

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

JOHN YERESSIAN,
Appellant,

DOCKET NUMBER
SF-0752-09-0049-C-2

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: January 28, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John Yeressian, Pasadena, California, pro se.

Larry F. Estrada, Esquire, Los Angeles, California, 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 compliance initial decision (CID) issued by the administrative judge, which found that the agency complied with the remand initial decision (RID) and denied the appellant's petition for enforcement. Generally, we grant

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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. § 1201.115²](#)). 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

DISCUSSION OF ARGUMENTS ON REVIEW

On review, the appellant complains, among other things, that the administrative judge: (1) failed to inform him of his burden of proof to establish non-compliance and erroneously shifted the burden of proof from the agency to him; (2) improperly denied his request for a hearing; (3) improperly drew adverse inferences against him; and (4) failed to properly analyze into which position he should be placed for the status quo ante. The appellant also challenges the

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.

agency's back pay calculations and complains that the administrative judge was biased.³ For the following reasons, we are not persuaded by these arguments.

The appellant's complaint, that the administrative judge "did not clearly advise this pro se appellant, at minimum, of the proper jurisdictional burden," *see* Petition for Review (PFR) File, Tab 18 at 21, is not applicable to the instant appeal because *the agency* has the affirmative burden of proving compliance with a Board order, and its assertions of compliance "must be supported by relevant, material, and credible evidence in the form of documentation or affidavits." *Pernell v. Department of Veterans Affairs*, [118 M.S.P.R. 15](#), ¶ 7 (2012) (citations omitted). With respect to the appellant's argument that the administrative judge improperly shifted the burden of proof to him, PFR File, Tab 18 at 17, he did not explain, nor could we find any evidence to support, that contention.

With respect to the appellant's claim that he was improperly denied a hearing, we note that the administrative judge described, at length, the "*extraordinary* circumstances" of this appeal, which resulted in his finding that the appellant waived his "right" to a hearing. CF-2, Tabs 103, 112 (CID) (emphasis in original). The Board's regulations, however, state that the decision to hold a hearing in a compliance matter is discretionary; thus, the appellant had no *right* to a hearing on his petition for enforcement. *Knight v. Department of the Treasury*, [113 M.S.P.R. 548](#), ¶ 16 (2010) (citations omitted); *see* [5 C.F.R. § 1201.183\(a\)\(3\)](#) ("The judge may convene a hearing if one is necessary to resolve matters at issue."). Under the unusual circumstances of this appeal, we

³ The appellant also appears to make numerous arguments related to his attorney fee petition and his involuntary resignation matter. As both of these matters are before us on petition for review, we do not address the arguments related to those matters herein.

We also note that the administrative judge joined the instant matter and the appellant's involuntary resignation appeal, *Yeressian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-C-2, Compliance File-2 (CF-2), Tab 57, but the initial decisions in these appeals were separately issued and did not reference the other matter. To minimize any further confusion, we have decided to issue our decisions in these matters separately as well.

discern no abuse of discretion with the administrative judge's decision in this regard.

With respect to the administrative judge's decision to issue a discovery sanction in the form of an adverse inference against the appellant, the Board's regulations authorize an administrative judge to impose sanctions upon a party "as necessary to serve the ends of justice." [5 C.F.R. § 1201.43](#). "Under [5 C.F.R. § 1201.43](#), the imposition of sanctions is a matter for the presiding official's sound discretion, and absent a showing that such discretion has been abused, the presiding official's determination will not be found to constitute reversible error." *McVay v. Department of Transportation*, [17 M.S.P.R. 175](#), 177 (1983) (internal citations omitted). The abuse of discretion standard is "a very high standard" and it allows for "great deference." *Lipscomb v. Department of Defense*, [69 M.S.P.R. 484](#), 487 (1996). The appellant was given notice regarding the consequences of failing to appear for the agency's properly noticed deposition and failing to timely respond to the agency's discovery requests, CF-2, Tab 87, and we discern no error with the administrative judge's decision to issue the adverse inference sanction. We also discern no error with the administrative judge's finding that, based on the adverse inference, the appellant's entitlement to back pay and other benefits ended on March 15, 2009.⁴ CID at 13-14; *see Shustyk v. U.S. Postal Service*, [32 M.S.P.R. 611](#), 614 ("The use of the adverse inference has been held to be proper in Board cases when a party is silent in the face of probative adverse evidence.") (citations omitted), *aff'd* [831 F.2d 305](#) (Fed. Cir. 1987).

We also discern no error with the administrative judge's finding that the agency complied with the RID when it returned the appellant to the Student

⁴ We have also considered the appellant's arguments relating to his claim that the agency did not comply with the back pay order in the RID, and we find these arguments to be without merit.

Trainee (Realty) position in the Asset Management division. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984) (explaining that the purpose of a Board order canceling an adverse personnel action is to place the appellant as nearly as possible in the status quo ante). In particular, the Student Career Experience Program (SCEP) Working Agreement, which the appellant signed, obligated students, like the appellant, to provide to the agency evidence of coursework completed and continued satisfaction of academic standing. *Yeressian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-C-1, Compliance File (CF), Tab 20 at 52. The agreement also stated that, upon satisfaction of the requirements, “[e]very effort will be made” to convert the student to a permanent position, but that “a permanent position cannot be guaranteed.” *Id.* Having reviewed the relevant evidence, we agree with the administrative judge’s conclusion that the appellant did not meet this obligation and, alternatively, a conversion to the permanent position was not guaranteed.

The appellant’s claim of administrative judge bias is also without merit. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). An administrative judge’s conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge’s comments or actions evidence “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). The appellant has identified no such evidence in the record.

Finally, the appellant includes several documents on review. None of these documents appear to constitute new evidence, and we need not consider them on review.⁵ *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.11. 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

⁵ The appellant and the agency each requested that the Board issue sanctions against the other party. We deny the appellant's numerous requests for sanctions against the agency. Although we are extremely concerned about the multiple serious allegations made against the appellant, in light of our disposition, we deny the agency's requests for sanctions against him without prejudice. We also deny the agency's January 24, 2013 motion for leave to file an additional pleading.

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.