

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

MATTHEW R. RYAN,
Appellant,

DOCKET NUMBER
AT-0752-11-0440-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 23, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Joel J. Kirkpatrick, Esquire, Farmington Hills, Michigan, for the appellant.

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On petition for review, the appellant challenges the administrative judge's finding that the agency's decision to reassign the appellant was bona fide and based upon legitimate management reasons, *see* Initial Appeal File (IAF), Tab 23, Initial Decision (ID) at 13, reasserting his arguments from below that the directed reassignment was not bona fide because: (1) the agency reassigned the appellant to punish him and not for legitimate management reasons; and (2) the position to which the agency reassigned him was occupied by another employee, who accepted the position initially, but had medical issues that prevented her from relocating, and decided not to accept the position after the appellant had declined the reassignment. Petition for Review (PFR) File, Tab 1 at 5, 16, 18-20, 23, 25-29, 31; IAF, Tab 1 at 5, Tab 22 at 10.

The administrative judge considered and rejected both of these arguments in the initial decision. The administrative judge found that "it was the lasting impact of the unintended consequences of his actions on the Orlando Office employees that made up the legitimate management reason behind the desire to remove the appellant from that office, not a desire to punish him further." ID at 10. The administrative judge also found that the position in question was real and bona fide, as it existed before the appellant's reassignment, and that the agency's selection of another individual for the position does not diminish the bona fides of the position. *Id.* at 11. The appellant's reiteration of his arguments from below that the reassignment was not bona fide is thus essentially mere disagreement with the administrative judge's well-reasoned findings and, as such, provides no basis to disturb the initial decision. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987); *see also Woodward v. Department of the Interior*, [40 M.S.P.R. 649](#), 650-53 (1989) (reassignment

justified to “alleviate discord” between staff and management), *aff’d*, 895 F.2d 1421 (Fed. Cir. 1990) (Table); *Renville v. Department of Health & Human Services*, [26 M.S.P.R. 566](#), 568 (1985) (reassignment justified to utilize employees’ work strengths and avoid tensions caused by perceived personality conflict).

The appellant also asserts on review that the administrative judge omitted key factual evidence supporting his case. PFR File, Tab 1 at 21, 22, 24-25. It is well settled, however, that an 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).

On review, the appellant reiterates his claim from below that he did not have a mobility agreement with the agency but the agency now requires such agreements. PFR File, Tab 1 at 20-21; IAF, Tab 22 at 11. He alleges that, in dismissing his claim regarding the absence of a mobility agreement, the administrative judge ignored the evidence that no such policy existed at the time of his reassignment and subsequent removal. PFR File, Tab 1 at 23-24.

We disagree. In addressing the appellant’s claim that he did not have a mobility agreement, the administrative judge specifically noted that, after the appellant’s removal, the agency instituted a policy requiring such agreements, thereby acknowledging that no such policy existed when the appellant was reassigned and removed. ID at 13 n.1. The administrative judge found, however, that the absence of a mobility agreement does not detract from the bona fides of the legitimate reasons for the appellant’s reassignment. *Id.* We see no reason to disturb this finding.

The appellant also argues on review that the administrative judge made factual findings in the initial decision that are not supported by the parties’ testimony. PFR File, Tab 1 at 21. In particular, he contends that, on page 6 of the initial decision, the administrative judge incorrectly states that Mr. Greba was

not charged with deciding the appropriate disciplinary action to take and that he was only tasked to issue a letter of reprimand. *Id.* Contrary to the appellant's assertion, on page 6 of the initial decision the administrative judge states that Mr. Greba testified that he *was* charged with deciding the appropriate disciplinary action to take. *ID* at 6.

The appellant further alleges on review that the administrative judge “conducts illegal analysis regarding the case law prohibiting the agency from using the reassignment to force an employee to resign or retire.” PFR File, Tab 1 at 25-26. In particular, he asserts that the administrative judge failed to fully analyze *Shenwick v. Department of State*, [92 M.S.P.R. 289](#), ¶ 10 (2002), which held that, “[i]f an employee can show that the reassignment had no solid or substantial basis in personnel practice or principle, the Board may conclude that it was not a valid discretionary management determination, but was instead either an improper effort to pressure the appellant to retire, or was at least an arbitrary and capricious action.” PFR File, Tab 1 at 26. The appellant asserts that the administrative judge ignored the latter part of this holding. *Id.* He contends that he is not required to prove that the agency transferred him in the hope that he would leave the agency but merely that the reason for the transfer was anything but legitimate management discretion. *Id.* He states that he met his burden because “the evidence developed at hearing strongly suggest (sic) that the transfer was done for punishment not legitimate management discretion.” *Id.* at 27.

The appellant's argument that the administrative judge misapplied Board law is essentially a reiteration of his contention that the agency reassigned him as punishment and not for legitimate management reasons. As such, this argument constitutes mere disagreement with the administrative judge's finding that the reassignment was based on legitimate management considerations. Consequently, it provides no basis to overturn the administrative judge's findings on this issue. *See Broughton*, 33 M.S.P.R. at 359.

The appellant also argues on review that he resigned in the face of an impending adverse action and that his resignation was involuntary. *See* PFR File, Tab 1 at 29 (stating that he suffered from the first scenario that has emerged in cases where the employee alleged that he was coerced into resigning or retiring, i.e., the agency has proposed or threatened an adverse action against the employee, and the employee resigns or retires in the face of an impending adverse action); *see also id.* at 30 (stating that his involuntary resignation was tantamount to removal). As previously stated, the appellant was removed; he did not resign.

In arguing that the Board should reverse his removal for refusing to accept the directed assignment, the appellant relies on an initial decision issued by another Board administrative judge, *Poolaw v. Department of the Interior*, MSPB Docket No. DE-0752-08-0331-I-2, Initial Decision (Dec. 14, 2009). In *Poolaw*, the appellant retired after the agency proposed removing him for refusing to accept a directed reassignment. *Id.* at 12, 14. The administrative judge reversed the appellant's retirement in lieu of involuntary action, finding that the agency's charge of "failure to accept the directed reassignment" could not be sustained because the appellant accepted the directed reassignment in a timely manner. *Id.* at 24.

Poolaw does not advance the appellant's cause. Unlike Mr. Poolaw, the appellant declined the directed reassignment. Moreover, Board initial decisions are of no precedential value and cannot be cited or relied on as controlling authority. *Rockwell v. Department of Commerce*, [39 M.S.P.R. 217](#), 222 (1988).

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.