

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

KRISTINA FLYNN,  
Appellant,

DOCKET NUMBER  
DA-0752-11-0668-I-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: August 27, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Isaac A. Ortiz, El Paso, Texas, for the appellant.

Daniel B. Ritchey, Grand Prairie, Texas, 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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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 Board may grant a petition for review when the petitioner establishes that (1) new and material evidence is available that, despite due diligence, was not available when the record closed; or (2) the decision of the judge is based on an erroneous interpretation of statute or regulation. [5 C.F.R. § 1201.115\(d\)](#). The appellant submitted documents with her petition for review, arguing that some might be new evidence supporting her assertion that the agency rescheduled her investigative interview for March 5, 2010. Petition for Review (PFR) File, Tab 1 at 7-21. These documents include Form B's from January 8, 2010, and March 5, 2010. *Id.* at 7-8. They also include her March 5, 2010 Affidavit and excerpts from the Master Agreement between the agency and the Council of Prison Locals, American Federation of Government Employees. *Id.* at 9-21. None of these documents meet the Board's definition of new evidence. They were part of the record below and cannot be considered to be new. *See* Initial Appeal File (IAF), Tab 4, Subtab 4g at 12-16; *id.*, Subtab 4j; IAF, Tab 14, Exhibit B; *see Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). We also note that the administrative judge did not reject the March 5, 2010 Form B and Affidavit, as the appellant claims. *See* PFR File, Tab 1 at 4. Instead, he found that the copies she submitted as exhibits were duplicates of items already in the record. *See* IAF, Tab 14; Hearing Compact Disc (preliminary matters).

The administrative judge also adequately addressed the appellant's assertion that she cooperated fully with the investigation as a result of the March 5, 2010 interview. *See* IAF, Tab 16, Initial Decision (ID) at 8-11. Specification B addresses only her failure to answer questions and provide an affidavit on January 8, 2010, which the appellant did not deny. *See* IAF, Tab 4, Subtab 4e at 1. The appellant argues that the administrative judge "mischaracterized" the testimony that the agency had agreed on February 8, 2010, to reschedule her

interview. PFR File, Tab 1 at 5. The administrative judge, however, based the findings of fact on a careful credibility analysis, noting the internal inconsistencies in the testimony supporting her position. ID at 10-11; *see Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987) (in reaching credibility determinations, the administrative judge will consider such factors as any prior inconsistent statement by the witness; the contradiction of the witness's version of events by other evidence or its consistency with other evidence; and the inherent improbability of the witness's version of events). The appellant has identified nothing to undermine the credibility assessment here and simply insists that it is wrong.

Another of the appellant's arguments also pertains to witness credibility. She argues that the administrative judge ignored her testimony that she was not offered a Form B on January 7, 2010. PFR File, Tab 1 at 5. The administrative judge found that she was relying on demeanor-based credibility determinations to which the Board normally defers. ID at 5-6; *see Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002). The appellant has again offered nothing more than disagreement, which is insufficient to justify further review. *See Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980). The initial decision thus reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Under these circumstances, we see no reason for the Board to disturb his conclusions. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

The appellant's other arguments pertain to her allegations of harmful procedural error. She argues that she was denied her request to have David Rivera present on January 7, 2010, which violated her collective bargaining agreement. PFR File, Tab 1 at 5. The administrative judge extensively addressed this issue in the initial decision, and we find no error in his analysis. *See* ID at 14-18. Moreover, under the circumstances, she could not decline to be

interviewed. *See Sher v. Department of Veterans Affairs*, [97 M.S.P.R. 232](#), ¶ 13 (2004) (an employee’s refusal to provide information in an administrative investigation was not justified, where letter from the U.S. Attorney provided him with “use” immunity from prosecution, and employee had access to an attorney); *see also Pedeleose v. Department of Defense*, [107 M.S.P.R. 191](#), ¶ 27 (2007) (an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; instead, he must first comply with the order and then register his complaint or grievance), *vacated and superseded on other grounds*, [110 M.S.P.R.508](#) (2009).

Finally, the appellant argues that the administrative judge did not consider that the agency investigated the underlying allegations of misusing a government computer and inattention to duty and dismissed them in December 2009, and thus the agency had no reason to interview her on January 7 and 8, 2010. PFR File, Tab 1 at 3. The appellant mischaracterized the record. An agency investigator first sought to interview her on December 3, 2009. IAF, Tab 4, Subtab 4g at 24. Accompanied by her union-designated representative, the appellant refused to answer questions, and “after some deliberation, [she] stated that she was going home sick.” *Id.* Nothing in the record suggests that the investigation ended after that brief meeting, and, indeed, an actual interview did not take place. The record does not support her argument.

After fully considering the filings in this appeal, we AFFIRM the initial decision affirming the agency’s action.

#### **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.