

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

SARAH S. PEEBLES,
Appellant,

DOCKET NUMBER
AT-0752-11-0737-I-1

v.

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
Agency.

DATE: September 11, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL *

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Richard K. Johnson, Esquire, and Mark D. Baker, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

In the petition for review, the appellant challenges the initial decision denying her appeal of the agency action removing her based on several charges. The appellant argues that: 1) the administrative judge should not have allowed into evidence a DVD purporting to record events that took place in the jail's visiting room; and 2) the administrative judge erred in sustaining the charges and specifications against her.

The appellant asserts that she objected at the hearing to the administrative judge's allowing into evidence the DVD, contending that the agency did not properly authenticate the DVD; evaluate chain of custody, including how the information from a surveillance camera was transferred to the DVD; and explain whether it was condensed or recorded all events. She asserts that Lt. Chris Beach was not a disinterested witness, did not routinely testify about the DVD's authenticity, and had no firsthand knowledge of its creation. She contends that the DVD is non-probative hearsay under *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#) (1981), and that the administrative judge should not have relied on it.

The appellant has not shown that the administrative judge abused his discretion in admitting the DVD into evidence. An administrative judge has wide discretion to make rulings on evidence. *See, e.g., Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 (2012). As the appellant admits, hearsay evidence is admissible in Board proceedings. *See, e.g., Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 26 (2010). Further, prior to the hearing, the agency provided the appellant with relevant information from the January 12, 2011

videotape, Initial Appeal File, Tab 14 at 8-9, and the appellant was aware of a DVD, *id.*, Tab 15 at 7-8. Moreover, the appellant has not identified any specific alleged errors involving the administrative judge's findings in which he cited the video recording. Thus, we find that the administrative judge did not abuse his discretion in admitting the DVD. *Cf. Bencomo v. Department of Homeland Security*, [115 M.S.P.R. 621](#), ¶ 18 (2011) (the administrative judge did not err in considering polygraph evidence). Therefore, we will not reverse his ruling. *See, e.g., Ryan*, 117 M.S.P.R. 362, ¶ 5.

The appellant asserts that the administrative judge erred in sustaining the charges and specifications against her. The administrative judge based his determinations not only on the agency's evidence but on his findings that the appellant's testimony and claims were incredible. He based some of his credibility findings explicitly on her demeanor. The administrative judge thoroughly addressed the charges, specifications, and evidence, and we discern no reason to disturb those well-reasoned findings. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (stating that 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); *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (stating that there is no reason to disturb the initial decision where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

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.