

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

PAUL S. LASKODI,
Appellant,

DOCKET NUMBER
DA-0752-11-0569-I-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: January 10, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Erica N. Cordova, Esquire, Atlanta, Georgia, for the appellant.

Jose Calvo, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which orders the agency to cancel the removal and to retroactively restore the appellant effective June 14, 2011. Generally, we grant petitions such as this one only

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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\(b\)](#).

The agency proposed the appellant's removal based on a charge of improper conduct. The charge was supported by five specifications. The deciding official determined that four of five specifications underlying the charge were supported and, based on that determination, removed the appellant.

This appeal followed. After a hearing, the administrative judge determined that of the four remaining specifications underlying the charge, the agency established specifications 2 and 3, which alleged:

Specification 2: On December 30, 2010, you made a comment to CSI [and union representative] Powell that you were going to video tape the inspectors misconduct and send it to the Russian Consulate; creating an international incident.

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.

Specification 3: On December 30, 2010, you informed CSI Powell that you had a recording device that you were using, to record others without their consent or knowledge.

Initial Appeal File, Tab 11 at 16. The administrative judge determined, however, that the agency failed to establish the other two specifications underlying the charge, which alleged:

Specification 4: On or about December 8, 2010, you created an intimidating and hostile work environment by making offensive (derogatory and racially insensitive) comments about non-Whites.

Specification 5: Between December, 2010 - January 10, 2011, you created an unsafe work environment when you continually threatened staff with comments about your guns and that you would kill individuals who are not white.

Id. at 16-17. The administrative judge concluded that specifications 2 and 3, while supported, did not describe improper conduct and therefore could not serve as a basis for sustaining the charge. Specifically, the administrative judge did not find any evidence that the appellant actually undertook the actions described in his statements to Powell; he determined that the appellant's statements were made while he was off duty to his union president; and he concluded that such statements in themselves were not inherently improper.

The agency contends on review that the administrative judge improperly substituted his judgment for that of the deciding official regarding specifications 2 and 3. It argues that it need not have waited for the appellant to carry out his threats, given its high standards for employee conduct. Petition for Review (PFR) File, Tab 7 at 5-7. It contends that the serious repercussions of the appellant's threatened actions, if carried out, would justify removal. *Id.* at 6. The agency also contends that the administrative judge omitted the testimony of Dr. Jennifer Beasley-McKean from his discussion in the initial decision. PFR File, Tab 7 at 7-10. In light of the fact that the appellant sought out his union representative and made the statements in the course of seeking redress for his perceived mistreatment, and in the absence of any evidence that the appellant

engaged in the conduct described in his statements, we conclude that the record as a whole supports the administrative judge's conclusion that the statements made in that context were not inherently improper. *Cf. Capozzella v. Federal Bureau of Investigation*, [11 M.S.P.R. 552](#), 557 (1982) (finding that the appellant's articulation of a plan to exact revenge on a neighbor who had tormented him was not misconduct, as he did nothing to further his plan of assault, nor did the neighbor know that the appellant had any such plan). The administrative judge's failure to mention all of the evidence of record, such as Dr. Beasley-McKean's testimony, does not mean that he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table); *see also Haines v. Defense Logistics Agency*, [49 M.S.P.R. 52](#), 56-57 (1991) (allegations that the administrative judge erred in summarizing testimony and in presenting and omitting evidence do not establish a basis for reversal or warrant full review of record, where such allegations do not materially affect the correctness of the findings of fact and credibility assessments), *aff'd*, 960 F.2d 155 (Fed. Cir. 1992) (Table). Moreover, Dr. Beasley-McKean's testimony concerned the implications of the actions described in the appellant's statements alleged in specification 2, had the appellant taken such actions. It did not concern whether he made those statements. Accordingly, the agency's contentions concerning the administrative judge's failure to mention this testimony provides no basis for disturbing the initial decision.

The agency argues that the administrative judge erroneously rejected as not credible Dr. Henry Moore's testimony regarding an encounter with the appellant alleged in specification 4. PFR File, Tab 7 at 11-12. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe

the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). Here, the administrative judge cited several of the *Hillen* factors, including Dr. Moore's capacity to hear what the appellant said and the likelihood that Dr. Moore misinterpreted what he heard, the inconsistency between his hearing testimony and his prior sworn statement to an equal employment opportunity investigator, as well as the testimony of other witnesses who testified that they had never heard the appellant make any racially-derogatory statement. Considering the record as a whole, the administrative judge concluded that the evidence did not support the misconduct alleged in specification 4, noting that none of the agency's witnesses could identify any racially derogatory remark that the appellant made to them; none of them said he had ever threatened them personally; and none of them said he had ever made any demeaning comments to them nor had they heard him say racially or ethically demeaning comments to anyone. The agency's contentions on review provide no basis for the Board to substitute its own judgment for the administrative judge's reasoned credibility determinations or to disturb his conclusion that the agency failed to establish that the appellant engaged in the misconduct alleged in specification 4.

Similarly, the administrative judge determined with respect to specification 5 that, although some coworkers had heard the appellant talk about guns and hunting and some had even participated in those conversations, they testified that he never talked about using guns on people or on coworkers or on any person. In deciding whether statements constitute threats, the Board is to apply the reasonable person criterion, considering the listeners' reactions and apprehensions, the wording of the statements, the speaker's intent, and the

attendant circumstances. *Metz v. Department of the Treasury*, [780 F.2d 1001](#), 1004 (Fed. Cir. 1986). The administrative judge found the record completely devoid of any evidence that the appellant “continually threatened staff with comments about [his] guns and that [he] would kill individuals who are not white.” Overall, the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Under these circumstances, the agency’s petition for review provides no basis to disturb his conclusions. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

Accordingly, we AFFIRM the initial decision.

ORDER

We ORDER the agency to cancel the removal and to restore the appellant effective June 14, 2011. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management’s regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency’s efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board’s Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board’s Order and of the actions it

took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. See [5 C.F.R. § 1201.181\(b\)](#).

No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

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, D.C. 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, D.C. 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\(f\)](#) and [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 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. See 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, [126 Stat. 1465](#), 1469. Additional information about the United States Court of Appeals for the

Federal Circuit 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.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.