ¶¶ 5-7 (2011). We discern no reason to disturb the administrative judge's explained findings that the factors identified by the deciding official in his *Douglas* factors worksheet relate

⁴ The appellant does not invoke the term "due process" in describing her claims on review; however, because the initial decision characterized her claims as such, we have considered whether there was a due process violation.

to the charged misconduct and to the prior discipline mentioned in the proposal notice, not factors based upon new evidence or information that was not provided to the appellant, and that the deciding official's communications with the "nursing chain of command" are cumulative of the nurse's written statement that the appellant did not obtain approval to change the patient's diet orders. *See* ID at 22, 25. Furthermore, to the extent that the appellant challenges the administrative judge's finding that the agency's decision to remove her would not have been different had it provided her with a copy of the *Douglas* factors worksheet upon which the deciding official relied in imposing an enhanced penalty and/or given her an opportunity to respond to the oral statements made by the "nursing chain of command" to the deciding official, her assertions on review show no error in the administrative judge's harmful procedural error analysis. *See* ID at 25-26; *Thomas v. U.S. Postal Service*, [116 M.S.P.R. 453](#), ¶ 11 (2011) (citing *Ward*, 634 F.3d at 1281).

In assessing the reasonableness of the penalty, the administrative judge deferred to the agency's penalty determination, relying on Board cases in which all of the agency's charges were sustained. *See* ID at 26-27. However, the administrative judge did not sustain the charge of misrepresentation of nurse approval. ID at 8. Where the agency proves fewer than all of its charges and the agency does not indicate that it desires a lesser penalty to be imposed on fewer charges, the Board may mitigate to the maximum reasonable penalty if a careful balancing of the mitigating factors warrants, or the Board may impose the same penalty imposed by the agency based on justification of that penalty as the maximum reasonable penalty after balancing those factors. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999); *Parker v. U.S. Postal Service*, [111 M.S.P.R. 510](#), ¶ 6, *aff'd*, 355 F. App'x 410 (Fed. Cir. 2009).

Here, the agency has not indicated that it desires that a lesser penalty be imposed on fewer charges. Although the administrative judge cited the wrong standard for reviewing an agency imposed penalty, we agree with her findings

that the deciding official balanced the *Douglas* factors and that the penalty of removal is reasonable based on the sustained charges. ID at 28-29. The deciding official testified that he placed great emphasis on the seriousness of the offense of preparing food contrary to a patient's diet orders, the fact that the appellant previously was suspended for 14 days for similar misconduct,⁵ but that the suspension failed "to get her attention," and the fact that the appellant occupied a supervisory position, and therefore is held to a higher standard of conduct than other employees. *Id.*; HCD (testimony of the deciding official). Further, the deciding official testified that the appellant's 10 years of service was a mitigating factor, but that it was outweighed by the gravity of the appellant's misconduct.⁶ ID at 28-29; HCD (testimony of the deciding official).

The initial decision reflects that the administrative judge considered the record evidence, including the hearing testimony, and that she found that, in light of the seriousness of the proven misconduct and all of the appropriate penalty factors, the penalty of removal is reasonable. ID at 28-29. We therefore discern no reason to disturb the administrative judge's penalty findings. Thus, we AFFIRM the initial decision, MODIFYING the initial decision solely to clarify the applicable standard for reviewing an agency imposed penalty where fewer than all of the charges are sustained.

⁵ To the extent the appellant is challenging the merits of her prior 14-day suspension action, the suspension is not properly before the Board in this appeal. *See* PFR File, Tab 1 at 22.

⁶ To the extent that the appellant offers as a comparator a food service employee who allegedly placed eye drops in a co-worker's beverages and only received verbal counseling, the appellant has not shown enough similarity between herself and the proposed comparator. *See* PFR File, Tab 1 at 20; *Boucher v. U.S. Postal Service*, [2012 MSPB 126](#), ¶ 20 (To establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors.").

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.

**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 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, DC 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, DC 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\(f\)](#); [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.