

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

TAMELA FUTRELL-RAWLS,
Appellant,

DOCKET NUMBER
DC-0752-10-0268-B-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: June 22, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Tamela Futrell-Rawls, Baltimore, Maryland, pro se.

Xan DeMarinis, Washington, D.C., 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 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

¹ This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

With regard to the agency's reliance on the appellant's past record, we note that, in proposing the appellant's removal, the proposing official stated that he considered that the appellant received a reprimand on August 4, 2009, for absence without leave (AWOL), inappropriate use of sick leave, and failure to follow proper procedures for requesting leave, and that, on November 5, 2009, the agency had proposed to suspend her for 3 days for failure to follow instructions. Initial Appeal File (IAF), Tab 5, Subtab 4c at 4. In his decision letter on the removal, the deciding official stated that he had considered the appellant's "past record." *Id.*, Subtab 4b. The administrative judge considered as an aggravating factor the appellant's "prior disciplinary record." Remand Initial Decision (RID) at 12. In her petition for review, the appellant argues that neither action should have been considered because the union successfully challenged the reprimand and the 3-day suspension was not sustained. Petition for Review (PFR) File, Tab 1 at 4. However, the appellant did not challenge use of the prior discipline before the administrative judge.² IAF, Tab 1; Remand Appeal File (RAF), Tab 3. Because the appellant did not previously raise the validity of her prior discipline, she may not raise it for the first time before the Board. *Rosenberg v. Department of Transportation*, 105 M.S.P.R. 130, ¶ 32 (2007).

Nonetheless, we do discern an error with regard to the agency's reliance on the appellant's past record. Where, as here, the appellant did not challenge the validity of his prior discipline before the administrative judge, the Board will look only at whether the prior discipline occurred. *Holland v. Department of Defense*, 83 M.S.P.R. 317, ¶¶ 5-8 (1999). Evidence in the record reflects that the reprimand was issued by decision dated August 4, 2009. IAF, Tab 5, Subtab 4n. No evidence supports the appellant's claim that the union successfully challenged

² The appellant did not respond to the proposal notice.

the action. However, the agency has admitted that the 3-day suspension was never effected, explaining that, because the appellant continued to exhibit the same type of misconduct before a decision on the suspension was reached, those charges were folded into the proposed removal notice. IAF, Tab 5 at 7; *see id.*, Subtab 4h. Therefore, to the extent that the deciding official relied on the 3-day suspension as past record supporting an enhanced penalty, such reliance was improper because the suspension never occurred. Any such error was not harmful, however, since the appellant did have a past record, i.e., a reprimand, upon which the deciding official could properly rely to support an enhanced penalty. As noted, the administrative judge considered the appellant's "prior disciplinary record." RID at 12. Because we have found that the reprimand was prior discipline appropriate for consideration, even if the proposed 3-day suspension was not, the administrative judge's error, to the extent she made one, did not prejudice the appellant's substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The appellant's argument that she was unable to perform her duties because of her doctor's restrictions is unsupported by any reference to the record and therefore does not constitute a basis for Board review.³ *Herndon v. Department of the Navy*, 97 M.S.P.R. 609, ¶ 7 (2004) (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).

In challenging the administrative judge's finding sustaining the AWOL charge, the appellant argues that she was not absent because, on some of the dates charged, she was "in the building." PFR File, Tab 1 at 4. Presumably, she means to say that she was in the Pulmonary Section during some portion of the time

³ To the extent that the appellant may be challenging the administrative judge's finding that she did not establish her claim of disability discrimination, she has not shown error since she did not show that the cited misconduct was caused by her back pain. RID at 10; *Sublette v. Department of the Army*, 68 M.S.P.R. 82, 88-89 (1995).

charged. However, the appellant has offered no support for her claim that an AWOL charge can only be sustained when the employee is not in the building to which she is assigned, and we are aware of none. *Cf. Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 424-25 (1996) (Board sustained agency's AWOL charge where the appellant was found asleep in his Postal vehicle). To prove a charge of AWOL, the agency must show that an employee was absent, and either that his absence was not authorized or that his request for leave was properly denied. *Boscoe v. Department of Agriculture*, 54 M.S.P.R. 315, 325 (1992). The appellant has not shown error in the administrative judge's findings that, on the dates charged, she was not in the Respiratory Section as she had been instructed, her presence in the Pulmonary Section on two specific dates was not authorized, and she had not requested leave for any of the dates cited. RID at 6. Therefore, the appellant has not shown that the administrative judge erred in sustaining the AWOL charge.

The appellant also challenges the administrative judge's finding sustaining the conduct unbecoming charge, and she has submitted her version of what transpired during that incident. PFR File, Tab 1 at 4. In analyzing that charge, the administrative judge found that the agency established that the appellant was "disrespectful and rude" to Larry Conway, Chief of the Respiratory Section, on November 19, 2009, when he reminded her that she was no longer detailed to the Pulmonary Section, that she refused to make eye contact and kept moving away from him, putting up her hand in a "talk to the hand" motion and saying something to the effect that "I don't care what you say." RID at 7. As evidence in support of the charge, the administrative judge relied on Conway's contemporaneously-prepared description of the event as well as the corroborating description prepared the following day by Sheila Alston, Assistant Chief of the Respiratory Section, who observed the incident. *Id.* The appellant argues that, in moving away from Conway, she was attempting to move away from the "hostile (sic) environment." PFR File, Tab 1 at 4. And, she claims that Conway threw

paper at her. *Id.*; Exhibit J. As noted, there was no hearing in this case. The appellant submitted no documentary evidence below to support her version of what transpired that day. RAF, Tab 3. Her failure to do so then precludes her doing so on petition for review. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); *see also Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989) (to constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed). Therefore, the appellant has not shown error in the administrative judge's finding the conduct unbecoming charge sustained.

The appellant argues that the administrative judge "did not consider anything in [her] EEO file." PFR File, Tab 1 at 4. During the remand proceeding, the appellant submitted the entire record (2½ volumes) of the investigation conducted on an EEO complaint she filed on September 11, 2009, in which she alleged disability discrimination. RAF, Tab 3. However, she has failed to set forth or otherwise describe the evidence that she claims the administrative judge failed to consider. The appellant's petition is wholly lacking in sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record. *Herndon*, 97 M.S.P.R. 609, ¶ 7. In any event, an administrative judge's failure to mention all of the evidence of record does not mean that she did not consider it in reaching her decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986).

Finally, the appellant has submitted a number of documents with her petition for review. Most pre-date issuance of the initial decision, PFR File, Tab 1, Exhibits A-F, H, I, and therefore are not new. *Avansino*, 3 M.S.P.R. at 214; *see also Grassell*, 40 M.S.P.R. at 564. Two other documents are part of the record below, PFR File, Tab 1, Exhibits G, K; RAF, Tab 3, Subtab C-9 at 262-63;

IAF, Tab 5, Subtab 4e, and are also not new. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980).

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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

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. § 2000e5(f); 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 the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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:

William D. Spencer
Clerk of the Board

Washington, D.C.