

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

ROCKNEY J. CRUMM,  
Appellant,

DOCKET NUMBER  
CH-0752-12-0110-I-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: January 29, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Scott Bourn, Lincoln, Nebraska, for the appellant.

Linda L. Bowers, Esquire, Lincoln, Nebraska, 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

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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](#)).<sup>2</sup> 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

In arguing that the agency did not establish a nexus between the sustained misconduct and the efficiency of the service, the appellant contends that his misconduct did not occur on agency premises. However, the administrative judge acknowledged that the misconduct occurred off duty. Initial Decision (ID) at 4. An agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice*, [32 M.S.P.R. 71](#), 74 (1987). The administrative

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<sup>2</sup> 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.

judge found that the agency established nexus based on the deciding official's testimony that the appellant's conduct affected his trust and confidence, as well as the agency's mission. ID at 4.

The appellant challenges the agency's claimed loss of trust, arguing that the agency apparently did not consider it an issue when it first learned of his arrest in October 2010 because it did not place him on administrative leave or restrict his access to computer or telephone systems, and did not propose his removal (for the first time) until 6 months later. However, the appellant has provided no support for the proposition that loss of trust must always be followed by placement on administrative leave, and we are aware of none. *Carr v. Department of Justice*, No. 00-3342, slip op. at \*6 (Fed. Cir. Nov. 13, 2000).<sup>3</sup> Nor has he provided support for his claim that an agency must act immediately in all cases to propose discipline. The deciding official testified that the appellant's crime demonstrated that he succumbed to temptation and displayed poor judgment,<sup>4</sup> and that decisions made with poor judgment had the potential to harm the agency, particularly since the appellant worked with valuable equipment and had access to secure systems. Compact Disc (CD); Initial Appeal File (IAF), Tab 5 at 123. Such un rebutted testimony establishes the requisite nexus between the appellant's misconduct and the efficiency of the service. *Scheffler v. Department of the Army*, [117 M.S.P.R. 499](#), ¶ 13 (2012). Although the appellant argues that there can be no nexus because he does not work with money, no such requirement exists, and, as the administrative judge properly found, the agency established

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<sup>3</sup> The Board may follow nonprecedential decisions of the U.S. Court of Appeals for the Federal Circuit to the extent that it finds them to be persuasive. *Weed v. Social Security Administration*, [113 M.S.P.R. 221](#), ¶ 11 (2010).

<sup>4</sup> When the appellant was arrested, he was charged with felony theft for taking, at a casino, another casino patron's shoulder bag containing approximately \$13,000. The appellant pled guilty to the reduced charge of the Class A misdemeanor of stealing. IAF, Tab 7 at 36-60.

nexus by demonstrating that the appellant's misconduct adversely affected the agency's trust and confidence in his job performance. *Kruger*, 32 M.S.P.R. at 71.

The appellant challenges the administrative judge's finding that removal was a reasonable penalty. Where, as here, all of the agency's charges are sustained, but some of the underlying specifications are not, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness. *Parker v. U.S. Postal Service*, [111 M.S.P.R. 510](#), ¶ 8, *aff'd*, 355 F. App'x 410 (2009). The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Dunn v. Department of the Air Force*, [96 M.S.P.R. 166](#), ¶ 10 (2004), *aff'd*, 139 F.App'x 280 (Fed. Cir. 2005).

On review, the administrative judge determined that the deciding official's penalty determination was entitled to deference. ID at 5-6. She found, based on his testimony, that he considered the *Douglas* factors, as supported by his checklist. IAF, Tab 7 at 122-24. Specifically, he considered that the appellant's duties involve the confidentiality and integrity of the agency's systems, networks, and data; that he has contacts with vendors, consultants, and contractors; and that his position is one of trust; and that he works independently. *Id.* at 22-26; ID at 5. As noted, he explained that the nature of the appellant's wrongdoing showed poor judgment, causing the deciding official not to trust him, and that his prospects for rehabilitation were slight, given that he continues to deny having stolen anything. ID at 5. The deciding official also noted that the penalty was consistent with the agency's Table of Penalties. IAF, Tab 7, Agency Exhibit P at 32. He considered, as mitigating factors, that the appellant had 21 years of service with good performance ratings, *id.* at 122-24, but concluded that these factors were outweighed by the seriousness of the misconduct. *Id.* at 125-27.

The appellant argues on review that the deciding official failed to consider other mitigating factors, including his pending debt, his father-in-law's illness,

and his wife's continuing medical problems. The appellant raised these issues in his reply to the first proposal, specifically, in response to the specification regarding his indebtedness, *id.* at 103, which the agency dropped. In any event, the deciding official need not show that he considered all the mitigating factors in determining the penalty. *Lopez v. Department of the Navy*, [108 M.S.P.R. 384](#), ¶ 22 (2008). Therefore, even if he did not consider these particular factors, the appellant has not shown that they were sufficiently relevant to the sustained misconduct such that removal under these circumstances clearly exceeded the bounds of reasonableness.

Finally, the appellant argues that the deciding official failed to consider evidence of disparate treatment. He charges that John Allen, Chief of Staff, prepared the *Douglas* checklist for the deciding official, but, in doing so, did not indicate that there were any other employees who were disciplined for the same or similar misconduct. IAF, Tab 7 at 122-25. According to the appellant, a GS-13 IT Specialist was recently charged with failure to report an arrest (second offense) for possession and illegal entry, but was given only a 5-day suspension. Allen acknowledged that case in his testimony, but suggested that, while the situations were similar, they were not exactly so. CD. The administrative judge noted the appellant's allegation of disparate treatment during the prehearing conference, as well as the agency's response that no other employee pled guilty to an offense, although two employees who failed to report arrests received a 7-day and a 5-day suspension, respectively. IAF, Tab 15. Because the administrative judge did not address the disparate treatment claim in the initial decision, ID at 5-6, we do so here.

To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Ly v. Department of the Treasury*, [118 M.S.P.R. 481](#), ¶ 13 (2012). At the outset, the appellant failed to show that the charges were substantially similar since the comparator employee was suspended for 5 days for failing to report an arrest,

whereas the appellant was removed for improper conduct, specifically, having pled guilty to a Class A misdemeanor. In its second specification, the agency charged that the appellant failed to report his arrest, but the administrative judge did not sustain that specification. As such, the appellant did not present evidence that the comparator employee had engaged in similar conduct with respect to the charge, or the specification, that was sustained against the appellant. Rather, he only claimed that their conduct was similar with respect to a specification against him that was not sustained. Therefore, the appellant has not met his burden of establishing that the comparator employee was similarly situated to him for purposes of establishing a disparate treatment claim. *Reid v. Department of the Navy*, [118 M.S.P.R. 396](#), ¶¶ 22-23 (2012).

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

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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).

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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.