

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

ANNE MANLEY,
Appellant,

DOCKET NUMBER
PH-0752-11-0535-I-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: September 20, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Anne Manley, Severna Park, Maryland, pro se.

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Most of the appellant's arguments on review are either unspecific or unsubstantiated. The appellant alleges, for example, that the administrative judge's factual analysis was incomplete and selective. Petition for Review (PFR) File, Tab 1 at 1. She claims that the administrative judge "misrepresented" or omitted key evidence from the record. *Id.* However, she cites no specific examples in support of these claims. The appellant further alleges that the administrative judge failed to address the instances of disparate treatment in the record. Here, she has provided a few specific examples of the treatment she claims to have experienced, *see id.* at 1-2, but she has not substantiated her allegations with citations to the record. Instead, she suggests that the matters are substantiated in her "testimonies," *id.*, which presumably are part of the investigative reports pertaining to her equal employment opportunity (EEO) complaints filed with the agency, *see* Initial Appeal File (IAF), Tabs 16, 17.

Because no hearing was held, the Board is free to reweigh the evidence and reach its own conclusions. *See White v. Department of Housing & Urban Development*, [95 M.S.P.R. 299](#), ¶ 27 (2003) (where no hearing was held and the administrative judge's findings were based only on the written record, the Board made its own credibility findings based on its review of the record). The appellant's broad and unsubstantiated arguments, however, do not justify a full review of the record. *See Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992) (a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record); *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980) (before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual

determination is incorrect, and identify the specific evidence in the record which demonstrates the error). The initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Under these circumstances, we see no reason to disturb her conclusions. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

The appellant's arguments supporting her affirmative defenses are slightly more specific. Nevertheless, she has not shown that the administrative judge's analysis was wrong. Regarding the sole incident underlying the appellant's sex discrimination claim, the administrative judge found that the appellant demonstrated membership in a protected group and that she was similarly situated to Christopher McClintick, a nonmember of the group, but she failed to show that he engaged in conduct similar to hers. The administrative judge likewise found that the appellant failed to adduce any evidence that the agency acted based on her sex. IAF, Tab 19, Initial Decision (ID) at 7-8; *see Jackson v. U.S. Postal Service*, [79 M.S.P.R. 46](#), 52 (1998) (where the record is complete and a hearing has been held, the Board examines whether the appellant has demonstrated by a preponderance of the evidence that the agency's reason for its actions was pretextual); *Buckler v. Federal Retirement Thrift Investment Board*, [73 M.S.P.R. 476](#), 497 (1997) (to establish disparate treatment, an employee must show that she is a member of a protected group, was similarly situated to an individual who was not a member of the protected group, and was treated more harshly or disparately than that individual). Conversely, the agency proved its charge of insubordination by preponderant evidence, ID at 4-5, and the appellant did not dispute that she sent the email messages underlying the charge. To the extent that the appellant is arguing that she had a duty to challenge Donald Kosin, the attorney who objected to her conduct in the single example of alleged discrimination that she cited, PFR File, Tab 1 at 2; *see* IAF, Tab 16 at 2-3, we note that Kosin objected not to the disagreement itself, but instead to her

“condescending and patronizing” tone and disparaging insinuation that he did not understand the material they were discussing, IAF, Tab 16 at 00303-00305; *see also id.* at 00153.

Finally, with respect to her whistleblower defense, the appellant claims, contrary to the administrative judge’s findings, that she reported her concerns “to CMS managers all along in an effort to correct what was happening.” PFR File, Tab 1 at 3. The administrative judge found that her alleged disclosures were either made in the context of her EEO complaints or were “vague assertions regarding abuse of authority and wrongdoing by management officials, the majority of which involved their alleged failure to recognize her work.” ID at 10. The record supports the administrative judge’s characterization.

The appellant also claimed to have reported her concerns to the Office of the Inspector General for the Department of Health and Human Services. PFR File, Tab 1 at 3. She did not allege below that she had made such disclosures and instead alleged only that she made disclosures to the agency’s Office of Equal Opportunity and Civil Rights. *See* IAF, Tab 1 at 15-20. This appears to be a new issue on review. 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. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The appellant has not provided any newly-available evidence that she reported her concerns to the Inspector General. *See Weaver*, 2 M.S.P.R. at 133.

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 issued by the administrative judge, which is now the Board’s final decision. [5 C.F.R. § 1201.113\(b\)](#).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.