

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

KENNETH K. REED,
Appellant,

DOCKET NUMBER
CH-0752-11-0872-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: February 8, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

George A. Luscombe, III, Esquire, and Robert E. Bloch, Esquire, Chicago, Illinois, for the appellant.

Timothy B. Morgan, Esquire, Chicago, Illinois, 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, and the appellant has filed a cross petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which mitigated the appellant's removal to a

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

60-day suspension. Generally, we grant petitions such as these 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 neither party has established any basis under section 1201.115 for granting the petition or cross petition for review. Therefore, we DENY the petition for review and the cross 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\(b\)](#).

AGENCY'S PETITION FOR REVIEW

In its petition for review, the agency alleges that the administrative judge erred in sustaining only three of the six specifications contained in the sole charge of absence without leave (AWOL). Petition for Review (PFR) File, Tab 3. Specifically, the agency argues that the administrative judge failed to sustain the specifications concerning the appellant's attendance in morning huddles on April 27, July 15, and July 18, 2011, despite testimony from Mattie Newsome, the appellant's supervisor, and Rosamma Alexander, Ms. Newsome's assistant, that the appellant was not present in the morning huddles on those dates based upon

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.

their observations during the huddles. *Id.* at 5, 8-9, 16-18. The administrative judge, however, acknowledged that Ms. Newsome and Ms. Alexander testified that they did not see the appellant in the morning huddles, but nevertheless found that the agency failed to prove the specifications by preponderant evidence. Initial Appeal File (IAF), Tab 9, Initial Decision at 7-8. Citing the factors set forth in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), the administrative judge found that, although Ms. Newsome and Ms. Alexander testified credibly that they did not see the appellant, the appellant was more likely than not present in the morning huddles based upon the makeup of the conference room where the huddles were held, the appellant's credible and consistent testimony that he was present at each of the morning huddles in question, and the appellant's knowledge of his assignments each day, which were handed out at the morning huddles. ID at 7-8 & n.1.

It is well-established that the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Diggs v. Department of Housing & Urban Development*, [114 M.S.P.R. 464](#), ¶ 8 (2010). Here, the agency's assertions fail to provide a basis for granting review because they constitute mere disagreement with the administrative judge's explained credibility determinations and fact findings, which are supported by the record and entitled to deference. *See id.*; Initial Decision at 7-8. Therefore, the agency has failed to set forth any reason to disturb the administrative judge's findings in this regard.

The agency also asserts that the administrative judge improperly mitigated the penalty because she made findings of fact with respect to the three sustained specifications that are inconsistent with the record. PFR File, Tab 1 at 9. Each of these findings of fact is supported by the record. For instance, with respect to the third specification, the agency claims that the administrative judge mitigated

the penalty, in part, based upon her incorrect conclusion that Ms. Newsome was aware of the domestic incident concerning the appellant's daughter on June 22, 2011. *Id.* at 2-3 (citing Hearing Transcript (HT) at 27-29 (testimony of Newsome)). The agency claims that the appellant never explained the domestic incident to Ms. Newsome and that “[a]t no time did [the appellant’s] supervisor ever know why he failed to show up for work and treat patients on the 22nd.” *Id.* at 3. We disagree. In the appellant’s response to Ms. Newsome’s letter of inquiry regarding the appellant’s unauthorized absence on June 22, 2011, which Ms. Newsome acknowledged receiving on June 23, 2011, he informed Ms. Newsome that he was late the previous day because there was an incident that happened at his house concerning his daughter, which was serious, and he attached the police report indicating that a domestic incident had taken place. IAF, Tab 4, Subtabs 4f, 4g; HT at 26-27 (testimony of Newsome). Moreover, Ms. Newsome acknowledged in her hearing testimony that the appellant called her the morning of June 22, 2011, to inform her “that he had a bad day due to a situation that happened at home with his daughter the day before,” and Ms. Newsome granted emergency annual leave as a result. HT at 28 (testimony of Newsome). Therefore, contrary to the agency’s allegation, Ms. Newsome was aware of a domestic situation regarding the appellant’s daughter that occurred on June 22, 2011, and the administrative judge properly considered that fact in her analysis of the penalty.³ Initial Decision at 12.

³ The agency also argues that the administrative judge erred in mitigating the penalty because she wrongly concluded that the appellant informed Ms. Newsome on April 8, 2011, that he had a court hearing scheduled for April 28, 2011, citing to Ms. Newsome’s denial that the conversation took place during her hearing testimony. PFR File, Tab 3 at 3-4 (citing HT at 30 (testimony of Newsome)). The appellant, however, testified that he did inform Ms. Newsome on that date, and, therefore, the agency’s argument is mere disagreement with the administrative judge’s finding of fact. HT at 103 (testimony of the appellant). In any event, because the administrative judge did not indicate that she relied on this fact in performing her penalty analysis, it is not material.

The agency further claims that the administrative judge's *Douglas* factors analysis is flawed and that the gravity of the three sustained specifications warrant removal. PFR File, Tab 3 at 9-16. The agency's arguments, however, constitute mere disagreement with the administrative judge's explained and reasoned findings that a 60-day suspension was the maximum reasonable penalty under the circumstances, and we discern no reason to disturb these findings. Initial Decision at 9-13; *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); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

As alleged new evidence, the agency submits an affidavit in an effort to impeach the credibility of the appellant. PFR File, Tab 3 at 19. We find, however, that the information contained in the affidavit does not present a "significant challenge" to the appellant's testimony so as to circumvent the general rule that evidence offered merely to impeach a witness's credibility is not material. *Cf. Priddy v. Veterans Administration*, [40 M.S.P.R. 42](#), 45 (1989) (the general rule did not apply when the alleged new evidence did not raise a minor inconsistency in the appellant's testimony but alleged that the appellant admitted the misconduct at issue).

APPELLANT'S CROSS PETITION FOR REVIEW

In his cross petition for review, the appellant argues that the 60-day suspension should be further mitigated to a reprimand pursuant to the agency's table of penalties. PFR File, Tab 7 at 24-25. The appellant claims that, because the last chance agreement did not specifically provide to the contrary, his unauthorized absences from more than 4 years ago cannot be counted towards progressive discipline now because those absences "expired" upon his successful completion of the agreement. *Id.* at 25 (citing *Whitmore v. Department of the*

Navy, [34 M.S.P.R. 137](#) (1987)). In *Whitmore*, however, the Board found that the agency improperly considered the appellant's past disciplinary offenses that were more than 3 years old because it violated an agency regulation prohibiting such consideration. *Whitmore*, 34 M.S.P.R. at 140. Here, the appellant does not identify an agency regulation or rule that would prevent the deciding official or the administrative judge from considering his previous suspensions in determining the appropriate penalty. Accordingly, the appellant sets forth no reason to disturb the administrative judge's penalty determination. *See, e.g., Lovenduski v. Department of the Army*, [64 M.S.P.R. 612](#), 616-17 (1994) (the Board mitigated the removal penalty to a 60-day suspension, despite the appellant's prior disciplinary record, in light of the brief period of AWOL, the small value of the government property misused, and 18 years of satisfactory service).

ORDER

We ORDER the agency to cancel the removal and substitute in its place a 60-day suspension without pay and to restore the appellant effective September 30, 2011. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.** You

must file your attorney fees motion with the office that issued the initial decision on your 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.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.