UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EVERETT SPENCER,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
DC-0752-12-0756-I-1

DATE: February 14, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Stephen G. DeNigris, Esquire, Washington, D.C., for the appellant.

Lundi McCarthy Shafiei, Esquire, and Steven J. Weiss, Esquire, Washington, D.C., 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 of the initial decision, which affirmed the appellant's reduction in grade and pay. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

findings of material fact; the initial 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. *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 modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The agency reduced the appellant's grade and pay from the position of Supervisory Police Officer, AD-0083-09, to the position of Police Officer, AD-0083-07, based on a narrative charge of misconduct. Initial Appeal File (IAF), Tab 9 at 17-22, 32-36. After a hearing on the matter, the administrative judge affirmed the appellant's reduction in grade and pay. IAF, Tab 24, Initial Decision (ID). In support thereof, the administrative judge found as follows: (1) the agency's narrative charge included specifications that the appellant repeatedly violated parking regulations, failed to follow an August 12, 2010 written order, and misused his government-issued BlackBerry; (2) the agency proved the underlying specifications by preponderant evidence; (3) there was a nexus between the conduct charged and the efficiency of service; and (4) the penalty was reasonable. ID at 5-12. The appellant has filed a timely petition for review challenging the administrative judge's construction of the narrative charge and her findings regarding the merits of the sustained charge and the reasonableness of the penalty. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition. PFR File, Tab 3. The appellant does not

challenge the administrative judge's finding of nexus between the charged misconduct and the efficiency of service, and we discern no reason to disturb it.

The administrative judge erred by not requiring the agency to prove insubordination.

We agree with the appellant's argument on review that the administrative judge erred by construing the specification regarding the August 12, 2010 written order as a charge of "failure to follow an order." As the appellant correctly asserts, the August 12, 2010 written order specification actually constituted a specification of "insubordination," which required the agency to prove intent. PFR File, Tab 1 at 20, 23. For the following reasons, we MODIFY the administrative judge's initial decision to address the appropriate specification of insubordination.

A charge of "misconduct" has no specific elements of proof; it is established by proving that the appellant committed the acts alleged in support of the "misconduct" label. *See Parbs v. U.S. Postal Service*, 107 M.S.P.R. 559, ¶ 8 (2007), *aff'd*, 301 F. App'x 923 (Fed. Cir. 2008). The agency is required to prove the charge as it is set out in the notice of proposed removal, however, not some other offense that might be sustainable by the facts of the case. *Id*. In resolving the issue of how a charge should be construed, the structure and language in the proposal notice and decision notice will be examined. *Id*. The nature of a charge should be construed in light of the accompanying specifications and circumstances. *Id*.

Insubordination and failure to follow instructions are separate charges with different standards of proof. *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555 (1996). To sustain a charge of insubordination, the agency must establish that the refusal to obey a proper order was intentional and willful disobedience. *Id*. By contrast, the agency may prove a charge of failure to follow instructions by establishing that a proper instruction was given to an employee and that the

employee failed to follow it, without regard to whether the failure was intentional or unintentional. *Id*. at 556.

We find that the wording of the August 12, 2010 written order specification shows that the agency charged the appellant with insubordination. The written order at issue was the August 12, 2010 memorandum from the Acting Chief of the Pentagon Parking Office suspending the appellant's parking privileges through August 12, 2011. IAF, Tab 9 at 32-34; Tab 10 at 33-34. In the notice of proposed reduction in grade and pay, the agency stated that "[b]y parking on the Pentagon Reservation on June 8, 2011, [the appellant] failed to follow the written order of August 12, 2010 which suspended [his] parking privileges through August 12, 2011." IAF, Tab 9 at 32. The agency went on to repeatedly characterize his failure to follow the order as a "disregard" for the order's content. *Id*. at 33-34. The agency further stated that the appellant "continued to exhibit a complete lack of regard for the rules and the authority of the Parking Management Office by ignoring the decision to suspend [his] privileges." *Id*. at 34. In addition, the deciding official's recitation of the underlying facts in the decision letter demonstrates that he considered the offense to have been done "knowingly." *Id*. at 18. All of this language indicates that the agency charged the appellant with insubordination, not with simply failing to follow an order. *See Parbs*, 107 M.S.P.R. 559, ¶ 11.

Although we find that the administrative judge erred in her construction of this specification, we find it unnecessary to remand this case for further proceedings. As the record is adequately developed, we may analyze the evidence at this level to determine whether the agency proved the insubordination specification. *See Minor v. U.S. Postal Service*, 115 M.S.P.R. 307, ¶ 10 (2010).

The agency proved the underlying specifications of misconduct by preponderant evidence.

We find that the agency proved the insubordination specification by preponderant evidence. Insubordination is the willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Parbs*, 107 M.S.P.R. 559, ¶ 13. As noted above, it requires proof of intent. *Id*. Intent is a state of mind that is generally proven by circumstantial evidence in the context of an insubordination charge. *Id*. In considering whether the agency has proven intent, the Board must examine the totality of the circumstances. *Id*.

It is undisputed that the appellant parked on the Pentagon Reservation on June 8, 2011, in violation of the August 12, 2010 memorandum suspending his parking privileges through August 12, 2011, on the Pentagon Reservation. IAF, Hearing Transcript at 106-07, 110-12. It is also undisputed that the appellant received and was aware of the suspension of his parking privileges set forth in the August 12, 2010 memorandum. IAF, Hearing Transcript at 106; Tab 10 at 31-32 (appellant's response to the August 12, 2010 memorandum). The appellant testified below, and reiterated on review, that he asked another officer to move his parked car on June 8, 2011, because he was "on suspension" and did not "want to get dinged or anything." PFR File, Tab 1 at 10; IAF, Hearing Transcript at 111-12. Such testimony demonstrates that his violation of the memorandum was done knowingly and intentionally.

To the extent that the appellant asserts that the August 12, 2010 memorandum did not constitute an "order" issued by an individual who was entitled to have the order obeyed, or that it was otherwise vague, PFR File, Tab 1 at 23-24, we disagree. The Board has found that a police officer's order for an employee to move her vehicle because it was improperly parked was a proper order with which the employee must comply. *Smith v. Department of the Air Force*, 48 M.S.P.R. 594, 598 (1991). The appellant does not dispute that the

Acting Chief of the Pentagon Parking Office was authorized to suspend the appellant's parking privileges. IAF, Tab 10 at 31-32 (appellant's response to the August 12, 2010 memorandum requesting reconsideration of his suspended parking privileges). Thus, the Acting Chief's memorandum suspending the appellant's parking privileges was an order that he was entitled to have obeyed. Further, regardless of whether the August 12, 2010 order was clear regarding the appellant's ability to drive on the Pentagon Reservation, PFR File, Tab 1 at 23-24, it was clear with respect to the appellant's parking privileges such that he knew that he was violating the order by parking on the Reservation on June 8, 2011, PFR File, Tab 1 at 10; IAF, Hearing Transcript at 111-12. Therefore, we find that the appellant's intentional violation of this order constituted insubordination.

Based upon the appellant's stipulation to the underlying facts of the remaining specifications regarding the appellant's other parking violations and misusage of his government-issued BlackBerry, we find that the administrative judge properly sustained those specifications. ID at 6; IAF, Tab 20 at 2; *see* 5 C.F.R. § 1201.63. We find unavailing the appellant's assertion on review that he was unaware of the BlackBerry usage policy at the time of his excessive overage. PFR File, Tab 1 at 20. The appellant knew or should have known what the usage policy was given his position as a supervisor, his prior warning regarding his misuse of his government-issued cellular telephone, and the standard procedures used by the office in disseminating such policies. IAF, Tab 10 at 67-68, 76-77; IAF, Hearing Transcript at 79; *see Brown v. Department of the Air Force*, 67 M.S.P.R. 500, 506 (1995) (an appellant knew or should have known about the agency policy he violated due to, among other things, the appellant's position and an informal warning he received 3 years prior regarding a similar issue).

For the foregoing reasons, we conclude that the agency proved that all of the charged misconduct occurred, and the narrative charge of "Misconduct" is sustained. *See Parbs*, 107 M.S.P.R. 559, ¶ 8.

The appellant's reduction in grade and pay was reasonable.

When, as here, the Board sustains all of the agency's charges, it reviews the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 10 (2013); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). 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. *Portner*, 119 M.S.P.R. 365, ¶ 10. The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeds the bounds of reasonableness. *Id.*

As the administrative judge noted, the record shows that the deciding official considered the relevant *Douglas* factors in deciding the appropriate penalty. ID at 7-11. According to the *Douglas* factor analysis completed by the deciding official, he considered all of the relevant factors, including that: the misconduct was serious because, as a supervisory police officer, the appellant chose to violate parking regulations; as a supervisory law enforcement officer, the appellant was expected to provide guidance and set a positive example for his subordinates and maintain the trust of the public; the appellant repeatedly violated parking regulations in a short period of time; the appellant was on notice of the parking and cellular telephone usage rules that he violated; no other employees under the deciding official's supervision committed similar misconduct; the appellant's repeated misconduct made it difficult for management to trust that the appellant would abide by the rules and regulations in

the future; and the agency would be humiliated if information regarding the appellant's misconduct was made public. IAF, Tab 9 at 23-31. Contrary to the appellant's assertion on review, PFR File, Tab 1 at 26, the deciding official determined that the appellant's repeated disregard for the rules and regulations demonstrated a lack of potential for the appellant's rehabilitation, IAF, Tab 9 at 29. Also contrary to the appellant's assertion, PFR File, Tab 1 at 25, the deciding official considered the appellant's 24 years of experience with acceptable performance as a mitigating factor, IAF, Tab 9 at 26. However, in light of the appellant's repeated misconduct and the higher standard placed on the appellant as a supervisory law enforcement officer to abide by pertinent laws and regulations, the deciding official found that no lesser sanction than the reduction in grade and pay would deter future misconduct by the appellant. *Id.* at 30; *see Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996).

We find unavailing the appellant's reasserted arguments on review regarding the reasonableness of the penalty. First, contrary to the appellant's assertion, PFR File, Tab 1 at 27, the record evidence demonstrates that the disciplinary action was taken as a corrective, not punitive, measure, IAF, Tab 9 at 30. Second, the record evidence does not support the appellant's argument that the agency did not comply with its table of penalties in determining the appropriate penalty. PFR File, Tab 1 at 21. As the deciding official indicated, the totality of the appellant's misconduct was not adequately represented in the table of penalties. IAF, Hearing Transcript at 23-24; Tab 9 at 28. We note that the agency's table of penalties, found at Administrative Instruction 8,[2] is only to be used as a guide, IAF, Tab 9 at 28, and there is no record evidence otherwise suggesting that the appellant's reduction in grade and pay exceeded the maximum

[2] Contrary to the appellant's assertion below, Administrative Instruction 88 is not the controlling table of penalties because it sets forth only penalties involving Pentagon parking privileges and does not address appropriate penalties for employee misconduct. IAF, Tab 10 at 60-61.

reasonable penalties set forth in that guide. Third, as the administrative judge correctly stated, the agency's failure to engage in progressive discipline did not preclude it from imposing the reduction in grade and pay after providing the appellant with multiple prior warnings and citations. ID at 11; *see Roberson v. Veterans Administration*, 27 M.S.P.R. 489, 493 (1985) ("[A]n agency's use of warnings and counselings rather than formal disciplinary action does not preclude the agency from removing an employee when it becomes clear that his performance will not improve.").

To the extent that the appellant asserts that a demotion is only appropriate in the most serious situations when the employee demonstrates an inability to perform his job, PFR File, Tab 1 at 24-25, we disagree. The Board has found that a demotion may be appropriate when even relatively minor sustained charges call into question an appellant's ability to act in their supervisory role. *See, e.g.*, *Fischer*, 69 M.S.P.R. at 619 (demotion was appropriate when appellant's relatively minor charge demonstrated a lack of judgment and called into question his ability to act in a supervisory law enforcement role, despite the appellant's unblemished past record and lack of previous agency counseling). Here, as the deciding official concluded, the appellant's misconduct set an example for his subordinates that was contradictory to his primary duties as a supervisory law enforcement officer and, thus, called into question his ability to act in such a role. IAF, Tab 9 at 27.

Accordingly, the administrative judge properly determined that the reduction in grade and pay was reasonable under the circumstances. ID at 12. The initial decision, as modified by this Final Order regarding the insubordination specification, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.