

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

DUANE ALLEN,
Appellant,

DOCKET NUMBER
SF-0432-12-0136-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: December 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Randall B. Pennington, Esquire, and Samuel A. Frazer, Esquire, Port Hueneme, California, 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, which sustained the appellant's removal based on unacceptable performance under 5 U.S.C.

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

chapter 43. 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\(b\)](#).

In the initial decision sustaining the removal action, the administrative judge found that, although the agency provided the appellant a reasonable opportunity to demonstrate acceptable performance by completing three assigned tasks during the 60-day performance improvement plan (PIP) period, the appellant only half-completed the first task and did not come close to completing the second task. Initial Appeal File, Tab 12 (Initial Decision) at 6-15. The administrative judge therefore found that the agency produced substantial evidence that the appellant's performance during the PIP was unacceptable. *Id.* at 15.

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.

In his petition for review, the appellant raises factual arguments regarding the administrative judge's assessment of the record evidence. Petition for Review File, Tab 1 at 5-9. Specifically, the appellant alleges that the administrative judge erred in finding that: (1) he was afforded a reasonable opportunity to improve his performance because he encountered circumstances that hindered his ability to adequately perform the first task during the PIP; (2) he failed to acceptably perform the first task because his supervisor did not help him with respect to one of the duties involved in the task; and (3) he failed to acceptably perform the second task because the numbers in the operations team metric used to measure his performance were inaccurate. *Id.*

Each of the appellant's arguments on review was fully addressed by the administrative judge in the initial decision and constitutes mere disagreement with the administrative judge's explained findings. For example, regarding the appellant's first argument, the administrative judge addressed the circumstances that the appellant alleged hindered his ability to adequately perform the first task during the PIP, and found that they should not have prevented his successful completion of the task. Initial Decision at 10-11. Significantly, the administrative judge found that completing the first task each month during the PIP period should have occupied only a small part of the appellant's time (totaling a few days' worth of time over the course of the month) and that, even according to the appellant, one of the circumstances that allegedly hindered his ability to acceptably perform the task would have taken, at most, a few extra minutes to resolve.³ *Id.* at 7, 11. Therefore, although the appellant generally argues on review that these unforeseen circumstances prevented him from having a reasonable opportunity to demonstrate acceptable performance, the appellant has set forth no reason to disturb the administrative judge's finding that the appellant had ample time and reasonable opportunity to complete the assigned

³ We note that the appellant does not contest this finding on review.

task despite these unforeseen circumstances. *See Macijauskas v. Department of the Army*, [34 M.S.P.R. 564](#), 566 (1987), *aff'd*, [847 F.2d 841](#) (Fed. Cir. 1988).

Because the administrative judge's findings are supported by the weight of the record evidence and the applicable law, we discern no reason to disturb them. Initial Decision at 6-15; *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). Further, we note, as did the administrative judge, that the agency only needed to prove by substantial evidence that the appellant's performance as a whole was unacceptable during the PIP. Initial Decision at 14; *see* 62 Fed. Reg. 64,067 (1997) (located at IAF, Tab 4, Subtab 4n at 18). We agree with the administrative judge that the record evidence supports this finding. Initial Decision at 15.

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 the date of this order. 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.