UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY BARBER,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
PH-0752-11-0180-I-1

DATE: March 8, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

John Poindexter, Esquire, Washington, D.C., for the appellant.

Daryl T. Stottlemyer, Esquire, Fort Meade, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

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 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

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 administrative judge made specific factual determinations regarding the appellant's misuse of his government computer, finding, among other things, that "the appellant's attempt to either suggest that [other] employees could have downloaded the material or to cast doubt on the likelihood that he downloaded the pornographic materials on his computer is not credible." Initial Appeal File (IAF), Tab 25, Initial Decision (ID) at 5. In making her findings, the administrative judge identified the pertinent factual questions in dispute, summarized the evidence of record, and explained in sufficient detail why she found the appellant's version of events not credible. Thus, there is no basis to disturb the administrative judge's factual findings and credibility determinations.

Regarding the appellant's claim that that he was prevented from making an informed reply by the agency's alleged failure to state in sufficient detail the specific reasons for its proposed action, the administrative judge properly found that "the notice of proposed removal clearly stated the charge, the background facts alleged to support the charge, and the specification upon which the charge was based." ID at 7. And, after noting that "[t]he appellant presented an oral reply and submitted a lengthy written response to the proposal letter" and that "[i]n the proceedings before [her], the appellant presented well written and detailed prehearing submissions and he participated in the prehearing and hearing," the administrative judge further found that "there is no evidence that the appellant could not defend himself because the charge lacked specificity." *Id*. Thus, the administrative judge correctly found that the appellant had "not proven harmful procedural error based on a procedural defect in the charge." *Id*.

Regarding the penalty of removal, the administrative judge thoroughly considered the appellant's arguments, properly gave "deference to the agency's primary discretion in managing its work force," and correctly determined "that

the agency's judgment did not exceed the bounds of reasonableness." ID at 9-10. In so finding, the administrative judge pointed out that the deciding official appropriately took into account the appellant's "prior counseling for sending out emails with sexual overtones" not as part of his prior disciplinary record, but only in the context of considering whether the appellant "had been warned about the type of misconduct involved." *Id*.

Finally, the Board need not consider the appellant's contention raised for the first time on review that the agency "violated [his] procedural due process rights" by allegedly considering "new, highly prejudicial and unchallenged information against him" without "giv[ing] him the opportunity . . . to respond." PFR File, Tab 2 at 11; *see Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board 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). In any event, the appellant's argument is without merit. The appellant on December 22, 2008, acknowledged receipt of a "Counseling Statement" from his supervisor, Bernard Cullen, admonishing the appellant for inappropriately using his government computer by sending out e-mails with sexual content. *See* IAF, Tab 5, Subtab 4cc. The October 31, 2007 "Wild Costumes" e-mail was forwarded by the appellant to numerous individuals and was among the "inappropriate" messages implicitly referenced by Cullen in his Counseling Statement. *See id*. at Subtab 4dd. The Counseling Statement was referenced and relied upon by Cullen in his Notice of Proposed Removal. *See id*. at Subtab 4v at 2. Most importantly, however, there can be no due process violation as described where the appellant, in one of his several written responses to the deciding official, John Moeller, specifically addressed and challenged the significance of the "Wild Costumes" e-mail. *See id*. at Subtab 4r.

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, NW.
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.