

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LIESCHEN L. ROWE,
Appellant,

DOCKET NUMBER
CH-0752-10-0744-B-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: June 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

John A. Tacker, Esquire, Davenport, Iowa, for the appellant.

Timothy D. Johnson, Esquire, Fort McCoy, Wisconsin, 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 remand 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

The remand initial decision affirmed the appellant's removal from her position as a Human Resources Technician for misrepresentation. Remand Appeal File (RAF), Tab 11, Remand Initial Decision (RID). In support of this charge, the agency alleged that the appellant misrepresented her experience on the resume she submitted when applying for a promotion. The agency stated that the appellant accomplished this by crafting her resume to indicate that she possessed the skills identified on the RESUMIX skills list even though she had not performed duties involving those skills and was not familiar with what those skills entailed. Initial Appeal File, *Rowe v. Department of the Army*, MSPB Docket No. CH-0752-10-0744-I-1 (IAF), Tab 4, Subtab 4e.

On review, the appellant denies the alleged misconduct and argues that the agency failed to prove its charge. Remand Petition for Review (RPFR) File, Tab 1 at 9-11, 14-15. In the initial decision, the administrative judge set forth the facts underlying the charge, summarized the documentary evidence and hearing testimony relevant to the charge, including the testimony of the appellant and her witness, retired Staffing Technician Adeline Harvey, and found that the agency proved the charge by preponderant evidence. IAF, Tab 15, Initial Decision (ID) at 2-6. The administrative judge found the testimony of the appellant and Ms. Harvey, that the appellant's resume was accurate, unpersuasive because the appellant had been employed for a short time in a training position when she submitted the resume and she was unable to explain the basis for many of the statements in her resume. *Id.* at 4-5. The administrative judge therefore found that preponderant evidence shows the appellant misrepresented her experience in her application for employment. *Id.* at 5.

The administrative judge further found that the appellant's extensive use of the verbiage from the RESUMIX skills set in her resume constitutes "persuasive circumstantial evidence" that the appellant had access to confidential information

and used that information “in an intentional attempt to pass the computer screening process to allow for further consideration of her application.” ID at 5. The administrative judge concluded that, because the appellant intentionally supplied incorrect information for personal gain, the charge of misrepresentation is supported by preponderant evidence. *Id.* The appellant’s argument on review that the agency failed to prove its charge is essentially mere disagreement with the administrative judge’s explained findings, and, as such, provides no reason to disturb the initial decision. *See Schnell v. Department of the Army, 114 M.S.P.R. 83, ¶ 12 (2010).*

The appellant also asserts on review that the administrative judge decided facts that were not in evidence, and failed to consider facts that were presented to him. RPFR File, Tab 1 at 9, 14. The appellant does not explain this assertion and we find it unpersuasive. The administrative judge’s analysis in the initial decision demonstrates that he considered the appellant’s testimony and arguments. ID. The administrative judge’s failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *See 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).*

The appellant also asserts that the administrative judge improperly based his decision on “heresay [sic] and opinion testimony, not a preponderance of the evidence, or a totality of the circumstances, or even the slightest circumstantial evidence.” RPFR File, Tab 1 at 11. In particular, the appellant argues on review that the written summary of her March 1, 2010 interview with agency witness Gretchen Leigh and Donna Lauritsen, another agency employee, is inadmissible as hearsay because Ms. Lauritsen did not testify as a witness at the hearing. *Id.*

This argument is unavailing. Ms. Leigh had firsthand knowledge of the interview and signed the written summary of the interview. IAF, Tab 4, Subtab 4f. In any event, hearsay is admissible in Board proceedings. *See Borninkhof v. Department of Justice, 5 M.S.P.R. 77, 83-87 (1981).*

On review the appellant also alleges that the agency violated her due process rights. She contends that the agency charged her with fraud in its notice of proposed removal, but removed her based on a charge of misrepresentation and she was not afforded an opportunity to reply to the misrepresentation charge. RPFR File, Tab 1 at 4-6, 8. Contrary to the appellant's assertion, in the notice of proposed removal the agency charged her with misrepresentation, provided her the specific reasons for the proposed action, and included sufficient detail to allow her to make an informed reply to that charge. IAF, Tab 4, Subtab 4e; *see 5 U.S.C. § 7513(b); See Johnson v. Department of Justice, 65 M.S.P.R. 46*, 50 (1994), *review dismissed*, 48 F.3d 1236 (Fed. Cir. 1995) (Table). Further, the record reflects that the appellant availed herself of the opportunity to reply to the charge by submitting a written response to the notice of proposed removal. IAF, Tab 4, Subtab 4d. Consequently, we find that the agency did not violate the appellant's due process rights.

The appellant also argues on review that the deciding official, James Pattison, did not properly analyze the *Douglas* factors in determining that removal was an appropriate penalty. RPFR File, Tab 1 at 5-6. Specifically, she contends that in addressing the first *Douglas* factor, the nature and seriousness of the offense, the deciding official did not consider "whether the offense was intentional, or technical, or inadvertent, or was committed maliciously for gain or was frequently repeated." *Id.* at 5. In addition, she alleges that, in addressing another *Douglas* factor, the appellant's past work record, Mr. Pattison failed to consider her overall performance, length of service, and performance in the job, or getting along with fellow workers and dependability. *Id.* at 6.

The appellant seems to be arguing that the deciding official failed to consider each of the *Douglas* factors, and therefore the penalty cannot be affirmed. RPFR File, Tab 1 at 5-6. This argument is unpersuasive. A deciding official is only required to consider those factors that are relevant to a particular case, and the failure to consider one or more of the factors enumerated in

Douglas v. Veterans Administration, [5 M.S.P.R. 280](#) (1981), is not reversible error. *Id.* at 306 (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).

The decision notice and the hearing testimony of Mr. Pattison, as summarized in the initial decision, as well as his written analysis of the *Douglas* factors, show that he properly considered the *Douglas* factors in sustaining the appellant's removal. IAF, Tab 4, Subtabs 4b, 4c; ID at 5-6. Mr. Pattison found that the appellant's misconduct was "very serious" because of the type of work she did and her access to computer systems. *Id.* He also noted that the appellant had only 18 months of federal service and that the penalty in this case was consistent with that imposed in similar cases. IAF, Tab 4, Subtab 4c; ID at 6. In addition, Mr. Pattison stated that because of this appellant's misconduct, he has "no confidence" in her and believes that she lacks rehabilitative potential. *Id.*

In assessing the reasonableness of the agency's penalty, the administrative judge found that the agency properly considered relevant factors in determining the penalty and that its penalty did not clearly exceed the bounds of reasonableness. ID at 5-6. Recognizing that the Board must accord proper deference to the agency's primary discretion in managing its workforce, we see no reason to disturb this finding. *See Douglas*, 5 M.S.P.R. at 306.

On review the appellant also challenges the administrative judge's finding that she failed to prove disability discrimination based on failure to accommodate and disparate treatment. RPFR File, Tab 1 at 3-4. We find the appellant's arguments regarding her disability discrimination claim unpersuasive.

In a disability discrimination case based on a failure to accommodate, the appellant's *prima facie* case consists of a showing that he is a disabled person, and that the action appealed was based on his disability, and, to the extent possible, he must articulate a reasonable accommodation under which he believes he could perform the essential duties of his position or of a vacant funded

position to which he could be reassigned. *Henson v. U.S. Postal Service*, [110 M.S.P.R. 624](#), ¶ 6 (2009). After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. *Stalkfleet v. U.S. Postal Service*, [6 M.S.P.R. 637](#), 647-48 (1981). Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination. *Id.* However, in disability discrimination cases, as in retaliation cases, once the record is complete and a hearing has been held, the burden-shifting analysis drops from the case, and the appellant bears the ultimate burden of proving by preponderant evidence that he was the victim of prohibited discrimination. *Jackson v. U.S. Postal Service*, [79 M.S.P.R. 46](#), 53 (1998); *see* [5 C.F.R. § 1201.56\(a\)\(2\)\(iii\)](#).

Addressing the appellant's failure to accommodate claim, the administrative judge found that the appellant produced no evidence showing any causal relationship between her asserted disability (disc disease and problems with her legs) and the basis for her removal (misrepresentation of her experience when applying for a position). RID at 2. The administrative judge further found that the appellant failed to establish other elements of proof on her allegation, as her own testimony shows that her conditions were accommodated. *Id.* Therefore, the administrative judge found the appellant did not prove by preponderant evidence disability discrimination based on a lack of reasonable accommodation. *Id.*

Based on our review of the evidence, we discern no reason to disturb this finding. As the administrative judge explained, to prove a failure to accommodate disability discrimination claim, an appellant must prove, *inter alia*, that the action appealed was based on her disability. RAF, Tab 5 at 2 (citing *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 16 (2010)); RID at 2. The appellant has failed to submit any evidence to support her bare

assertion that the agency removed her because of her disability rather than her proven misconduct.

Turning to the appellant's disability discrimination claim based on disparate treatment, the administrative judge summarized the appellant's testimony as well as the testimony of agency witnesses Mr. Pattison and Ms. Leigh, both of whom testified that the appellant's back pain did not play a role in their decisions regarding the appellant's removal. RID at 3. The administrative judge noted that, while the appellant testified to a number of actual or perceived slights and generally stated that similarly-situated employees were not treated in this manner, she did not provide more detailed evidence supporting her claim that the agency's actions regarding various matters (e.g., the amount of leave used, the location of breaks, work hour schedules, training, and opportunities for assisting other employees) were motivated by her physical conditions. *Id.* at 3-4. Therefore, the administrative judge found the appellant did not show her removal was motivated by a disability. *Id.* at 4. The administrative judge further found that, even assuming the appellant could produce some evidence that her alleged disability was one motivating factor in the agency's action, she has not shown, by preponderant evidence, she was removed on the basis of that disability. *Id.*

On review the appellant contends that she is the victim of disparate treatment in that she is a member of a protected group and similarly situated individuals (i.e., other applicants for the promotion for which she applied) who were not members of her protected group were not treated as harshly as she because their resumes received less scrutiny than hers. RPFR File, Tab 1 at 4. This argument is essentially mere disagreement with the administrative judge's explained findings and, as such, does not establish a basis to disturb the remand initial decision. *See Schnell, 114 M.S.P.R. 83, ¶ 12.*

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 remand 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)). 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, DC 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, DC 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. § 794\(a\)](#).

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.