

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

DIANE KING,

Appellant,

DOCKET NUMBER

AT-1221-11-0037-B-1

v.

DEPARTMENT OF THE ARMY,

Agency.

DATE: November 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Diane King, Greensburg, Louisiana, pro se.

Anne M. Norfolk, Fort Benning, Georgia, 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. 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\(b\)](#).

With regard to the position in the Clinical Pathology Department advertised in Vacancy Announcement Nos. SCEA 10890330D and SCEA 10890330R, the appellant argues on review that the index for the agency file disproves the agency's contention that the selecting official, Colonel Jennifer Anderson, did not know she was a whistleblower. Remand Petition for Review (PFR) File, Tab 1 at 4. The index states that Colonel Anderson provided for the agency file Vacancy Announcement Nos. SCEA 10890330R and NCMD10243263DR. Initial Appeal File (IAF), Tab 5 (table of contents). Colonel Anderson was not the selecting official for NCMD10243263DR, a position at the Blood Donor Center, where the administrative judge found the appellant had self-identified as a whistleblower. *See* Remand Decision (RD) at 6-7; IAF, Tab 5, Subtab 4c at 1-5.

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

The Board may overturn an administrative judge's demeanor-based credibility determinations when the judge's findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *Faucher v. Department of the Air Force*, [96 M.S.P.R. 203](#), ¶ 8 (2004). Here, the administrative judge found based on live testimony that Colonel Anderson, who did not interview the appellant and was not present for the appellant's interview with the Blood Donor Center, did not learn that the appellant was a whistleblower or claimed to be a whistleblower until long after she selected another person for the position. RD at 10-11. In challenging this conclusion, the appellant relies only on the table of contents from the agency file. *See* IAF, Tab 5. Even if the table of contents correctly reflects the source of the documents, the document is *at most* circumstantial evidence that suggests *possible* knowledge. Such a document is insufficient to offset Colonel Anderson's *direct* testimony that she lacked specific knowledge regarding the appellant's interview for the Blood Donor Center position. As the appellant did not show that she was perceived to be a whistleblower when considered for this position, we need not give further consideration to her other arguments regarding the position in the Clinical Pathology Department.

The appellant advanced several arguments regarding the position at the Blood Donor Center, where the administrative judge found that she was a perceived whistleblower. In light of the recent decision in *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (Fed. Cir. 2012), we are satisfied that the agency showed by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing. The evidence supported the administrative judge's decision "in the aggregate considering all the pertinent evidence in the record, and despite evidence that fairly detracts from that conclusion." *Id.* at 1368.

As for her specific arguments, the appellant claims that Vacancy Announcement No. NCMD10243263DR required the successful applicant to have

a bachelor's degree, and the selectee, Martha Espinoza-Lloyd, lacked the proper educational credentials. Remand PFR File, Tab 1 at 2. Her argument is unavailing given the record evidence that the Civilian Personnel Advisory Center, not the selecting panel, determined in the first instance that Ms. Espinoza-Lloyd met the minimum qualifications for the position. Specifically, the agency's Chief of Human Resources, Stephanie Ellis Carpenter, who rated and referred the applicants, testified that Ms. Espinoza-Lloyd was fully qualified. Hearing Compact Disc (testimony of Carpenter). Consequently, there is no indication that the selecting panel improperly found Ms. Espinoza-Lloyd to be qualified for the position in order to avoid hiring the appellant. *See* RD at 9.

Furthermore, we have reviewed Vacancy Announcement No. NCMD10243263DR, as well as the position description. We note that the record shows that relevant experience can substitute for some of the course work and a degree is *not* required to meet the minimum qualifications for the position. IAF, Tab 5, Subtab 4c at 1; *see also* Remand File (RF), Tab 16 at 4-5. Indeed, consistent with the Office of Personnel Management qualifications standards for GS-0644-09 Medical Technologist positions, a combination of appropriate education and experience may be sufficient in order to meet the minimum qualifications requirements for the position. *See* <http://opm.gov/qualifications/standards/IORs/gs0600/0644.htm>. On its face, Espinoza-Lloyd's application shows that she had considerable experience and had completed the required undergraduate-level courses to meet the minimum requirements for the position. IAF, Tab 5, Subtab 4c at 7-10. Therefore, the record shows that she met the basic qualifications for the position as set forth in the vacancy announcement.

The appellant argues that the agency cancelled and reissued the announcement to avoid appointing her. Remand PFR File, Tab 1 at 1-2. She argues that the Board should not accept the agency's explanation that it wanted to attract more applicants because it offered no bonuses, relocation expenses, or the

like. *Id.* The administrative judge found this argument unavailing, *see* RD at 9, and we agree. The appellant has not identified any authority that would require the agency to employ these measures to attract more candidates when re-advertising the vacancy a few months later resulted in a larger pool of applicants. The appellant has not identified any evidence in the record that contradicts the agency's stated reason for cancelling and re-issuing the vacancy announcement or shown that, by doing so, the agency took an "identifiable step that constitutes a decision not to hire" her. *See* RF, Tab 9 at 8; *see also Ruggieri v. Merit Systems Protection Board*, [454 F.3d 1323](#), 1326 (Fed. Cir. 2006).

Finally, the appellant alleges that the agency may have denied her veterans' preference rights. Remand PFR File, Tab 1 at 3-4. She raised this issue in the initial appeal and again on remand. *See* IAF, Tab 1 at 5; RF, Tab 4 at 5; RF, Tab 8 at 1; RF, Tab 11 at 1. The administrative judge docketed a separate claim under the Veterans Employment Opportunities Act of 1998 to address these issues. RF, Tab 12. That appeal was later dismissed for lack of jurisdiction. *King v. Department of the Army*, MSPB Docket No. AT-3330-12-0155-I-1, Initial Decision (Mar. 19, 2012).

**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.