

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

LISA M. WYER,  
Appellant,

DOCKET NUMBER  
CH-0752-10-0927-I-2

v.

DEPARTMENT OF DEFENSE,  
Agency.

DATE: August 31, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL** \*

Tae Sture, Esquire, Indianapolis, Indiana, for the appellant.

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

### **DISCUSSION OF ARGUMENTS ON REVIEW**

The agency suspended the appellant, a Secretary with the Defense Finance and Accounting Service (DFAS), for 30 days based on two specifications of Unauthorized Use of Government Information involving the appellant accessing, printing, and providing materials involving a job selection from an agency database to a colleague pursuing an equal employment opportunity (EEO) complaint involving that selection. *Wyer v. Department of Defense*, MSPB Docket No. CH-0752-10-0927-I-2 (I-2 File), Tab 6, Exhibits A-B. The appellant appealed, and the administrative judge affirmed the agency's action, finding that the deciding official "thoroughly and conscientiously" considered the relevant *Douglas* factors, and that the penalty was both within the tolerable bounds of reasonableness and promoted the efficiency of the service. I-2 File, Tab 8, Initial Decision (ID) at 11-12. The administrative judge also found that the appellant failed to establish that the agency disparately punished her. ID at 10-11.

In her timely filed petition for review, the appellant first claims that the administrative judge improperly denied her request for three witnesses, Rosa Scarborough, Patty Ragas, and Snider Page. Petition for Review (PFR) File, Tab 3 at 3-4; *see* I-2 File, Tab 7 at 2-3. In her prehearing submissions, the appellant asserted that Ms. Scarborough in her capacity as a DFAS attorney reviewed all DFAS disciplinary actions and that she would testify regarding the disproportionality of the appellant's discipline. I-2 File, Tab 6 at 3. However, it is questionable whether Ms. Scarborough's testimony would have been permissible under the ethical rules governing attorney-client relationships, and, in any event, the administrative judge did grant the appellant's request for Garry O'Neal, a Management Employee Relations Specialist who was actually involved

in this matter and who testified regarding the same issue. *See id.*; I-2 File, Tab 7 at 2; Hearing Transcript, August 8, 2011 (HT) at 91-109. On this issue, Mr. O'Neal testified that his chief, who also reviewed all DFAS adverse actions, could not remember a similar case and did not find a similar offense in his search of the agency's database. HT at 96-97. The administrative judge has wide discretion under [5 C.F.R. § 1201.41\(b\)\(8\), \(10\)](#) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *E.g., Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985). The appellant has not demonstrated that the administrative judge abused that discretion.

The administrative judge withheld ruling on the appellant's request for Ms. Ragas pending a determination at the hearing on the relevance and materiality of her testimony. I-2 File, Tab 7 at 3. At the end of the hearing, the parties discussed the appellant's request for Ms. Ragas as a rebuttal witness, and the administrative judge determined that the proffered testimony would duplicate the appellant's. HT at 159-61. The appellant also requested Mr. Page as a rebuttal witness. HT at 88. In her petition for review, the appellant asserts that Mr. Page would have refuted testimony of the deciding official, Elaine Kingston, and supported the appellant's retaliation claim. PFR File, Tab 3 at 3-4. In denying the appellant's request for Mr. Page, the administrative judge found that the proffered testimony was irrelevant because the actions of the deciding official were at issue, not the advice that she received from Mr. Page. HT at 89. We disagree with the administrative judge that Mr. Page's testimony would be irrelevant to the issue of disparate penalties. However, even if the administrative judge abused her discretion in excluding this witness, the error did not ultimately affect the outcome here given the evidence that the agency did undertake efforts to ensure the consistency of penalties in this instance. HT at 91-109.

The appellant also contends that the administrative judge improperly limited the testimony of a fourth witness, DFAS Associate General Counsel

Regina Delarosa. PFR File, Tab 3 at 4. Specifically, the appellant asserts that the administrative judge would not allow Ms. Delarosa to testify that DFAS General Counsel Jack Mester once told her that “he should be able to get rid of anyone who complains.” *Id.* In her witness request, the appellant proffered that Ms. Delarosa was “expected to testify about Mr. Mester’s reputation for retaliation and [the appellant’s] trustworthiness.” I-2 File, Tab 6 at 3. In the prehearing conference summary, the administrative judge approved Ms. Delarosa as a character witness for the appellant, implicitly rejecting the portion of the appellant’s proffer regarding Mr. Mester. I-2 File, Tab 7 at 2. The administrative judge required the parties to notify her if they believed the summary was incorrect, and neither party did so. I-2 File, Tab 7 at 3-4; *cf. Crowe v. Small Business Administration*, [53 M.S.P.R. 631](#), 634-35 (1992) (an issue is not properly before the Board where it is not included in the administrative judge’s memorandum summarizing the prehearing conference, which states that no other issues will be considered, unless either party objects to the exclusion of that issue in the summary). Although the appellant asserts in her petition for review that her “counsel raised this matter with the judge at the time of the prehearing conference and again prior to the beginning of the hearing,” PFR File, Tab 3 at 4, neither instance is reflected in the record, and the statements of a party’s representative in a pleading do not constitute evidence, *e.g., Hendricks v. Department of the Navy*, [69 M.S.P.R. 163](#), 168 (1995). Additionally, the hearing transcript does not reflect that the appellant’s counsel raised the issue in his direct questioning of Ms. Delarosa or that he made any proffer in this regard or interposed any objections during her brief testimony. *See* HT at 153-59. The appellant’s failure to timely object to rulings on witnesses precludes her doing so on petition for review. *See Tarpley v. U.S. Postal Service*, [37 M.S.P.R. 579](#), 581 (1988).

Moreover, the appellant provides no context for Mr. Mester’s alleged statement, does not assert that he was referring to her or any other individual

employee when he made it, and provides nothing other than his alleged, vague statement in support of her retaliation defense. For an appellant to prevail on a contention of illegal retaliation for EEO activity, she has the burden of showing that: (1) she engaged in a protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *E.g.*, *Agbaniyaka v. Department of the Treasury*, [115 M.S.P.R. 130](#), ¶ 15 (2010), *aff'd*, 2012 WL 2308123 (Fed. Cir. June 19, 2012) (unpublished). The administrative judge found that the appellant failed to establish a genuine nexus between Mr. Mester and her suspension. ID at 8. We agree. The vague statement at issue is insufficient to establish that fourth element. Thus, the appellant fails to establish that the administrative judge abused her discretion in limiting Ms. Delarosa's testimony or that she erred in finding a lack of nexus between the alleged retaliation and the suspension action.

The appellant also challenges the administrative judge's determination that the charged conduct violated agency policy, asserting that the administrative judge incorrectly found that such a policy existed and that the appellant knew of it. PFR File, Tab 3 at 5. For example, the appellant argues that there is no evidence that she even read the boilerplate language at the bottom of the first document she opened warning that the document was for official use only, may contain information covered by the Privacy Act, and should be protected from unauthorized access and/or disclosure. PFR File, Tab 3 at 6; *see* ID at 4; I-2 File, Tab 6, Exhibit D at 28. The appellant also asserts that, even if she had read the disclaimer, both she and the recipient of the documents were authorized users of the system, and she was permitted to rely on the assumption that the documents themselves would be "locked down" if she was not authorized to see them. PFR File, Tab 3 at 6-7. The administrative judge did not find the appellant's arguments persuasive, and neither do we. The appellant's actions, in, among other things, removing the header that would identify the documents as being

accessed and printed from her computer, belie her claims that she did not know the information was protected and indicate instead that she wished to conceal her identity as the source of the documents. *See* ID at 4.

The appellant also claims that the administrative judge failed to properly analyze the *Douglas* factors or to determine whether the deciding official properly applied them. PFR File, Tab 3 at 5-6, 9. The administrative judge found that the deciding official's testimony and decision letter indicated that she had "thoroughly and conscientiously" done so and had exercised her managerial discretion in sustaining the 30-day suspension. ID at 11. The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981). Moreover, 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). The appellant fails to show that either the deciding official or the administrative judge erred with regard to the penalty in this matter. Lastly, the appellant asserts that the administrative judge improperly took the agency's side. PFR File, Tab 3 at 11. 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. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). The appellant's bare allegations fail to meet this standard.

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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 5SW12G  
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your

discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.