UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NANCY HICKS, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DE-0432-10-0472-I-2 DATE: December 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Peter C. Rombold, Esquire, Junction City, Kansas, for the appellant.

Eric L. Carter, Esquire, Fort Riley, Kansas, 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 affirmed the agency's action reducing the appellant in grade based on performance reasons. Generally, we grant petitions such as this one only when: the initial

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).[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).

The appellant argues on review that the administrative judge pressured the parties to keep closing statements brief, but then improperly relied on the agency's lengthier closing brief rather than the evidence, and took 6 months to issue the initial decision. The parties agree that the administrative judge urged the parties to keep their arguments brief, but he did not set a page limit. The appellant submitted a 6-page brief, Initial Appeal File (IAF) I-2, Tab 10, while the agency's brief was 24 pages. *Id.*, Tab 11. Contrary to the appellant's claim, the administrative judge, in his 15-page decision, repeatedly cited both the testimonial[3] and documentary evidence in the record. The appellant's theory that

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[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.

[3] The hearing testimony is on two compact discs which were available to the administrative judge.

the 6 months that elapsed between the close of the record and issuance of the initial decision caused the administrative judge to forget the testimony is not only speculative but is belied by the initial decision itself.

On the merits, the appellant argues that the administrative judge failed to make credibility findings, made incorrect factual findings, and failed to properly weigh the evidence. We have considered the appellant's arguments but discern no basis to reweigh the evidence or substitute our assessment of the record for the administrative judge's findings. *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (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). While the administrative judge did not make explicit credibility determinations, he did find, for example, that agency witnesses straightforwardly confirmed during their testimonies that the appellant was told to concentrate on producing one error-free estimate per day, and that their testimony as to the concentration on quality versus quantity was confirmed by their interactions with the appellant during the period in question. Initial Decision (ID) I-2 at 7. Because the administrative judge was present to hear the live testimony, such a finding is an implicit credibility determination. *Haebe v. Department of Justice*, 288 F.3d 1288, 1300 (Fed. Cir. 2002); *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

Regarding the appellant's claim that the administrative judge failed to properly weigh the evidence, we find that he considered the testimony of all of the appellant's witnesses, but discounted some on the basis that certain witnesses admitted to reviewing only a limited amount of her work and others because they stated that her errors were "minor," but admitted that she transposed numbers, for example, that could result in an incorrect retirement estimate. ID (I-2) at 8-9. While the administrative judge did not specifically state that he was assessing these witnesses' credibility, he did implicitly find them not credible on this point.

The appellant's mere disagreement with the administrative judge's findings and credibility determinations does not warrant the Board's full review of the record. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The appellant argues the administrative judge failed to consider her harmful error claim that she was held to the higher performance expectations of a journeyman level Human Resources Specialist. Reversal of an action under a claim of harmful procedural error is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. *Boltz v. Social Security Administration*, 111 M.S.P.R. 568, ¶ 10 (2009). It is true that the performance standard cited in the performance improvement plan notice is written at the full journeyman level and that the agency referenced the full performance journeyman level in the Notice of Unacceptable Performance and the proposal notice. *Id.*; IAF I-1, Tab 11, Subtabs 4f and 4i. However, it is undisputed that, because the appellant was in a developmental position, the full performance level did not apply to her, and the administrative judge found that she was on clear notice of the standard that applied to her. ID I-2 at 7-8. We therefore agree with the administrative judge that the appellant has not established error, much less harmful error, by the agency in this regard.

The appellant states that the administrative judge failed to prove that her reduction in grade promotes the efficiency of service, but she has provided no basis for her argument. The administrative judge's finding on this issue, although unsupported, ID I-2 at 11, is nonetheless correct and requires no further explanation since an adverse action promotes the efficiency of service when the grounds for the action relate to the employee's ability to accomplish her duties satisfactorily, *Fontes v. Department of Transportation*, 51 M.S.P.R. 655, 665, n.7 (1991).

The appellant argues that the administrative judge did not properly consider her claim of racial discrimination based on disparate treatment because he found only that she did not establish her allegations of race, color, and age discrimination.[4] During the prehearing conference, the administrative judge set out the appellant's burden to establish a prima facie case of discrimination based on disparate treatment. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997); IAF I-2, Tab 1. In the initial decision, he acknowledged that, where the record is complete, and a hearing has been held, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the inquiry shifts from whether the appellant has established a prima facie case to whether she has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination. ID I-2 at 11-12. In such situations, the question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that the agency intentionally discriminated against her. *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 17 (2008). Evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any other evidence of discrimination that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Id.* The appellant does not challenge the administrative judge's finding that the appellant did not name any similarly situated employees who made the repeated errors that she did. The administrative judge did acknowledge the appellant's claim that Marla Kline,

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[4] There is no indication in the record that the appellant ever raised a claim of age discrimination. IAF I-2, Tab 1.

Acting Branch Chief, harbored racial animus based on her use of "ghetto" in two unexplained conversations. ID I-2 at 12. The administrative judge concluded that Kline's interaction with the appellant was insufficient to show that the agency acted unreasonably in holding the appellant accountable for her unacceptable performance, that Kline was not involved in the decision at issue, and that the appellant presented no evidence to show that those who were so involved engaged in any actions evidencing racial discrimination. *Id.* The appellant's argument on review that "[t]hose African American witnesses who testified . . . ascribed a racial animus" to the way she was treated, does not, without more, establish error in the administrative judge's finding that the appellant failed to show that her unacceptable performance was not the actual reason for this action and that the agency intentionally discriminated against her.

The appellant argues that the administrative judge mischaracterized the nature of her prohibited personnel practice and merit system principle claims. In the appellant's prehearing submission, she alleged that her demotion was contrary to merit system principles found at 5 U.S.C. § 2301(b). IAF I-1, Tab 20. And, she alleged that the agency committed prohibited personnel practices under 5 U.S.C. § 2302(b)(1)(A) (discrimination on the basis of race or color) and § 2302(b)(12) (action contrary to merit principles). *Id.* In the Summary of Prehearing Conference, the administrative judge incorrectly stated that the appellant was only raising claims under 5 U.S.C. § 2302(b). IAF I-2, Tab 1. Despite being afforded an opportunity to object, *id.*, the appellant's representative did not do so. At the start of the hearing, the administrative judge asked him if he was still going forward with his prohibited personnel practice claims under § 2302(b), and he responded that he was, and did not otherwise challenge the administrative judge's question. CD 1. In his initial decision, the administrative judge addressed but found unsupported the appellant's claimed violation of the specific prohibited personnel practices. ID I-2 at 14. He noted that the appellant had raised for the first time in her closing brief allegations that the agency

violated various specific merit system principles, *id.* n.10, but he did not address them except to state that, because he had found that the agency followed the laws, rules, and regulations covering performance based action under chapter 75, the appellant had not shown a violation of § 2302(b)(12). *Id.* at 14.

We agree that the administrative judge misstated the appellant's claims in the summary of prehearing conference. However, this adjudicative error did not affect the outcome of this appeal, and therefore, is not a basis for reversing the administrative judge's decision. *Panter v. Department of Air Force*, 22 M.S.P.R. 281 (1984). Specifically, under 5 U.S.C. § 7701(c)(2), an appellant may raise the following three affirmative defenses to an adverse action: (1) that the agency committed harmful error in the application of its procedures in arriving at the decision; (2) that the decision was based on a prohibited personnel practice under 2302(b)(2); and (3) that the decision was not in accordance with law. The Board has long held that the merit systems principles set forth in 5 U.S.C. § 2301 are not self-executing and that, absent evidence that an agency violated a law, rule or regulation implementing the merit system principle, i.e., committed a prohibited personnel practice, an alleged violation thereof does not give rise to an affirmative defense to the adverse action. *See LeBlanc v. Department of Transportation*, 60 M.S.P.R. 405, 417 (1994), *aff'd* 53 F.3d 346 (Fed. Cir. 1995) (Table); *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 48 (1992). Moreover, even assuming *arguendo* that the appellant's claims of alleged violations of merit systems principles alone could be adjudicated as an affirmative defense, we would still find that the administrative judge's failure to address them would not warrant reversal because an appellant is bound by the acts or omissions of his chosen representative. *Jones v. Department of Justice*, 83 M.S.P.R. 182, 182-83 (1999); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Here, the administrative judge gave the appellant's representative two opportunities to correct the record. Because he failed to do so, the appellant cannot now argue that the administrative judge erred by not considering his claim.

Lastly, the appellant generally argues that the administrative judge was biased against her, as evidenced by the way in which he conducted the proceedings. However, an administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if his comments or actions evidence a deep-seated favoritism or antagonism that would make fair judgment impossible. *Simpkins v. Office of Personnel Management*, 113 M.S.P.R. 411, ¶ 5 (2010). The appellant's conclusory claims of bias, none of which involved extrajudicial conduct, did not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Id.; Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980).

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.