

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

ROMAN J. ANDERSON,  
Appellant,

DOCKET NUMBER  
SF-0752-10-0842-C-1

v.

DEPARTMENT OF THE NAVY,  
Agency.

DATE: August 17, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Brook L. Beesley, Alameda, California, for the appellant.

Michael Larsen, Twentynine Palms, 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 that was not available for consideration earlier or when the administrative judge

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

On review, the appellant asserts that the administrative judge erred with regard to his hearing related rulings concerning Kim Martinez as a witness, the medical evidence as concrete and positive evidence of showing him ready, willing, and able to work issue, and his affirmative defenses of reprisal and bad faith raised in a petition for enforcement. Compliance Petition for Review (CPFR) File, Tab 5 at 2. However, because the appellant has failed to explain how the administrative judge erred or provide any evidence or argument to support these assertions, we have not addressed them. *See Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992) (a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record); *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980) (before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error).

The appellant also asserts that he is relying “substantively on his MSPB submissions of record,” and he states that he is incorporating them as his specific objections and challenges to the initial decision. CPFR File, Tab 5 at 2. However, the simple resubmission of documents filed below does not meet the petition for review criteria because it specifies no error in the administrative judge’s analysis. *See Mawson v. Department of the Navy*, [48 M.S.P.R. 318](#), 321 (1991). To the extent the appellant is rearguing these issues, he is merely disagreeing with the administrative judge’s finding that he is not entitled to back pay or benefit for the period from June 18, 2010, to July 6, 2010, because he has failed to show that he was “ready, willing and able” to perform the duties of his position during this period of time. *See Weaver*, 2 M.S.P.R. at 133-34.

The appellant also argues that the administrative judge incorrectly decided material facts, and he challenges the administrative judge's credibility determinations. Specifically, the appellant argues that he credibly testified that he requested light duty from Chief Kevin Sullivan and that Sullivan denied his request. CPFR File, Tab 5 at 2. The appellant contends that the administrative judge found Sullivan credible and found him not credible but that the administrative judge failed to make detailed credibility fact-based findings to support his credibility determinations. CPFR File, Tab 5 at 2.

The Board must give deference to an administrative judge's credibility determinations when 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). Here, the administrative judge thoroughly reviewed the evidence and the hearing testimony and specifically cited to *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987),<sup>2</sup> in setting forth his credibility determinations. Compliance Initial Decision at 6-9, 12-16. Thus, the administrative judge thoroughly addressed his credibility determinations in the initial decision, and we discern no reason to disturb those well-reasoned findings. See *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

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<sup>2</sup> To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987).

appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

Finally, the appellant asserts that, after the close of the record below, he obtained new and material evidence in the form of a copy of the agency's standard operating procedures showing the daily planning level and a letter showing that another agency firefighter, Stanley Garcia, was on a light duty assignment. The appellant contends that, contrary to the agency's assertions, the agency did have a light duty policy. CPFR File, Tab 5 at 3. With regard to the copy of the agency's standard operating procedures, we have not considered it because the appellant has made no showing that this document was unavailable before the record closed despite his due diligence. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). As for the letter, even assuming the document is new, it only shows that Garcia suffered an on-the-job injury and that he made a formal light duty request through the Office of Workers' Compensation Programs, which was granted. This document does not show that the appellant ever requested light duty, or that he was ready, willing, and able to work during the period of June 18, 2010, to July 6, 2010. Thus, these documents do not change the outcome of the appeal. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (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.

**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 "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.