

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

JULIUS I. ENGLAND,
Appellant,

DOCKET NUMBER
AT-0752-10-0752-B-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: February 4, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Julius I. England, Jacksonville, Florida, pro se.

Margaret L. Baskette, Esquire, Tampa, Florida, 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 remand initial decision issued by the administrative judge that affirmed the removal action. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 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.² 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.³ 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 has filed a motion to submit additional evidence after the record closed on review. Petition for Review (PFR) File, Tab 8. Under the revised regulation at [5 C.F.R. § 1201.114\(k\)](#), the Board will consider evidence submitted after the close of the record on review if the appellant can show that

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 appellant filed a reply to the agency's response to the petition for review, reasserting his harmful error and due process claims. Petition for Review (PFR) File, Tabs 1, 7. To be consistent with our consideration of the appellant's motion to file an additional pleading after the record on review closed under revised regulation [5 C.F.R. § 1201.114\(k\)](#) (rev. Nov. 13, 2012), we have applied the revised regulations with regard to the appellant's reply brief. We note that the old regulations, which were in effect at the time the appellant filed his appeal, are no more favorable to the appellant than the revised regulations. Under the revised regulations, the appellant's reply is untimely filed because he filed it on July 6, 2012, more than a month after the agency filed its June 2, 2012 response brief; thus, the Board has not considered the appellant's untimely reply brief filed more than 10 days after the date of service of the response to the petition for review. See [5 C.F.R. § 1201.114\(e\)](#) (rev. Nov. 13, 2012).

the evidence was unavailable prior to the close of the record. Here, the record on review closed on June 12, 2012. *Id.*; PFR File, Tab 6. In his motion to file additional evidence, the appellant seeks to submit alleged testimony of agency employees during a July 11, 2012 criminal hearing before the U.S. District Court, Middle District of Florida, Jacksonville Division and during an October 17, 2012 deposition, the transcript of which was not available to the appellant until November 26, 2012. PFR File, Tab 8. Although the proffered evidence post-dates the close of the record, the appellant has failed to show the relevancy of the proffered evidence. From our review of the appellant's summary of the witnesses' testimony, none of the proffered evidence shows that the agency violated the appellant's *Weingarten* rights or that the agency failed to provide the appellant with a copy of the proposal notice. Thus, we DENY the appellant's motion to submit additional evidence under [5 C.F.R. § 1201.114\(k\)](#).

On review, the appellant alleges, inter alia, that the administrative judge failed to consider his claim that the agency did not apprise him of his *Miranda* rights during the Office of Inspector General (OIG) interview, that the agency misled him to believe that the OIG interview was administrative, when in fact the report of investigation formed the basis for the criminal proceedings against him, and that the agency submitted erroneous information regarding his removal to the agency's human resources office and to the Office of Personnel Management. PFR File, Tabs 1, 5. However, these claims were not enumerated by the Board as issues for adjudication on remand.⁴ See *England v. U.S. Postal Service*, [117](#)

⁴ To support his claim that the agency failed to apprise him of his *Miranda* rights, the appellant submits a copy of the Motion to Suppress Physical Evidence and Statements that he filed on May 29, 2012, with the U.S. District Court for the Middle District of Florida, Jacksonville Division in Case No. 3:11-cr-296-TJC-TEM; he moved to suppress evidence that he contends was illegally obtained by the agency during the OIG's interview without apprising him of his *Miranda* rights. PFR File, Tab 3. As the agency's alleged failure to apprise the appellant of his *Miranda* rights is not properly before the Board on remand, and the appellant has not shown that the proffered evidence is relevant to his claims regarding his *Weingarten* rights or the agency's

[M.S.P.R. 255](#), ¶ 9 (2012); *see also Nicoletti v. Department of Justice*, [60 M.S.P.R. 244](#), 251 (1993) (finding that the administrative judge properly exercised her discretion to exclude testimony that was not relevant or material to the issues outlined in the Board's remand order); *Umshler v. Department of the Interior*, [55 M.S.P.R. 593](#), 597 (1992) (finding that the administrative judge did not err by limiting a hearing on remand to two additional witnesses and not holding an entirely new hearing), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993) (Table). Thus, the administrative judge did not err in not addressing these issues.⁵

Although the appellant disagrees with the administrative judge's finding that the agency did not violate his *Weingarten* rights, he has shown no error by the administrative judge.⁶ *See* PFR File, Tab 1. The record evidence and the applicable law support the administrative judge's findings that the appellant did not request a union representative during the OIG interview. Thus, we discern no reason to disturb the administrative judge's finding that the appellant failed to prove that the agency violated his *Weingarten* rights. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (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

alleged failure to provide him with a copy of the proposal notice, we find that the proffered evidence is not relevant, and therefore have not considered the evidence on review.

⁵ On review, the appellant also disputes the administrative judge's decision to sustain the charge. PFR File, Tab 1 at 3. However, this claim falls outside the scope of the remand order. The Board affirmed the administrative judge's finding that the agency proved the charge and solely remanded the appeal to the administrative judge for adjudication of the appellant's affirmative defenses. *See England*, [117 M.S.P.R. 255](#), ¶ 7.

⁶ To the extent that the appellant contends that the remand initial decision fails to comport with the requirements under *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980), we disagree. *See* PFR File, Tab 1 at 18. The remand initial decision identifies the material issues of fact and law, and summarizes the evidence and the authorities that the administrative judge relied upon in reaching his conclusions.

conclusions); *Broughton v. Department of Health and Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

On review, the appellant reasserts that he did not receive a copy of the proposal notice based on the agency's failure to properly deliver the proposal notice via certified mail in accordance with requirements of the Postal Service regarding the delivery of certified mail, and therefore the agency committed harmful procedural error and violated his due process rights. PFR File, Tabs 1, 5. However, even if the agency failed to comply with its regulations regarding the delivery of certified mail, the appellant has not shown that he was harmed by this error. The undisputed record reflects that the proposal notice of removal was also sent via first-class mail. *See* Remand Appeal File (RAF), Tab 3 at 30; *Gross v. U.S. Postal Service*, [103 M.S.P.R. 334](#), ¶ 7 (2006) (a letter properly addressed, stamped, and mailed is presumed to have been duly delivered to the addressee); *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991) (an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error).

The appellant has shown no error in the administrative judge's finding that the agency made intelligent and diligent efforts to provide the appellant with a copy of the notice of proposed removal, sending the proposal notice via certified mail and first-class mail to the appellant's address of record, and that the sworn declarations of the proposing official and the mail carrier aver that the proposal notice was mailed to the appellant on March 15, 2010. *See McCauley v. Department of the Interior*, [116 M.S.P.R. 484](#), ¶ 7 n.1 (2011); RAF, Tab 2, Tab 3 at 25-26, 28, 33, 42. Thus, we discern no reason to disturb the administrative judge's finding that the agency afforded the appellant minimum due process.

**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.