

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

THOMAS C. DANIELS,
Appellant,

DOCKET NUMBER
SF-1221-12-0426-W-1

v.

SOCIAL SECURITY
ADMINISTRATION,
Agency.

DATE: November 6, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Thomas C. Daniels, Temple City, California, pro se.

Daniel P. Talbert and Francesco Paulo Benavides, San Francisco,
California, 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 initial decision issued by the administrative judge denying the appellant's request for corrective action based upon alleged whistleblower

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

reprisal. 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 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.² *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 and we DENY the petition for review. For the reasons discussed below, however, we VACATE the administrative judge's initial decision and DISMISS the appellant's individual right of action (IRA) appeal for lack of jurisdiction. This is the Board's final decision pursuant to [5 C.F.R. § 1201.113\(b\)](#).

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant, a Supervisory Attorney Advisor, filed an IRA appeal challenging the agency's issuance of a 14-day suspension as an act of retaliation for his making several alleged protected disclosures. *See* Initial Appeal File (IAF), Tab 21 at 31-35. The appellant alleged below that he made two separate disclosures concerning an administrative law judge's (ALJ) disability benefits decision which he believed was legally incorrect because it failed to properly identify the claimant's limitations, incorrectly awarded benefits, and amounted to

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

a gross waste of funds and was in violation of federal regulations. IAF, Tab 21 at 31; *see* IAF, Tab 20 at 45. Separately, the appellant also alleged that he disclosed that the Regional Chief ALJ issued him an improper directive to cease using Optional Form (OF) 347 when ordering interpreter services for hearings in violation of agency policy and the Federal Acquisition Regulations (FAR). *See* IAF, Tab 50 at 5-6. Additionally, the appellant also claimed that he disclosed to the Chief ALJ and a deputy commissioner that the Regional Chief ALJ inferred in a grievance decision that he would take a personnel action against him when he instructed the appellant to follow the directive he issued concerning the ordering and payment of interpreter services. *Id.*

The appellant asserts that the Regional Chief ALJ retaliated against him for making these disclosures when he issued a decision suspending the appellant for 14 days based upon three charges of misconduct. IAF, Tab 1. The appellant filed a complaint with the Office of Special Counsel (OSC), IAF, Tabs 3, 21, and 50, and thereafter filed a timely IRA appeal with the Board seeking corrective action under the Whistleblower Protection Act (WPA).

The administrative judge issued an initial decision denying the appellant's request for corrective action. IAF, Tab 61, Initial Decision (ID). In her initial decision, the administrative judge found that one of the appellant's disclosures concerning the ALJ's disability benefits decision did not constitute a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#) because the appellant made the disclosure to his supervisor in the normal course of his duties. ID at 6-7 (relying on *Huffman v. Office of Personnel Management*, [263 F.3d 1341](#) (Fed. Cir. 2001)). As to the second of the appellant's disclosures concerning the ALJ's benefits decision, the administrative judge found that, although the appellant established jurisdiction over his claim that he made a protected disclosure, the appellant ultimately failed to establish by a preponderance of the evidence that he made a protected disclosure under section 2302(b)(8). *Id.* at 11. In reaching this conclusion, the administrative judge considered the Federal Circuit's decision in

Meuwissen v. Department of the Interior, [234 F.3d 9](#) (Fed. Cir. 2000), and held that “disagreements about [ALJ] decisions fall outside the purview of the WPA.” ID at 10.

The administrative judge also found that the appellant’s disclosures concerning the Regional Chief ALJ’s directive to cease using OF-347 failed to constitute a protected disclosure of a violation of law because the agency’s policies authorized the use of several payment options for interpreter services, including the use of OF-347, which was designated as the least preferred method. *Id.* at 13 (noting that there is no agency policy requiring the use of OF-347). The administrative judge also concluded that the appellant failed to nonfrivolously allege that he disclosed a violation of law concerning the Regional Chief ALJ’s grievance decision because a reasonable person could not conclude that the decision contain a threatened personnel action in violation of [5 U.S.C. § 2302\(b\)\(9\)](#). *Id.* at 15-16.

The appellant has filed a petition for review in which he alleges, inter alia, that the administrative judge was biased, misapplied *Meuwissen*, overlooked the Board’s decision in *Cassidy v. Department of Justice*, [118 M.S.P.R. 74](#) (2012), and improperly denied his two motions seeking certification of an interlocutory appeal concerning the administrative judge’s discovery rulings. *See* Petition for Review (PFR) File, Tab 1. The agency has opposed the appellant’s petition for review, and the appellant has filed a reply. PFR File, Tabs 3 and 5.

The appellant failed to make nonfrivolous allegations that his disclosures about the ALJ disability insurance benefits decision were protected disclosures.

We find that the appellant failed to make nonfrivolous allegations that both of his disclosures about the ALJ’s disability benefits decision constituted protected disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#), and we DISMISS the appellant’s claims for lack of jurisdiction. Although the administrative judge found that one of the appellant’s disclosures about the ALJ’s decision was not a

protected disclosure because the appellant made it to his supervisor in the normal course of his employment duties, ID at 5-6, the Board recently held that the amendments contained within the Whistleblower Protection Enhancement Act (WPEA) clarified the definition of a protected disclosure and should be applied to cases pending before the Board. *See Day v. Department of Homeland Security*, [119 M.S.P.R. 589](#), ¶ 26 (2013). Under the WPEA, a disclosure made either to an alleged wrongdoer or in the normal course of performing one's job duties is not excluded from protection under [5 U.S.C. § 2302\(b\)\(8\)](#). *See 5 U.S.C. § 2302(f)(1)-(2)*; *Day*, [119 M.S.P.R. 589](#), ¶ 26. Under the WPEA, therefore, we need not decide whether the appellant made one of his disclosures concerning the ALJ's benefits decision in the normal course of his duties under section 2302(b)(8).

We find, however, that both of the appellant's disclosures concerning the ALJ's benefits decision fall outside of the definition of a protected disclosure because they consist of the appellant's disagreement with an administrative agency's adjudicative decision and therefore fail to qualify as protected disclosures under *Meuwissen*. *See O'Donnell v. Department of Agriculture*, [2013 MSPB 69](#), ¶ 15. "An erroneous agency ruling is not a 'violation of law'" under the WPA, and "an employee's disagreement with an agency ruling or adjudication does not constitute a protected disclosure even if that ruling was legally incorrect." *Id.* (citing *Meuwissen*, 234 F.3d at 13-14). Consistent with *Meuwissen*, we conclude that the appellant's disclosures about the legality and correctness of the ALJ's adjudicative ruling fail to qualify as protected disclosures under the WPA.³ *See id.* (rejecting an appellant's claim that his disclosure of his disagreement with his agency's land eligibility adjudication was a protected disclosure under section 2302(b)(8)).

³ We accordingly VACATE the administrative judge's finding that the appellant made a nonfrivolous allegation of a protected disclosure by reporting his disagreement with the ALJ's benefits decision to the agency's internal Payment Center. *See* ID at 7, 11.

On review, the appellant argues that the administrative judge failed to consider the Board's decision in *Cassidy*, [118 M.S.P.R. 74](#), to which the appellant cites in support of his claim that a disclosure concerning the "judicial determinations of a non-Article III judge" may qualify as a protected disclosure under the WPA. See PFR File, Tab 1 at 11. We do not read *Cassidy* as supporting this proposition of law. In *Cassidy*, the Board held that the appellant made a protected disclosure concerning an immigration judge's "conduct and unnecessary delays" which rose to the level of due process violations of detainees. [118 M.S.P.R. 74](#), ¶ 9. Unlike the instant case, none of the protected disclosures supporting the IRA appeal in *Cassidy* concerned the legality of the substance of an administrative officer's rulings or determinations. See *id.*, ¶ 6 (explaining that the appellant's disclosures concerned the immigration judge's conduct and the management of his docket). *Cassidy*, therefore, does not support the appellant's theory that he made protected disclosures when he complained about the legal reasoning of the ALJ's disability insurance benefits decision. As we recently made clear in *O'Donnell*, an employee's expression of disagreement with an adjudicatory ruling believed to be erroneous is not a protected disclosure of a violation of law under the WPA. [2013 MSPB 69](#), ¶ 15.

The appellant failed to make nonfrivolous allegations that his disclosures concerning the use of OF-347 were protected disclosures.

We also agree with the administrative judge that the appellant failed to make nonfrivolous allegations that his disclosures relating to the use of OF-347 for the ordering of translator services were protected disclosures under section 2302(b)(8). As explained by the administrative judge, the record reflects that the agency possessed a variety of ways to order and pay for services, including using a government-issued credit card under the agency's micro-purchasing authority and utilizing a written purchase order using OF-347. See IAF, Tab 23 at 21. We agree with the administrative judge that there is no

evidence in the record that would support a reasonable belief that the directive to use one authorized method of payment over another amounts to a violation of any law, rule, or regulation. *See* ID at 13-14. We further note that the record reflects that different regional offices within the agency processed the payment of translator services differently, thus supporting the administrative judge's conclusion that the directive issued by the Regional Chief ALJ overseeing the appellant's location reflects a policy choice with which the appellant disagreed. *See, e.g.*, IAF, Tab 60, Exhibits C, D; ID at 14. Policy disagreements do not rise to the level of protected disclosures under the WPA. *Lachance v. White*, [174 F.3d 1378](#), 1381 (Fed. Cir. 1999).

We also find no reason to disturb the administrative judge's finding that the appellant failed to nonfrivolously allege that he reasonably disclosed a violation of law when he complained about the Regional Chief ALJ's grievance decision in which he reminded the appellant of the need to follow the directives of his superiors. *See* ID at 14-15. We concur with the administrative judge that a reasonable person would not read the decision as either threatening to take a personnel action or implying such a threat, and we find that the appellant's subjective reading of the decision, alone, fails to nonfrivolously establish a reasonable belief that the decision violated [5 U.S.C. § 2302\(b\)\(9\)](#). *See* PFR File, Tab 1 at 14 (“[I]t is clear that Appellant believed [the Regional Chief ALJ] threatened him with disciplinary action if Appellant did not comply with [his] order prohibiting the use of OF-347.”). “A purely subjective perspective of an employee is not sufficient” to establish a reasonable belief of a protected disclosure under section 2302(b)(8). *Lachance*, 174 F.3d at 1381.

The administrative judge did not abuse her discretion in denying the appellant's motions for certification of interlocutory appeals, and the appellant has not demonstrated administrative judge bias.

Finally, we find that the administrative judge did not abuse her discretion in denying both of the appellant's certification motions for interlocutory appeals concerning the administrative judge's discovery rulings, and we further conclude that the appellant has not shown administrative judge bias. *See Asatov v. Agency for International Development*, [119 M.S.P.R. 692](#), ¶ 13 (2013); *Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 n.1 (2012). Both of the administrative judge's discovery rulings are the type of rulings issued in the normal course of Board proceedings which do not touch upon "important issue[s] of law or policy about which there is a substantial ground for difference of opinion." *Ryan*, [117 M.S.P.R. 362](#), ¶ 5 n.1. We have, moreover, reviewed the administrative judge's discovery rulings with respect to the application of the attorney-client privilege and the relevance of the appellant's discovery requests, and we discern no error therein. We have also identified no evidence of administrative judge bias that would overcome "the presumption of honesty and integrity that accompanies administrative adjudicators," *Asatov*, [119 M.S.P.R. 692](#), ¶ 13, and find that the appellant's claims of bias are grounded in his dissatisfaction with the adjudicatory rulings below, something which "does not establish bias," *id.*

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.

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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under [5 U.S.C. § 2302](#)(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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 about the United States 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, and 11. Additional information about other courts of appeals can be found at their

respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.