

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

CELESTINE PORTER,
Appellant,

DOCKET NUMBER
DC-0752-12-0092-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: August 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL *

Morris E. Fischer, Esquire, Silver Spring, Maryland, for the appellant.

James Dikeman, Esquire, Washington, D.C., and Tracey Rockenbach,
Washington Navy Yard, D.C 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 initial decision affirmed the agency's decision to demote the appellant to the GS-13, Step 5 Auditor position with no supervisory responsibilities. On review, the appellant argues, among other things, that the administrative judge: ignored relevant credibility factors and made improper credibility determinations; did not keep the agency to its required burden of proof and/or improperly shifted the burden of proof to the appellant; failed to mention the criminal investigation report and its findings; excluded relevant evidence; did not permit closing statements; and was biased. Petition for Review (PFR) File, Tabs 1, 6.

With respect to the appellant's arguments regarding credibility, we note that many of her arguments constitute mere disagreement with the administrative judge's findings and credibility determinations and they do not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (per curiam). Nevertheless, we have considered the appellant's arguments. The Board must give deference to an administrative judge's credibility determinations when, as here, they are based, explicitly or implicitly, 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. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002). The administrative judge's credibility determinations were thoughtful and detailed, and we discern no sufficiently sound reasons to overturn his findings.

We disagree with the appellant's contentions that the administrative judge did not keep the agency to its burden of proof or improperly shifted the burden of proof to the appellant by concluding that "something happened" to K.L.'s arm with such severity as to cause bruising, and by not allowing the appellant's

attorney to ask the deciding official how he came to the conclusion that K.L.'s bruise was caused by squeezing, as opposed to a skin condition or domestic violence or other source. PFR File, Tab 6 at 17-21. We note that the administrative judge stated, in his credibility findings in the initial decision, that "the photographs taken of [K.L.'s] arm a day after the incident (and several days thereafter too) confirm that something happened to [K.L.'s] arm with such severity as to cause bruising." Initial Appeal File, Tab 25 at 10. We do not believe that this single statement, mentioned in the context of several factors that the administrative judge considered in determining witness credibility, relieved the agency of its burden of proof or improperly shifted the burden of proof to the appellant. With respect to the administrative judge's exclusion of evidence regarding what the deciding official believed caused the bruising on K.L.'s arm, an administrative judge "has broad discretion to regulate the course of the hearing and to exclude evidence that has not been shown to be relevant or material to the issues of the case." *Reeves v. U.S. Postal Service*, [117 M.S.P.R. 201](#), ¶ 12 (2011) (citations omitted); see [5 C.F.R. § 1201.41](#)(b). Here, the appellant's attorney was attempting to ask the deciding official questions on cross-examination about whether he believed that the bruising could be caused by a skin condition; however, the deciding official was an accountant, not a medical doctor, see Hearing Transcript at 121, 163, and the appellant had elicited no information from K.L. about whether she had any such skin conditions, *id.* at 163. We discern no error with the administrative judge's decision to preclude such questions, and we also do not view this decision as relieving the agency of its burden of proof or improperly shifting the burden of proof to the appellant.

With respect to the appellant's contention that the administrative judge failed to mention the agency's criminal investigation report, we note that the administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *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), *cert. denied*, 476 U.S. 1141 (1986). The investigator's conclusion, that he was unable to determine how the bruises occurred and thus, he did not recommend that the matter be forwarded for prosecution, does not affect our decision where, as here, the charge was not based on the outcome of any criminal matter. *See, e.g. Moss v. Department of Defense*, [116 M.S.P.R. 85](#) (2010) (Table) (because the agency's charge was based on the appellant's misconduct, and the agency's proof did not rely on the criminal proceedings, the fact that the criminal charges were dismissed does not affect the decision to sustain the misconduct); *Larry v. Department of Justice*, [76 M.S.P.R. 348](#), 355 (1997) (the fact that criminal charges arising out of same domestic incident for which the appellant was charged with off-duty misconduct were dismissed did not mean that misconduct charge could not be sustained).

Although the appellant complains in her initial submission that the administrative judge did not permit closing statements, *see* PFR File, Tab 1, the appellant does not identify in the record, and we cannot find, where the appellant requested an opportunity to make a closing statement and her request was denied. Even if the appellant asked to provide a closing statement, below, and the administrative judge denied this request, closing statements are committed to the administrative judge's discretion, *see Ford v. Department of the Navy*, [43 M.S.P.R. 495](#), 500 (1990), and the appellant has not shown that the administrative judge abused his discretion in this regard. We also discern no evidence of administrative judge bias. *See Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980) (In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators.).

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.caafc.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.