

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

PAULA JO HEARN,
Appellant,

DOCKET NUMBER
NY-0731-12-0120-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: April 26, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Andrew P. Fleming, Esquire, Hamburg, New York, for the appellant.

Bryan E. Miller, Esquire, Buffalo, New York, 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 affirmed 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

DISCUSSION OF ARGUMENTS ON REVIEW

On review, the appellant contends that the administrative judge applied the incorrect legal standard to the facts of her appeal. Petition for Review (PFR) File, Tab 1 at 8-9. The appellant also challenges the administrative judge's finding that the agency established a nexus between the appellant's conduct and the efficiency of the service. *Id.* at 11-13. Further, the appellant contends that the administrative judge improperly found that the penalty of removal was reasonable. Specifically, she asserts that the penalty of removal was excessive and that the deciding official failed to consider the *Douglas* factors. *Id.* at 9-11. In addition, the appellant argues that the agency violated her due process rights.

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.

Id. at 15-17. As discussed below, the appellant's assertions on review fail to provide a basis to disturb the initial decision.

The administrative judge properly affirmed the agency's removal action.

Contrary to the appellant's assertions, the administrative judge properly applied the correct legal standard in the initial decision. Although the appellant contends that the administrative judge failed to consider her as an "employee," PFR File, Tab 1 at 8-9, the administrative judge found that the appellant was an employee as defined under [5 U.S.C. § 7511](#)(a)(1) during her employment with the agency. Initial Appeal File (IAF), Tab 16, Initial Decision (ID) at 4. The administrative judge then correctly applied *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#) (2011) to the facts of the appeal. In particular, the administrative judge found that, although the appellant's removal was directed pursuant to 5 C.F.R. part 731, it was subject to the requirements of chapter 75, subchapter II, including the efficiency of the service standard under [5 U.S.C. § 7513](#)(a). ID at 9; *see Aguzie*, [116 M.S.P.R. 64](#), ¶ 31. As noted by the administrative judge, the Board will only sustain a removal based on a sustained charge of misconduct if both of the efficiency of the service criterion under [5 U.S.C. § 7513](#)(a) are met: first, that there is a nexus between the appellant's conduct and the efficiency of the service, and second, whether the penalty is appropriate. ID at 9; *Aguzie*, [116 M.S.P.R. 64](#), ¶ 32. The administrative judge properly applied this standard in determining whether to sustain the agency's removal action.

On review, the appellant makes numerous arguments that relate to the issue of nexus. The nexus requirement, for the purpose of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish her duties satisfactorily or some other legitimate government interest. *Canada v. Department of Homeland Security*, [113 M.S.P.R. 509](#), ¶ 10 (2010). An agency may establish nexus by

showing that the employee's conduct: (1) affected her or her coworkers' job performance; (2) affected management's trust and confidence in the employee's job performance; or (3) interfered with or adversely affected the agency's mission. *Id.*, ¶ 11.

In her petition for review, the appellant argues that she did not pose a security risk to the agency. Specifically, the appellant contends that Deborah Czombel, the proposing official, knew of her misdemeanor conviction prior to hiring her, and would not have hired her if she thought the appellant posed a threat to the agency's security. PFR File, Tab 1 at 11-12. The appellant asserts that the administrative judge erred in finding that Ms. Czombel's testimony, in which she stated that she was not aware that the appellant had pled guilty to a misdemeanor in Federal court prior to hiring her, was credible. *Id.* at 12. The appellant further contends that the administrative judge incorrectly denied a witness, Madonna Scoville, who would have testified that Ms. Czombel knew that the appellant had been convicted of a misdemeanor prior to hiring her. *Id.*

In finding that the Ms. Czombel's testimony was more credible than the appellant's, the administrative judge properly considered the factors listed in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#) (1987). *Id.* at 21. We do not discern any sufficiently sound reason for overturning the administrative judge's credibility determination. See *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002).

Further, an administrative judge has wide discretion under [5 C.F.R. § 1201.41\(b\)\(8\)](#) and (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Gregory v. Federal Communications Commission*, [79 M.S.P.R. 563](#), ¶ 12 (1998). Even if Ms. Czombel did know that the appellant had pled guilty to a misdemeanor prior to hiring her, such knowledge was not material to the outcome of the case because the agency would still be able to establish that its action promoted the efficiency of the service. Hearing CD. Accordingly, because Ms. Scoville's

testimony regarding this issue would not have been material to the outcome in this appeal, the administrative judge did not abuse her discretion in denying Ms. Scoville as a witness.

The appellant further argues that the fact that agency officials waited months to remove her after learning about her misdemeanor conviction evidences that these officials did not consider her as a threat to the agency's security. PFR File, Tab 1 at 13. The appellant also contends that she was hired to a non-sensitive position and could not have posed a security risk in this position. *Id.* at 14-15.

The appellant's arguments do not provide a basis to disturb the administrative judge's finding that the agency established the nexus requirement. The deciding official, Major Martin Lewton, testified that, as soon as the agency received notification regarding the appellant's prior misdemeanor conviction and prior misconduct, the appellant was monitored to ensure that she was not exceeding her authority on the agency's networks. Hearing CD, Testimony of Major Martin Lewton. The administrative judge comprehensively reviewed relevant documentary and testimonial evidence in determining that the agency had shown that the appellant's prior misconduct could interfere with efficient service in her position. Accordingly, we see no basis for disturbing the administrative judge's finding that the agency established nexus between the appellant's prior misconduct and the work of the agency.

The appellant has also failed to establish that the administrative judge erred in finding that the agency's penalty of removal was reasonable. ID at 30. Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Woebcke v. Department of Homeland Security*, [114 M.S.P.R. 100](#), ¶ 7 (2010). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial

function of maintaining employee discipline and efficiency. *Id.* The Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty. *Gmitro v. Department of the Army*, [95 M.S.P.R. 89](#), ¶ 8 (2003), *aff'd*, 111 F. App'x 610 (Fed. Cir. 2004).

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). Among these factors are the nature and seriousness of the offense, the consistency of the penalty with those imposed upon other employees for the same or similar offenses, and the potential for the employee's rehabilitation. *Id.* at 305-06. The Board places primary importance upon the nature and seriousness of the offense, and its relation to the appellant's duties, position and responsibilities. *Gmitro*, [95 M.S.P.R. 89](#), ¶ 7. All of the factors will not be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive to the appropriate penalty. *Id.*

In this case, the deciding official testified that he considered certain *Douglas* factors prior to rendering his decision. Hearing CD, Testimony of Major Martin Lewton. Specifically, he testified that he considered the seriousness of the offense, that it was intentionally committed for gain, and frequently repeated over the course of a few months. *Id.* However, the deciding official also testified that he failed to consider the appellant's potential for rehabilitation. *Id.* The deciding official further testified that he failed to consider whether other employees had been disciplined for similar misconduct, and whether the penalty was consistent with those imposed upon other employees for the same or similar offense. *Id.* Further, as noted by the appellant, the deciding official's decision letter does not reference the *Douglas* factors, and the deciding official did not submit a *Douglas* factor analysis with his decision noting the factors he took into consideration when making his decision. PFR File, Tab 1 at 11.

Because the deciding official failed to consider relevant mitigating factors, the administrative judge correctly independently weighed the relevant *Douglas* factors in her initial decision. See *Brown v. U.S. Postal Service*, [64 M.S.P.R. 425](#), 432-33 (1994) (where the record did not contain any evidence that the deciding official considered any mitigating factors, the Board independently weighed the relevant mitigating factors). In making her penalty determination, the administrative judge noted the seriousness of the charged misconduct. ID at 26. The administrative judge also considered the appellant's arguments relating to her potential for rehabilitation and to the issue of whether the agency had considered alternate sanctions. In this regard, the administrative judge noted that, contrary to the appellant's assertions, agency officials had discussed mitigating the penalty but believed that because of the nature of their work, it was not possible to provide the appellant with limited access to the agency's computers. ID at 26. The administrative judge further considered the appellant's disparate penalty arguments, noting that these allegations were unsupported and "based on rumor." *Id.* at 26-29. The administrative judge ultimately determined that, notwithstanding the appellant's years of service, the penalty of removal was appropriate. ID at 30. Because the administrative judge weighed the relevant *Douglas* factors in determining that the penalty of removal was within the bounds of reasonableness, we discern no reason to disturb the administrative judge's finding on review.

The Board will not consider the appellant's due process arguments.

For the first time on review, the appellant alleges that the agency violated her due process rights. PFR File, Tab 1 at 15-17. 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. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). Here, the appellant has failed to show that her due process arguments were based on new and material evidence not previously available despite her due

diligence; accordingly, the Board will not consider these arguments.³ *See id.* at 271; [5 C.F.R. § 1201.115\(d\)](#).

The Board will not consider the documents the appellant submits along with her petition for review.

The appellant has submitted two affidavits for the first time on review. PFR File, Tab 1 at 20-22. The Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Because the appellant has not shown that the evidence she submitted for the first time on review was unavailable before the record closed despite her due diligence, the Board will not consider it. *See id.* at 214; [5 C.F.R. § 1201.115\(d\)](#).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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 have the right to request review of this final decision 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

³ Even if we were to consider these arguments, they would fail to provide a basis for disturbing the initial decision. Specifically, although the appellant argues she was denied an opportunity to respond, the record reflects that she was in fact provided with such a right. IAF, Tab 6, Subtabs 4C, 4H. Further, contrary to her assertion, the appellant has failed to show that the deciding official considered factors and reasons other than those specified in the notice of proposed action in deciding to remove the appellant.

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.