

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

JESUS CLEMENTE,
Appellant,

DOCKET NUMBER
SF-1221-12-0135-W-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: January 29, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Jesus Clemente, San Diego, California, pro se.

Charles F. Smith, Esquire, and Jeff Rosenblum, Esquire, Falls Church,
Virginia, 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 dismissed the appeal for lack of jurisdiction under the Whistleblower Protection

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Act. Generally, we 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](#)).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 that the correspondence included in the record and that he appended to the petition for review establishes that he made "nonfrivolous disclosures" to Congresswoman Susan A. Davis. Petition for Review (PFR) File, Tab 1 at 4-6; *see id.*, Exhibit (Ex.) 1. The letters from the congresswoman to the appellant filed with the petition for review are from June 19, 2008, August 8, 2008, September 18, 2008, December 4, 2008, October 27, 2010, and December 17, 2010. *Id.*, Ex. 1 at 1-2, 5, 7. The petition for review also includes letters from the agency to the congresswoman dated August 25, 2010, and December 6, 2010, and from the Equal Employment Opportunity Commission to the congresswoman dated September 15, 2008. *Id.* at 3-4, 8. The letters dated

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.

October 27, 2010, and December 17, 2010, are already part of the record and are not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980); Initial Appeal File (IAF), Tab 1 at 19-20; IAF, Tab 14, Ex. 1 at 5-6.

As for the newly-submitted letters, the appellant has not shown that they are “new” under the Board’s definition. *See* [5 C.F.R. § 1201.115](#)(d). He has not explained why he was unable to produce this correspondence, which clearly pre-dates the close of the record, despite due diligence prior to the close of the record. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Additionally, the 2008 letters, which the appellant claims were included to show that his contacts with Congresswoman Davis preceded his transfer request, are immaterial because they do not in any way reveal the allegations he might have made in his Office of Special Counsel (OSC) complaint. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980); PFR File, Tab 1 at 5; *see also* IAF, Tab 16, Initial Decision (ID) at 10.

The appellant argues as a general matter that he satisfied the Board’s standards for whistleblower jurisdiction. PFR File, Tab 1 at 4. He cites two recent Board cases, *Ontivero v. Department of Homeland Security*, [117 M.S.P.R. 600](#) (2012), and *Dorney v. Department of the Army*, [117 M.S.P.R. 480](#) (2012), as examples of the Board’s recent reversals of findings that appellants failed to make nonfrivolous jurisdictional allegations. PFR File, Tab 1 at 5-6. These cases differ from the instant case in that the administrative judges found a lack of jurisdiction for reasons other than the appellant’s failure to exhaust his administrative remedies. *See Ontivero*, [117 M.S.P.R. 600](#), ¶ 14 (the administrative judge found that the disclosures were made in the normal performance of duties, and the appellant could not have had a reasonable belief that her disclosures fell within the statutory definition); *Dorney*, [117 M.S.P.R. 480](#), ¶ 4 (the administrative judge found that none of the disclosures clearly fell within the statutory definition and, further, that the appellant failed to nonfrivolously allege that her disclosures contributed to her nonselection).

The appellant argues that the administrative judge “inappropriately obligated him to obtain and submit” his OSC complaint without giving him a good reason for doing so. PFR File, Tab 1 at 3. He argues that the administrative judge only explained in the initial decision why the document was important. *Id.* The administrative judge, in fact, did explain in the jurisdictional order to the appellant why the OSC complaint was important. IAF, Tab 12 at 4. The Board may only consider claims of whistleblowing that are first presented to the OSC. *Ellison v. Merit Systems Protection Board*, [7 F.3d 1031](#), 1037 (Fed. Cir. 1993); *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶¶ 14, 18 (2004). To satisfy the requirement for administrative exhaustion, the appellant must inform OSC of the precise ground of his whistleblowing claim and give OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Ellison*, 7 F.3d at 1036; *Coufal*, [98 M.S.P.R. 31](#), ¶ 14. The Board has held that, where an appellant failed to submit a copy of his OSC complaint and decision letter, the administrative judge properly found that he failed to establish exhaustion of his administrative remedies. *See Kinsey v. Department of the Navy*, [107 M.S.P.R. 426](#), ¶¶ 12-14 (2007). In *Kinsey*, as here, the appellant submitted no evidence to the administrative judge that would have established the disclosures and personnel actions that he raised in his OSC complaint, despite the administrative judge’s order to do so. *Id.*, ¶¶ 6, 8. OSC’s closure letter indicates that the appellant reported to OSC matters “regarding [his] involuntary transfer to East Mesa,” but it does not identify the matters asserted in his complaint, including any disclosures he might have made to the congresswoman. *See* IAF, Tab 1 at 15.

The appellant argues that the administrative judge inappropriately considered the court’s memorandum opinion from his case before the U.S. District Court for the Eastern District of Virginia. PFR File, Tab 1 at 1; *see* ID at 2. The opinion, he asserts, is irrelevant to his appeal, and the administrative judge accepted it without affording him “the opportunity to address privacy rights and other confidential matters contained in the . . . decision.” PFR File, Tab 1

at 1. The administrative judge, however, has the authority to accept and consider the evidence she finds relevant. [5 C.F.R. § 1201.41\(b\)\(3\)](#); *see Tisdell v. Department of the Air Force*, [94 M.S.P.R. 44](#), n.13 (2003) (an administrative judge has wide discretion to control the proceedings before her, to receive relevant evidence, and to ensure that the record on significant issues is fully developed). The appellant has not explained why he believes that the opinion is irrelevant other than to assert generally that the standards and burdens of proof differ between Board and District Court proceedings. PFR File, Tab 1 at 1. As for his claim regarding privacy rights and confidentiality, *id.*; *see also* IAF, Tab 13 at 5, the appellant has not shown that the administrative judge's decision adversely affected his substantive rights. *See Karapinka v. Department of Energy*, [6 M.S.P.R. 124](#), 127 (1981). The document is in the public record.

The appellant argues that the administrative judge improperly considered the Collective Bargaining Agreement (CBA), which the agency submitted to support its argument that he elected to grieve his complaint. PFR File, Tab 1 at 3-4; *see* [5 U.S.C. § 7121\(g\)](#); IAF, Tab 5 at 4-5. The administrative judge, however, explicitly declined to address the agency's election argument in light of her finding that the Board lacked individual right of action jurisdiction. ID at 4 n.2.

Finally, the appellant claims that the administrative judge was biased in favor of the agency. PFR File, Tab 1 at 2-3. 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 asserts that the administrative judge showed bias by granting the agency's motion to stay discovery and to delay submission of the agency file without giving him opportunity to respond. PFR File, Tab 1 at 2; *see* IAF, Tab 6. Even if the administrative judge erred regarding

the stay of discovery, she may grant or deny a motion for an extension of time in which to file a pleading without providing the other party an opportunity to respond to the motion. *See* IAF, Tab 5 at 7; [5 C.F.R. § 1201.55\(b\)](#). Regarding the stay, the appellant has not identified any evidence of favoritism or antagonism, nor has he shown that the decision adversely affected his substantive rights. *See Karapinka*, [6 M.S.P.R. at 127](#). The appellant also alleges that the administrative judge allowed the agency to file a partial copy of the CBA, and, when the appellant objected, she allowed the agency to file a complete copy. PFR File, Tab 1 at 3. Again, such a decision does not evidence favoritism or antagonism, and, as noted above, the administrative judge declined to decide whether the appellant had elected a remedy by filing a grievance prior to filing his OSC complaint.

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.

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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under [5 U.S.C. § 2302\(b\)\(8\)](#), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of

this order. See [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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 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. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.