

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

DAMON O. GRANT,
Appellant,

DOCKET NUMBER
DA-0752-11-0446-I-2

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

R. Bobby Devadoss, Esquire, Dallas, Texas, for the appellant.

Craig Paulson, Esquire, Texarkana, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 administrative judge properly considered the factors under *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), to make credibility determinations and findings of fact in this appeal. He discredited the appellant's testimony based upon prior inconsistencies and found that the agency's witnesses testified consistently with each other and the record evidence. The appellant does not dispute these findings, and we discern no reason to disturb the administrative judge's finding that the agency proved the charge by preponderant evidence.

The administrative judge also found a "direct connection between the appellant's misconduct and his duties." Specifically, he found that the appellant was deployed as an agency employee in a combat zone in a foreign country, that his victim as well as local police knew him to be a Department of Defense employee visiting on temporary government orders in their country, that his conduct violated General Order No. 1 applicable to all active duty and civilian employees whether on- or off-duty who are deployed within the theater of operations, and that he displayed his government identification card in order to impersonate a police officer. The appellant does not dispute these findings, and we discern no reason to disturb the administrative judge's finding that the agency proved the nexus between the appellant's misconduct and the efficiency of the service.

Further, the appellant has not provided any assertion or evidence supporting his argument, raised for the first time on review, that the agency violated his due process rights by engaging in ex parte communication. His only argument concerns the testimony of Darlene Cass, who testified concerning the injuries of the victim and statements she heard on the night of the incident. There is no evidence in the record to suggest that the deciding official knew of Ms. Cass, communicated with Ms. Cass, or otherwise relied upon any of Ms. Cass's

knowledge to conclude that the appellant engaged in the charged misconduct or to conclude that removal was the appropriate penalty under the circumstances. In fact, the deciding official testified that he only relied upon the written documents, which were created prior to the notice of proposed removal, and the appellant's oral reply in his decision to effect the appellant's removal. Thus, the appellant has not set forth any allegations demonstrating that the agency engaged in ex parte communications in violation of his due process right to notice and an opportunity to respond to the charge against him. *See Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#) (Fed. Cir. 1999). To the extent that the appellant is asserting that the agency engaged in harmful procedural error by relying on information obtained by Ms. Cass in effecting his removal, such an assertion is not supported by the record. *See 5 C.F.R. § 1201.56(c)(3)*. Finally, the administrative judge did not rely upon Ms. Cass's testimony in the initial decision, and we find that he did not abuse his discretion by allowing Ms. Cass to testify. *See generally Grubb v. Department of the Interior*, [96 M.S.P.R. 377](#), ¶ 61 (2004) (the administrative judge has wide discretion to control the proceedings before him and the Board will not find reversible error in such rulings absent an abuse of discretion).

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.