

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

ZANE CHAMBERS,
Appellant,

DOCKET NUMBER
CH-0752-12-0312-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: April 26, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Brad Bowman, Esquire, Decatur, Georgia, for the appellant.

Anne E. Burnham, Esquire, and Micah I. Shirts, Esquire, Fort Knox,
Kentucky, 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 appellant's removal. Generally, we grant petitions such as this one only

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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.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 agency removed the appellant from the GS-14 position of Supervisory Human Relations Specialist based on the charge of conduct unbecoming a federal employee. Specifically, the agency charged that the appellant sent an e-mail to three GS-9 employees outlining a 3-step plan to get them promoted to GS-12. Initial Appeal File (IAF), Tab 5, Subtab 4g. The plan detailed how the appellant wrote the GS-12 position description, would rewrite the employees' resumes to match the upgraded position, and would announce the positions using the GS-12 position description that the appellant wrote as a template. *Id.* In selecting the removal penalty, the agency relied on the appellant's prior disciplinary record, a written reprimand. *Id.*

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 administrative judge found that the agency proved the charge. IAF, Tab 22 at 2-10. She found that the appellant's actions, rewriting his subordinates' resumes, would have provided them with preferential treatment or an unfair, unauthorized, and improper advantage in subsequent selections for the vacancies. *Id.* at 10. She found that the appellant failed to prove disability discrimination. *Id.* at 11-15. Finally, she found that disciplining the appellant for the proven misconduct promotes the efficiency of the service and that the removal penalty was within the bounds of reasonableness. *Id.* at 10-11, 15-18.

In his petition, the appellant asserts that the conduct unbecoming charge cannot be sustained because it is a "nebulous concept" and that, to the extent that the standard to prove the conduct unbecoming charge is to establish that the appellant committed a prohibited personnel practice, the agency did not prove the charge. Petition for Review (PFR) File, Tab 1, at 4-5. The agency is required to prove the charge as it is set out in the notice of proposed removal, not some other offense that might be sustainable by the facts of the case. *See Spruill v. U.S. Postal Service*, [84 M.S.P.R. 36](#), ¶ 17 (1999). Here, the agency charged the appellant with conduct unbecoming a Department of the Army employee. IAF, Tab 5, Subtab 4g. The appellant's assertion that the agency must prove another charge, that the appellant committed a prohibited personnel practice, is unavailing.

The Board has articulated the standard to prove a charge of conduct unbecoming. A charge of "conduct unbecoming," much like a charge of "improper conduct," has no specific elements of proof; it is established by proving that the employee committed the acts alleged in support of the broad label. *Alvarado v. Department of the Air Force*, [103 M.S.P.R. 1](#), ¶ 22 (2006), *aff'd*, 626 F. Supp. 2d 1140 (D.N.M. 2009); *Otero v. U.S. Postal Service*, [73 M.S.P.R. 198](#), 202 (1997). Essential to the charge is that the conduct was improper or detracted from the employee's character or reputation as a

supervisor. *See Crouse v. Department of the Treasury*, [75 M.S.P.R. 57](#), 63 (1997); *Miles v. Department of the Army*, [55 M.S.P.R. 633](#), 637 (1992).

Here, there is no dispute that the agency established that the appellant engaged in the charged misconduct. Further, the agency showed that the conduct detracted from the appellant's reputation as a supervisor. As the administrative judge found, the appellant in his role as a supervisor in human resources was expected to set an example for subordinate employees in professionalism and integrity in the promotion process. IAF, Tab 22 at 10. By engaging in the charged misconduct, the appellant failed to set the proper example. As the administrative judge also found, the agency had a legitimate reason to expect the appellant to refrain from any act or perception that certain employees were being provided preferential treatment. *Id.* at 11

The appellant asserts that the penalty is unreasonable. PFR File, Tab 1, at 8-9. Under the circumstances, where the appellant had been an employee of the agency for only 2 years at the time of his misconduct, had a prior disciplinary record, had no potential for rehabilitation, and, as a supervisory employee could be held to a higher standard of conduct, *see George v. Department of the Army*, [104 M.S.P.R. 596](#), ¶ 11 (2007), the administrative judge properly found that the agency's selection of the removal penalty was within the bounds of reasonableness. *See Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981) (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).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request 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 your request 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, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. 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](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request review of this final decision on the other issues in your appeal by the United States Court of Appeals for the Federal Circuit. 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.