UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WEN CHIANN YEH, Appellant,	DOCKET NUMBER CH-1221-11-0433-W-2
v.	
DEPARTMENT OF DEFENSE, Agency.	DATE: July 16, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Wen Chiann Yeh, Cary, North Carolina, pro se.

Lauren Adkins, Fort Meade, Maryland, 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. 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

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

made an error interpreting a law or regulation. The regulation that 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 Board has jurisdiction over an individual right of action appeal if the appellant has exhausted her administrative remedies before the Office of Special Counsel and makes nonfrivolous allegations that: (1) She engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985).

The administrative judge in this appeal provided notice that was limited to informing the appellant of the exhaustion requirement. Initial Appeal File, MSPB Docket No. CH-1221-11-0433-W-2 (IAF 2), Tab 3. She did not put the appellant on notice of the remaining jurisdictional elements. Moreover, the administrative judge's statement of the jurisdictional standard in the initial decision was incomplete in that it mentioned exhaustion, protected disclosure, and personnel action, but not contributing factor. Initial Decision (ID) at 2-3. When an administrative judge fails to provide sufficient notice of the appellant's burden of proving jurisdiction, that notice may be cured by the initial decision or by an agency pleading. *See Easterling v. U.S. Postal Service*, 110 M.S.P.R. 41, ¶ 13 (2008). The initial decision contained a proper explanation of the protected disclosure prong, ID at 2-4, and so the administrative judge's failure to afford notice of the contributing factor test only prejudiced the appellant's rights if the appellant satisfied the remaining jurisdictional elements.

We find that the administrative judge correctly found that the appellant did not make a nonfrivolous allegation that she disclosed matters that a reasonable person would believe evidenced a violation of law, rule, or regulation, gross

mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The appellant's disclosures are based primarily on her speculative assumptions about the propriety of the work habits of her co-workers. ID at 4-6; *see Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008) (nonfrivolous allegations are material fact issues, not mere unsubstantiated speculation). Therefore, because the appellant has not made a nonfrivolous allegation that her disclosures were protected, the administrative judge's failure to afford her complete notice concerning the contributing factor test did not prejudice the appellant's substantive rights.[2]

The appellant submits for the first time on review documents from the investigation that resulted in her termination. Petition for Review File, Tab 4. These documents are not relevant to the question of whether the appellant made a nonfrivolous allegation that she made a protected disclosure. Further, the documents all pre-date her termination, but the appellant does not allege or show that they were unavailable to her before the record closed below. Therefore, we have not considered them. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

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 initial decision of the administrative judge is the Board's final decision.

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[2] In any event, the agency submitted below a detailed motion to dismiss that set forth the complete jurisdictional test. IAF 2, Tab 15 at 5, 9-10. The Board has found that an agency pleading alone is sufficient to cure an administrative judge's failure to provide adequate notice of the burdens and elements of proof on jurisdiction. *See Wilson* v. *U.S. Postal Service*, 109 M.S.P.R. 60, ¶ 6 (2008); *King v. Department of Veterans Affairs*, 105 M.S.P.R. 21, ¶ 16 (2007); *Nichols v. Department of the Interior*, 69 M.S.P.R. 386, 388-89 (1996).

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.