

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

LEILA CRONFEL,
Appellant,

DOCKET NUMBER
DE-0752-11-0113-I-2

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: January 18, 2013

THIS ORDER IS NONPRECEDENTIAL¹

Joshua L. Klinger, Esquire, and Thomas F. Muther, Jr., Esquire, Denver,
Colorado, for the appellant.

Katie Pull, Washington, D.C., for the agency.

BEFORE

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

REMAND ORDER

The agency 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² For the reasons discussed below, we GRANT the agency's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

BACKGROUND

The appellant, an Assistant Chief Counsel with the agency's Office of the General Counsel, Immigration and Customs Enforcement, was removed on a charge of "Conduct Unbecoming an Assistant Chief Counsel/Trial Attorney." The proposal notice listed four specifications, as follows:

Specification 1: On August 1, 2007, you signed and submitted to the Immigration Court in Denver, Colorado, the Government's Motion to Submit Its Proposed Exhibits (hereafter, Motion) in the matter of Santiago Rojas-Hernandez. By signing the Motion, you represented to the Immigration Court that all proposed exhibits were true and accurate copies of the original documents. Exhibit 7, which is one of the proposed exhibits attached to the Motion, appeared to be a 2-sided copy of the executed I-205 Form,³ executed on March 26,

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.

³ An I-205 Form is a Warrant of Removal/Deportation, which authorizes an officer to remove a person from the United States. A fully executed I-205 Form is filled out on the front and back side and contains the name of the alien, the photograph of the alien, the right index fingerprint of the alien, the signature of the alien, the signature and title of the officer who fingerprinted the alien, and the signature and title of the officer who

1999. You submitted this exhibit to show that Mr. Rojas-Hernandez had been previously removed from the United States. On its face, the exhibit appeared to be a true and accurate copy of the executed I-205 Form, and there is no obvious reason to question it. On October 16, 2008, during a hearing on the same matter, the ACC [Assistant Chief Counsel] representing the Agency on that date, Lillian Alves, found the “original” Exhibit 7 in the case file and presented it to the court. The “original” Exhibit 7 was not the executed I-205 Form, but was comprised of 2-sided I-205 Forms taped together: (1) the original executed I-205 Form, which was fully completed on both sides, but was marked on the front side with a red line and handwriting indicating it was found to be invalid in 2001 and directing the reader to a memo in the file; and (2) an incomplete, unexecuted I-205 Form, which was filled out on the front side with the same information as the executed I-205 Form (albeit without the red line and handwriting), but is blank on the back side, and therefore, unexecuted. Thus, Exhibit 7 is not a true and accurate copy of the executed I-205 Form. Instead, Exhibit 7 is a copy made from two different forms: the back side of the executed I-205 Form and the front side of the unexecuted I-205 Form. In your signed and sworn affidavit, dated January 7, 2010, you stated that you prepared the exhibits, including Exhibit 7, and that you selected which documents to submit without the direction of anyone else.

Specification 2: On May 11, 2009, you sent an email to the Denver Chief Counsel in which you explain the background history of the Santiago Rojas-Hernandez matter and notify her that a Motion to Impose Sanctions had been filed against you. In your email, you explain that you submitted the executed I-205 Form. You did not submit the executed I-205 Form as you stated. Instead, you filed a copy of the back side of the executed I-205 Form and the front side of the unexecuted I-205 Form.

Specification 3: In your signed and sworn affidavit, dated January 7, 2010, you were asked, “Did you knowingly and willfully offer into evidence to the immigration court in Denver a document that you knew was not a true, complete, and correct copy of the original?” You responded, “No.” Your response was not true. On August 1,

witnessed the alien’s departure. In the Immigration Court context, an executed I-205 Form may be used as evidence to show that a person was previously removed from the United States, which may warrant removal through reinstatement of the executed I-205 Form and Order of Removal. Initial Appeal File (IAF), Tab 5 at 62.

2007, you signed and submitted to the Immigration Court in Denver, Colorado, the Government's Motion to Submit Its Proposed Exhibits in the matter of Santiago Rojas-Hernandez. By signing the Motion, you represented to the Immigration Court that all proposed exhibits were true and accurate copies of the original documents. Exhibit 7, which is one of the proposed exhibits attached to the Motion, appears to be a 2-sided copy of the executed I-205 Form, executed on March 26, 1999. However, Exhibit 7 is not a true and accurate copy of the executed I-205 Form. Instead, Exhibit 7 is a copy made from two different forms: the back side of the executed I-205 Form and the front side of the unexecuted I-205 Form. In your signed and sworn affidavit, you stated that you prepared the exhibits, including Exhibit 7, and that you selected which documents to submit without the direction of anyone else. You knew that the executed I-205 has a red line across the front side and a notation that it is invalid. Therefore, you knew that Exhibit 7 was not a true and accurate copy of the executed I-205 Form but you chose to submit it to the court as if it was a true and correct copy.

Specification 4: In your signed and sworn affidavit, dated January 7, 2010, you were asked, "OK, so when you signed your name on the Department's 'Motion to Submit Proposed Exhibits' dated August 1, 2007, you were not aware that the Form I-205's contained in Mr. Santiago-Hernandez's A-file were merged into one document, is that correct?" You responded, "Yes. That's correct." You did know that the I-205 Forms were merged into one document because you submitted Exhibit 7 to the Immigration Court. In your signed and sworn affidavit, you stated that you prepared the exhibits, including Exhibit 7, and that you selected which documents to submit without the direction of anyone else. Exhibit 7 is not a copy of the executed I-205 Form; it is a copy of the back side of the executed I-205 Form and the front side of the unexecuted I-205 Form. ACC Alves found the "original" Exhibit 7 in the file, which was comprised of the two I-205 Forms taped together.

IAF, Tab 5 at 62-64.

The administrative judge determined that specifications (1) and (2) required the agency to prove the elements of a falsification charge and found that the agency had failed to meet its burden with respect to either specification. Initial Decision (ID) at 10-12. With regard to specifications (3) and (4), which, by the agency's admission, also required proof of falsification, the administrative

judge found that they could not be sustained because they were premised on the viability of specification (1). *Id.* at 11. Accordingly, the administrative judge reversed the action. *Id.* at 13.

On petition for review, the agency contends that the administrative judge erred in reading specifications (1) and (2) as requiring proof of falsification. In the alternative, the agency argues that, even if the administrative judge did read those specifications correctly, it succeeded in proving the elements of a falsification charge. Petition for Review File, Tab 1 at 17.

ANALYSIS

We have granted the agency's petition for review for the purpose of addressing the following errors in the administrative judge's analysis with regard to the four specifications of the charged misconduct, the burdens of proof of each specification, and his findings under the applicable law.

Specification (1)

To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. *Naekel v. Department of Transportation*, [782 F.2d 975](#), 977 (Fed. Cir. 1986). Our reviewing court has explained that the *Naekel* test includes several distinct elements:

A charge that an employee knowingly supplied wrong information with an intent to defraud the agency requires first that the agency prove that the information submitted included a false statement. The test here is objective and is made without regard to the employee's subjective understanding or knowledge. Second, the agency must prove that the false statement was material. Third, the agency must show that the employee acted with the requisite intent. Our cases confirm that the intent element itself requires two distinct showings: (a) that the employee intended to deceive or mislead the agency, and (b) that he intended to defraud the agency for his own private material gain.

Leatherbury v. Department of the Army, [524 F.3d 1293](#), 1300 (Fed. Cir. 2008). In order to show that the employee intended to deceive or mislead the agency, it is sufficient to establish that the employee either knew that her submission included a false statement of fact or was reckless with respect to ascertaining the truth of the statement. *Id.* However, the agency must also show that she acted with the intent to defraud the agency for the sake of monetary benefit or other personal advantage. *Id.*; see *Bradley v. Veterans Administration*, [900 F.2d 233](#), 237 (Fed. Cir. 1990) (finding falsification charge unproven where misrepresentations were motivated by a desire for privacy rather than a desire to defraud).

In this instance, we agree with the administrative judge that the agency's first specification requires proof of falsification. Where, as here, the agency has employed a generic label for the charge, the Board must look to the specification to determine what conduct the agency is relying on as the basis for its proposed action. *Lachance v. Merit Systems Protection Board*, [147 F.3d 1367](#), 1372 (Fed. Cir. 1998); *Boltz v. Social Security Administration*, [111 M.S.P.R. 568](#), ¶ 16 (2009). In resolving the issue of how a charge should be construed and what elements require proof, the Board examines the structure and language of the proposal notice and the decision notice. *Boltz*, [111 M.S.P.R. 568](#), ¶ 16; *George v. Department of the Army*, [104 M.S.P.R. 596](#), ¶ 7 (2007), *aff'd*, 263 F. App'x 889 (Fed. Cir. 2008); see *Lachance*, 147 F.3d at 1373 (relying in part on decision notice in construing the charge). If, but only if, the charge is ambiguous, the testimony of a deciding official may also be considered to determine the true nature of the charge. See *Lachance*, 147 F.3d at 1373.

Standing alone, the proposal notice is consistent with, but does not compel, a finding that specification (1) requires proof of falsification.⁴ The decision

⁴ The notice does include the following statement, which is suggestive of a falsification charge: "In proposing your removal, I have considered your employment record, the nature of the violation, and the nature of your position within the agency. Your misconduct is very serious. . . . You deceived people into believing the copy was

letter, by contrast, clearly indicates that specification (1) should be construed as a falsification charge. In discussing the appellant's reply to the proposal notice, the deciding official made several findings with regard to specification (1) that relate to the elements of falsification, and which there would be no reason to address in connection with a lesser charge such as lack of candor. For instance, the deciding official found that the appellant intentionally deceived the immigration court and had a motivation to do so:

I also do not believe that you had no motive or interest in deceiving the immigration court. . . . [I] do find that you intended to deceive the court by submitting the exhibit as you did. If you did not intend to deceive the court, you would have submitted an accurate copy of the executed I-205. . . . By submitting the exhibit as you did, you avoided having to argue that the executed I-205's 'invalid' notation was erroneous. Therefore, I find that you had motivation to deceive the court.

IAF, Tab 5 at 35. The deciding official also expressly found that the discrepancy was "material," which is likewise essential to a falsification charge. *See Leatherbury*, 524 F.3d at 1300. Although the proposal notice and decision letter include some statements that, taken alone, could support the proposition that the agency did not charge the appellant with intentional falsification, these statements do not overcome the references cited above, which warrant the conclusion that the accompanying specifications and circumstances in their entirety show that the agency charged the appellant with intentional falsification. *See Boltz*, [111 M.S.P.R. 568](#), ¶ 18.

Furthermore, to the extent the written charge may be ambiguous, the testimony of the deciding official lends support to a finding that specification (1) requires proof of falsification. With regard to specification (1), the deciding official stated: "Basically, I think [the nature of the offense] amounts to

something it was not." IAF, Tab 5 at 64. It is evident from the context, however, that the proposing official was citing the appellant's alleged intent as an aggravating factor, not as a component of the charge.

committing a fraud upon the court—the primary offense. . . . Well, fraud upon the court or . . . presenting a fraudulent document to the court, I think is just about as serious an offense as an attorney can commit.” Hearing Transcript (HT) 1 at 210. The terms “fraud on the court” and “fraudulent document” clearly imply falsification. In light of the above, we conclude that the administrative judge correctly construed specification (1) as requiring proof of falsification.

In applying the *Naekel* test, however, the administrative judge made several significant errors. First, rather than determining whether the agency proved that the appellant submitted a false statement, the administrative judge required the agency to prove that the appellant intentionally manufactured Exhibit 7 to reflect the executed I-205 as it existed before its purported rescission. ID at 9-10. As the deciding official made clear, the agency did not charge the appellant with intentionally manufacturing the merged exhibit. IAF, Tab 5 at 35. Thus, the administrative judge erred in requiring the agency to prove misconduct which was not charged. *See Rodriguez v. Department of Homeland Security*, [117 M.S.P.R. 188](#), ¶ 10 (2011) (where agency charged appellant with “Failure to Report an Accident Involving a Government Owned Vehicle,” the administrative judge erred in requiring the agency to prove that the appellant was in the vehicle when the accident occurred).

Second, the administrative judge did not make a finding as to whether the appellant’s misrepresentation to the court was material, which is a necessary element of a falsification charge. Nevertheless, we find that, regardless of whether the submission and discovery of the merged I-205 could have affected the outcome of the immigration case, it was material for present purposes because it resulted in a motion for sanctions—which, although later denied on procedural grounds, delayed the final decision by several months, *see* IAF, Tab 23, Appellant’s Exhibit A at 166-67, and also painted the agency in a poor light.

Third, in determining whether the requisite intent for a falsification charge was met, the administrative judge did not thoroughly consider the evidence with

regard to the two distinct showings that are required to prove the element of intent. Thus, because the requisite showings were not thoroughly addressed, the element of intent is not as clear cut as the administrative judge represented in his initial decision. For instance, the administrative judge did not consider whether, even if the appellant was not aware at the time of the submission that Exhibit 7 was not a true and accurate copy of the original, she may have nonetheless been reckless in failing to ascertain its provenance. If the appellant was reckless in this regard, it would be sufficient to establish the first prong of the intent element. *See Leatherbury*, 524 F.3d at 1300.

Similarly, the administrative judge did not thoroughly consider all of the evidence when he found that, because the appellant had already “openly submitted” the executed I-205, she would have known that any attempt to deceive the court was doomed to fail and that she therefore had no motive to submit a falsified document. *See ID* at 11. For instance, on July 9, 2007, the appellant indicated to the immigration judge and Santiago’s then-attorney that she would submit an executed I-205 with fingerprints and a picture showing that Santiago had previously been removed, albeit under his brother’s name. IAF, Tab 23, Appellant’s Exhibit A at 90. Santiago’s then-attorney indicated that an Officer Murphy had shown him that the executed I-205 had been canceled. *Id.* The appellant responded that it was valid against Santiago and could not have been cancelled because the removal was by order of an immigration judge. *Id.* at 90-91. Thus, the validity of the executed I-205 was briefly raised as an issue before the court. However, contrary to the initial decision, the appellant did not submit the form at that time because she had not yet made a copy. *See id.* at 91. The irregularity with Exhibit 7 was not discovered until October 16, 2008, more than a year after its submission, when Alves retrieved the original merged document from Santiago’s A-file. It appears the immigration judge asked Alves to do so only because the copied photograph of Santiago on Exhibit 7 was indistinct and the original I-205 had a color photograph on it. *See id.* at 135.

Were it not for that happenstance, it is possible that the taped originals would not have been discovered. Thus, if the appellant intended to deceive the court by submitting a copy of the merged document as Exhibit 7, it is by no means clear that her effort was “doomed to fail.” *See* ID at 11.

Finally, the administrative judge did not address the agency’s argument that the appellant had a motive to conceal the purported cancellation of the executed I-205, as this saved her from having to again argue that the I-205 was nonetheless valid against Santiago. If the agency can make such a showing, the appellant’s benefit of not having to reargue the validity of the I-205 could meet the requisite finding that the appellant intended to defraud the agency for her own private material gain. Accordingly, we find that this specification must be readjudicated.

Specification (2)

As discussed above, the decision letter and the testimony of the deciding official indicate that specification (1) should be construed as requiring proof of falsification. However, we do not find similar indications in the proposal notice or decision letter that the same is true of specification (2). Moreover, the deciding official testified at the hearing that he viewed specification (2) as representing “lack of candor.” HT 1 at 210. Thus, we find that Specification 2 should be readjudicated under the standards applicable to a lack of candor charge.

Specifications (3) and (4)

Based on our finding that specifications 1 and 2 must be readjudicated, we find that specifications 3 and 4 must also be readjudicated. Specifically, we agree with the administrative judge that specification (3) presupposes the viability of specification (1) and necessarily fails if specification (1) is not sustained. However, there are scenarios in which the agency might fail to prove specification (1), yet prove specification (4). For example, if the appellant knew that Exhibit 7 was not a true and accurate copy when she submitted it to the court

but did not intend to defraud the court for her own gain (e.g., with the intent of saving herself the trouble of arguing that the purportedly rescinded I-205 was valid against Santiago), then specification (1) would not be sustained. Yet, it could still be the case that, when she answered the investigator's question untruthfully, the appellant did intend to deceive the investigator for her own benefit—presumably with the aim of avoiding discipline. This would be sufficient to sustain specification (4). Thus, when adjudicating these specifications, the administrative judge must consider all of the evidence and its impact on the possible scenarios of each specification. The administrative judge must also address the elements of falsification with respect to specification (4), even after finding that the agency failed to prove specification (1). Furthermore, in the event the administrative judge finds that the agency did prove specification (1), the administrative judge must then consider whether the agency proved the elements of falsification with respect to specification (3) as well.

In light of the issues discussed above, we find that the charge must be readjudicated—and, in the event the charge is sustained, it will also be necessary for the administrative judge to determine whether the deciding official properly considered the *Douglas* factors and whether the penalty of removal is reasonable.⁵ In addition, because the administrative judge did not make any explicit credibility findings in his initial decision, he should make such findings on remand consistent with the criteria set forth in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987).

⁵ The administrative judge found below that the appellant failed to establish her affirmative defenses of harmful error and retaliation for equal employment opportunity activity. We discern no error in these findings, and the appellant has not challenged them on review. Thus, the administrative judge may incorporate these findings in a new initial decision.

ORDER

Accordingly, we vacate the initial decision and remand this appeal to the Denver Field Office for further adjudication consistent with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.