

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

DAVID NOBLE, JR.,
Appellant,

DOCKET NUMBERS
DC-0752-11-0880-I-1
DC-0752-12-0054-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: October 25, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

David Noble, Jr., Gaithersburg, Maryland, pro se.

Stephen W. Furgeson, Esquire, Landover, Maryland, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed petitions for review in these cases asking us to reconsider the initial decisions issued by the administrative judge. As set forth below, we JOIN the appeals of the appellant's removal and constructive suspension, AFFIRM as MODIFIED the initial decision that upheld his removal,

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

and VACATE the initial decision that dismissed his constructive suspension appeal as untimely filed, instead DISMISSING that appeal for lack of jurisdiction.

Removal appeal

The appellant appealed the agency's action removing him from his Level 5 Letter Carrier position based on "Unsatisfactory Attendance/Absence Without Official Leave/Permission (AWOL)." Initial Appeal File (IAF), 0880, Tab 9, Subtabs 4b, 4a. The agency charged that he had been AWOL from February 24, 2011, "through present [April 28, 2011]," explaining that he had failed to report for duty as scheduled and that, although twice requested to do so, he had not submitted acceptable documentation to support his extended absence. *Id.*, Tab 9, Subtab 4b. During adjudication, the appellant argued that, because the agency had made his working conditions intolerable, his absence from work should be considered a constructive suspension rather than AWOL. *Id.*, Tab 11 at 1. The administrative judge considered the claim as an affirmative defense in the removal appeal but also granted the appellant's request to litigate it as a separate, discrete action, *id.*, Tab 23, and he docketed a new appeal.

Following a hearing, the administrative judge affirmed the agency's removal action. IAF, 0880, Tab 45, 0880 Initial Decision (ID) at 1, 26. He found that the appellant was AWOL during the period in question and that the agency appropriately placed him in an AWOL status. 0080 ID at 3-13. The administrative judge found the agency had also proven that the appellant was irregular in attendance during the period in question. *Id.* at 13-14. The administrative judge considered as an affirmative defense, but ultimately rejected, the appellant's claim that he was forced to absent himself from work because of intolerable conditions. *Id.* at 19-20.

In his petition for review, the appellant cites to numerous "errors of fact" in the initial decision. Petition for Review (PFR) File, 0880, Tab 3 at 15-19. We

have reviewed these alleged errors and find that, while he challenges specific language in the initial decision, he has not shown any impact on his substantive rights. An adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). The appellant challenges the administrative judge's credibility determinations, but they were consistent with Board case law on assessing credibility, *see Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987); 0880 ID at 13-14, and the appellant's mere disagreement with those determinations does not provide a basis for Board review, *see Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980).

The appellant argues that the administrative judge improperly excluded argument "as to the merits." PFR File, 0880, Tab 3 at 19-20. To the extent the appellant is suggesting that he wished to pursue his constructive suspension claim in this appeal, he has done so and, as noted, the administrative judge also docketed that matter as a separate appeal. Therefore, the appellant has failed to show how he was harmed in this regard. *See Panter*, 22 M.S.P.R. at 282.

The appellant argues that the administrative judge erred in finding the charge of AWOL sustained and otherwise misconstrued the charge. The administrative judge correctly found that, to sustain a charge of AWOL, the agency must show that the employee was absent and that his absence was unauthorized, or that his request for leave was properly denied. *Little v. Department of Transportation*, [112 M.S.P.R. 224](#), ¶ 6 (2009); 0880 ID at 13. The appellant does not dispute that he was absent during the period in question but contends, as he did below, that he was on long-term leave without pay (LWOP), as evidenced by a PS Form 50 showing him on LWOP beginning January 14, 2011. IAF, Tab 11, Exhibit D.² During the proceeding below, the appellant also argued that certain of his pay stubs showed that he was carried on LWOP. The

² The appellant has not suggested, however, that he ever requested LWOP.

administrative judge found that evidence in the record supported the agency's position that the appellant was AWOL during the period in question. 0880 ID at 5-6; *see, e.g.*, IAF, 0880, Tab 9, Subtab 4c (the appellant's time and attendance records); Hearing Transcript (HT) at 47 (testimony of Antonio Jones, author of the return-to-duty letter, that the code of "24" on the appellant's time and attendance documents signifies AWOL); HT at 79 (testimony of Sterling Colter, Service Supervisor, that, when an individual is AWOL, the pay stub shows LWOP, signifying that the individual was not paid).³ The PS Form 50 alone, even with the appellant's argument, does not outweigh the other considerable evidence of his AWOL status. We therefore agree with the administrative judge that the agency proved the AWOL charge by preponderant evidence.

The appellant contends that the administrative judge misconstrued the charge by also finding that he failed to follow leave-requesting procedures and used excessive LWOP. PFR File, 0880, Tab 3 at 20-21. The administrative judge did find that the agency proved that it took action against the appellant for excessive approved absence, and that it was proper to do so, 0880 ID at 18-19, and that the agency proved that he was irregular in attendance during the period in question, *id.* at 14. In determining how an adverse action charge is to be construed, the Board will examine the structure and language of the proposal notice. *Williams v. Department of the Army*, [102 M.S.P.R. 280](#), ¶ 5 (2006). Although the charge was "Unsatisfactory Attendance/Absence Without Official Leave/Permission (AWOL)," IAF, 0880, Tab 9, Subtab 4b, the underlying specification referred only to the appellant's AWOL status since February 24, 2011, "through present." *Id.* Therefore, the agency only supported the AWOL charge, although the appellant clearly had other significant attendance-related issues. We therefore modify the initial decision by vacating any and all

³ In addition, the administrative judge found that the appellant never submitted his pay stubs. 0880 ID at 6 n.3. Nor have we been able to locate them in the record.

references to a charge of irregular attendance, 0880 ID at 14, or use of approved leave, *id.* at 18-19.

The appellant argues that the administrative judge interfered with his discovery efforts by preventing him from taking depositions of witnesses Antonio Jones and Paris Washington before the hearing. Beyond claiming surprise at one statement that each of the two witnesses made during their testimony, the appellant has failed to explain how his substantive rights were prejudiced by not having deposed Jones and Washington in advance of the hearing or how any information he sought to discover would have changed the result in this appeal. *See White v. Government Printing Office*, [108 M.S.P.R. 355](#), ¶ 7 (2008). Therefore, the appellant has not shown that the administrative judge abused his discretion in this regard.

The appellant next alleges that the administrative judge erred in failing to give proper instructions regarding his affirmative defense of violation of the collective bargaining agreement (CBA). On the contrary, early on in the proceeding below, the administrative judge set forth the definition of harmful error and explained that the burden is on the appellant to show that he was harmed by any error. IAF, 0880, Tab 13 at 3. The appellant also argues that the administrative judge wrongly concluded that he did not establish his affirmative defense of harmful error with regard to his claimed violations of the CBA. IAF, 0880, Tab 11, Exhibit A. The administrative judge addressed each of the appellant's claims and analyzed them under a harmful error standard, concluding that none of the alleged violations rose to that level and instead went to the reasonableness of the penalty. 0880 ID at 15-18. Beyond his mere disagreement, the appellant has not shown error in the administrative judge's harmful error analysis. *See Hall v. Department of the Navy*, [73 M.S.P.R. 251](#), 255 (1997).

The appellant disputes the administrative judge's finding that he did not establish his claim of intolerable working conditions, challenging the administrative judge's legal reasoning. In support of his claim, the appellant

cites to numerous cases from various circuits. *See, e.g.*, PFR File, 0880, Tab 3 at 25-28. However, those cases are not dispositive. *See Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#), ¶ 12 (2009) (decisions of the Court of Appeals for the Federal Circuit are controlling authority for the Board). The administrative judge properly considered whether the intolerable working conditions alleged by the appellant compelled him to be absent and found that, considering the totality of the circumstances, the working conditions were not so difficult that a reasonable person in the appellant's situation would have felt compelled to leave the workplace. *See Peoples v. Department of the Navy*, [83 M.S.P.R. 216](#), ¶ 5 (1999); 0880 ID at 19-20. The appellant has not shown error in these findings, particularly in view of the fact that a number of the alleged incidents upon which he relies occurred well before the period in question. *See Gerges v. Department of the Navy*, [89 M.S.P.R. 669](#), ¶ 11 (2001), *aff'd*, 52 F. App'x 513 (Fed. Cir. 2002).

The appellant alleges that the administrative judge erred in not addressing his claim of disparate penalties with regard to employee Leonard Poe. In fact, the administrative judge's penalty analysis did not include a discussion of this claim. 0880 ID at 24-26. During the hearing, the appellant testified and also presented testimony by Leon Tucker, a former shop steward in the appellant's work area, regarding Leonard Poe, an alleged comparator employee who was not removed, although he had prior discipline, was AWOL for several months, and would not explain why he had been absent when he returned to duty or produce documentation in support of his absence. IAF, 0880, Tab 22 at 5; HT at 218-19, 223-24.

To establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Lewis*

v. Department of Veterans Affairs, [113 M.S.P.R. 657](#), ¶ 15 (2010). If he does so, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Id.*

The agency's burden has not been triggered here because the appellant did not show that the charges and circumstances surrounding the charged behavior were substantially similar. The only evidence the appellant presented was his and Tucker's testimony. Tucker was unsure whether Poe was AWOL or on LWOP, HT at 222-23, and he did not indicate when the action occurred. He testified that he thought that William French (the proposing official in the appellant's removal) disciplined Poe once and that other named officials disciplined him on other occasions. *Id.* at 223. Tucker was not asked who the deciding official was in Poe's case (Paris Washington was the deciding official in the appellant's case). French and Washington both testified at the hearing, but the appellant did not specifically question either about Poe.

Additionally, there is no evidence that the agency necessarily began levying a heavier penalty without notice. Moreover, the Board has consistently held that the penalty of removal is reasonable for a significant amount of AWOL. *See Dias v. Department of Veterans Affairs*, [102 M.S.P.R. 53](#), ¶ 16 (2006), *aff'd*, 223 F. App'x 986 (Fed. Cir. 2007). Thus, we find that the appellant failed to show that the charges and the circumstances surrounding the charged behavior of Poe are substantially similar in order to establish his disparate penalties claim. *See Thomas v. Department of Defense*, [66 M.S.P.R. 546](#), 552 (the consistency of the penalty is only one of the factors to be considered under *Douglas* in determining the reasonableness of the agency-imposed penalty), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table); *see also Lewis*, [113 M.S.P.R. 657](#), ¶ 6.

The appellant has not otherwise shown error in the agency's or the administrative judge's penalty analysis. Contrary to the appellant's claim, the administrative judge found, and the record reflects, that the deciding official considered the appropriate *Douglas* factors in determining that removal was

appropriate. 0880 ID at 24-26; IAF, 0880, Tab 9, Subtab 4a. Although the appellant argues that no consideration was given to his allegation that he suffered intolerable working conditions, the administrative judge considered that claim, although in a different context, concluding that the record did not support the appellant's allegation. 0880 ID at 19-20. Therefore, we find that the appellant has not established error in the administrative judge's conclusion regarding the reasonableness of the penalty. *See Dias*, [102 M.S.P.R. 53](#), ¶ 16.

The appellant contends that the administrative judge erred by failing to disqualify himself. PFR File, 0880, Tab 3 at 20. Despite his assertion of "deep-seated antagonism" on the part of the administrative judge, our review of the record reveals none, and the appellant's claim of bias, which does not involve extrajudicial conduct, fails to overcome the presumption of honesty that accompanies administrative adjudicators. *See Simpkins v. Office of Personnel Management*, [113 M.S.P.R. 411](#), ¶ 5 (2010).

Constructive suspension appeal

As noted above, during adjudication of the appellant's removal appeal, the administrative judge docketed as a separate appeal the appellant's claim that he was constructively suspended, effective January 14, 2011. IAF, 0880, Tab 23; IAF, 0054, Tab 3. The administrative judge then explained for the appellant the timeliness and jurisdictional issues raised by this new appeal and set forth his burdens of proof. IAF, 0054, Tab 5. The appellant responded to both issues. *Id.*, Tab 8. With regard to jurisdiction, he made the identical argument and cited the same court cases from other circuits, as he has in his petition for review of the initial decision on his removal. *Id.* at 3-5; PFR File, 0080, Tab 3 at 25-28.

In his initial decision, the administrative judge dismissed the appeal as untimely filed, IAF, 0054, Tab 14, 0054 Initial Decision (ID) at 1, 9, finding that the appellant had not established good cause for the filing delay, 0054 ID at 5-9.

Based on this finding, the administrative judge did not address the issue of the Board's jurisdiction over the appeal. *Id.* at 1 n.3.

Although the existence of Board jurisdiction is a threshold issue, in an appropriate case, an administrative judge may dismiss an appeal as untimely filed if the record on timeliness is sufficiently developed and shows no good cause for the untimely filing. *Hanna v. U.S. Postal Service*, [101 M.S.P.R. 461](#), ¶¶ 4, 6 (2006); *Popham v. U.S. Postal Service*, [50 M.S.P.R. 193](#), 197 (1991). That approach is not appropriate, however, if the jurisdictional and timeliness issues are “inextricably intertwined,” that is, if resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *Hanna*, [101 M.S.P.R. 461](#), ¶ 6. The issues of timeliness and jurisdiction are generally considered to be inextricably intertwined in a constructive suspension appeal because a failure to inform an employee of Board appeal rights may excuse an untimely filed appeal, and whether the agency was obligated to inform the employee of such appeal rights depends on whether the employee was affected by an appealable action. *Fields v. U.S. Postal Service*, [117 M.S.P.R. 475](#), ¶ 7 (2012). Therefore, the administrative judge erred in dismissing this appeal as untimely filed without first addressing jurisdiction. *See Edge v. U.S. Postal Service*, [113 M.S.P.R. 692](#), ¶ 9 (2010).

We need not remand this appeal, however, because, as noted, the administrative judge provided the appellant with proper jurisdictional notice as to his claimed constructive suspension, IAF, 0054, Tab 5 at 5-6, and the appellant responded to the issue, *id.*, Tab 8. Moreover, the administrative judge specifically noted, in his initial decision dismissing the appeal as untimely, that, at the hearing on the appellant's removal, witnesses testified at length about the issues related to the appellant's constructive suspension claim. 0054 ID at 1 n.2.

The agency actions that the appellant alleged constituted intolerable working conditions include “sabotaging” his attempts to get paid for annual and sick leave, holding his route far out of adjustment and ordering him to work

overtime against his doctor's recommendation, keeping him without health insurance for several months, failing to pay him for holidays, "setting him up" on a false charge of AWOL, refusing to communicate with him, and blocking his access to the collectively-bargained-for grievance procedures. IAF, 0054, Tab 8 at 3-6. It seems clear that the appellant has had a difficult relationship with Postal management over the years, as evidenced by his having filed at least six Board appeals since 2005, a number of which addressed these very issues, IAF, 0880, Tab 13 at 4-5; Tab 23 at 3, as well as various grievances and unfair labor practices. The appellant has continued to recount his years of dissatisfaction with the way in which he was treated by the agency. However, the totality of the circumstances is examined by an objective standard, not the employee's purely subjective evaluation. *Heining v. General Services Administration*, [68 M.S.P.R. 513](#), 520 (1995). Based on our review of the record, we agree with the findings the administrative judge made in the removal initial decision that the appellant has not shown that the actions the agency took were so harassing or so severe as to compel a reasonable person in his position to absent himself and remain absent. 0880 ID at 19-20; *see Gerges*, [89 M.S.P.R. 669](#), ¶¶ 8-20. He therefore has not shown that his absence constituted a constructive suspension. The initial decision is modified accordingly to dismiss the appellant's appeal of that action for lack of Board jurisdiction, rather than as untimely filed.⁴

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). Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision as to the appeal of the appellant's removal.

⁴ In our review of the appellant's petition for review of the removal initial decision, we have addressed, but found unavailing, his claims, also raised in this petition for review, that the administrative judge abused his discretion by interfering with his discovery efforts and by refusing to disqualify himself.

**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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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.