

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

DAVID J. AZOLAS,
Appellant,

DOCKET NUMBER
SF-0752-10-1007-B-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: February 5, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In the petition for review, the appellant, a Customer Services Supervisor, challenges the initial decision sustaining his removal based on unacceptable conduct. The appellant argues that: 1) sufficiently sound reasons exist for overturning the administrative judge's credibility findings that the witnesses' testimony and evidence supporting the charge were more credible than the appellant's testimony; 2) the charge was barred by laches; and 3) removal is an unreasonable penalty.

The administrative judge thoroughly addressed the testimony and evidence; made explicit credibility determinations, some of which were based on the witnesses' demeanor; and explained his basis for sustaining the charge. We discern no reason to disturb those well-reasoned findings. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002); *see also Crosby v.*

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.

U.S. Postal Service, [74 M.S.P.R. 98](#), 106 (1997) (stating that there is no reason to disturb the initial decision where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same). Specifically, the appellant contends that the administrative judge erred in finding the testimony of C.Y. credible because she did not report his alleged comments when they were made but waited until after he “yelled at her to stop talking,” which she considered the “last straw.” Petition for Review (PFR) File, Tab 1 at 6. He thus asserts that his work-related conduct caused her complaint. *Id.* at 6. He similarly notes that the agency was investigating C.Y. for a postal vehicle accident when she made the allegations against him. He asserts that the administrative judge erred in discounting this evidence. *Id.* at 6-7. He also asserts that the administrative judge erred in giving no weight to the fact that C.Y. claimed that he made the comment on the open work floor, but that no one, including Supervisor Dan Asher, heard the comment. *Id.* at 7-8.

Contrary to the appellant’s argument, the administrative judge thoroughly considered the same assertions the appellant raises in his petition for review and explained his reasons for rejecting them. Specifically, the administrative judge found it unbelievable that C.Y. would fabricate testimony about the appellant’s April 2010 sexually inappropriate remark to shift attention from the postal vehicle accident she had later that month. The administrative judge also found that C.Y.’s delay in filing a discrimination complaint about the appellant’s remarks until April 2010, after he had confronted her about talking in the workplace, was understandable given his finding that she feared the appellant and was under stress. The administrative judge acknowledged that C.Y. stated that Asher overheard the appellant making the remark and that, in a written statement, Asher denied overhearing the appellant say anything inappropriate. He found Asher’s denial not dispositive, though, because it was unclear whether Asher was

in a position to overhear the remark or whether C.Y. was simply mistaken. Remand Initial Decision (RID) at 15-16.

Moreover, the appellant's own descriptions of the decisions he cites to support his argument for overturning the administrative judge's credibility determinations show that the decisions involve situations in which the administrative judge failed to consider conflicting evidence, credited testimony that conflicted with sworn statements by impartial witnesses, or failed to identify and discuss relevant evidence. PFR File, Tab 1 at 7. Here, the appellant has identified nothing that the administrative judge did not consider; rather, he merely disagrees with the administrative judge's conclusion that, although C.Y. was nervous, her demeanor while testifying supported her credibility and her testimony was consistent with multiple other witnesses' recollections regarding the appellant using abusive language and another witness's testimony regarding the appellant making sexually inappropriate comments. RID at 14-15. In contrast, the administrative judge was "unimpressed with the appellant's demeanor, finding his denials less than credible, finding that he appeared to be shading the truth." RID at 15. The appellant has presented nothing that would warrant overturning the administrative judge's explained credibility determinations, which were partly based on his observation of the witnesses' demeanor. *See Haebe*, 288 F.3d at 1301.

The appellant asserts that, "[s]imilarly," the administrative judge credited K.F.'s allegations that the appellant used "profanity" in 2008, even though she failed to make them at the time. PFR File, Tab 1 at 8-9. Again, the administrative judge found K.F. "a credible witness, testifying in a straightforward and deliberate manner," and her testimony bolstered by the contemporaneous record she made on July 16, 2008, regarding the appellant's remark. RID at 17. By contrast, he found the appellant's attempted explanations "strained and otherwise not credible." RID at 17.

The appellant summarily argues that the testimony of M.N., B.W., Y.M., and J.G. was “inherently unreliable and lacked credibility.” PFR File, Tab 1 at 8. He asserts that none of the witnesses could identify the times or dates when they heard the appellant using profanity and that the administrative judge acknowledged that J.G. recalled that the appellant’s name-calling towards her stopped in 2007. He thus argues that the evidence should be found unreliable. *Id.* at 9.

As discussed above, the administrative judge explained his reasons for crediting those witnesses’ testimony. In summary, he noted that M.N. kept contemporaneous notes; that B.W. and Y.M.’s testimony was consistent with those notes and with other witnesses’ testimony and statements; and that M.N.’s deposition testimony, other witnesses’ testimony, and his own observation of the appellant’s intimidating demeanor credibly explained the witnesses’ delay in complaining about the appellant’s conduct. RID at 7-8, 18, 20. Moreover, the administrative judge acknowledged that J.G. testified that the appellant stopped calling her names in 2007, after she reported his conduct to Asher, who told him not to talk to her anymore. RID at 8. The appellant has not explained why this finding supports his assertion that J.G.’s testimony concerning his conduct before that time was not credible.

Further, the appellant has not shown that the administrative judge erred in finding that he failed to prove his affirmative defense of laches. *See, e.g., Wilson v. Department of Homeland Security*, [118 M.S.P.R. 62](#), ¶ 10 n.3 (2012). He contends that the alleged offensive comments were made years before his removal and that he was unfairly prejudiced because his alleged conduct was not raised at the time and that it was not identified with sufficient specificity to allow him to defend against the allegations. PFR File, Tab 1 at 9.

The administrative judge thoroughly addressed the appellant’s laches affirmative defense. He found that M.N. documented multiple incidents from May 2008 to May 2009, that the agency did not become aware of the incidents

until 2010, and that it proposed the appellant's removal later that same year. The administrative judge found that the agency acted quickly after it learned of the allegations and that the appellant had not shown that his ability to defend against the allegations was prejudiced by any delay. The administrative judge found that J.G. testified that the appellant's comments occurred in 2007. He found that the Board has found a 3-year delay not unreasonable where, as here, the agency acted after it found a pattern of conduct warranting discipline. He again found that the appellant was not materially prejudiced by the delay. The administrative judge found that the incidents involving K.F. occurred in 2008 and 2009, that the delay in bringing the charge was not unreasonable, and that the appellant did not show that he was materially prejudiced by any delay because he testified at length concerning them. RID at 22-23.

Moreover, the administrative judge carefully considered the appellant's arguments concerning the appropriateness of the agency-imposed penalty. The appellant asserts that the agency and the administrative judge failed to properly consider the relevant factors in determining the penalty, specifically his 25 years of unblemished service, his potential for rehabilitation, and his short (1-year) tenure as a supervisor. PFR File, Tab 1 at 9-11. He asserts that he possessed all of the favorable factors for demoting him back to a nonsupervisory position cited in *Jackson v. U.S. Postal Service*, [48 M.S.P.R. 472](#), 476-77 (1991). PFR File, Tab 1 at 10-11.

The appellant has failed to show that the administrative judge erred in not mitigating the agency-imposed penalty. To begin with, the administrative judge's basis for taking jurisdiction over the appeal was his determination, following Board remand, that "the appellant was performing identical duties in his position as a 204-B supervisor continuously since 2005 when he stopped carrying a letter carrier route" and that his employment in that temporary supervisor position was the same or similar to the Supervisory Customer Services position to which he was promoted in March 2010. RID at 5. Thus, the appellant's defense that he

had been a supervisor for only 1 year before his September 2010 removal is unavailing.

Further, the administrative judge fully considered the appellant's other asserted mitigating factors. Specifically, the administrative judge cited deciding official Joe DiGiacomo's testimony and evidence as follows: DiGiacomo reviewed the notice of proposed removal, the supporting materials, and the appellant's written reply. The appellant denied any wrongdoing, believed the union was out to get him, and believed that everyone who had complained was a poor performer. He found the appellant's denials of misconduct incredible given that multiple witnesses had observed his conduct over an extended period. He considered the misconduct serious. He also considered the appellant's 25 years of service, lack of discipline, and overall record. But he found that the appellant was on adequate notice not to engage in such conduct from "stand up" training and as a matter of common sense. He rejected the appellant's claim that he was just using slang, finding the comments highly offensive. He considered alternative discipline such as a demotion or suspension but rejected them because, in light of the appellant's lack of remorse and pattern of conduct, he had no reason to think that the appellant's behavior would change. He also noted that demoting the appellant to a nonsupervisory position in the same office could potentially create a hostile work environment. He testified that the penalty was consistent with others he had imposed. RID at 24-25; Remand Appeal File, Tab 18, Subtab 4E.

The administrative judge found that the penalty did not exceed the bounds of reasonableness. He found that agencies are entitled to hold supervisors to a higher standard of conduct than nonsupervisors, that the misconduct was very serious, and that the Board had found removal reasonable where the appellants had engaged in persistent patterns of misconduct of this nature. RID at 25-26.

Thus, the appellant has not shown that he exhibited the rehabilitation potential for which he cited *Jackson*. Moreover, as discussed above, both

DiGiacomo and the administrative judge considered the appellant's many years of service and lack of prior disciplinary record and the appellant's argument that, in light of this, the penalty should be mitigated to a demotion to his prior nonsupervisory position. RID at 24-26. The appellant has shown no error in the administrative judge's findings, however, that these factors did not outweigh the aggravating factors supporting removal. *See, e.g., Neuman v. U.S. Postal Service*, [108 M.S.P.R. 200](#), ¶ 23 (2008); *Kirkland-Zuck v. Department of Housing & Urban Development*, [90 M.S.P.R. 12](#), ¶ 19 (2001), *aff'd*, 48 F. App'x 749 (Fed. Cir. 2002); *Wilson v. Department of Justice*, [68 M.S.P.R. 303](#), 310 (1995); *Hicks v. Department of the Treasury*, [62 M.S.P.R. 71](#), 75-76 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table). The appellant has not shown that the administrative judge erred in finding that removal was within the tolerable limits of reasonableness for the sustained misconduct. *See Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981).

After the record closed on review, the agency submitted a July 13, 2012 arbitration award in which the arbitrator found that agency management had failed to act to prevent the appellant's misconduct. The award was not readily available before the record closed. However, it does not affect the outcome of this appeal.

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).

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.