UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANGELA ABREGO,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DA-0752-11-0025-I-1

DATE: December 2, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

David C. Holmes, Esquire, Houston, Texas, for the appellant.

Kim E. Garcia, Esquire, Coppell, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

The agency removed the appellant from her Security Manager position for failing to meet the performance standards of her position, as evidenced by her failure to attain a minimum performance rating of "Achieves Standards" on a test of her knowledge of Standard Operating Procedures (SOP), despite a performance improvement plan (PIP). Initial Appeal File (IAF), Tab 6, Subtab 4g. The administrative judge found that, based on the appellant's scores, she had failed to "Achieve Standards," and that therefore the agency had proved the charge, Initial Decision (ID) at 3-11, that action based on that failure promoted the efficiency of the service, *id.* at 11-12, and that, under the circumstances, removal was reasonable. *Id.* at 12-14.

DISCUSSION OF ARGUMENTS ON REVIEW

On petition for review, the appellant argues that the agency failed to fulfill its promises to her under the PIP, Petition for Review (PFR) File, Tab 1 at 4-5, 9-10, and that, with regard to the penalty, the agency did not, as it was required to do, consider the requirements of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1980), based on its erroneous belief that removal was the only option available to it, given her failure to achieve a passing score and thereby meet her performance standards. *Id.* at 5-9.

The administrative judge considered the appellant's challenges to the PIP, finding that the agency afforded her 1 hour per day, 4 days per week, in which to study the SOP, and that various supervisors were assigned to meet with her weekly regarding her performance. IAF, Tab 6, Subtab 4hh; ID at 6, 8. The administrative judge found, however, that the appellant did not take advantage of

the one-on-one training that was offered to her, and that, while she claimed that she did not have sufficient time to study during the period in question because of other job duties, she conceded that she continued to perform those collateral duties, even though she was specifically told not to. ID at 10. The administrative judge further found that, while the PIP, which began on April 5, 2007, was to be 90 days in length, the appellant told her supervisors, after she completed the Basic Screener Training, that she wanted to take the test early because she felt confident, and that, against their advice, she took it on May 16, 2007. *Id.* at 7, 9, 10-11. Although in hindsight, the appellant might have preferred a different type of PIP, she has only disagreed with, but has not shown error in, the administrative judge's finding that she was afforded the requirements of the PIP, as provided for by the agency's guidance, IAF, Tab 6, Subtabs 4kk, 4ll, and that, notwithstanding, she received a failing grade on the subsequent quiz. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). As such, her argument does not provide a basis for Board review.

The appellant also argues that the administrative judge erred in not addressing the agency's erroneous belief that its only options were removal or reassignment, and that under *Douglas*, it was required to consider various factors and other options which it failed to explore. The applicable provisions of Management Directive (MD) 1100.75-3, Addressing Conduct and Performance Problems, do require consideration of the *Douglas* factors. IAF, Tab 6, Subtab 4uu at 5-6; *see also Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 11 (2009), *aff'd*, 370 F. App'x 119 (Fed. Cir.), *cert. denied*, 131 S. Ct. 833 (2010). In the decision letter, the deciding official did not mention the *Douglas* factors. He did state, however, that, in assessing the reasonableness of the

penalty, he considered the appellant's response to the proposal notice[2] and her work history, but that her inability to achieve the requisite level of performance to retain her position as required by MD 1100.75-3 served as the basis for the action and required her removal. IAF, Tab 6, Subtab 4g at 2. When questioned by agency counsel at the hearing, the deciding official testified that he did, in fact, consider the pertinent *Douglas* factors before determining to remove the appellant. Hearing Compact Disc (CD). Specifically, he considered the importance of the appellant's position as a manager, and her need to be knowledgeable to her subordinates and to serve as a role model to them. He also considered her 5 years of discipline-free service, but found that that factor was outweighed by her failure to exhibit the required technical knowledge. He noted that "national guidance" provided that only removal or permanent reassignment were options under the circumstances, but that the appellant had not indicated any interest in reassignment, a claim she does not challenge. He also considered that, while there was no notoriety involved in the appellant's failure, if the work force or stakeholders learned of it, they would lose confidence in her, as he did. And, he considered that the appellant was on notice of the requirements regarding her performance. *Id.*

Based on our review of the documentary and testimonial evidence, we do not believe that the appellant has shown error in the administrative judge's finding that the deciding official considered the appropriate *Douglas* factors, whether or not he referred to them as such in his decision letter. In any event, it is well established that not all of the *Douglas* factors are pertinent in every case. *Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983); *Douglas*, 5 M.S.P.R. at 306. MD 1100.75-3 contains specific language that is in accord. IAF, Tab 6, Subtab 4uu at 5. Moreover, not all

[2] In her reply, the appellant noted the collateral duties for which she was responsible at the time the PIP began as well as various personal and health problems of her own and her family members. IAF, Tab 6, Subtab 4h.

Douglas factors apply in performance cases. *See, e.g., Fairall v. Veterans Administratio*n, 33 M.S.P.R. 33, 46, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987). According to the deciding official, the seriousness of the appellant's demonstrated lack of technical knowledge was most critical, given its implications to the safety of the flying public. CD.

Nor has the appellant shown error in the administrative judge's finding that the agency's decision to remove the appellant for her test failures is reasonable. The appellant argues that the agency could have put her on another PIP, suspended her, placed her on probation until she passed, or temporarily assigned her to a non-operational job until she passed. Although MD 1100.75-3 includes a provision for progressive discipline, it also states that removal is not precluded "as the first action taken against any employee where . . . performance . . . [is] so serious as to warrant removal, such as engaging in any activity that seriously undermines security interests, [or] poses a threat or danger to the traveling public . . . ." IAF, Tab 6, Subtab 4uu at 4. MD 1100-75-3 also provides that, in determining the appropriate action to take based on performance, consideration should be given to whether the performance problem is because of a refusal or failure to perform acceptably or, as it is here, an inability to perform, and that a suspension would not be appropriate in the latter case. *Id.* We note that, prior to the agency's issuance of the proposal notice, the appellant asked to be demoted to the lower pay-band position of Behavior Detection Officer. *Id.*, Subtab 4t. The head of that program indicated that the appellant could compete for the position, *id.*, Subtab 4r at 3, but it does not appear that she did so. Providing the appellant with that option is consistent with the agency's updated procedures. *Id.*, Subtab 4ee. In sum, the appellant has not shown that the administrative judge erred in her penalty analysis.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

This is 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.