

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

GEORGE CAMAJ,
Appellant,

DOCKET NUMBER
NY-0752-11-0048-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: December 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Thomas G. Roth, Esquire, Belle Meade, New Jersey, for the appellant.

Jeffrey M. Feinblatt, Esquire, Newark, New Jersey, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On petition for review, the appellant asserts that his due process rights were violated because the deciding official allegedly consulted with other supervisors before rendering his decision on the penalty. Petition for Review (PFR) File, Tab 1 at 37-43. In *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011), the Federal Circuit held that, if an employee has not been given "notice of any aggravating factors supporting an enhanced penalty," an ex parte communication with the deciding official regarding such factors may constitute a due process violation. *Id.* at 1280. However, only the introduction of new and material information violates due process. *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#), 1377 (Fed. Cir. 1999); *see Ward*, 634 F.3d at 1279.

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.

While the appellant has not proven by preponderant evidence that the deciding official spoke with the appellant's supervisors, assuming arguendo that such communications occurred, the topic of the communications was the appellant's trustworthiness. Initial Appeal File (IAF), Tab 14, Ex. B at 7-9, 18-19. The appellant was warned in the notice of proposed action that one reason for the proposed action was that management had "lost trust and confidence in" him. IAF, Tab 5, Subtab 4f at 15. Thus, if the deciding official spoke with the appellant's supervisors regarding their ability to trust the appellant, no new information was introduced regarding this aggravating factor. Additionally, the deciding official asserted in his sworn deposition and at the hearing that he considered the appellant's past performance and disciplinary history to be mitigating factors. IAF, Tab 14, Ex. B at 19; Hearing Transcript (HT) at 160-161; *see* IAF, Tab 5, Subtab 4c at 3. Therefore, assuming arguendo that these communications with the appellant's supervisors occurred, the penalty was not "enhanced" as a result and there was therefore no due process violation. *See Ward*, 634 F.3d at 1280.

The appellant also asserts that the agency used disparate penalties. PFR File, Tab 1 at 24-29. 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" *Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶ 15 (2010); *Archuleta v. Department of the Air Force*, [16 M.S.P.R. 404](#), 407 (1983). When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Lewis*, [113 M.S.P.R. 657](#), ¶ 6.

On petition for review, the appellant asserts that there were four other employees who were treated differently with respect to the penalty imposed. PFR File, Tab 1 at 24-29. However, the deciding official consistently explained that

the appellant was different from these employees, particularly because the appellant failed to recognize the magnitude of his actions. HT at 175-181, 183-84; *see* IAF, Tab 14, Ex. B at 10-12.

The appellant also challenges the deciding official's assessment of many of the *Douglas* factors. PFR File, Tab 1. However, when all charges have been sustained, mitigation of an agency's penalty is appropriate only where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness. *Vaughn v. U.S. Postal Service*, [109 M.S.P.R. 469](#), ¶ 16 (2008), *aff'd*, 315 F. App'x 305 (Fed. Cir. 2009). After considering the appellant's assertions and the record, we discern no reason to hold that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness.

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:

William D. Spencer
Clerk of the Board

Washington, D.C.