UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTHUR L. ROBINSON, Appellant, v. DEPARTMENT OF HOMELAND SECURITY, Agency.	DOCKET NUMBER DC-0752-11-0650-I-1 DATE: August 22, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Lawrence Berger, Esquire, Glen Cove, New York, for the appellant.

Michael W. Gaches, Esquire, and Daniela Murch, Arlington, Virginia, 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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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

DISCUSSION OF ARGUMENTS ON REVIEW

On October 28, 2011, the appellant timely filed this petition for review (PFR) of a September 23, 2011 initial decision. Petition for Review (PFR) File, Tab 1. In the initial decision, the administrative judge affirmed the appellant's April 21, 2011 removal from the federal service from an excepted service appointment to the position of Civil Aviation Security Specialist (Federal Air Marshal) with the Transportation Security Administration, Department of Homeland Security. The removal action was based on the appellant's inability to maintain the required top secret security clearance. The parties stipulated that the appellant's position of record required a valid security clearance and that his clearance was revoked. The issues identified for adjudication by the administrative judge concerned "whether the agency provided the appellant with the procedural protections required by law for employees covered by the FAA personnel system and whether he was provided with a meaningful opportunity to respond to the agency's action." Initial Decision (ID) at 5.

In his petition for review, the appellant argues, as he did below, that the agency failed "to comply with its own procedures, constitutionally, statutorily and by mandated regulation or executive order" when it failed to provide him a copy of an Office of Personnel Management (OPM) October 1, 2008 Single Scope Background Investigation - Periodic Reinvestigation (SSBI-PR) report relied upon by the agency when it revoked the appellant's security clearance. The parties did not dispute that the SSBI-PR report was a record under the control of OPM, and that the agency instructed the appellant in detail how to request a copy of the report from OPM. PFR File, Tab 1, Exhibit B.

After a comprehensive factual and legal analysis, the administrative judge concluded that "the agency complied with the applicable procedures and that the appellant had a meaningful opportunity to respond to the reasons for the proposed action as stated in the Notice." ID at 18. The administrative judge also found that, based on a review of Executive Orders 12968 and 10450 and 5 C.F.R. § 736.104, the appellant had failed to establish a violation of these provisions when the agency did not provide a copy of OPM SSBI-PR to him and instead instructed him to contact OPM directly. ID at 11. We agree.

The appellant also alleged that, because he was not provided with a copy of the SSBI-PR, he had to "[‘]guess' at a reason for his security clearance suspension." PFR File, Tab 1 at 11-12. Relying upon *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), the appellant argued that he was not given sufficient information to enable him to provide a meaningful response to the agency's action. *Id*. The administrative judge fully considered the appellant's arguments, finding that the agency's action complied with *Cheney* and that the appellant in this case was provided with enough information to make a meaningful reply. Specifically, the agency's notice of intent to revoke the appellant's clearance provided the appellant with an exhaustive list that included specific and detailed information regarding the many allegations against him. ID at 16-17. We find the appellant had specific notice of the allegations and ample opportunity to respond to these allegations. He also had a reasonable opportunity to obtain a copy of the SSBI-PR from OPM. Therefore, we find no basis to disturb the administrative judge's well-reasoned findings that he received the due process to which he was constitutionally entitled.

Accordingly, 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.