

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

TERHEMEN JOSEPH ACHAMBER,
Appellant,

DOCKET NUMBER
SF-0752-24-0041-I-1

v.

U.S. POSTAL SERVICE,
Agency.

DATE: August 7, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Terhemen Joseph Achamber, Colorado Springs, Colorado, pro se.

Roderick Eves, Esquire, St. Louis, Missouri, for the agency.

Alexander R. Rivera, Esquire, Denver, Colorado, for the agency.

BEFORE

Henry J. Kerner, Vice Chairman
James J. Woodruff II, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which sustained his removal for the charges of unacceptable conduct and failure to cooperate in an agency investigation. On petition for review, he argues that the agency did not prove its charge that he failed to cooperate in an agency

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

investigation, that the deciding official failed to properly weigh, and the administrative judge failed to reweigh, the relevant factors found in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), that the penalty of removal is excessive, and that the agency failed to produce exculpatory documentation. He also alleges, for the first time on review, that his removal was the result of the agency's procedural errors. Generally, we grant petitions such as this one only in the following circumstances: 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 administrative 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. 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, 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, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

On review, the appellant argues that the agency violated its own policy by closing its initial management inquiry process without interviewing him first. Petition for Review (PFR) File, Tab 2 at 5-6. In support, he submits agency Publication 552, Manager's Guide to Understanding, Investigating, and Preventing Harassment (Publication 552), which instructs managers on how to handle harassment claims. *Id.* at 13-50. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant argues that this evidence was unavailable to him below because the

agency withheld and concealed evidence during discovery. PFR File, Tab 2 at 4. However, Publication 552 was published in November 2018 and is publicly available. *Id.* at 13; *see* U.S. Postal Service, Publication 552 (Nov. 2018), available at <https://apwu.org/contracts/pub-552-managers-guide-understanding-investigating-and-preventing-harassment-12-16/>, <https://www.nalc.org/workplace-issues/resources/body/PUB-552.pdf>. We therefore find that the appellant did not show that this evidence was not available to him before the record closed below despite his due diligence.

In any event, to the extent that the appellant argues that the agency concealed Publication 552 and other evidence he seeks to submit on review during discovery, he has failed to show that he exercised due diligence. PFR File, Tab 2 at 3, 10-83. A party does not exercise due diligence when he fails to use the discovery process to obtain information or file a motion to compel during the proceedings below. *See Ellis v. U.S. Postal Service*, 121 M.S.P.R. 570, ¶ 6 (2014) (concluding that an appellant who failed to utilize the discovery process to obtain a document from the agency did not make a showing of due diligence when he was unsuccessful in obtaining the document from the agency in response to his Privacy and Freedom of Information Acts request); *Head v. Office of Personnel Management*, 53 M.S.P.R. 421, 422 (1992) (explaining that because an appellant did not pursue discovery or file a motion to compel discovery below, he failed to exercise due diligence when the agency allegedly ignored his request for relevant documents). Here, the appellant asserts that he engaged in discovery. However, he has not identified what requests he made to the agency that should have caused it to provide these documents, and he did not file a motion to compel below. *Szejner v. Office of Personnel Management*, 99 M.S.P.R. 275, ¶ 5 (2005) (explaining that if an appellant failed to file a motion to compel discovery during the proceedings before the administrative judge, he is precluded from raising the issue for the first time on petition for review), *aff'd*, 167 F. App'x 217 (Fed. Cir.

2006). Therefore, we decline to consider the documents he submits for the first time on review.

NOTICE OF APPEAL RIGHTS²

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

² Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on

race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.³ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

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Washington, D.C. 20439

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³ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board