

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

CHRISTOPHER DAVIS,
Appellant,

DOCKET NUMBER
DA-0752-11-0674-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 7, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Henry Mesa and Isaac A. Ortiz, El Paso, Texas, for the appellant.

Andrea Geiger, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 submitted a May 3, 2010 order from the Equal Employment Opportunity Commission (EEOC) finding that he failed to show good cause for not appearing at the deposition for his equal employment opportunity (EEO) complaint, dismissing his request for a hearing, and returning his complaint for issuance of a final agency decision. Petition for Review (PFR) File, Tab 1 at 11-13. The appellant asserts that he should have been allowed to present this document and others at his Board hearing. *Id.* at 3-4; *see also id.* at 8. He further asserts that this document and the final agency decision would show that the agency acted in bad faith and committed double jeopardy when it suspended him for failure to cooperate during an official investigation. *Id.* at 3-4. He additionally asserts that article 6 of the Master Agreement (collective bargaining agreement) requires that questioning of an employee who requests a union representative not take place until the representative is present. *Id.* at 4.

The final agency decision has not yet been issued, so the Board cannot consider it. *See* PFR File, Tab 3 at 6. As for Master Agreement, the appellant could have submitted it as an exhibit, but he did not. *See* Initial Appeal File (IAF), Tab 8 at 2; IAF, Tab 14. He has not explained why he failed to do so. The Master Agreement is thus not new evidence. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). As for the EEOC order, it is not new evidence because the agency placed it in the record and the administrative judge considered it. *See* IAF, Tab 14, Ex. 2; Initial Decision (ID) at 6 n.1; *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980).

The appellant also asserts that the administrative judge failed to let him call Kristina Flynn to testify regarding the dismissal of his request for an EEOC hearing. PFR File, Tab 1 at 3. The administrative judge found that her testimony was not relevant to the approved issues. IAF, Tab 8 at 2. After the

administrative judge narrowed the issues and approved witnesses during the prehearing conference, the appellant failed to challenge or supplement the conference summary, despite receiving notice he could do so. *See id.* at 3. His failure to timely object to rulings on witnesses precludes him from raising an objection now. *See Tarpley v. U.S. Postal Service*, [37 M.S.P.R. 579](#), 581 (1988).

The bulk of the appellant's petition reiterates his contention that the agency should be estopped from disciplining him for failing to appear because the EEOC had already penalized him for the same conduct. PFR File, Tab 1 at 4, 8-9. An agency cannot impose disciplinary or adverse action more than once for the same misconduct. *Bowen v. Department of the Navy*, [112 M.S.P.R. 607](#), ¶ 13 (2009), *aff'd*, 402 F. App'x 521 (Fed. Cir. 2010). His arguments are unavailing. The EEOC penalty is not a disciplinary or adverse personnel action, and is instead a procedural sanction within the authority of the administrative judge. *See* [29 C.F.R. § 1614.109\(f\)\(3\)](#). Indeed, EEOC administrative judges have not been given the authority to impose adverse personnel actions. *See* 29 C.F.R. § 1614.501 (list of EEO remedies and enforcement actions).

Further, the agency did not impose disciplinary or adverse action more than once for the same misconduct. Though arising from the same sequence of events, the agency's suspension and the EEOC's sanction were actions taken by separate agencies based on different facts at different stages of the sequence. The agency suspended the appellant because he refused to cooperate during an official investigation of his failure to follow supervisory instructions. IAF, Tab 5, Subtabs 4c, 4e, 4j. The EEOC administrative judge sanctioned the appellant for failing to show good cause for not attending the deposition and for other reasons. IAF, Tab 14, Ex. 2 at 1-2. Charges arising from the same sequence of events are not duplicative when they rely upon different facts. *See, e.g., Williams v. Defense Logistics Agency*, [34 M.S.P.R. 54](#), 58 (1987) (although suspension for absence without leave and removal for falsification arose from same sequence of events, they depended on different facts and were based on events at different

stages of the sequence). As for whether the agency committed harmful procedural error by suspending the appellant, we find no error. We thus conclude that the administrative judge decided these issues correctly.

The appellant asserts that the agency denied him due process by asking him to answer investigatory questions without first advising him that his failure to answer might result in disciplinary action and that any statement he made would not be used against him in a criminal proceeding. PFR File, Tab 1 at 8. The appellant did not raise this issue below or present any new evidence on review supporting this argument. *See* IAF, Tab 7, Ex. B at 2; *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). Moreover, his assertion is false. The Form B's that he refused to sign on June 22, 2010, fully set forth his rights under *Garrity v. New Jersey*, [385 U.S. 493](#), 496-500 (1967). *See* IAF, Tab 4, Subtabs 4i, 4j.

Finally, the appellant argues that the agency engaged in entrapment by forcing him to answer questions it knew he would not answer. PFR File, Tab 1 at 9. The appellant minimally raised this issue below when he testified that he believed the agency was engaging in entrapment. *See* Hearing Compact Disc (testimony of Davis). He did not, however, identify this issue in his prehearing submission and it is not listed in the prehearing conference summary. *See* IAF, Tab 7, Ex. B at 2; IAF, Tab 8 at 1-2. The appellant did not object to the prehearing conference summary, and so the Board will not consider it. *See Crowe v. Small Business Administration*, [53 M.S.P.R. 631](#), 635 (1992) (an issue is not properly before the Board where it is not included in the administrative judge's prehearing conference summary, which states that no other issues will be considered, and neither party objects to the exclusion of that issue in the summary).

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 and AFFIRM the initial 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.