

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

JEROLD LAMONT ALLIE,
Appellant,

DOCKET NUMBER
DC-0752-24-0335-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 27, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Joan Karen Jappa, Oxon Hill, Maryland, for the appellant.

Peter D. Gregory, Esquire, Camp Springs, Maryland, for the agency.

Michael Spargo, Esquire, South Burlington, Vermont, for the agency.

BEFORE

James J. Woodruff II, Chairman
Henry J. Kerner, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which sustained his removal for misconduct. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

of statute or regulation or the erroneous application of the law to the facts of the case; the administrative 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. 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, 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 to clarify that the appellant's alleged failure to timely report his misconduct is not a basis for either finding nexus or denying his affirmative defense under 5 U.S.C. § 2302(b)(10), we AFFIRM the initial decision.

BACKGROUND

The appellant was a GS-14 Information Technology Specialist for the agency. Initial Appeal File (IAF), Tab 1 at 1, Tab 5 at 13. On May 5, 2023, the agency proposed the appellant's removal based on charges of (1) improper conduct, (2) failure to report own misconduct, and (3) telework from an unauthorized location. IAF, Tab 7 at 4-11. After the appellant responded, the deciding official issued a decision sustaining all three charges and removing the appellant effective February 20, 2024. IAF, Tab 5 at 13-43.

The appellant filed a Board appeal contesting the merits of his removal and raising affirmative defenses of discrimination based on conduct that does not adversely affect job performance, i.e., a violation of 5 U.S.C. § 2302(b)(10), and retaliation for protected union activity. IAF, Tab 1 at 10, Tab 10, Tab 31 at 1-2. After a hearing, the administrative judge issued an initial decision sustaining the removal. IAF, Tab 40, Initial Decision (ID). He found that the agency only proved Charge 1, but that it nevertheless established nexus and that the removal penalty

was reasonable for the sustained charge alone. ID at 7-13, 16-21. He also found that the appellant did not prove either of his affirmative defenses. ID at 13-16.

The appellant has filed a petition for review disputing many of the administrative judge's findings of fact and credibility determinations, as well as some of his legal analyses and procedural rulings. Petition for Review (PFR) File, Tab 1. The agency has responded to the petition for review, and the appellant has filed a reply to the agency's response. PFR File, Tabs 3-4.

ANALYSIS

In an appeal of an adverse action under 5 U.S.C. chapter 75, the agency bears the burden of proving by preponderant evidence that its action was taken for such cause as would promote the efficiency of the service. *MacDonald v. Department of the Navy*, 4 M.S.P.R. 403, 404 (1980); 5 C.F.R. § 1201.56(b)(1)(ii). To meet this burden, the agency must prove its charge, establish a nexus between the charge and the efficiency of the service, and demonstrate that the penalty imposed was reasonable. *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997). However, even if the agency carries this burden, the action may not be sustained if the appellant shows that the agency's decision was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b). 5 U.S.C. § 7701(c)(2)(B); *see* 5 C.F.R. § 1201.56(b)(2)(i)(C).

Charge

As stated above, the administrative judge sustained only Charge 1—improper conduct. ID at 7-13. A charge of “improper conduct” has no specific elements of proof; rather, it is established by proving that the appellant committed the acts of misconduct alleged in support of the broad label. *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 11 (2010).

In support of its charge, the agency alleged that, on or about May 20, 2022, the appellant engaged in misconduct in the form of a domestic violence incident.

IAF, Tab 7 at 4-5. The notice of proposed removal recounted the details of a police report:

[The alleged victim, T.R.,] stated that on May 11, 2022, you arrived at her residence drunk, assaulted her, and then held her in her room against her will. The alleged victim reported that she called 911, but when police arrived, you turned off the lights and held her down. She reported that you kept her with you for the week following the incident. As a result, she was unable to make a report until you left. Officers noted in the report that the alleged victim had bite marks on her forearm and shoulder, and her left eye was bruised and bloodshot. Officers also verified that a 911 call was made from the alleged victim's phone number on May 11, 2022, at 11:25pm, during which the dispatcher noted arguing and screaming. The police report notes, when officers were dispatched to the scene, "they did not locate the incident."

Id. at 4. The specification went on to explain the criminal proceedings that ensued, including an arrest warrant, summons, and criminal complaint. *Id.* at 4-5.

The administrative judge sustained the charge, finding it more likely than not that the appellant engaged in misconduct as alleged. ID at 7-10. He interpreted the agency's charge as pertaining to the underlying conduct and not to the ensuing legal proceedings. ID at 9-10. He also made clear that his finding was "not based on the mere fact that the appellant was arrested or criminally charged," but was instead based on all the record evidence about the events that transpired on the date in question. ID at 8. In reaching his conclusion, he considered all of the relevant evidence, including the parties' stipulations, the police report documenting the alleged incident, photographs of injuries to T.R., the appellant's testimony, the testimony of the responding officer, Sgt. C.L., the agency's report of investigation, and the relevant court records. ID at 4-5, 8-9; IAF, Tab 7 at 14-22, 37-42, 91, 132-38, 161-221, Tab 33 at 3-4, Tabs 35-37, Tab 38, Hearing Recording (HR) at 3:06:30 (testimony of Sgt. C.L.), 4:15:30 (testimony of the appellant). The administrative judge found that the evidence that the agency provided was credible and internally consistent. ID at 8. He found that the appellant's version of events, i.e., that T.R. got hit by a tree branch while doing yard work and tried to implicate

him because she was mentally ill, was not credible. ID at 8-9. He based his credibility determination on the appellant's demeanor and on a comparison of the appellant's story with the other evidence of record, particularly the photographic evidence of T.R.'s injuries. ID at 9.

On petition for review, the appellant argues that the administrative judge should not have admitted into evidence the photographs of T.R.'s injuries. PFR File, Tab 1 at 6-10, 22, 30-33. By way of background, during the direct examination of Sgt. C.L., the agency sought to introduce three photographs of T.R. that agency counsel claimed to have received only that day despite having previously requested them from the Police Department of the City of Clairton, Pennsylvania. HR at 3:17:10, 3:18:40. The photographs appeared to show a bite mark on T.R.'s left shoulder, a bite mark on her right forearm, and a periorbital hematoma (black eye) around her left eye. IAF, Tabs 35-37. The appellant's representative objected on the basis that the appellant had not seen this evidence before and had not been able to review it. HR at 13:17:50. The administrative judge asked the appellant's representative whether there would be any prejudice to introducing the photographs and whether she needed an opportunity to review them. HR at 3:20:40. The appellant's representative stated that there would be prejudice because the photographs were salacious and unduly prejudicial. HR at 3:20:50, 3:23:25. The administrative judge overruled the appellant's objection but allowed her representative 10 minutes to review the photographs. HR at 3:24:20. The appellant argues on review that, for several reasons, the administrative judge abused his discretion by accepting the photographs into the record.² PFR File, Tab 1 at 6-7, 9-10, 30-31, 33.

The appellant argues that, under 18 PA. CONS. STAT. § 9122.5, the Clairton Police "would have had to file for [a] petition to use those photos." PFR File,

² Some of these arguments have been raised by the appellant for the first time on review. Nevertheless, considering how the evidence was introduced, we find it appropriate to consider all of the appellant's arguments at this time.

Tab 1 at 8-9. Assuming, without deciding, that state law could limit the admission of evidence at a Federal administrative proceeding such as this one, we find that the statute does not apply to the photographs at issue. The statute pertains to records that have been expunged or that have been designated “limited access” under a statutory procedure. 18 PA. CONS. STAT. § 9122.5. There is no indication that these photographs fall under either of those categories.

The appellant further argues that the administrative judge violated the Board’s regulations for the admission of exhibits at a hearing, allowing the photographs into the record “without a formal introduction.” PFR File, Tab 1 at 10. However, the authentication requirements of the Federal Rules of Evidence, Rule 901, do not apply to Board proceedings. *Arterberry v. Department of the Air Force*, 25 M.S.P.R. 582, 583 (1985). Unlike the rules of many courts, the Board’s regulations do not set forth strict procedures for authenticating exhibits and moving them into evidence. Instead, they leave these matters largely to the discretion of the administrative judge. In any event, we find that the photographs were appropriately authenticated and properly moved into evidence. HR at 3:29:30 (testimony of Sgt. C.L.).

The appellant argues that the injuries in the photographs were not verified to have been caused by him, PFR File, Tab 1 at 5, 8, 22, that they were unduly prejudicial to his case, *id.* at 10, 22, and that the agency knew about the photographs before the hearing began but waited until the hearing was underway to surprise him, *id.* at 9-10, 32. As to whether the appellant caused these injuries, we agree that the photographs only tend to show that T.R. was injured and the nature of her injuries; they do not themselves show that the appellant was the source of those injuries. Nevertheless, this argument goes only to the probative value of the evidence—not to its admissibility. As for whether the photographs were unduly prejudicial, we agree with the administrative judge that this consideration is not particularly relevant to Board proceedings. *See, e.g., Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) (holding that concerns over

undue prejudice under Federal Rule of Evidence 403 have “no logical application to bench trials”). As for the agency’s failure to raise this issue at the beginning of the proceedings, we agree with the appellant that it should have done so rather than wait until the hearing had already been underway for more than 3 hours. Nevertheless, we find that the administrative judge handled the matter appropriately, duly considering the appellant’s position on the matter and taking appropriate steps to mitigate prejudice to his procedural rights. HR at 3:17:50.

The appellant also argues that the administrative judge committed harmful procedural error and violated his due process rights by admitting these photographs. PFR File, Tab 1 at 10. The concepts of “harmful procedural error” and “due process” are, however, misplaced in the context of this issue. Rather, the question is whether the administrative judge abused his discretion in admitting the photographs into the record and, if so, whether the appellant’s substantive rights were prejudiced. *See* 5 C.F.R. § 1201.115(c); *see also Semenov v. Department of Veterans Affairs*, 2023 MSPB 16, ¶ 26 n.6 (An administrative judge has broad discretion to control the proceedings before him and his rulings regarding the admissibility of evidence are subject to review by the Board under an abuse of discretion standard.). Having carefully considered the appellant’s arguments and relevant portions of the record, for the reasons explained above, we find no abuse of discretion.

Considering the photographs themselves, the appellant argues that it was never verified that these injuries to T.R. were caused by him assaulting her. He states that T.R. never sought medical attention and that he was never questioned by the police. PFR File, Tab 1 at 6, 18, 32. We agree that T.R. did not seek medical attention for her injuries. However, we find that the most likely explanation is the same reason that she did not file a police report until 7 days after the assault, viz., the appellant kept her with him for those 7 days and she was unable to do so. HR at 3:39:40 (testimony of Sgt. C.L.). The record shows that T.R. called 911 on May 11, 2022, at 11:25 p.m., and the call-taker documented yelling and screaming,

but when the police arrived, they were unable to locate the incident.³ IAF, Tab 7 at 137. According to Sgt. C.L.’s affidavit of probable cause, T.R. reported that, when the police arrived, the appellant turned off the lights and held her down on a bed. *Id.* She further related that the appellant kept her with him for the next week, so she was unable to talk to the police until May 18, 2022, after the appellant left. *Id.* We find this account to be internally consistent, and we further find that it explains T.R.’s failure to seek medical attention for her injuries. We also agree with the appellant that the police never got his side of the story. However, that more properly concerns the criminal proceedings, which were terminated when T.R. twice declined to appear at a preliminary hearing. HR at 3:43:20 (testimony of Sgt. C.L.). As far as these administrative proceedings are concerned, the appellant had a full and fair opportunity to give his side of the story to both the agency and the Board. As for “verification” that the injuries in the photographs were caused by the appellant, as stated above, we agree with the appellant that the photographs themselves do not reveal the source of the injuries they show. However, for the reasons explained in the initial decision, other evidence adequately verifies that the appellant was the source of the injuries. ID at 8-9.

As set forth in the parties’ joint stipulations of fact, the appellant has a significant history of being arrested and charged with crimes only to have the charges later dropped. IAF, Tab 33 at 2-4. The appellant argues that the agency used this prior history as support for the current charge. PFR File, Tab 1 at 5, 31-32. The administrative judge, however, explicitly stated that he would not consider these prior matters as evidence that the appellant committed the specific

³ The appellant argues that the record does not show that the 911 call took place at the time of the assault but that it does show that it did not come from T.R.’s house. PFR File, Tab 1 at 20-21. We disagree. The record is consistent that the assault took place in the 11:00 p.m. hour on May 11, 2022, which is the same time as the 911 call. IAF, Tab 7 at 137. As for the location, Sgt. C.L. testified that “phase 2” is a tool that 911 dispatch uses to narrow down the location of a call, and that phase 2, in this case, was able to give an approximate location. HR at 3:48:50 (testimony of Sgt. C.L.). Sgt. C.L. did not testify that the call came from somewhere other than T.R.’s home.

offense with which he was charged in this case, and there is no indication that he did so. ID at 2 n.1.

As for the criminal charges associated with the conduct underlying the removal action, the appellant argues that the charges were never proven but were instead dismissed. He argues that the mere fact that charges were brought against him is insufficient to prove that he committed misconduct as alleged, particularly because the police never questioned him or heard his side of the story. PFR File, Tab 1 at 6, 8, 14-16, 19-20, 22-24, 29, 32-33. We agree with the appellant. However, so did the administrative judge. In his initial decision, the administrative judge stated, “To be clear, my finding is not based on the mere fact that the appellant was arrested or criminally charged.” ID at 8. It was instead based on his review of all the record evidence. *Id.* The administrative judge did not, as the appellant argues on review, “assum[e] the police report narrative to be fact.” PFR File, Tab 1 at 14. The appellant questions how the agency could charge him with engaging in criminal conduct that has not been proven in a court of law. PFR File, Tab 1 at 24. However, as the administrative judge correctly found, “the agency has not charged or alleged in its proposal that the appellant was convicted of the underlying misconduct. Instead, the agency charged the appellant with engaging in criminal conduct.” ID at 10. The administrative judge also correctly found that the Board may independently adjudicate whether a Government employee has engaged in criminal conduct. *Id.*; *see, e.g., Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1115 (Fed. Cir. 1986) (affirming the administrative judge’s finding that “an acquittal does not entitle an employee to reinstatement when an agency is able to prove by preponderant evidence that a removal action on the underlying conduct is justified.”).

The appellant argues that the agency has failed to meet its burden of proving the charge because its case is founded on unreliable hearsay. PFR File, Tab 1 at 16-17, 19-22. He states that T.R. fabricated the story of the assault because she is a mentally ill drug user who is prone to lying and hysterics. PFR File, Tab 1

at 21. We agree with the appellant that the agency's case may have been stronger if it were able to produce T.R. to testify in person. We further agree with the appellant that the agency's case was largely founded on hearsay. However, hearsay is admissible in Board proceedings, and not all hearsay is unreliable. *See Wisecup v. Office of Personnel Management*, 30 M.S.P.R. 191, 193 (finding no showing that the agency's documentary evidence was not routinely made in the ordinary course of business, or that it was inherently unreliable, untrustworthy, or noncredible), *aff'd*, 809 F.2d 790 (Fed. Cir. 1986) (Table); *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83, 87 (1981) (holding that assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case).

In this case, the administrative judge appropriately evaluated the agency's evidence, and for the reasons explained in the initial decision, we agree with him that the agency proved by preponderant evidence that the appellant assaulted T.R. as alleged. ID at 4-8. In particular, we find that the evidence that the agency provided was internally consistent and that Sgt. C.L.'s sworn hearing testimony and affidavit of probable cause have formal indicia of reliability. Nor is there any reason to think that Sgt. C.L. had a motive to fabricate his account. *See Borninkhof*, 5 M.S.P.R. at 83-87 (setting forth factors for the Board to consider in assessing the reliability of hearsay evidence). We have considered the appellant's assertions about T.R.'s character and mental health conditions, but under the circumstances, we find that they do not provide an adequate explanation for what transpired. Not only did the administrative judge consider the evidence provided by the agency, but he also considered the appellant's version of events and found it to be inherently improbable. ID at 8-9. The appellant testified that the injury to T.R.'s face occurred earlier in the week when a large tree branch fell on her head as she was doing yardwork. HR at 4:43:25, 5:33:20 (testimony of the appellant). The

administrative judge found, and we agree, that the appellant's story does not match the photographic evidence.⁴ ID at 9; IAF, Tab 37.

The administrative judge also considered the appellant's demeanor when assessing his testimony, and he found that the appellant's demeanor detracted from his credibility. ID at 9. On petition for review, the appellant argues that his demeanor at the hearing was affected by the surprise introduction of the photographs and the administrative judge's "aggressive line of questioning" about them. PFR File, Tab 1 at 33. It is well settled, however, that the Board will defer to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on observing the demeanor of witnesses testifying at a hearing, and that the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Although we understand that the appellant was uncomfortable at the hearing, we find that he has not provided a sufficiently sound reason for us to disturb the administrative judge's demeanor-based credibility determinations.

The appellant argues that the agency's case is undermined by its failure to bring a lack of candor charge against him for denying the misconduct. PFR File, Tab 1 at 14-15. He reasons that, if the agency believed that his denials of misconduct were untruthful, then it would have levied a lack of candor charge as well. *Id.* Although agencies are free to bring a separate charge of lack of candor against an employee who is untruthful to investigators, *e.g.*, *Chavez v. Small Business Administration*, 121 M.S.P.R. 168, ¶ 6 (2014), the agency's decision not to do so in this case does not detract from the strength of the evidence underlying the charge that it did bring. For the reasons explained in the initial decision, we

⁴ The appellant argues that the administrative judge added facts that were not in the record, *i.e.*, that T.R. was knocked to the ground or rendered unconscious by the tree branch. PFR File, Tab 1 at 11. The administrative judge did not do so. He merely recounted the appellant's testimony that T.R. did not lose consciousness or fall to the ground despite a tree branch as thick as two fists allegedly falling from 8 to 10 feet onto her head. ID at 9; HR at 5:33:05 (testimony of the appellant).

agree with the administrative judge that the agency proved the charge of improper conduct. ID at 7-10.

Nexus

In addition to the requirement that the agency prove its charge, the agency must also prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for an adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 8 (2010). The Board has recognized three categories under which an agency may prove nexus between off-duty misconduct and the efficiency of the service: (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. *Id.*, ¶ 9. In this case, the administrative judge found that agency established nexus under the second category. ID at 16-18. Specifically, he found that the appellant's supervisors lost trust and confidence in him and that "the appellant's misconduct is an action which goes to his reliability, veracity, trustworthiness, and ethical conduct." ID at 17.

"Loss of trust and confidence" is not simply a talisman that an agency can invoke to punish an employee for conduct that has nothing to do with his employment. However, for employees like the appellant, who have sensitive duties and occupy positions of trust, the Board has found that off-duty misconduct of the type proven here may satisfy the nexus requirement. *Honeycutt v. Department of Labor*, 22 M.S.P.R. 491, 494 (1984) (finding nexus for off-duty arrest for first-degree assault and public drunkenness in light of the sensitive and trustworthy nature of the appellant's duties), *aff'd*, 770 F.2d 181 (Fed. Cir. 1985) (Table). The administrative judge's finding that the agency had genuinely lost confidence in the

appellant's ability to perform is further supported by administrative judge's demeanor-based credibility determinations. ID at 17.

On petition for review, the appellant disputes the Personnel Security Division's decision to suspend his eligibility to occupy a sensitive position and argues that the agency did not charge him with failure to maintain a security clearance. PFR File, Tab 1 at 5, 11, 16, 23, 30. As an initial matter, the Board is not authorized to review a decision of the agency's Personnel Security Division about whether an employee is eligible to perform sensitive duties. *See Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988); *Ingram v. Department of Defense*, 120 M.S.P.R. 420, ¶ 7 (2013). In any event, this argument is ultimately immaterial to the outcome of the appeal because the agency proved nexus through means separate and apart from his loss of eligibility to occupy a sensitive position.

The appellant also argues that his personal issues with T.R. did not affect his ability to perform his duties, his performance remained good between May 11, 2022, and the date of his removal, the misconduct was not notorious so as to bring the agency into disrepute, and the misconduct was not so egregious as to give rise to a presumption of nexus. PFR File, Tab 1 at 12-14, 16, 19, 24, 30. We disagree with the appellant's arguments because, as set forth above, there are multiple ways that an agency can establish nexus, and the agency in this case established that management lost trust and confidence in him. To establish nexus, an agency is not required to prove that the appellant's conduct caused actual harm or interference to its mission, and it need not wait for the adverse effects of an employee's conduct to occur before taking action. *Smith v. Internal Revenue Service*, 12 M.S.P.R. 615, 616 (1982).

The appellant further argues that the administrative judge erred in finding nexus because the agency did not prove its charge. PFR File, Tab 1 at 14, 29, 31. However, for the reasons explained above, the agency did prove its charge.

Affirmative Defense Under 5 U.S.C. § 2302(b)(10)

Related to the issue of nexus is the appellant's affirmative defense under 5 U.S.C. § 2302(b)(10), which provides in relevant part that it is a prohibited personnel practice for an agency to "discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." The administrative judge found that the appellant failed to prove this affirmative defense because the appellant worked in a sensitive position of trust, and the agency lost faith in him as an employee. ID at 14. The administrative judge further stated, "Additionally, the appellant failed to timely report his misconduct as required by agency policy and his misconduct harmed the employee-employer relationship." On petition for review, the appellant argues that the administrative judge's finding was in error to the extent that it was based on Charge 2, which the administrative judge did not sustain. PFR File, Tab 1 at 29.

The analysis of the nexus issue and the analysis of the (b)(10) defense must generally rise or fall together. *See Middleton v. Department of Justice*, 23 M.S.P.R. 223, 228 (1984) (finding that a clear and specific finding of nexus negates a claim under 5 U.S.C. § 2302(b)(10)), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (Table). For the reasons explained above, we find that the nexus requirement is satisfied, and so the (b)(10) defense must fail. Nevertheless, we agree with the appellant that his alleged failure to report his own misconduct cannot figure into the analysis because the agency did not prove Charge 2. PFR File, Tab 1 at 29; ID at 14. We therefore modify the initial decision to remove any reliance on Charge 2 in either finding nexus or denying the appellant's affirmative defense under 5 U.S.C. § 2302(b)(10).

Retaliation for Union Activity

To prove an affirmative defense of retaliation for union activity under 5 U.S.C. § 2302(b)(9)(A)(ii), an appellant must show that (1) he engaged in protected activity, (2) the accused official knew of the activity, (3) the adverse action under review could have been retaliation under the circumstances, and

(4) there was a genuine nexus between the alleged retaliation and the adverse action. *Warren v. Department of the Army*, 804 F.2d 654, 658 (Fed. Cir. 1986); *Mattison v. Department of Veterans Affairs*, 123 M.S.P.R. 492, ¶ 8 (2016). In this case, the administrative judge found that the appellant met the first three requirements. ID at 15. Specifically, the appellant engaged in protected activity when he grieved a 14-day suspension in November 2022, the proposing and deciding officials were aware of it, and the removal action could have been retaliation. *Id.*; IAF, Tab 30 at 87-94. However, the administrative judge found that the appellant did not prove that there was a genuine nexus between his grievance and his removal. ID at 15-16. He found credible the testimony of the proposing and deciding officials that the appellant's grievance did not affect the removal action. ID at 15-16; HR at 25:00 (testimony of the deciding official), 1:48:40 (testimony of the proposing official). He also found no evidence apart from timing that the removal was retaliatory, and he concluded that temporal proximity between the grievance and the removal was, by itself, insufficient to establish a genuine nexus. ID at 15-16.

On petition for review, the appellant argues that he has established a genuine nexus through the knowledge/timing test. PFR File, Tab 1 at 25-26, 28. However, the knowledge/timing test is a way of proving the contributing factor element of a whistleblower claim. *See* 5 U.S.C. § 1221(e); *see generally Turner v. Department of Agriculture*, 2023 MSPB 25, ¶ 12 (setting forth the burdens of proof in an individual right of action appeal, filed under the Whistleblower Protection Act). We find that it does not apply to a claim of retaliation for non-whistleblower union activity, which has a different analytical framework. *See Pridgen v. Office of Management and Budget*, 2022 MSPB 31, ¶ 32. Similarly, although the appellant urges the Board to apply the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), we find that they do not apply to an affirmative defense that does not involve allegations of whistleblower reprisal. PFR File, Tab 1 at 28.

In connection with this affirmative defense, the appellant also asserts that the proposing official harbored animus towards him based on previous conflicts and that he essentially orchestrated the appellant's removal, which the deciding official ultimately rubber-stamped. PFR File, Tab 1 at 26-28. We have considered the appellant's argument but find that it provides no basis to disturb the initial decision. The appellant has still not made a sufficient showing that any friction between him and the proposing official was born out of his grievance of the 14-day suspension. Again, the appellant relies chiefly on timing to prove the genuine nexus element, but we agree with the administrative judge that, under the facts of this case, timing alone is insufficient to make the required showing. ID at 16.

Other Claims

The appellant claims that the agency committed harmful error in connection with its pre-removal proceedings. PFR File, Tab 1 at 7, 10. He also contends that the agency committed harmful error by taking too long to render its decision. *Id.* at 32. In addition, he asserts that he was prejudiced by the agency's delay in bringing the removal action. PFR File, Tab 1 at 15, 23; *see Mercer v. Department of Health and Human Services*, 82 M.S.P.R. 211, ¶ 10 (1999) (stating that the equitable defense of laches bars an action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken).

The Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Clay v. Department of the Army*, 123 M.S.P.R. 245, ¶ 6 (2016). These claims were not identified during the prehearing conference as issues for adjudication, IAF, Tab 31 at 2-7, they do not appear to be based on previously unavailable evidence, and the appellant has not explained why he did not raise them before the close of the record below. We therefore decline to consider these arguments any further. *See Chin v. Department of Defense*, 2022 MSPB 34, ¶ 21.

Penalty

The Board will review an agency-imposed penalty only to determine whether 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). “When the Board sustains fewer than all of the agency’s charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges.” *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

In this case, the administrative judge found that, even though the agency only proved one of its three charges, removal was still a reasonable penalty under the circumstances. ID at 20-21. Specifically, he found that the appellant’s misconduct was frequently repeated and was serious in light of the nature of his position. ID at 20. He found that the appellant was on clear notice that his violent criminal behavior was unacceptable, but he persisted in it despite the agency’s previous attempts to address his misconduct through lesser discipline. ID at 20-21. The administrative judge acknowledged the appellant’s good work record over a 23-year career, but he found that this was insufficient to warrant a lesser penalty. ID at 21.

On review, the appellant argues that his prior discipline was, like the removal action at issue in this appeal, based on arrests and charges that were never proven in a court of law. PFR File, Tab 1 at 4-5, 7, 16, 19. He contests his 14-day suspension in particular and argues that the Board should reverse the action and award him status quo ante relief. *Id.* at 14, 20, 25, 27. However, the Board’s review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). At least as far as the

5- and 14-day suspensions are concerned, we find that the *Bolling* criteria are satisfied and that these actions were not “clearly erroneous.” IAF, Tab 8 at 9-29. There is a third disciplinary action cited in the notice of proposed removal—a March 14, 2021 oral admonishment. IAF, Tab 7 at 6. This oral admonishment would not appear to satisfy the *Bolling* criteria. However, the appellant has not raised a serious challenge to its propriety; as stated above, the mere fact that an arrest or charge did not ultimately result in a conviction does not mean that an agency cannot impose discipline for the underlying conduct. *See Wiemers*, 792 F.2d at 1115.

The appellant disputes the administrative judge’s finding that the sustained charge was serious as it related to his position. He argues that, if the agency believed that the charge was serious, it would not have waited so long to remove him. PFR File, Tab 1 at 15, 19, 23, 32. We do not agree that it can be inferred from the relatively slow removal process that agency management was not taking the appellant’s misconduct seriously. Agency management contacted the Office of Investigations the day after the appellant informed them of his arrest warrant, immediately setting in motion the process that culminated in his removal. IAF, Tab 7 at 24. In any event, there are numerous reasons that a removal action can take longer than usual, and we decline to assume that the reason in this case was that agency management was unconcerned with the appellant’s repeated criminal conduct.

As far as mitigating factors are concerned, the appellant argues that the administrative judge should have considered that he had ended his relationship with T.R., which ended his run-ins with the police. PFR File, Tab 1 at 12. He highlights the personal trauma that he has overcome as well as his performance awards and 23 years of service. *Id.* at 14-16. The appellant also points out that the only reason that the agency knew about the criminal complaint against him was that he self-reported it. *Id.* at 14, 31. As to the appellant’s self-reporting of the criminal complaint, we observe that he had an affirmative duty to do so. IAF, Tab 7

at 51-55. Therefore, we find that this is not so much a mitigating factor as the absence of what could have been an additional aggravating factor. However, we agree with the appellant that the remainder of these factors weigh in his favor—particularly his 23 years of service and good work record. Nevertheless, weighing the factors as a whole, we agree with the administrative judge’s ultimate conclusion that the removal penalty is within the tolerable limits of reasonableness. ID at 20-21.

Bias

The appellant argues that the administrative judge exhibited bias by ruling against him and finding him not credible despite the agency’s failure to provide sufficient evidence to support its case. PFR File, Tab 1 at 7, 12, 22, 31. He also argues that the administrative judge exhibited bias by admitting the photographs over his objection, as discussed above. *Id.* at 11. However, in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The mere fact that a party lost an appeal or that the administrative judge made rulings that were unfavorable to a party does not establish that the administrative judge was biased against the party. *Seltzer v. Office of Personnel Management*, 62 M.S.P.R. 493, 496 (1994), *aff’d*, 40 F.3d 1250 (Fed. Cir. 1994) (Table).

The appellant further argues that the administrative judge exhibited bias by questioning him aggressively and at length during the hearing. PFR File, Tab 1 at 8, 11, 33. We have reviewed the relevant portions of the record and find nothing improper about the way that the administrative judge questioned the appellant. HR at 5:32:00 (testimony of the appellant). Although the administrative judge questioned the appellant closely, he asked questions that were relevant to the issues in the appeal and did so with the courtesy and respect due to a party before the Board and with the decorum proper to an administrative judge. *Id.* (testimony of the appellant); *see Protopapa v. Department of Transportation*, 14 M.S.P.R. 455,

459 (1983) (finding no indication of bias in the presiding official’s questioning of witnesses because “at all times the presiding official’s basic purpose was to obtain relevant evidence on the issues before him or to clarify ambiguities.”).

Accordingly, we affirm the initial decision as modified above.

NOTICE OF APPEAL RIGHTS⁵

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 may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

⁵ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination.

This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action

involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁶ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
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Washington, D.C. 20439

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⁶ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board