UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SAMUEL A. MARTIN, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER DA-0752-11-0472-I-1 DATE: July 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Clementine T. Ray, Temple, Texas, for the appellant.

Jeffrey T. Reeder, Esquire, Austin, Texas, 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

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the administrative judge 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 appellant filed an appeal of an agency action removing him from his Housekeeping Aid Supervisor position based on his purported inappropriate supervisory conduct toward a subordinate. Initial Appeal File (IAF), Tab 5, Subtab 4F. After a hearing, the administrative judge found that the agency proved its charge, that the appellant failed to prove his affirmative defense of race discrimination, and that the penalty of removal was reasonable and promoted the efficiency of the service. IAF, Tab 13, Initial Decision.

In his petition for review and supplement[2] the appellant essentially challenges the administrative judge's fact findings and credibility determinations and asserts that the administrative judge did not consider all of the evidence. Petition for Review (PFR) File, Tabs 1, 3, 5. We disagree and note, for example,

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[2] With his petition for review, the appellant submitted his own statement and several statements from his coworkers and subordinates. Petition for Review (PFR) File, Tabs 1, 5. Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant has not alleged that the documents submitted on petition for review were unavailable prior to the close of the record below; indeed, the supporting statements were dated prior to the close of the record and many of those statements were already part of the record. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980) (evidence that is already part of the record is not new). The appellant offers the statements to impeach his subordinate's testimony and to support his contention that she was motivated to accuse him of misconduct because of her dissatisfaction with her work assignment. PFR File, Tab 1 at 3. However, evidence offered merely to impeach a witness's credibility is not generally considered new and material. *Bucci v. Department of Education*, 42 M.S.P.R. 47, 55 (1989). In any case, the appellant could have obtained this information before the record closed. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989) (to constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed).

that the administrative judge specifically found that the subordinate testified in a "straightforward and direct" manner "without any evidence of evasion or prevarication," while she found the appellant's testimony inconsistent with his prior statements. IAF, Tab 13, Initial Decision at 12-13. We also note that, contrary to the appellant's assertions, the initial decision reflects that the administrative judge carefully considered the appropriate record evidence, including the cell phone telephone records. *Id*. To the extent that the administrative judge did not mention a specific piece of evidence, that does not mean that she did not consider it. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table).

Based on our review of the record, we find that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions; thus there is no reason to disturb the initial decision. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). Moreover, we note that where, as here, the administrative judge's credibility determination is based 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. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

On review the appellant complains that he did not have adequate representation in the appeal and that he was prejudiced when his union representative failed to submit timely prehearing submissions and failed to appear for the prehearing conference. It is well settled, however, that an appellant is responsible for the errors of his chosen representative and the appellant's dissatisfaction with his representative does not provide a basis for granting review. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Moreover, contrary to the appellant's assertions, the administrative judge

considered the statements and documents attached to his untimely prehearing submission and cited to those exhibits in her initial decision.[3] *See* ID at 14; IAF, Tab 10, Exhibits II and V (Statement of Michael J. Elliot).

Finally, on review the appellant contends that the agency and the administrative judge failed to appropriately weigh the mitigating *Douglas* factors and that the penalty of removal is not consistent with penalties given to other employees for similar misconduct. PFR File, Tab 5 at 2-3. The administrative judge thoroughly considered the penalty issue, including the appellant's disparate penalty claim, and found the penalty of removal reasonable. ID at 15-19. Nothing in the appellant's arguments on review or in our review of the record presents a reason to disturb that conclusion.

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 and affirm the initial decision.

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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the

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[3] Regarding the appellant's claim raised for the first time on review that the agency failed to prove the charge of "sexual harassment" because his sexual advances, if any, were not unwelcome, PFR File, Tab 1, we note that the appellant did not raise this claim below and thus the Board need not consider it now. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). In any event, the agency did not charge the appellant with sexual harassment.

United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.