

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

LIGIA E. JOJ,

Appellant,

DOCKET NUMBER

SF-0752-12-0060-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,

Agency.

DATE: January 16, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Ligia E. Joj, Hawthorne, California, pro se.

Evan Stein, Esquire, Los Angeles, California, 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 mitigated the appellant's removal penalty to a 30-day suspension. Generally, we grant

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

DISCUSSION OF ARGUMENTS ON REVIEW

In its petition for review, the agency challenges the administrative judge's determination regarding the reasonableness of the penalty. Petition for Review (PFR) File, Tab 1. Specifically, the agency argues that the deciding official correctly considered the factors as set forth in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981), and that the administrative judge erroneously substituted his own judgment for that of the agency when he mitigated the removal penalty to a 30-day suspension. PFR File, Tab 1 at 5-8. We disagree.

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 administrative judge found, in light of *U.S. Postal Service v. Gregory*, [534 U.S. 1](#), 10 (2001), and *Jones v. Department of the Air Force*, [24 M.S.P.R. 429](#), 431 (1984), and considering the “significant difference between a suspension costing an employee one day’s pay and one costing one week’s pay,” that the Board should not defer to the agency’s penalty selection. Initial Appeal File (IAF), Tab 10, Initial Decision at 12 (citing *Franklin v. Department of Justice*, [71 M.S.P.R. 583](#), 593 (1996)). The agency argues that the administrative judge’s finding is erroneous because, unlike in *Jones* and *Franklin*, the appellant’s previous discipline was mitigated, not overturned. PFR File, Tab 1 at 6-7. However, the administrative judge found, and we agree, that the situations were sufficiently analogous, even though the agency management official did not “reverse” the previous suspension in the present appeal, considering the appellant’s penalty was reduced to a mere 1-day suspension. Initial Decision at 12.

The agency also argues that the administrative judge’s finding is erroneous because, unlike in *Gregory*, there was no “grievance proceeding” pending at the time of the Board’s review. PFR File, Tab 1 at 7. In *Gregory*, the Supreme Court found that the Board’s practice of independently reviewing prior disciplinary actions in assessing the reasonableness of a penalty—even if those actions were subject to a pending grievance process—was consistent with its statutory authority. In so holding, the Court also noted the Board’s “policy of not relying upon the disciplinary actions that have already been overturned in grievance proceedings at the time of Board review.” *Gregory*, 534 U.S. at 10. However, nothing in *Gregory* suggests, much less compels, finding that the Board is precluded from considering an agency’s reduction of a prior penalty in assessing the reasonableness of a penalty in an appeal before it. Here, the appellant’s prior 5-day suspension had already been mitigated at the time of the Board’s review, and *Gregory* does not proscribe the Board from considering that reduction in finding the proposed penalty of removal to be unreasonable. IAF, Tab 4 at 37.

The agency further argues that the administrative judge's finding is erroneous because he should have considered the "timing and reasons" for the agency's mitigation of the previous discipline. PFR File, Tab 1 at 7. The administrative judge addressed these issues in the initial decision, however, and the agency's argument constitutes mere disagreement with the administrative judge's well-reasoned and explained findings. Initial Decision at 13 n.2; *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).

The agency further challenges the administrative judge's finding that the appellant's potential for rehabilitation was a mitigating factor. PFR File, Tab 1 at 8; Initial Decision at 13. Specifically, the agency alleges that the administrative judge failed to accord significant weight to the deciding official's finding of no rehabilitative potential because, according to the deciding official, the appellant expressed little evidence of remorse during the oral reply. PFR File, Tab 1 at 8. The deciding official acknowledged in her analysis of the *Douglas* factors, however, that the appellant's union representative expressed remorse on the appellant's behalf during the oral reply. IAF, Tab 4 at 19. Given that the appellant's representative was speaking on behalf of the appellant during the oral reply, and given the administrative judge's demeanor-based credibility determinations that the appellant's expression of contrition was sincere, the agency has failed to set forth any reason to disturb the finding of the administrative judge in this regard. *See Raco v. Social Security Administration*, [117 M.S.P.R. 1](#), ¶ 16 (2011).

**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. *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.