

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

MICHAEL L. BRUNNER,
Appellant,

DOCKET NUMBER
SF-0752-10-0274-A-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: January 14, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Peter L. Petrich, Esquire, and Michael G. Sanders, Esquire, Tacoma,
Washington, for the appellant.

Jaime L. Preciado, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The agency 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 agency removed the appellant from the position of Transportation Security Manager based on the charge of misconduct of a sexual nature. Initial Appeal File (IAF), Tab 7, Subtabs 4A, 4B, 4D. The administrative judge reversed the agency's action. IAF, Tab 32. The Board denied the agency's petition for review by Nonprecedential Final Order, Member Rose dissenting. Petition for Review File, Tab 8. The appellant filed a motion for attorney fees. Initial Fee File (IFF), Tab 1. The administrative judge found that the appellant was the prevailing party because the agency failed to prove the only charge against him, that he had an attorney-client relationship with the attorneys seeking fees and they provided legal services to the appellant, and that an award of fees was in the interest of justice because the appellant was substantially innocent of

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 charges. IFF, Tab 7. He awarded the appellant \$33,950.77 in fees and costs. *Id.* at 8.

The agency has petitioned for review, contending that the unsustained charges were not wholly unfounded. The agency bases its contention on its characterization of the record evidence and its assertion that the administrative judge failed to analyze the appellant's and the complaining witness's testimony pursuant to *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). Fee Petition for Review File, Tab 1.

The "substantially innocent" criterion is based upon the result of the case before the Board, not upon the evidence and information available to the agency at the time it took the action. *Yorkshire v. Merit Systems Protection Board*, [746 F.2d 1454](#), 1457 (Fed. Cir. 1984); *Hutchcraft v. Department of Transportation*, [55 M.S.P.R. 138](#), 148 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993) (Table). The substantially innocent standard warrants fees in the interest of justice where the employee prevails on substantially all of the charges and the Board or the administrative judge finds that the agency's unsustained charges were wholly unfounded because incredible or unspecific evidence was presented which was fully countered by the employee. *Thomson v. Department of the Navy*, [33 M.S.P.R. 106](#), 110 (1987).

When, as here, the administrative judge's decision on the merits is the Board's final decision, it is not subject to recharacterization in the attorney fees proceedings. *See Del Prete v. U.S. Postal Service*, [104 M.S.P.R. 429](#), ¶ 9 (2007). The findings from the initial decision on the merits when that decision became the final decision of the Board, not re-review of the full record developed below or the administrative judge's recharacterization of his findings in the attorney fee decision, control in determining whether an award of attorney fees is warranted in the interest of justice. *Gensburg v. Department of Veterans Affairs*, [80 M.S.P.R. 187](#), ¶ 16 (1998). In the merits initial decision, the administrative judge found

that the appellant prevailed on the only charge against him. Thus, whether the appellant prevailed is not an issue on petition for review.

As the agency asserts, in the merits initial decision, the administrative judge did not analyze the appellant's and the charging witness's testimony pursuant to *Hillen*. He found, "[o]n the evidence presented, it is certainly possible that the appellant committed the acts with which he was charged but, in light of the conflicting evidence and other factors which detract from [the complaining witness's] testimony, one cannot say that, more likely than not, he actually did." IAF, Tab 32 at 12. Although a credibility finding that is based on an analysis using the *Hillen* factors is persuasive, the Board has not required that an administrative judge articulate the *Hillen* factors as underpinning credibility findings. The Board has long recognized that a credibility finding may be implicit when based on observation of the demeanor of a witness testifying before the administrative judge. 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). By finding that conflicting evidence and other factors detracted from the complaining witness's testimony, the administrative judge, without making similar findings regarding the appellant, was implicitly finding that the complaining witness was not credible.

The administrative judge's explicit finding in the attorney fee decision that the complaining witness was not credible does not constitute a recharacterization of his findings in the initial decision on the merits that would warrant a finding of error. Under the circumstances as here, where the only persons who were present at the time of the alleged misconduct were the appellant and the complaining witness, to find that the complaining witness was not credible is tantamount to a finding that the agency evidence of the charged misconduct was incredible and

fully countered by the appellant. Thus, the administrative judge properly found that fees were warranted in the interest of justice because the appellant was substantially innocent of the charged misconduct.

We ORDER the agency to pay the attorney of record \$33,950.77 in fees. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) ([5 U.S.C. § 1204\(a\)\(2\)](#)).

We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. We ORDER the appellant and the attorney to provide all necessary information that the agency requests to help it carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant or the attorney believes the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. *See* [5 C.F.R. § 1201.182\(a\)](#).

**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 the date of this order. 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, [126 Stat. 1465](#), 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.