

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

NAKSHIN R. SHAH,  
Appellant,

DOCKET NUMBER  
SF-1221-11-0324-W-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: August 7, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Nakshin R. Shah, South San Francisco, California, pro se.

Helen Bouras, Esquire, and Martha T. Wong, Esquire, 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. We grant petitions such as this one only when significant new evidence is presented to us

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 individual right of action (IRA) appeal under the Whistleblower Protection Act asserting that his termination from an Agricultural Specialist position with the Bureau of Customs and Border Protection was taken in reprisal for his disclosures. Initial Appeal File (IAF), Tab 2 at 2. The administrative judge denied the appellant's request for corrective action. *Id.*, Tab 23, Initial Decision (ID).

In the petition for review, the appellant makes a number of general claims of error by the administrative judge, including that the administrative judge did not understand the law and did not look at all of the evidence. Petition for Review (PFR) File, Tab 3 at 7. The initial decision reflects, however, that the administrative judge considered the evidence as a whole, drew appropriate inferences, made reasoned credibility determinations, and reached supportable conclusions, and thus we discern no reason to reweigh the evidence. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

On review, the appellant argues that his case is analogous to *Adamsen v. Department of Agriculture*, [116 M.S.P.R. 331](#) (2011), a case in which the Board reversed a removal for unacceptable performance based on questions regarding whether the agency had obtained the Office of Personnel Management's approval for the significant changes it made to its non-Senior Executive Service performance appraisal system. PFR File, Tab 3 at 4. The decision in *Adamsen* is inapposite to the instant case, which involves a claim that the appellant was

terminated during his probationary period in reprisal for whistleblowing. To the extent that the appellant is attempting to challenge the substance of the personnel action at issue in his IRA appeal, as found in the appellant's previous appeal of his probationary termination, the Board lacks jurisdiction to consider such claims. *See Marren v. Department of Justice*, [51 M.S.P.R. 632](#), 638-39 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table).

In his petition for review, the appellant complains that the administrative judge lied when she said that she was going to conduct the hearing in two stages because she never held the second hearing. PFR File, Tab 3 at 5. The record shows that the administrative judge explained to the parties that the hearing would be bifurcated into two parts and that, in the first part of the hearing, the appellant had the burden of proving by preponderant evidence that he made a protected disclosure that was a contributing factor in the agency's personnel action. IAF, Tab 8 at 1, Tab 16 at 1; Hearing Transcript at 5. The administrative judge further informed the parties that she would hold the second part of the hearing if the appellant met his burden of proof in the first part of the hearing. IAF, Tab 8 at 1; Hearing Transcript at 5. Following the initial 6-hour hearing, the administrative judge concluded that the appellant had failed to prove the required elements of his IRA appeal by the applicable preponderance of the evidence standard. ID at 2. Thus, the administrative judge did not err by holding only the first part of the hearing. We discern no error in the administrative judge's failure to hold the second part of the hearing concerning the agency's burden to establish by clear and convincing evidence that it would have taken the same action absent the disclosure. *See Dick v. Department of Veterans Affairs*, [290 F.3d 1356](#), 1363-64 (Fed. Cir. 2002), *overruled on other grounds by Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006).

We have considered the Federal Circuit's recent decision in *Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1366-77 (Fed. Cir. 2012), regarding how the Board should analyze the evidence presented under the clear and convincing

standard in a case where the appellant established by preponderant evidence that he made protected disclosures and that those disclosures were a contributing factor in his termination. Because we find in the instant case that the administrative judge properly found that the appellant failed to prove by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to terminate him, it is unnecessary to address whether the agency established by clear and convincing evidence that it would have terminated the appellant in the absence of the protected disclosure.<sup>2</sup> See *Stiles v. Department of Homeland Security*, [116 M.S.P.R. 263](#), ¶ 24 n.4 (2011) (finding that it was unnecessary to address whether the agency established by clear and convincing evidence that it would have taken a personnel action in the absence of a protected disclosure when the appellant failed to show that the disclosure was a contributing factor to the personnel action).

The appellant also asserts on review that he “never had a chance to present his witnesses.” PFR File, Tab 3 at 6. The record shows, however, that Ms. O'Brien and the appellant testified, Hearing Transcript 11-96, and that the administrative judge denied the appellant's other requested witnesses because the appellant did not claim that any of his witnesses, other than Ms. O'Brien, had any first-hand knowledge about relevant issues, IAF, Tab 19. An administrative judge has wide discretion to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious, and the appellant's vague assertions on review do not show error. See *Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985); [5 C.F.R. § 1201.41\(b\)\(10\)](#).

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<sup>2</sup> In *Whitmore* the Court was critical of the administrative judge's exclusion of witnesses sought by the appellant, *Whitmore*, 680 F.3d at 1368-70, but here, contrary to the appellant's assertions, see IAF, Tab 17 at 4, the administrative judge approved Ms. O'Brien as a witness and rearranged the hearing schedule to permit her to testify, *id.*

The appellant requested permission to add three witnesses after he mistakenly concluded that his witness, Ms. O'Brien, would not be able to testify. IAF, Tab 17 at 4. In denying the appellant's request for his additional witnesses, the administrative judge noted, inter alia, that she had approved Ms. O'Brien as a witness. IAF, Tab 19. The administrative judge also changed the time of the hearing in order to permit Ms. O'Brien to testify first so that she would be able to appear in person. *Id.* This is not a case where the administrative judge categorically excluded all witnesses offered by the appellant on relevance grounds and effectively prevented him from presenting his case, leaving only the agency's side of the case in play. *See Whitmore*, 680 F.3d at 1370.

Finally, the appellant claims that the administrative judge demonstrated bias against him by, among other things, sustaining agency objections and overruling his objections, tampering with witnesses, and possibly accepting bribes. PFR File, Tab 3 at 8-10. The appellant's vague claims of bias are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). Further, an administrative judge's conduct during the course of a Board proceeding will warrant a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)).

After fully considering the filings in this appeal,<sup>3</sup> we conclude that there is no new, previously unavailable, evidence and that the administrative judge made

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<sup>3</sup> After the record closed on review, the appellant filed a reply to the agency's response to his petition for review. PFR File, Tab 10. In reaching our decision in this case, we have not considered this submission because it is not authorized under our regulations and the appellant has not shown that it is based on evidence that was not readily available prior to the close of the record on review. *See Pimentel v. Department of the Treasury*, [107 M.S.P.R. 67](#), ¶ 3 n.\* (2007), *aff'd*, 287 F. App'x 850 (Fed. Cir. 2008);

no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review.

**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](http://www.cafc.uscourts.gov). Of particular relevance is the court's

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*White v. Social Security Administration*, [76 M.S.P.R. 447](#), 459 n.8 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table); [5 C.F.R. § 1201.114](#)(i).

"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.