

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

GEORGE R. GADD,
Appellant,

DOCKET NUMBER
DA-4324-11-0200-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Johnathan D. Dial, Sr., Esquire, Little Rock, Arkansas, for the appellant.

Jason Laeser, Esquire, and Leslie K. Schumacher, Esquire, Springfield, 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 of the initial decision that denied corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA). We grant petitions such as this one only when significant new

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

evidence is presented to us 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 review, the appellant contends that he was denied the opportunity to submit evidence and call witnesses and the right to a hearing before an impartial hearing officer.² Petition for Review (PFR) File, Tab 1 at 1. In so alleging, he renews his objections to the administrative judge's disapproval of witnesses and denial of his various procedural and discovery motions.³ *See id.* at 1-3; Initial Appeal File (IAF), Tabs 6, 12, 19, 23, 26, 48, 40, 50, 54, 55, 56, 59, 60, 63. However, it is well established that administrative judges have broad discretion in controlling the proceedings before them. *See Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 (2012). This includes, but is not limited to, the

² With his petition for review, the appellant attaches transcripts of the depositions of Drug Enforcement Administration Administrator Michelle Leonhart and Senior Inspector Selma Ramirez. Petition for Review (PFR) File, Tab 1, Exhibits AA, HH. He alleges that the documents were unavailable prior to the March 25, 2011 close of the record. PFR File, Tab 1 at 7. However, the appellant proffers this new evidence to impeach the credibility of Assistant Special Agent in Charge (ASAC) William Bryant and to admit evidence regarding the best qualified lists, which was not presented at the hearing because the administrative judge restricted the scope of cross examination. *Id.* The Board generally does not consider evidence offered merely to impeach a witness's credibility to be new and material when the new evidence raises a mere inconsistency to the witness's credibility. *Cole v. Department of the Army*, [78 M.S.P.R. 288](#), 293 (1998). Moreover, the appellant has not shown that the deposition transcripts of Ramirez and Leonhart present new and material evidence that warrants a different outcome than that of the initial decision. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980). Based on the foregoing reasons, the Board need not consider the new evidence submitted by the appellant on review.

³ The appellant objects to the administrative judge's denial of his motion for summary judgment. PFR File, Tab 1 at 6; Initial Appeal File (IAF), Tabs 47, 48. However, the Board has recognized that it generally lacks the authority to grant summary judgment. *Johnson v. Department of Justice*, [104 M.S.P.R. 624](#), ¶ 30 (2007) (citing *Denney v. U.S. Postal Service*, [66 M.S.P.R. 191](#), 193 n.1 (1995)). The appellant has not shown that this matter presents circumstances in which summary judgment is appropriate, and thus we discern no error in the administrative judge's denial of the motion.

discretion to regulate the course of the hearing and to exclude evidence that has not been shown to be relevant or material to the issues of the case. *Reeves v. U.S. Postal Service*, [117 M.S.P.R. 201](#), ¶ 12 (2011); [5 C.F.R. § 1201.41\(b\)](#).

The appellant has not shown that the administrative judge disallowed relevant evidence that could have affected the outcome of his appeal. *See Reeves*, [117 M.S.P.R. 201](#), ¶ 12. He has not specifically identified the exhibits that the administrative judge excluded, let alone shown how they could have affected the outcome of this appeal. Nor has he shown the relevance of the emails regarding his alleged coerced resignation that the agency produced and redacted based on privilege in a matter before a U.S. District Court, which was the subject of his motion for in camera review of privileged documents. *See* PFR File, Tab 1 at 2; IAF, Tabs 12, 19, 23, 48. Furthermore, the appellant has not shown any abuse of discretion in the administrative judge's denial of his numerous motions to compel discovery responses for failure to comply with [5 C.F.R. § 1201.74\(a\)](#). *See* PFR File, Tab 1 at 1-2; IAF, Tabs 26, 34, 50, 54, 55, 56; *see also Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992) (the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table).

On review, the appellant disagrees with the administrative judge's decision to disallow witnesses whose proffered testimony she deemed neither relevant nor material, and her denial of his motion to add Don Hickman as a witness. PFR File, Tab 1 at 1-4; IAF, Tabs 48, 53, 63. He asserts that Chris Anderson and Kimball Hardaman would have testified regarding ASAC Bryant's alleged statement that "[the appellant] hasn't paid his dues" and that employees who are hired as GS-9s instead of as GS-7s have not paid their dues. PFR File, Tab 1 at 3-4. However, administrative judges have 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. *Ryan*, [117 M.S.P.R.](#)

[362](#), ¶ 5 (citing *Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985)). Although the appellant asserts the importance of Anderson's proffered testimony, he fails to show any abuse of discretion in the administrative judge's denial, for failure to show good cause, of his motion to allow Anderson to testify from New Mexico or to direct the agency to make arrangements for such testimony, considering that the appellant had advance notice of the hearing date. *See* PFR File, Tab 1 at 4-5; IAF, Tab 63. Hardeman's proffered testimony may have been relevant and material insofar as it would have corroborated the appellant's testimony that ASAC Bryant expressed hostility toward employees who were hired at the GS-9 level; however, the appellant's description of Hardeman's proffered testimony makes no reference to the appellant or to veterans' preference. *See* PFR File, Tab 1 at 4; IAF, Tab 30 at 18. Therefore, the appellant has not shown that the administrative judge's exclusion of these witnesses caused substantial harm or prejudice to his rights which could have affected the outcome of the case. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Additionally, the appellant argues that the administrative judge was biased against him, as evidenced by her admitting all of the agency's proffered evidence and rejecting his hearing exhibits as an alleged sanction for his representative's whispering comments about one of the administrative judge's rulings during the hearing. PFR File, Tab 1 at 5. However, this bare assertion does not establish a deep-seated antagonism towards the appellant that would make fair judgment impossible and does not overcome the presumption of honesty and integrity accorded to administrative judges. *See Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002); *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

On review, the appellant disagrees with the administrative judge's weighing of the evidence and credibility findings.⁴ PFR File, Tab 1 at 7-27. For example, he alleges that the administrative judge failed to afford proper weight to evidence that the agency did not uniformly apply medical standards and that, contrary to the agency's portrayal of him as someone who did not get along with his co-workers, he was an exemplary employee; he points out inconsistencies in Special Agent in Charge Jimmy Fox's hearing and deposition testimony regarding the selection of candidates and in ASAC Bryant's hearing testimony and the other record evidence. *Id.* at 14-15, 19, 22-27. The appellant also reasserts that ASAC Bryant took actions, such as refusing to approve the expenditure of a typist to accommodate his disability, falsely accusing him of not doing his job, and stating that there were no available light-duty positions for him, actions he alleges were motivated by antimilitary animus with the intent to cause an adverse employment action.⁵ PFR File, Tab 1 at 20-27. However, the appellant has not shown a sufficiently sound reason for overturning the administrative judge's credibility and fact findings. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (the Board may overturn an administrative judge's credibility

⁴ To the extent the appellant asserts that he was better qualified than the selectees for the Diversion Inspector Supervisor positions, the merits of the agency's decisions are not properly before the Board. The Board may only consider such a claim insofar as it shows evidence of discrimination based on military service in violation of the USERRA. *See* PFR File, Tab 1 at 7-12; *see also Becwar v. Department of Labor*, [115 M.S.P.R. 689](#), ¶ 7 (2011) (in a traditional USERRA nonselection appeal, the Board does not consider whether the applicant was "entitled to" or "qualified for" the position. Once jurisdiction is established, the Board analyzes whether the appellant has shown that her military service was a motivating or substantial factor in the agency's action and whether the agency has shown that it would have taken the same action despite the appellant's protected status).

⁵ In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Court held that, if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA. *Id.* at 1194.

determinations only when it has "sufficiently sound" reasons for doing so). The Board will not grant a petition for review based on a party's mere disagreement with an administrative judge's findings. *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-106 (1997).

In assessing the witnesses' credibility, the administrative judge considered the relevant factors under *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), including, but not limited to, the witnesses' capacity to observe the incident, prior inconsistent statements, the contradiction of the witnesses' testimony, and the inherent improbability of the witnesses' version of the events. *See* Initial Decision. As the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions, we discern no reason to reweigh the evidence or substitute the Board's own judgment on credibility issues. *See Crosby*, 74 M.S.P.R. at 106; *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987). Consequently, we defer to the administrative judge's thorough and explained credibility findings. *See Haebe*, 288 F.3d at 1301 (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).

Notwithstanding the appellant's disagreement with the administrative judge's weighing of the evidence, the record evidence and the applicable law support her explained findings that the appellant failed to prove that ASAC Bryant or any other agency official had antimilitary animus towards him or any other identifiable veteran or general animus towards veterans, or that his military service was a motivating or substantial factor in his nonselection/promotion to any of the several Diversion Investigator Supervisor positions for which he applied. Initial Decision at 7-48. Thus, we discern no reason to disturb the administrative judge's decision to deny corrective action under the USERRA.

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.