

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

RANDY ASHMORE,
Appellant,

DOCKET NUMBER
CH-0752-11-0871-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: March 18, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Philip Bauman, Beach Park, Illinois, for the appellant.

Michael P. Mahoney, Great Lakes, Illinois, 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 agency's removal action. 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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.² 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. [5 C.F.R. § 1201.113\(b\)](#).

The appellant asserts on review, without any explanation or support, that "there [sic] facts did not match with the proper documentation, nor was it consistent." Petition for Review (PFR), Tab 1 at 5. However, because the appellant has failed to explain how the administrative judge erred or provide any evidence or argument to support these assertions, we have not addressed them. See *Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992) (a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record); *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980) (before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect and identify the specific evidence in the record which demonstrates the error).

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.

The appellant also challenges the removal penalty by asserting that the administrative judge “did not consider [his] 19 years of government service or [his] hospitalization.” PFR, Tab 1 at 4. However, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). Here, contrary to the appellant’s assertions, the administrative judge’s review of the penalty was very thorough and reasonably explained, and we agree with her determination that the removal penalty is within the bounds of reasonableness for the sustained misconduct. As the administrative judge explicitly summarized, Initial Decision (ID) at 10-12, the deciding official considered the medical documentation which only addressed 10 days of the appellant’s lengthy absence, the observations of the dispatcher, the accounts of the co-watch commanders who investigated the incident, the fact that the appellant had been absent without leave (AWOL) from May 16, 2011, through the August 15, 2011 effective date of his removal, the appellant’s failure to attend a June 30 meeting concerning his return, and the appellant’s failure to contact anyone for 5 weeks after the June 30 meeting. ID at 10-11. The deciding official also considered the seriousness of the misconduct and the appellant’s prior 14-day suspension for AWOL and failure to follow leave procedures in March 2011. ID at 11. In addition, the deciding official testified that he considered the appellant’s 19 years of service as well as sanctions other than removal but determined that the Public Safety Dispatcher position is one of public trust that requires the appellant to be 100 percent capable of carrying out his assigned duties and that the appellant had clearly demonstrated that he was unable to do so. ID at 11. Thus, the deciding official testified that he determined the appellant’s removal to be commensurate with the level of his misconduct. *Id.* After considering the hearing testimony, the administrative judge found that the deciding official had thoroughly and persuasively explained his decision to

remove the appellant rather than impose a lesser penalty, and she found removal to be well within the bounds of reasonableness. ID at 11-12.

As shown above, the administrative judge thoroughly reviewed the seriousness of the sustained misconduct, the record evidence and testimony, and the relevant *Douglas* factors. ID at 9-12. Our review of the record and the relevant case law supports the administrative judge's penalty determinations. See *Walker v. U.S. Postal Service*, [112 M.S.P.R. 580](#), ¶ 16 (2009) (the Board found the penalty of removal reasonable where the appellant was AWOL for 5 days, the appellant was clearly aware of the proper procedures for requesting leave, his failure to follow the procedures was deliberate and willful, and he offered no mitigating factors sufficient to overcome the aggravating factors). Here, the sustained misconduct is serious. The appellant reported to work under the influence of alcohol to a position in which he was responsible for handling emergency telephone calls and transmitting the information to the police and fire departments. The appellant was then AWOL for an extensive period of time. Although the appellant submitted a request for leave without pay on August 5, after the period for a response to the proposed removal had passed, he only provided supporting documentation for 10 days of the charged AWOL period. Based on the lengthy period of the AWOL, the appellant's failure to attend the June 30 meeting, his continuing AWOL from June 30 until his removal, and his previous 14-day suspension for AWOL and failure to follow leave procedures only a few months prior to this incident, we agree with the deciding official that the appellant lacks the potential for rehabilitation. Accordingly, the appellant has provided no basis upon which to disturb the administrative judge's decision to sustain his removal.

**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.