

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

CYNTHIA C. CARR,  
Appellant,

DOCKET NUMBER  
DE-1221-11-0161-W-2

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: December 6, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Roger Clinkenbeard, Lakewood, Colorado, for the appellant.

Thomas R. Kennedy, Esquire, Denver, Colorado, 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, which denied her request for corrective action. Generally, we grant petitions such as this one

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous 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](#)).<sup>2</sup> 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\(b\)](#).

The appellant contends on review that the administrative judge erred by finding that Jacobs, the deciding official in the appellant's 3-day suspension, was not aware of the appellant's whistleblowing at the time she made her decision to suspend the appellant. Petition for Review (PFR) File, Tab 1 at 1. The appellant asserts that Jacobs knew about her whistleblowing because Jacobs was the Regional Director, had regular meetings with her Division Chiefs, and would have discussed the appellant's whistleblowing with the appellant's supervisors. *Id.* This argument is speculative and unsupported by any evidence of record. Moreover, the administrative judge found that Jacobs's testimony that she was unaware of the appellant's whistleblowing was credible. Initial Decision (ID) at 21; Hearing Transcript, May 13, 2011, at 201-02. Because the administrative

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<sup>2</sup> 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.

judge based her credibility determination at least in part on her assessment of Jacobs's demeanor, ID at 21, the Board cannot set aside the determination absent "sufficiently sound" reasons to do so. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (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). The appellant offers no such reasons, and we discern none.

The appellant also alleges that the administrative judge erred by finding that the agency proved by clear and convincing evidence that it would have taken the two reprimands and the 3-day suspension against the appellant absent any whistleblowing. PFR File, Tab 1. The appellant's petition for review is largely a collection of excerpts from documents in one or more of her discrimination cases, and she seems to argue that these excerpts support her version of events. However, the administrative judge based her conclusions on her assessment of witness credibility, including witness demeanor. *See Haebe*, 288 F.3d at 1301. The appellant's arguments fall short of establishing a "sufficiently sound" reason to set the administrative judge's findings aside.

Moreover, the administrative judge's findings are thorough, complete, and well-founded in the record. We agree that there is little or no evidence of retaliatory motive given that the agency found the appellant's protected disclosure to be meritorious and disciplined the employee involved, and that the disclosure did not implicate the appellant's managers or harm them in any way. We also agree that the appellant's supervisors made every effort to honor the appellant's special circumstances by conducting a high-quality investigation into the charges of misconduct and her defenses to those charges; by presenting her with evidence that contradicted her claims and gave her multiple pre-decisional opportunities to respond to that evidence; and by affording her greater procedural

protections with respect to the reprimands than is required by law. The agency's actions show that it made every effort to ensure that the disciplinary actions it took against the appellant were based on accurate information rather than on conduct that might have been based on a misunderstanding between the appellant and her supervisors. Under all of the circumstances of the case, we agree with the administrative judge that the agency showed by clear and convincing evidence that it would have taken the same actions against the appellant absent her whistleblowing. *See Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1367-68 (Fed. Cir. 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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.