UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RANDOLPH S. KOCH, Appellant, v. SECURITIES AND EXCHANGE COMMISSION, Agency.	DOCKET NUMBER DC-0752-10-0413-I-1 DATE: November 14, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL[*]

Kevin L. Owen, Esquire, Silver Spring, Maryland, for the appellant.

W. Smith Greig, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a separate concurring opinion.

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

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[*] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant has not shown that the administrative judge abused her discretion in declining to dismiss his appeal without prejudice.

The appellant asserts in his petition for review that the administrative judge violated 5 C.F.R. part 1207 in declining to dismiss his appeal without prejudice to automatic refiling on September 14, 2010. He contends that she applied the wrong regulatory definition of "qualified individual with a disability" under 5 C.F.R. part 1207. He further contends that his requested accommodation under 5 C.F.R. part 1207 - the dismissal without prejudice - is not an undue burden because the Board frequently grants such requests, particularly in cases where the appellant suffers from medical issues. Petition for Review (PFR) File, Tab 6 at 10-17.

The appellant has not provided a basis for the Board to consider his challenge to the administrative judge's ruling as a violation of 5 C.F.R. part 1207. Part 1207 is entitled "Enforcement of Nondiscrimination on the Basis of Disability in Programs or Activities Conducted by the Merit Systems Protection Board." A review of its provisions reveals that it is concerned with making the Board's proceedings accessible to disabled individuals. It does not provide an independent basis for contesting an administrative judge's case-related rulings.

In that regard, the Board considers a challenge to an administrative judge's rulings, including a ruling on a motion to dismiss without prejudice, under an abuse-of-discretion standard. *See, e.g., Ayers v. National Aeronautics & Space Administration*, 80 M.S.P.R. 550, ¶ 5 (1999). An administrative judge has wide

discretion to dismiss an appeal without prejudice in the interests of fairness, due process, and administrative efficiency. *See Thomas v. Department of Treasury*, 115 M.S.P.R. 224, ¶ 7 (2010).

The appellant has failed to show that the administrative judge abused her discretion. The initial decisions the appellant cited to support his assertion that the administrative judge should have granted his motion are nonprecedential. *See, e.g., Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 27 (2010). The Opinion and Order the appellant cited to support his assertion - *Padilla v. Department of the Air Force*, 58 M.S.P.R. 561 (1993) - is distinguishable. In *Padilla*, the Board found that the administrative judge appropriately exercised his discretion in granting a request to dismiss without prejudice based on the statement of the appellant's psychologist that the appellant would be unable to appear for her deposition for 6 months. *Id.* at 563, 566. Here, in contrast, the appellant is represented by counsel and was released from the hospital almost 8 weeks before the scheduled hearing date. Although the appellant asserted that he was undergoing physical rehabilitation several times per week, is limited in his ability to sit or stand for prolonged periods, is taking painkillers that make him drowsy, and has difficulty thinking and functioning in the morning hours, *see* Initial Appeal File (IAF), Tab 14 at 2-3, he failed to explain what assistance he was incapable of providing to his counsel or how exactly he was prevented from participating in the appeals process. Notably, the appellant is represented by apparently quite capable counsel, who was responsible for responding to the agency's requests for discovery and preparing for the hearing. The appellant has not explained why or how his counsel was unable to proceed with discovery or with preparing for the hearing without his constant presence. Thus, the appellant has failed to show that the administrative judge abused her wide discretion in declining to dismiss his appeal without prejudice. *See, e.g., Ayers*, 80 M.S.P.R. 550, ¶¶ 6-7.

The agency proved each of its charges by preponderant evidence.

In his petition for review, with respect to the charges of falsifying work hours, failure to follow tour of duty, inappropriate use of official time, and specification 1 of absence without leave (AWOL), the appellant fails to explain why the challenged factual determinations are incorrect or to identify the specific evidence in the record which demonstrates the error. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Accordingly, his assertions on these issues are without merit, and we discern no error in the administrative judge's findings that the agency proved these charges by preponderant evidence. *See* Initial Decision at 4-9.

With respect to Specification 2 of the AWOL charge, based on our review of the medical documentation submitted by the appellant, we discern no error with the administrative judge's finding that the appellant's medical documentation did not support a finding that the appellant was medically unable to work during the relevant period. *See* Initial Decision at 8. None of the appellant's medical documentation indicated that he was incapacitated for duty because of his conditions or otherwise explained why he was absent during the relevant time period. *See* IAF, Tab 4, Subtab 4c at 22-54, 57-69.

The agency properly established a nexus between the appellant's misconduct and the efficiency of the service.

The appellant asserts that the agency never alleged that he failed to work a full 40-hour week, that he failed to complete his work, or that he produced unsatisfactory work and that any discipline would not promote the efficiency of the service. PFR File, Tab 6 at 37. While the administrative judge failed to make a specific finding on this element, Board precedent establishes a clear nexus between the charges sustained and the efficiency of the service. *See, e.g.*, *Davis v. Veterans Administration*, 792 F.2d 1111, 1113 (Fed. Cir. 1986) (finding that an unauthorized absence, by its very nature, disrupts the efficiency of the service);

Washington v. Department of Agriculture, 22 M.S.P.R. 374, 376 (1984) (finding a clear nexus between falsification of time and attendance records and the efficiency of the service).

The appellant failed to prove his affirmative defenses.

The appellant asserts in his petition for review that the agency committed harmful procedural error when it relied on data of the appellant's swipes of his ID/Access Card in the turnstiles located at the agency's entrances and exits, because the Memorandum of Understanding (MOU) with the National Treasury Employees Union states that data collected from the use of ID/Access Cards will not serve as a basis for monitoring time and attendance. PFR File, Tab 6 at 25. The Merriam-Webster Online Dictionary defines "monitor" as "to watch, keep track of, or check usually for a special purpose." http://www.merriam-webster.com/dictionary/monitor?show=1&t=1296508588. Examples of "monitor" in the Merriam-Webster Online Dictionary include: "Nurses constantly monitored the patient's heart rate"; "We're in a good position to monitor and respond to customer concerns"; and "Government agents have been monitoring the enemy's radio communication." *Id.*

We discern no error with the administrative judge's finding that the agency did not commit harmful error. The MOU does not prohibit the use of such data as part of an adverse action, and, while the use of such information does not fall within the two purposes for the ID/Access Cards set forth in the MOU, the MOU notes only the "two *primary* purposes." IAF, Tab 4, Subtab 4c at 18 (emphasis added). The administrative judge essentially distinguished between tracking or watching the time and attendance of employees in general, and, as in this case, investigating the time and attendance of a specific employee against whom specific allegations of misconduct regarding time and attendance have been raised to the Office of Inspector General (OIG). *See* Initial Decision at 3-4. In that regard, in the agency's Report of Investigation and Final Agency Decision

regarding the appellant's equal employment opportunity (EEO) discrimination complaints, the agency noted that Thomas Funciello, the Branch Chief of the Employee and Labor Relations Branch in the Office of Human Resources, stated that agency management had relied on turnstile data "in prior cases," that "the use of such records does not constitute inappropriate monitoring when there is reason to believe an employee is falsifying time," and that the "union has expressed concern over using this data in the past but has not formally opposed it." IAF, Tab 4, Subtab 3c at 22.

The appellant asserts in his petition for review that the administrative judge erred in finding that the appellant's requested accommodation of telework, flexible schedule, use of credit hours, and an intermittent part-time schedule were not appropriate because they would not allow him to perform the essential function of regularly reporting to work. PFR File, Tab 6 at 31. The appellant has failed to show how his requested accommodation of flexible workplace, telework, part-time work schedule, and full use of credit hours would allow him to adhere to a regular work schedule in light of his extensive history of excessive AWOL, falsely reporting his work hours, and failure to follow his tour of duty, which was previously altered as a reasonable accommodation. *See* Initial Decision at 12. Moreover, while the Board has held that a modified work schedule may, at least facially, constitute a reasonable accommodation, *Stevens v. Department of the Army*, 73 M.S.P.R. 619, 629 (1997), we discern no error in the administrative judge's finding that providing such an accommodation to an employee who has shown a willingness on many occasions to falsely report his work hours, fail to report for duty for months, and use official time inappropriately would be unduly burdensome for the agency, *see* Initial Decision at 12.

The appellant also asserts in his petition for review that his supervisors, Mr. Miller, and Mr. Donohue were all aware of his "voluminous record" of prior protected activity either from personal knowledge or from reading the OIG report and that they were clearly motivated by retaliatory animus. PFR File, Tab 6 at

35. We discern no error in the administrative judge's finding on this issue. *See* Initial Decision at 16-17. Beyond his bare assertion, the appellant has not established that either Mr. Miller or Mr. Donohue had any motive to retaliate against him due to his prior EEO complaint. *See Weaver*, 2 M.S.P.R. at 133 (before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error).

The penalty of removal is reasonable.

In his petition for review, without any support or further explanation, the appellant asserts that the agency should not have relied on his past disciplinary record without establishing that the criteria set forth in *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981), had been met. PFR File, Tab 6 at 36. With respect to the appellant's 5-day suspension in 2000, the appellant was informed of the suspension in writing, the action was a matter of record, he was given the opportunity to grieve the action to an official of authority higher than the one who proposed the action, and it does not appear that the agency's action was clearly erroneous. *See* IAF, Tab 4, Subtab 4d at 37-50; *see also U.S. Postal Service v. Gregory*, 534 U.S. 1 (2001) (an agency may consider an employee's past disciplinary record when setting a penalty for misconduct, even if it is the subject of a pending grievance). Accordingly, the appellant has failed to show that the agency's consideration of his prior discipline as part of its penalty determination was improper.

The appellant does not otherwise dispute the administrative judge's findings with respect to the agency-imposed penalty in his petition for review. The administrative judge found that the record demonstrates that Mr. Miller and Mr. Donahue properly evaluated the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), in making the penalty determination, and we discern no error in her findings on this issue. *See* Initial

Decision at 22. The penalty of removal is therefore reasonable under the circumstances.

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF ANNE M. WAGNER

in

Randolph S. Koch v. Securities and Exchange Commission

MSPB Docket No. DC-0752-10-0413-I-1

¶1 I join the majority in finding that the appellant failed to establish his claim of disability discrimination on the part of the agency, and that the agency met its burden of showing by preponderant evidence that the appellant's removal was for such cause as promotes the efficiency of the service.

¶2 I disagree, however, with the majority's view that 5 C.F.R. part 1207 does not provide an independent basis for contesting an administrative judge's case-related rulings. The express purpose of the regulations set forth therein is to effectuate the statutory prohibition against discrimination on the basis of disability in programs and activities conducted by the Board. *See* 5 C.F.R. § 1207.101. There is no doubt that the adjudication of cases constitutes a program or activity of the Board such as to bring it within the ambit of part 1207. In fact, the regulations expressly provide that a party may file a pleading alleging discrimination on the basis of disability "in the adjudication of a case," and they further establish procedures for addressing such allegations, including requiring that the "judge to whom the case is assigned . . . decide the merits of any timely allegation . . ., and shall make findings and conclusions regarding the allegation either in an interim order or in the initial decision. . . ." *See* 5 C.F.R. § 1207.170(b). The appellant's challenge to the denial of his requests for dismissal without prejudice falls squarely under this provision and our consideration of his complaint of disability discrimination serves the broad purpose of part 1207. *See* 5 C.F.R. § 1207.101.

¶3 The appellant correctly observes that the administrative judge erred in her analysis of his complaint. The administrative judge found that the appellant, while disabled, was not a "qualified person with a disability," because the

modification he requested, i.e., his request for dismissal without prejudice to accommodate his medical condition, "would result in a fundamental alteration of the appeals process." Initial Decision at 19. In making that finding, the administrative judge erroneously applied 5 C.F.R. § 1207.103(i), which defines the term "qualified individual with a disability" only with respect to programs or activities under which a person is required to perform services or achieve a level of accomplishment. With respect to any other program or activity, such as the adjudication of a Board appeal, the term "qualified individual with a disability" is defined as "an individual with a disability who meets the essential requirements for participation in, or receipt of benefits from, that program or activity." 5 C.F.R. § 1207.103(ii). Because the appellant is disabled and is entitled to appeal his removal to the Board, he is a qualified individual with a disability for purposes of 5 C.F.R. part 1207, and therefore may not on account of his disability "be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity" conducted by the Board, including the appeals process. *See* 5 C.F.R. § 1207.120(a).

¶4 Nonetheless, I would find there is no merit to the appellant's allegation that the administrative judge violated 5 C.F.R. part 1207 in denying his requests for dismissal without prejudice. Although I do not agree with the majority that the appellant's challenge should be considered strictly under an abuse of discretion standard, I agree that *Padilla* is distinguishable and that the appellant failed to provide an adequate explanation of how he was allegedly prevented from participating in the appeals process. *See* Majority Opinion at 3. Moreover, the appellant has not shown or alleged that he was otherwise discriminated against on

the basis of disability in the adjudication of his appeal. Accordingly, I concur in the judgment.

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Anne M. Wagner
Vice Chairman