

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

DANIELLE PISCHELLO-NEGRON,
Appellant,

DOCKET NUMBER
AT-114M-25-0025-Y-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: October 13, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Damian Deleonardo, Boynton Beach, Florida, for the appellant.

Jonathan Clifford Padilla, Vero Beach, Florida, for the appellant.

Ryan Atkinson, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

James J. Woodruff II, Chairman
Henry J. Kerner, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which sustained her removal based on a charge of off-duty misconduct. Generally, we grant petitions such as this one only in the following circumstances: 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

of the law to the facts of the case; the administrative 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. 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, 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, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

Effective September 18, 2024, the agency removed the appellant from her position as a Lead Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) at Vero Beach, Florida Municipal Airport based on a charge of off-duty misconduct. Initial Appeal File (IAF), Tab 7 at 18-27, 33-39. The agency's charge contained one specification, which provided as follows: "On February 22, 2024, you were arrested at Walmart by Officer N.[T.] from the Port St. Lucie Police Department and charged with Theft by Shoplifting (First Degree Petit Theft)." *Id.* at 33. The agency's notice of proposed removal explained that a Walmart Loss Prevention employee had observed the appellant "failing to scan and under scanning items at a self-checkout register yet still placing all of the items in the grocery bag."² *Id.* at 33-34.

The appellant challenged her removal before the Board and requested a hearing on the matter. IAF, Tab 1 at 1. Following a hearing on the matter, the administrative judge issued an initial decision affirming the agency's removal

² The record evidence indicated that the appellant failed to scan seven items, totaling \$36.40. IAF, Tab 7 at 178, 183-84.

action. IAF, Tab 36, Initial Decision (ID) at 2, 12.³ The appellant has filed a petition for review of the initial decision, and the agency has filed a response. Petition for Review (PFR) File, Tabs 1, 3. In her petition, the appellant argues the following: (1) the administrative judge did not properly consider her physical and mental condition at the time of the incident; (2) the penalty of removal was unreasonable under the circumstances and the administrative judge did not sufficiently consider mitigating factors; (3) the administrative judge improperly discounted both comparator evidence and the agency's table of penalties; (4) the deciding official did not view the video footage of the incident, which amounted to both a violation of her due process rights and harmful procedural error; and (5) she has new and material evidence, i.e., she was found not guilty of criminal charges related to the February 22, 2024 incident. PFR File, Tab 1 at 4-6.

ANALYSIS

The appellant argues that the administrative judge did not properly consider her physical and mental condition at the time of the incident underlying the agency's charge, i.e., the appellant failing to scan items for purchase at a store self-checkout register on February 22, 2024. PFR File, Tab 1 at 4; IAF, Tab 7 at 19-20, 33-34. She asserts that she had undergone a dental procedure earlier that day and, as a result, was under the influence of medication. PFR File, Tab 1 at 4. We find this assertion unavailing. Here, the administrative judge considered the appellant's claims regarding the side effects associated with her dental procedure but found them unpersuasive. ID at 6-7. We discern no basis to disturb her reasoned findings, which were based, in part, on credibility determinations. *Id.*;

³ As properly set forth in the initial decision, in accordance with a September 26, 2021 Memorandum of Agreement entered into between the agency and the Board, the provisions set forth in TSA Management Directive 1100.75-3 and its accompanying handbook apply to disciplinary actions against TSOs. ID at 1-3; IAF, Tab 7 at 96-100; see *Wilson v. Department of Homeland Security*, 122 M.S.P.R. 262, ¶ 3 (2015); *Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶¶ 5-6 (2009), *aff'd*, 370 F. App'x 119 (Fed. Cir. 2010).

see Haebe v. Department of Justice, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (indicating that the Board must defer to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on observing the demeanor of witnesses testifying at a hearing); *see also Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (stating that the Board will not disturb an administrative judge's findings when she considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility).

The appellant contends that the agency's penalty was unreasonable and that the administrative judge did not give sufficient weight to various mitigating factors. PFR File, Tab 1 at 4-6. When the agency's charge is sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised discretion within tolerable limits of reasonableness. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Ellis*, 114 M.S.P.R. 407, ¶ 11; *Douglas*, 5 M.S.P.R. at 306. The Board will modify an agency-imposed penalty only when it finds that the agency did not weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Ellis*, 114 M.S.P.R. 407, ¶ 11; *see Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) ("It is well established that the determination of the proper disciplinary action to be taken to promote the efficiency of the service is a matter peculiarly and necessarily within the discretion of the agency."). Here, we find that the administrative judge applied the proper legal standard. ID at 10-12; *see Ellis*, 114 M.S.P.R. 407, ¶ 11. Although the cumulative value of the unscanned items was not particularly high, IAF, Tab 7 at 178, 183-84, the appellant has not presented a basis to disturb the initial decision. Indeed, as discussed therein, the deciding official considered several

mitigating factors, including the appellant's lack of prior discipline and favorable work performance; however, he explained that the appellant's conduct was inconsistent with her position requirements, which mandated a high level of trust and included the handling of airline passengers' valuable personal items. ID at 10-11; IAF, Tab 35-3, Hearing Recording (HR) (testimony of the deciding official); *see Haebe*, 288 F.3d at 1301; *see also Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010) (stating that the most important factor in assessing whether the agency's chosen penalty is within the tolerable bounds of reasonableness is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities). Thus, we discern no basis to disturb the initial decision.

The appellant argues that the administrative judge improperly discounted evidence regarding comparator employees. PFR File, Tab 1 at 5. She avers that other unidentified employees were treated more leniently and that the administrative judge should have required the agency "to produce comparator evidence or justify the disparity."⁴ *Id.* Here, the administrative judge acknowledged the appellant's argument that she had been subjected to a harsher penalty than other employees; however, she found that the appellant had not provided any evidence to support this claim. ID at 11 n.4. She also found that the deciding official's testimony that no other agency employees had been disciplined for off-duty misconduct involving theft within the last 5 years was "undisputed"; in other words, she found that no potential comparator employees had been identified. *Id.*; *see Haebe*, 288 F.3d at 1301; *see also Singh v. U.S. Postal Service*, 2022 MSPB 15, ¶ 13 (stating that potential comparators should be limited to employees whose

⁴ To the extent that the appellant is challenging a discovery ruling made by the administrative judge, her vague challenge does not compel a different outcome. PFR File, Tab 1 at 5; IAF, Tab 26 at 1-2; *see Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992) (indicating that the appellant's failure to timely object to the administrative judge's rulings precluded the appellant from doing so on petition for review).

misconduct and/or other circumstances closely resemble those of the appellant). The appellant's unsupported disagreement with this finding is unavailing. PFR File, Tab 1 at 5; *see Davison v. Department of Veterans Affairs*, 115 M.S.P.R. 640, ¶ 9 (2011) (indicating that mere disagreement with an administrative judge's explained findings is not a basis to grant a petition for review); *see also Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992) (indicating that a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge).

The appellant contends that the administrative judge improperly discounted the agency's table of penalties and ignored "internal consistency requirements and due process rights." PFR File, Tab 1 at 5. These unclear and unsupported contentions do not provide a basis to disturb the administrative judge's finding that the agency's table of penalties was merely a guideline and, therefore, the appellant had not identified a procedural error, much less a harmful one. ID at 9-10; *see Taylor v. Department of Veterans Affairs*, 112 M.S.P.R. 423, ¶ 10 (2009) (explaining that the Board has found that an agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty and that such a table is merely a guide unless the agency has a specific statement making the table mandatory and binding rather than advisory), *modified on other grounds by Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010); *see also Tines*, 56 M.S.P.R. at 92. In any event, even assuming that the agency misinterpreted or misused the table, the appellant has not shown that any such error was likely to have caused the agency to reach a different conclusion regarding the penalty; indeed, the deciding official provided persuasive testimony that, given the nature of the charge and the appellant's job duties, neither a demotion nor a suspension would have been appropriate because the appellant still would have had access to personal property. HR (testimony of the deciding official); *see Pumphrey v. Department of Defense*, 122 M.S.P.R. 186, ¶ 10 (2015). Thus, a different outcome is not warranted.

The appellant, citing *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), asserts that the deciding official violated her due process rights by not reviewing video footage of the February 22, 2024 incident prior to effecting her removal. PFR File, Tab 1 at 5. She relatedly asserts that the deciding official's "failure to review [this] primary, direct evidence" constituted harmful procedural error. *Id.* We find these assertions unpersuasive. Here, the administrative judge issued an order summarizing the parties' prehearing conference. IAF, Tab 33 at 1-9. In this order, she identified the sole affirmative defense at issue as whether the agency committed harmful procedural error by not following the table of penalties. *Id.* at 5-6. Neither the appellant nor her non-attorney representatives discernably objected to this order despite being provided an opportunity to do so.⁵ *Id.* at 9. Thus, to the extent that the appellant raises additional affirmative defenses on review, we decline to consider the same. *See Thurman v. U.S. Postal Service*, 2022 MSPB 21, ¶¶ 17-18 (setting forth a list of nonexhaustive factors for consideration in determining whether an appellant will be deemed to have waived an affirmative defense). In any event, even if we were to consider these claims, a different outcome would not be warranted because the appellant's assertions, including her reference to *Stone*, are unclear. PFR File, Tab 1 at 5; *see Stone*, 179 F.3d at 1376-77 (explaining that a deciding official violates an employee's due process rights when the official relies on new and material ex parte information as a basis for decisions regarding the merits of a proposed charge or the penalty to be imposed); *see also Keefer v. Department of Agriculture*, 92 M.S.P.R. 476, ¶ 18 n. 2 (2002) (indicating that the Board is not obligated to search a voluminous record to make sense of vague allegations). To this end, regarding her harmful procedural error claim, the appellant does not allege, much less show, how any purported agency error regarding the video

⁵ The appellant's representative generally referenced due process prior to the start of the hearing. IAF, Tab 35-1, Hearing Recording (prehearing statements). To the extent that the appellant is arguing that this reference amounted to an objection to the administrative judge's order, we are unpersuaded. IAF, Tab 33 at 6, 9.

footage of the incident was likely to have caused the agency to reach a conclusion different from the one it would have otherwise reached; thus, she has not demonstrated any prejudice to her substantive rights.⁶ PFR File, Tab 1 at 5; *see Pumphrey*, 122 M.S.P.R. 186, ¶ 10; *see also Tines*, 56 M.S.P.R. at 92.

The appellant asserts that she has new and material evidence; specifically, she avers that, “[f]ollowing the issuance” of the initial decision, she was tried and found not guilty in a criminal case related to the February 22, 2024 incident. PFR File, Tab 1 at 5. However, this evidence is not new; a document regarding the appellant’s February 26, 2025 acquittal was included in the record before the administrative judge and discussed during the parties’ prehearing conference. IAF, Tab 32 at 4, Tab 33 at 8; *see Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980) (indicating that evidence that is already part of the record is not new).⁷ Moreover, this evidence is not material to the outcome of this appeal. Criminal actions and administrative actions employ different standards of proof; the former is based on proof beyond a reasonable doubt, whereas the latter applies a lower standard of proof, such as preponderant or substantial evidence. *See, e.g., Rodriguez-Ortiz v. Department of the Army*, 46 M.S.P.R. 546, 548 (1991) (explaining that a criminal acquittal is not binding in a civil action due to the differing standards of proof). When the charged misconduct in an administrative action concerns the underlying conduct and not the fact of a conviction, as here, the charge may be sustained notwithstanding a criminal acquittal. *See Larry v.*

⁶ The record before the administrative judge contained video recordings of the February 22, 2024 incident underlying the agency’s charge, including a video of the appellant scanning items at the check-out register. IAF, Tab 13-6 (Video 3). The administrative judge reasoned that this video evidence supported the agency’s version of events. ID at 5-7.

⁷ To the extent that the appellant is arguing that the administrative judge did not discuss this document in the initial decision, a different outcome is not warranted. 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 and Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff’d*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). In any event, as discussed herein, this evidence is not material.

Department of Justice, 76 M.S.P.R. 348, 355 (1997). Thus, the appellant's assertion is unpersuasive.

We have considered all the appellant's remaining assertions but find that they do not warrant a different outcome. Accordingly, we affirm the initial decision.

NOTICE OF APPEAL RIGHTS⁸

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

⁸ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination.

This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. 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.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC 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 a request for review to the EEOC 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, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁹ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

⁹ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board