

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

JOHN R. LYNCH,
Appellant,

DOCKET NUMBER
PH-1221-10-0619-W-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 7, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John R. Lynch, Aberdeen Proving Ground, Maryland, pro se.

Justin W. Ulrich, Aberdeen Proving Ground, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 appellant filed an individual right of action (IRA) appeal asserting that, in reprisal for his disclosure that, among other things, his acting supervisor violated an agency regulation by denying his request for two hours of annual leave, he received a “below successful” rating. Initial Appeal File (IAF), Tab 1 at 6-9. After affording the parties an opportunity to file evidence and argument, the administrative judge found that the appellant did not establish by preponderant evidence that he made a protected disclosure covered by the Whistleblower Protection Act (WPA). IAF, Tab 13, Initial Decision (ID) at 5. On review, the appellant disagrees with the administrative judge’s holding, but we find that the administrative judge correctly concluded that the appellant failed to show that he possessed a reasonable belief that the agency regulation was violated. *See id.* Accordingly, we discern no reason to disturb the administrative judge’s well-reasoned findings. *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (stating that there is no reason to disturb the initial decision 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).

Regarding the appellant’s primary argument on review that he also disclosed that his acting supervisor violated [18 U.S.C. § 1001](#) when he made false statements to justify the denial of the leave request, the appellant’s argument amounts to mere disagreement with his acting supervisor’s assessment regarding office staffing needs and the quality and timeliness of the appellant’s work.² We do not believe that disclosures about such disagreements are the types

² The administrative judge did not address the appellant’s assertion that he reasonably believed that his acting supervisor violated [18 U.S.C. § 1001](#), but we note that the appellant only made passing reference to this argument in his response to the

of matters covered by the WPA. *See Herman v. Department of Justice*, [115 M.S.P.R. 386](#), ¶ 13 (2011) (discussions and disagreements over job related duties are a normal part of most positions and not every complaint about an employee’s disagreement with his supervisor’s conduct is protected by the WPA); *see also White v. Department of the Air Force*, [391 F.3d 1377](#), 1382 (Fed. Cir. 2004) (policy disagreements on staffing and resource allocation matters can serve as the basis for a protected disclosure only if the legitimacy of a particular policy choice is “not debatable among reasonable people”). To the extent the appellant alleges that he made a protected disclosure by asserting that his acting supervisor engaged in an abuse of authority, we believe that his argument suffers from the same shortcoming as his argument that the acting supervisor violated [18 U.S.C. § 1001](#).

We note that, in addition to finding that the appellant failed to show that he made a protected disclosure, the administrative judge also found that the appellant established that his disclosure was a contributing factor in the “below successful” performance appraisal he received and that the agency showed by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. ID at 6-7. We are cognizant of the Federal Circuit’s recent decision in *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (Fed. Cir. 2012), remanding an IRA appeal to the Board for a more thorough analysis of all of the record evidence as it relates to the finding that the agency presented clear and convincing evidence that it would have taken the same personnel action absent Mr. Whitmore’s protected disclosure. The *Whitmore* decision is inapplicable to the facts of the instant case, however, because the appellant here failed to meet his burden of showing that he made a protected disclosure.

administrative judge’s close of the record order. IAF, Tab 10 at 4, 10. To the extent the administrative judge erred by not considering the argument, we have fully considered the appellant’s claim now.

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.

**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.