

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

SUKCHA THARP,  
Appellant,

DOCKET NUMBER  
PH-0752-11-0293-I-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: September 20, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Gerald L. Gilliard, Esquire, Washington, D.C., for the appellant.

Carol A. Joffe, Esquire, and Letitia Pinkney, 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 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

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On review,<sup>2</sup> the appellant alleges, *inter alia*, that the administrative judge erred in: excluding Edward Duffy and David Lillo as witnesses for the hearing; refusing to play audiotapes of the agency's investigative interviews during the hearing; denying the appellant's motion to compel the production of the Drug Enforcement Administration's (DEA)'s Personnel Manual and the DEA Planning and Inspection Manual; and denying the appellant's motion to continue the hearing in order to allow additional time to compel the production of the aforementioned manuals. Petition for Review (PFR) File, Tab 2; Initial Appeal File (IAF), Tab 39, Tab 69 at 7-10. We note as an initial matter that the appellant did not timely object to the administrative judge's ruling on witnesses, and that

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<sup>2</sup> Neither party disputes the administrative judge's findings that: (1) the agency revoked the appellant's eligibility to hold a security clearance; (2) a security clearance was a requirement of the appellant's position; and (3) the removal action promotes the efficiency of the service. We discern no reason to disturb these findings.

On review, the appellant submits a copy of a July 20, 2011 letter that her attorney sent to the Chief Administrative Judge, requesting reconsideration of the presiding administrative judge's denial of the appellant's request to certify an interlocutory appeal based on *Romero v. Department of Defense*, [527 F.3d 1324](#) (Fed. Cir. 2008), and requesting an extension of time to compel the production of the Drug Enforcement Administration's manuals. Petition for Review (PFR) File, Tab 2 at 31-33. She alleges that the letter was not included in the record. *Id.* at 15 n.3. Although we agree that the letter is not contained in the record, the omission does not prejudice the appellant's substantive rights because the presiding administrative judge considered the letter and ultimately denied the request for an extension of time. Initial Appeal File, Tab 59; *see Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). To the extent the appellant is challenging the administrative judge's denial of the motion to certify an interlocutory appeal, the appellant has not shown that the administrative judge abused her discretion in denying the motion. *See* PFR File, Tab 2 at 15 n.3; *Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 n.1 (2012) (the Board will not reverse an administrative judge's denial of a request for certification absent an abuse of discretion).

she is therefore precluded from raising the matter for the first time on petition for review. *See Tarpley v. U.S. Postal Service*, [37 M.S.P.R. 579](#), 581 (1988). In addition, it is well settled that administrative judges have broad discretion to control proceedings, including ruling on discovery matters and other motions and excluding witnesses and evidence that are not relevant or material to the issues of the case. *See Reeves v. U.S. Postal Service*, [117 M.S.P.R. 201](#), ¶ 12 (2011) (exclusion of evidence); *Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992) (discovery rulings), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table); *Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985) (exclusion of witnesses); [5 C.F.R. § 1201.41](#)(b)(4), (8), (10). The appellant has not shown that the administrative judge abused her discretion in denying the appellant's discovery-related motions or in excluding witnesses and evidence to warrant reversal of these rulings. *See Ryan*, [117 M.S.P.R. 362](#), ¶ 5 (the Board will not reverse an administrative judge's rulings on discovery matters, the exclusion of witnesses and rulings concerning proceedings absent an abuse of discretion).

Additionally, the appellant alleges that the administrative judge precluded her from obtaining copies of the DEA Personnel Manual and the DEA Planning and Inspection Manual and improperly limited her harmful error claim to whether the agency violated Executive Order 12,968, which is codified at [28 C.F.R. § 17.47](#). PFR File, Tab 2 at 13-17. To the contrary, the administrative judge considered the appellant's allegation that the agency failed to follow the aforementioned DEA manuals, but found that she failed to submit copies of the manuals to support her claim. Initial Decision (ID) at 12. Further, the appellant failed to exercise due diligence in pursuing discovery to obtain the aforementioned manuals and, thus, she is responsible for the absence of evidence to support her harmful error claim. *See Radziewicz v. U.S. Postal Service*, [42 M.S.P.R. 692](#), 696 (1990).

The appellant contends on review that the agency failed to comply with its regulations and procedures governing the revocation of security clearances. PFR File, Tab 2 at 11-15. In *Romero*, 527 F.3d at 1329, the court acknowledged that the Board may not review the substance of a security clearance revocation decision, but vacated the Board's decision and remanded the matter because the Board did not address whether Romero had shown that the agency committed harmful error in failing to follow its own procedures when revoking his Secret security clearance. *Id.* at 1325-26, 1329-30. The court found that *Egan v. Department of the Navy*, [484 U.S. 518](#) (1988) and other decisions did not preclude the Board from reviewing whether the agency complied with its own regulations and procedures in revoking Romero's security clearance. *Id.* at 1329. The statutory basis for such review is [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#), which provides that the Board may not sustain an action on appeal if the appellant "shows harmful error in the application of the agency's procedures in arriving at [its] decision." *Id.* at 1328.

To the extent the appellant alleges here that she submitted Report No. 1-2004-002, Review of the DEA's Disciplinary System, which shows that the agency must conduct investigations within 180 days of making an allegation under Chapter 8310 of the DEA Planning and Inspection Manual, she has not shown that any such agency regulation exists. *See* PFR File, Tab 2 at 16-17; ID at 12. Although the report states that the agency *should* complete Office of Professional Responsibility investigations within 180 days, other parts of the report state that this is a goal, not a mandate. *See* IAF, Tab 39, Ex. FF at 38-39. Thus, it is unclear from the report whether there is an agency regulation requiring completion of an Office of Professional Responsibility investigation within

180 days, and the appellant has not submitted any other evidence to support her claim.<sup>3</sup>

Furthermore, the record evidence and the applicable law support the administrative judge's findings that the appellant failed to prove that the agency denied her request for a representative during its investigative interviews and that, but for the agency's alleged delay in providing the audio tapes of the investigative interviews, the Department of Justice, Access Review Committee would have reversed the revocation decision. *See Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991) (harmful error under [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error). Thus, we discern no reason to disturb the administrative judge's finding that the appellant failed to prove that the agency committed harmful error in failing to follow its internal regulations in revoking her security clearance. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings 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); ID at 13.

For the first time on review, the appellant alleges that the agency denied her *Miranda* right to counsel and violated her *Weingarten* rights.<sup>4</sup> PFR File, Tab

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<sup>3</sup> We make no findings on whether investigations conducted by the Office of Professional Responsibility are deemed part of the revocation process conducted by the Office of Security Programs.

<sup>4</sup> *Weingarten* rights involve a private sector employee's right to request union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action. *National Labor Relations Board v. Weingarten, Inc.*, [420 U.S. 251](#), 260 (1975). They are comparable to the provision found at [5 U.S.C. § 7114\(a\)\(2\)-\(3\)](#). *Howard v. Office of Personnel Management*, [31 M.S.P.R. 617](#), 621

2 at 22-27. Previously, the appellant merely alleged that the agency denied her request for counsel during the agency's investigative interviews in violation of [5 U.S.C. § 555\(b\)](#). See IAF, Tab 37 at 21. Because she has not shown that her arguments are based on new and material evidence that was unavailable prior to the close of the record below, despite her due diligence, the Board will not consider these new arguments on review. See *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

On review, the appellant also asserts that the administrative judge erred in failing to consider her claims of retaliation and discrimination. PFR File, Tab 2 at 20-21. However, the Board generally cannot decide a claim of discrimination in an appeal from an action that was based on suspension or revocation of access to classified material. *Helms v. Department of the Army*, [114 M.S.P.R. 447](#), ¶ 9 (2010). Doing so would involve an inquiry into the validity of the agency's reasons for deciding to revoke the appellant's access to classified information. *Id.* To the extent the appellant is alleging that the agency should have reassigned her to a position that does not require a security clearance, there is no evidence that the agency was required to do so under statute, regulation, or policy. See PFR File, Tab 2 at 20-21; IAF, Tab 69 at 102-108. In the absence of such a statute, regulation, or policy, there is no general duty for an agency to search for a non-sensitive position for an employee who occupies a sensitive position and whose security clearance is suspended or revoked. *VanDuzer v. Department of the Navy*, [41 M.S.P.R. 357](#), 360-61 (1989)

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made

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(1986), *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). An employee does not have a *Miranda* right to counsel in an agency investigative interview unless: (1) the investigation may result in criminal prosecution; and (2) the interrogation takes place while the employee is in custody. *Chisolm v. U.S. Postal Service*, [7 M.S.P.R. 116](#), 120 (1981).

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.ca9c.uscourts.gov](http://www.ca9c.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.