

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

THOMAS C. SMITH,  
Appellant,

DOCKET NUMBER  
PH-0752-12-0506-I-2

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: October 22, 2014

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania, for the appellant.

Steven J. Lewengrub, Atlanta, Georgia, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

¶1 The appellant has filed a petition for review of the initial decision, 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 decision is based on an erroneous interpretation of statute or regulation

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

### **BACKGROUND**

¶2 Effective August 13, 2012, the agency removed the appellant from his position as a Federal Air Marshal (FAM) and the federal service based on charges of lack of candor (five specifications), interfering with an investigation, and violation of Transportation Security Administration policy on use of alcohol. MSPB Docket No. PH-0752-12-0506-I-1, Initial Appeal File (IAF-1), Tab 4, Subtabs 4a-4b. The appellant appealed his removal, arguing that the agency did not support the charges by preponderant evidence and that the removal penalty was excessive. IAF-1, Tab 1 at 1, 3. He also raised the affirmative defense of harmful procedural error. MSPB Docket No. PH-0752-12-0506-I-2, Initial Appeal File (IAF-2), Tab 17 at 4.

¶3 After holding the requested hearing, the administrative judge issued an initial decision affirming the removal action. IAF-1, Tab 1 at 2; IAF-2, Tab 25, Initial Decision (ID) at 2. He found that the agency proved the charges and specifications by preponderant evidence, the appellant failed to prove his claim of

harmful procedural error by preponderant evidence, and the agency's penalty was within the bounds of reasonableness. ID at 4-40.

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 5. On review, the appellant challenges the administrative judge's findings regarding the sustained conduct, his harmful procedural error claim, and the reasonableness of the penalty. *Id.* at 5-23. The agency has filed a response in opposition. PFR File, Tab 9.

### DISCUSSION OF ARGUMENTS ON REVIEW

¶5 In alleging that the administrative judge erred in finding that the agency proved its charges, the appellant primarily challenges the administrative judge's credibility determinations. PFR File, Tab 5 at 5-8, 18-21. We find, however, that the appellant's arguments constitute mere disagreement with the administrative judge's well-reasoned and explained findings, which are supported by the record and entitled to deference. *See* ID at 6-34; *see also Diggs v. Department of Housing & Urban Development*, [114 M.S.P.R. 464](#), ¶ 8 (2010) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so).<sup>2</sup>

¶6 For example, concerning the lack of candor charge, the appellant reiterates that his approximation of the timing of events during the period in question was made in good faith and that there is no credible evidence in the record showing that he was deceitful and deliberately provided misinformation to the agency. PFR File, Tab 5 at 19; IAF-2, Tab 17 at 7-10. The administrative judge, however, addressed these contentions below and concluded, based on the totality of the

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<sup>2</sup> Although the administrative judge did not make any explicit demeanor-based credibility determinations in the initial decision, he heard live testimony, and his credibility determinations must be deemed to be at least implicitly based upon witness demeanor. *See Little v. Department of Transportation*, [112 M.S.P.R. 224](#), ¶ 4 (2009).

circumstances, that the appellant's assertions were not credible and that he was attempting to deceive the agency through his actions. ID at 7-17; IAF-1, Tab 4, Subtab 4k; Hearing Compact Disc (HCD) at 2:38:34-4:22:04 (testimony of appellant) (July 25, 2013). Although the appellant generally disagrees with these findings, he has provided no basis to disturb them on review. The appellant additionally restates his concerns regarding the credibility of C.A., a FAM who was present during the events in question and who the agency has since terminated. PFR File, Tab 5 at 6-9; IAF-2, Tab 17 at 10-12, 14-15. The administrative judge, however, addressed these concerns and thoroughly explained his findings regarding Mr. C.A.'s credibility in the initial decision. ID at 14-15; HCD at 9:48:21-11:14:22 (testimony of C.A.) (July 24, 2013). Again, the appellant generally disagrees with the administrative judge's findings in this regard but has failed to provide any basis to disturb them.

¶7 Concerning his claim of harmful procedural error, the appellant claims that the investigation was "slanted" and "designed to develop charges against [him] without according him a fundamental right to be apprised of the allegation against him and without according him an opportunity to address the accusations." PFR File, Tab 5 at 8-9. He also claims that the primary investigator, S.S., testified untruthfully regarding the circumstances surrounding the investigation.<sup>3</sup> *Id.* at 10-18. The appellant made these arguments before the administrative judge, however, and the administrative judge, upon consideration of all of the relevant evidence, found them to be unpersuasive. IAF-2, Tab 17 at 11-12; HCD

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<sup>3</sup> Throughout his petition for review, the appellant appears to quote directly from the hearing testimony but he fails to cite to the hearing compact disc or any transcript of the proceedings. PFR File, Tab 5. In its response to the petition for review, the agency has not challenged the accuracy of the quoted testimony. We have compared portions of the quoted testimony to the recording of the proceedings on the hearing compact disc and note that his transcription of the testimony is not a verbatim record of the proceedings. *Compare id.* at 12, *with* HCD at 12:57:54-1:01:01 (testimony of Special Agent in Charge V.B.) (July 25, 2013). In any event, for purposes of our review, we have accepted the appellant's transcription of the testimony as accurate and considered the testimony as quoted by the appellant in our analysis.

at 5:17:11-5:34:43 (appellant's closing argument) (July 25, 2013); ID at 28-35. We find that the administrative judge's findings are supported by the record and that the appellant has shown no basis to disturb them on review. HCD at 2:44:00-6:06:33 (testimony of S.S.) (July 24, 2013); HCD at 12:42:24-1:04:10 (testimony of V.B.) (July 25, 2013); IAF-1, Tab 4, Subtab 4k.

¶8 The appellant also contends that the administrative judge erred in finding that the removal penalty was within the bounds of reasonableness. PFR File, Tab 5 at 22-23. Where the agency's charges are 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 tolerable limits of reasonableness. *Woebcke v. Department of Homeland Security*, [114 M.S.P.R. 100](#), ¶ 7 (2010). Here, the administrative judge found that the deciding official properly weighed the *Douglas* factors and concluded that the removal penalty did not exceed the bounds of reasonableness. ID at 36-41. The appellant appears to argue on review that the mitigating factors, such as his previously unblemished record and the continued support of his colleagues and supervisors, should have lessened the penalty. PFR File, Tab 5 at 22. However, as the administrative judge properly noted, the deciding official considered these mitigating factors but ultimately concluded that they did not outweigh the aggravating factors, including the seriousness of the offenses. ID at 38-40; IAF-1, Tab 4, Subtab 4b at 13-15. Under these circumstances, we agree for the reasons explained in the initial decision with the administrative judge that the removal penalty is within the tolerable limits of reasonableness. ID at 36-41; *See Woebcke*, [114 M.S.P.R. 100](#), ¶ 7.

#### **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](http://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](#).

If you are interested in securing pro bono representation for your court appeal, you may visit our website at <http://www.mspb.gov/probono> for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems

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

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.