

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

LUIS A. GUZMAN,
Appellant,

DOCKET NUMBER
PH-0752-09-0193-B-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: October 2, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Luis A. Guzman, West Palm Beach, Florida, pro se.

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant argued he was denied a fair hearing. Remand Petition for Review (PFR) File, Tab 1 at 4. He also argued that the administrative judge to whom the case was reassigned did not contact him after the case was reassigned in order to “find out [his] status regarding change of demands and to coordinate the date and time of the hearing.” *Id.*

The cancellation of the hearing and the orders transferring adjudication of the appeal were proper. As for the cancellation of the hearing, an administrative judge may exclude a party, representative or other person “for contumacious misconduct or conduct that is prejudicial to the administration of justice.” [5 C.F.R. § 1201.31\(d\)\(1\)](#); *see also* [5 C.F.R. § 1201.41\(b\)\(7\)](#) (administrative judge’s wide discretion allows her to exclude “any person from all or any part of the proceeding before him or her as provided under §1201.31(d)”). The appellant’s misconduct justified his exclusion. The hearing transcript shows that he repeatedly talked over other people and argued with the administrative judge who presided over the hearing. His rude conduct and refusal to follow instructions caused her to correct him several times. Hearing Transcript (HT) at 90-92. The administrative judge who presided over the hearing warned him that the hearing would be canceled if he continued to demonstrate such behavior. HT at 91-92.

The administrative judge who presided over the hearing followed proper procedure when she excluded the appellant from the proceedings. She issued an order to show cause and allowed him to respond. Remand File (RF), Tabs 17-18; *see* [5 C.F.R. § 1201.31\(d\)\(2\)](#). She explained the basis for the order and cited the underlying authority for issuing it. RF, Tab 18. She even granted him extra time in which to respond. RF, Tabs 19-20. After considering his response, the

administrative judge who presided over the hearing issued an order explaining the basis for her ruling. RF, Tab 22; *see* RF, Tab 21; [5 C.F.R. § 1201.31](#)(d)(3). The appellant did not seek interlocutory review. *See* [5 C.F.R. § 1201.31](#)(d)(2), (3). We thus find that he failed to show that the administrative judge who presided over the hearing abused her discretion in canceling the hearing.

As for the transfer of the appeal, Board rules allow for the transfer of appeals from one office to another. *See* [5 C.F.R. § 1201.4](#)(d). The record shows that the Board gave the appellant timely notice of the transfers. RF, Tab 23 at 2; RF, Tab 24 at 2.

Without citing any example in the record, the appellant argued that the administrative judge who presided over the hearing was biased against him and in favor of the agency. Remand PFR File, Tab 1 at 4. Again without citing any example, he also claimed that the administrative judge, presumably the administrative judge who presided over the hearing, discriminated against him based on ethnicity, race, and age both during the initial appeal and on remand. *Id.*

In making a claim of bias against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if her comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002). We find no evidence in the record of any form of bias against the appellant or in favor of the agency. Although the administrative judge's countenance or tone of voice may have revealed her frustration with his frequent interruptions, refusal to follow instructions, and argumentative nature, any mild expression of frustration or impatience on her part would be insufficient to overcome the presumption of honesty and integrity. *See Smets v. Department of*

the Navy, [117 M.S.P.R. 164](#), ¶ 15 (2011). Moreover, the record shows that some of the rulings by the administrative judge who presided over the hearing even assisted the appellant in presenting his case. She allowed him to obtain additional records from the agency; granted his request for additional time for filing prehearing submissions; and, had the hearing continued as scheduled, would have permitted him to introduce evidence on a disclosure he had not set forth in the prehearing submission. *See* RF, Tab 5 at 1; RF, Tab 10 at 1; RF, Tab 14 at 1-2.

Although the appellant did not present any arguments based on the merits of the appellant's whistleblower claims, we have examined the analysis by the administrative judge to whom the case was reassigned and find that the record supports it. 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 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.