

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

LAWRENCE KIDD,
Appellant,

DOCKET NUMBER
PH-4324-11-0464-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: January 28, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Phillip Kete, Esquire, Washington, D.C., for the appellant.

Angela D. Hall, Esquire, Indian Head, Maryland, 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 denies the appellant's request for corrective action pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Generally, we

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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](#)). 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.² [5 C.F.R. § 1201.113\(b\)](#).

The appellant asks the Board to remand the appeal to the regional office “for a description of the alleged poor performance and conduct for which, according to the judge, the agency fired Mr. Kidd, and identification of the evidence supporting the judge's conclusion that the agency had a good faith belief he was guilty of it.” Petition for Review (PFR) File, Tab 1 at 1. He argues that the initial decision did not set forth any specific information regarding the reasons for his removal other than the conclusion that the agency had “legitimate, nondiscriminatory reasons” to terminate him during his probationary period. *Id.* at 2; *see* Initial Appeal File (IAF), Tab 42, Initial Decision (ID) at 7.

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.

In USERRA actions, the appellant must make an initial showing by preponderant evidence that his military status was at least a motivating or substantial factor in the agency action. *Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013 (Fed. Cir. 2001). In making his showing, the appellant may avail himself of any record evidence, including the agency's explanation for its action taken. *Id.* at 1014. The agency's discriminatory motive may be shown by either direct or circumstantial evidence. *Id.* When the appellant has met his burden, "the employer *then* has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *Id.* at 1013 (emphasis added). Although the agency must meet its own burden of proof after the appellant successfully makes the initial showing, the appellant has cited no authority that would allow him to prevail if he fails to make an initial showing. The mere fact that the appellant was terminated and was a member of a protected class is insufficient to satisfy his burden of proof for the initial showing. *See id.* at 1015.

Most of the administrative judge's analysis pertains to the appellant's failure to make the initial showing. ID at 4-7. The administrative judge explained that the appellant first offered direct evidence of his general allegation of discrimination during the hearing when he claimed under cross-examination that Sharon Greenwell told him that she had not wanted to hire him, but did so because he was a veteran, and that she intended to fire him. ID at 4-5. Earlier during the appeal, the appellant had conjectured that the agency's stated reasons for his termination were less than credible, and he requested and was granted discovery and a hearing. *See* IAF, Tab 3 at 5, 12, 15-17; Tab 7 at 8-9; Tab 11; Tab 22; Tab 30 at 5-6; Tab 34 at 4-5. At the hearing, the appellant claimed that he reported Greenwell's comments to Dennis Holden. ID at 5. Greenwell denied that she made such remarks, however, and Holden denied that the appellant reported her alleged statements. *Id.*

The administrative judge made credibility determinations, and, citing *Hillen* factors, he found Holden's and Greenwell's testimony to be more credible than that of the appellant. ID at 5-7; *see Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). The administrative judge particularly noted that, despite earlier opportunities, the appellant did not make specific allegations until the hearing, and the agency witnesses testified in a forthright and candid manner and seemed to lack any motive to lie. ID at 6; *see Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (the Board must defer 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); *Hillen*, 35 M.S.P.R. at 458 (in resolving credibility issues, the administrative judge considers such factors as the witness's bias, or lack of bias, and the witness's demeanor). Additionally, the administrative judge explained that Greenwell's support of the appellant when problems arose regarding his security clearance made it less likely that she made the alleged remarks. ID at 7; *see Hillen*, 35 M.S.P.R. at 458 (factors for consideration in resolving credibility issues include the witness's character; any prior inconsistent statement by the witness; the contradiction of the witness's version of events by other evidence or its consistency with other evidence; and the inherent improbability of the witness's version of events). The administrative judge concluded that the appellant failed to show discriminatory intent, that is, to meet his burden of proof for the initial showing that his military service was a substantial or motivating factor in his termination. ID at 6; *see Sheehan*, 240 F.3d at 1013-14. The administrative judge then turned to the agency's explanation for why it terminated the appellant and concluded in the alternative that the agency established by preponderant evidence that its decision to terminate the appellant was based on legitimate considerations. ID at 7.

We find no error here. The appellant's argument is an unpersuasive challenge to the demeanor-based credibility findings. The appellant also asserts

that the record is incomplete, *see* PFR File, Tab 1 at 4-5, in an attempt to reopen discovery matters that were resolved below, *see* IAF, Tabs 9, 11, 17, 19-25, 27. To the extent that the appellant disagrees with the administrative judge's credibility findings and weighing of the evidence, the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. We discern no reason to reweigh the evidence or substitute the Board's judgment on credibility issues. *See Haebe*, 288 F.3d at 1302; *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987). Likewise, to the extent that he is challenging the administrative judge's discovery rulings, he has not shown that the administrative judge abused his discretion. *See Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). Accordingly, we AFFIRM the initial decision.³

³ We DENY the appellant's January 9, 2013 motion to amend his appeal to include allegations of race, sex, and age discrimination, or, alternatively, to notify the Equal Employment Opportunity Commission (EEOC) that the Board cannot decide such issues in cases filed under the Veterans Employment Opportunities Act (VEOA) and USERRA. *See* PFR File, Tab 3. As the appellant admitted, *id.* at 2, the Board has long held that its authority with regard to USERRA complaints "does not extend beyond the complained-of discrimination because of military status . . . and thus does not include a review of other claims of prohibited discrimination," *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, ¶ 15 (2001). Similarly, the Board cannot decide other claims of prohibited discrimination in VEOA appeals. *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 12 (2001).

Further, in filing the motion, the appellant failed to comply with the Board's regulations. *See* [5 C.F.R. § 1201.114](#)(a), (e), (k). The motion is also significantly delayed without a showing of due diligence. *See* [5 C.F.R. § 1201.115](#)(d). Although the record may have closed before the agency dismissed his discrimination complaint, *see* PFR File, Tab 3 at 10-13, his final submission to the regional office suggests that he knew about the dismissal before the Board's initial decision was issued, *see* IAF, Tab 41. Nevertheless, he failed to file the motion until 6 months after the EEOC Office of Federal Operations affirmed the agency decision. *See* PFR File, Tab 3 at 14-18.

**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. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.