UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TRENT K. FREELAND, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	DOCKET NUMBER PH-0752-12-0072-I-1 DATE: January 22, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Randolph A. Elliott, Camp Hill, Pennsylvania, for the appellant.

Karen L. Saxton, Esquire, New Cumberland, Pennsylvania, 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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). 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.[2] 5 C.F.R. § 1201.113(b).

On review the appellant asserts that the administrative judge erred in failing to apply the standard set forth in *Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986), in determining whether the agency proved the Conduct Unbecoming charge. Petition for Review (PFR) File, Tab 1 at 10. In *Metz*, our reviewing court held that, in deciding whether statements constitute threats, the Board is to apply the reasonable person criterion, considering the listeners' reactions, their apprehensions of harm, the speaker's intent, any conditional nature of the statements, and the attendant circumstances. *Metz*, 780 F.2d at 1002. The appellant contends that his statements did not constitute threats under the *Metz* standard because the listeners had no apprehension of harm and no reaction to the statements, he did not intend to threaten anyone, and his

[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.

statement that he became violent when he felt threatened was conditional in nature. PFR File, Tab 1 at 10-11.

The Board is required to review an agency's decision on an adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more adequate or proper basis. *Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 9 (2006), *aff'd*, 218 F. App'x 1001 (Fed. Cir. 2007). Here, the agency did not charge the appellant with threats per se. Instead, it charged him with Conduct Unbecoming. Initial Appeal File (IAF), Tab 4 at 29. This charge contains a lesser burden of proof than the *Metz* test because it does not require that the agency prove that the appellant intended to cause harm or that any listeners felt threatened by the alleged statements. *Wiley*, 102 M.S.P.R. 535, ¶ 10. Thus, contrary to the appellant's assertion, the agency was not required to prove that the appellant's statements constituted a "true threat" under *Metz*, but only that his statements constituted conduct unbecoming of a federal employee. *See Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202-04 (1997). Therefore, we find that the administrative judge properly analyzed the charge as written by the agency.

In finding that the agency proved the Conduct Unbecoming charge, the administrative judge fully set forth the facts underlying the charge and considered the testimony of several witnesses, including the appellant, as well as the documentary evidence relevant to the agency's charge. IAF, Tab 14, Initial Decision (ID) at 5-7. The administrative judge noted the conflicting testimony as to whether the appellant engaged in the alleged misconduct and recognized that he was required to make a credibility determination. *Id.* at 5. Applying the factors for making credibility determinations set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), the administrative judge credited the testimony of the agency's witnesses regarding whether the appellant engaged in the conduct at issue over that of the appellant, finding that the appellant's general denials were clearly self-serving and not supported by any other record evidence.

Id. By contrast, the administrative judge found that the agency's witnesses testified in a forthright and candid manner concerning the appellant's statements and conduct on the date in question and that their testimony was consistent without being contrived. *Id.* The administrative judge also found that the testimony offered by each of the agency's witnesses during the hearing was consistent with prior written statements they had made shortly after witnessing the events in question. *Id.* In addition, the administrative judge stated that he could discern no bias on the part of any of the agency's witnesses, as there was no evidence that they would gain anything from the appellant's removal. *Id.* To the extent that the appellant claims on review that he did not engage in the alleged misconduct, this argument is essentially mere disagreement with the administrative judge's explained findings and credibility determinations and, as such, provides no basis to disturb the initial decision.

On review the appellant argues that the administrative judge erred by excluding from evidence an Abeyance Agreement Offer in which the agency states that the appellant was transferred from his previous worksite to "stop brewing racial tensions." PFR File, Tab 1 at 9; IAF, Tab 5, Subtab A-2 at 2. The appellant asserts that he offered this document to rebut the hearing testimony of an agency witness who testified that the agency transferred the appellant from his previous worksite due to his "raucous behavior towards his co-workers." PFR File, Tab 1 at 9.

Although the appellant asserts on review that the administrative judge did not allow the Abeyance Agreement Offer into the record, he acknowledges in the same paragraph of his petition for review that this document is part of the record.[3] PFR File, Tab 1 at 9. In any event, even if the administrative judge had

---

[3] Our review of the record indicates that during the hearing the appellant's representative attempted to question the deciding official about this document in order to impeach her testimony that the agency transferred the appellant from his previous worksite because he was considered a threat to other employees. IAF, Tab 15, Hearing

excluded the Abeyance Agreement Offer from evidence, we believe that it would have been appropriate for him to do so, as the agency's reasons for transferring the appellant from his previous duty station have no bearing on whether the appellant committed the charged misconduct. Further, even assuming arguendo that the administrative judge erred by excluding this evidence, the appellant has not shown prejudice to his substantive rights by this error because he has adduced no proof that the result would have been different if the evidence had been allowed. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

On review the appellant also seems to reiterate his argument below that the agency committed harmful procedural error by using Family Medical Leave Act (FMLA) information against him. PFR File, Tab 1 at 11; IAF, Tab 1 at 5; Tab 12 at 6. More specifically, he contends, as he did below, that the agency used "paperwork" against him which reflects that, while participating in the agency's Employee Assistance Program (EAP), the appellant admitted to his physician that he had violent thoughts toward his co-workers.[4] PFR File, Tab 1 at 11; IAF, Tab 12 at 6. In support of his harmful error claim, the appellant asserts that, under Board law, potentially threatening statements made in the context of an EAP counseling session may not provide the basis for a threat charge. PFR File, Tab 1 at 11 (citing *Powell v. Department of Justice*, 73 M.S.P.R. 29 (1997), and *Larry*

Compact Disc. Agency counsel objected to the appellant's representative's question on relevancy grounds, and the administrative judge sustained the objection. *Id.* To the extent that the appellant is arguing that the administrative judge erred in sustaining the agency's objection, we find such an argument unavailing. As noted above, the agency's reasons for transferring the appellant from his previous worksite have no bearing on the issue of whether he committed the alleged misconduct. Moreover, even if the administrative judge's ruling could be regarded as erroneous, the appellant has not shown that it adversely affected his substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

[4] The argument that he makes on review is identical to the argument he made in his prehearing submission. *Compare* PFR File, Tab 1 at 11, *with* IAF, Tab 12 at 6.

v. Department of Justice, 76 M.S.P.R. 348 (1997)). He also notes that the Board has expressed concerns about whether it is appropriate for an agency to take action against an employee on the basis of statements made to medical professionals during the course of obtaining medical treatment when those statements are protected by a legally-recognized privilege. *Id.* (citing *Gray v. Government Printing Office*, 111 M.S.P.R. 184 (2009)).

Harmful error cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Bair v. Department of Defense*, 117 M.S.P.R. 374, ¶ 8 (2012). It is the appellant's burden to prove that a procedural error occurred and that the error substantially prejudiced his rights such that the outcome was probably affected. *Mercer v. Department of Health & Human Services*, 772 F.2d 856, 859 (Fed. Cir. 1985); 5 C.F.R. § 1201.56(c)(3).

The administrative judge rejected the appellant's allegation of harmful procedural error based on the agency's alleged use of FMLA information, finding that "the appellant has not shown that the agency even used FMLA information against him let alone used it improperly."[5] ID at 11. In addition, the administrative judge found that, to the extent the appellant was claiming a violation of the Privacy Act, the Board is not authorized to consider claims that an agency violated the Privacy Act. *Id.* (citing *Normoyle v. Department of the Air Force*, 65 M.S.P.R. 80, 83 (1994)).

---

[5] In the initial decision, the administrative judge states that the appellant raised the allegation that the agency used FMLA information against him in his initial appeal to the Board but did not raise this allegation in his prehearing submission. ID at 11. Although the appellant did not use the term "FMLA information" in his prehearing submission, *see* IAF, Tab 12 at 6, it appears that he did raise this allegation in that submission inasmuch as it seems that the "paperwork" he referenced in that submission as having been used against him is a health care provider certification form dated June 28, 2010 [FMLA form]. IAF, Tab 4 at 371-74.

Based on our review of the record, we agree with the administrative judge that the record does not support the appellant's claim that the agency used any FMLA information against him. The sole basis for this claim appears to be agency counsel's apparent reference to the FMLA form in the agency's response to his appeal. PFR File, Tab 1 at 11; IAF, Tab 4 at 10. There is no evidence that the agency relied on the information in his FMLA form in charging him with Conduct Unbecoming or in deciding to remove him, however. Unlike *Powell*, *Larry*, and *Gray*, the charge against the appellant was not based on statements he made in the course of psychotherapy.[6] Rather, the agency based its charge on the appellant's conduct and statements to his supervisor on July 21, 2011. IAF, Tab 4 at 29-30. Therefore, we see no reason to disturb the administrative judge's finding that the appellant failed to prove harmful procedural error.

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. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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).

---

[6] Further, *Larry* and *Powell* both involved threat charges and required analysis under *Metz*. *See Gray*, 111 M.S.P.R. 184, ¶ 11.

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) (as rev. eff. Dec. 27, 2012). You may read this law, as well as other sections of the United States Code, at our website http://www.mspb.gov/appeals/uscode/htm. 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.