

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

MARK B. BARTA,
Appellant,

DOCKET NUMBER
CH-1221-13-0359-B-1

v.

DEPARTMENT OF DEFENSE,
Agency.

DATE: February 13, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Mark Blair Barta, Galena, Ohio, pro se.

Amanda J. Dinges and Mickey Lee, Indianapolis, Indiana, 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 remand initial decision, which denied his request for corrective action in this individual right of action (IRA) appeal. 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 remand initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

The following facts, as set forth in the remand initial decision, are generally undisputed. *Barta v. Department of Defense*, MSPB Docket No. CH-1221-13-0359-B-1, Appeal File (B-1 AF), Tab 62, Remand Initial Decision (RID). In 1993, the appellant was recruited by the Defense Finance and Accounting Service (DFAS) as a GS-12 litigation attorney in the Office of General Counsel (OGC) and was soon thereafter reassigned to an accounting and fiscal law attorney position. RID at 1; B-1 AF, Tab 50 at 4.² In 2009, the appellant left DFAS OGC to fulfill a new position as a Strategic Policy Analyst. RID at 2; B-1 AF, Tab 50 at 5. In 2012, approximately 3 years after leaving DFAS OGC, the appellant applied, and was not selected, for three different attorney positions within OGC.³ RID at 2; B-1 AF, Tab 50 at 5. On or around December 7, 2012, the appellant filed a complaint with the Office of Special Counsel (OSC), in which he alleged that DFAS retaliated against him for making

² The administrative judge noted that the appellant agreed with the agency's proposed stipulations at B-1 AF, Tab 50. RID at 1 n.1.

³ These attorney positions were (1) Supervisory Deputy Assistant General Counsel, Administrative and Employment Law and Litigation Directorate, (2) Supervisory Deputy General Counsel, and (3) Assistant General Counsel, Accounting and Commercial Law Directorate. RID at 2; B-1 AF, Tab 50 at 5-7.

disclosures concerning his supervisor, the DFAS General Counsel (GC), during an Internal Review (IR) investigation, an earlier Board appeal, and two equal employment opportunity (EEO) complaints filed by fellow employees. RID at 3; B-1 AF, Tab 50 at 7; *Barta v. Department of Defense*, MSPB Docket No. CH-1221-13-0359-W-3, Appeal File (W-3 AF), Tab 1 at 4-5. On January 30, 2015, OSC issued a close-out letter and advised the appellant of his right to file a Board appeal. RID at 3; W-3 AF, Tab 1 at 4-5.

The appellant filed an IRA appeal, which was dismissed twice without prejudice and refiled. *Barta v. Department of Defense*, MSPB Docket No. CH-1221-13-0359-W-1, Initial Appeal File, Tabs 1, 4; *Barta v. Department of Defense*, MSPB Docket No. CH-1221-13-0359-W-2, Appeal File (W-2 AF), Tabs 1, 27; W-3 AF, Tab 1. The administrative judge subsequently dismissed the appeal for lack of jurisdiction. RID at 3; W-3 AF, Tab 25. In pertinent part, the administrative judge noted that all of the appellant's disclosures occurred in or before 2010, prior to the expansion of appeal rights under the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, which became effective on December 27, 2012. *Barta v. Department of Defense*, MSPB Docket No. CH-1221-13-0359-W-3, Remand Order, ¶ 4 (Sept. 22, 2022). The administrative judge found that, under pre-WPEA law applicable to this appeal, the appellant failed to make a nonfrivolous allegation that he made a protected disclosure because all of his alleged disclosures were made during the course of an agency investigation or administrative proceeding and that, prior to the enactment of the WPEA, whistleblower protection did not extend to disclosures made in such proceedings. *Id.* She additionally found that, to the extent that the appellant raised the same disclosures outside the context of an investigation or administrative proceeding, those disclosures were not protected because they were made to his supervisor about the supervisor's own misconduct. *Id.* The appellant filed a petition for review of that initial decision. RID at 3.

The Board issued a Remand Order, which noted that it was undisputed that the alleged disclosures and personnel actions occurred before the enactment of the WPEA, and it agreed with the administrative judge's decision to apply pre-WPEA standards concerning the scope of an IRA appeal. Remand Order, ¶ 6. The Board found that the appellant exhausted his administrative remedies with OSC, and he nonfrivolously alleged that his disclosures during the IR investigation about misuse of travel funds, use of the beach house, and the flower fund (disclosures (1), (4), and (5)) were protected by 5 U.S.C. § 2302(b)(8) and were a contributing factor in the nonselections. *Id.*, ¶¶ 8, 10-15, 17-22. The Board also found that the appellant did not nonfrivolously allege that disclosures (2) and (3) were protected because they contained allegations that the GC committed misconduct in violation of discrimination laws, which were specifically excluded from coverage under 5 U.S.C. § 2302(b)(8).⁴ *Id.*, ¶ 16. The Board remanded the appeal for further adjudication, including a hearing on the merits. *Id.*, ¶¶ 1, 22.

On remand, the administrative judge held a hearing. B-1 AF, Tabs 52, 54. The administrative judge issued a remand initial decision, which denied the appellant's request for corrective action. RID at 1. The administrative judge found that the appellant proved that disclosures (1), (4), and (5) were protected by 5 U.S.C. § 2302(b)(8), but he did not prove that these disclosures were a contributing factor in the nonselection actions.⁵ RID at 5-17. The appellant has

⁴ The Board also determined that the administrative judge properly interpreted pre-WPEA provisions and concluded that the appellant's disclosures made during his prior Board appeal (activity covered by 5 U.S.C. § 2302(b)(9)(A)) or through testifying in an EEO proceeding filed by another employee (activity covered by section 2302(b)(9)(B)) were not protected by 5 U.S.C. § 2302(b)(8) and did not establish a basis for Board jurisdiction under pre-WPEA law. Remand Order, ¶ 9.

⁵ In pertinent part, the administrative judge found that the appellant did not prove that any individuals who were involved in or had influence over the selection process for the vacant positions had knowledge of his disclosures. RID at 11-17.

filed a petition for review, the agency has filed a response, and the appellant has filed a reply. Remand Petition for Review (RPFR) File, Tabs 2, 4, 7-8.

DISCUSSION OF ARGUMENTS ON REVIEW

At the merits stage of an IRA appeal involving pre-WPEA disclosures and personnel actions, the appellant must prove by preponderant evidence that he made a disclosure that was protected by 5 U.S.C. § 2302(b)(8), and his disclosure was a contributing factor in a personnel action taken against him. *Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 8 (2016). If the appellant meets that burden, then the agency is given an opportunity to prove by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. *Id.*

On review, the appellant makes the following assertions: (1) disclosures related to discrimination matters are protected under 5 U.S.C. § 2302(b)(8); (2) the administrative judge's broad order in limine violated his due process rights; and (3) the administrative judge abused her discretion when she disallowed prior statements made under oath and disallowed evidence that impeached one of the agency's key witnesses. RPFR File, Tab 2 at 4. For the following reasons, these assertions do not warrant a different outcome.

Disclosures involving violations of discrimination law are not protected by 5 U.S.C. § 2302(b)(8)(A)(i).

The appellant asserts on review that removing EEO matters from the scope of the whistleblower protection statutes is inconsistent with the WPEA itself and related legislative history. *Id.* He also asserts that the WPEA clarified that it is a prohibited personnel practice to take or fail to take an action because of a disclosure of information that an employee reasonably believed evidences “any violation of any law, rule, or regulation,” which would include violations of discrimination law. *Id.* at 5, 8 (emphasis supplied). He “renews his appeal of the MSPB’s earlier decision,” *id.* at 5, which we understand to mean the Remand

Order. He also asserts that the Board should overrule its decision in *Edwards v. Department of Labor*, 2022 MSPB 9, *aff'd*, No. 2022-1967, 2023 WL 4398002 (Fed. Cir. July 7, 2023), and that an opinion from the U.S. District Court for the Southern District of Ohio on his age discrimination claim warrants a decision in his favor in this matter. RPFR File, Tab 2 at 7-11. We have considered these assertions, but none warrants a different outcome.

As the appellant notes, WPEA § 101(a) changed the language of 5 U.S.C. § 2302(b)(8)(A)(i), which originally protected disclosures based on “*a* violation of any law, rule, or regulation,” to protect disclosures based on “*any* violation of any law, rule, or regulation.” WPEA § 101(a)(1) (emphasis supplied); *Abernathy v. Department of the Army*, 2022 MSPB 37, ¶ 8 n.5; *Scoggins*, 123 M.S.P.R. 592, ¶ 11 n.6; *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 5 n.3 (2013). The Board has not explicitly stated whether WPEA § 101(a) constitutes a clarification of existing law and, thus, whether it has retroactive application to disclosures and personnel actions that predated the effective date of the WPEA. In *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶¶ 10-26 (2013), the Board found that WPEA § 101(b)(2), which involved disclosures made during an employee’s normal course of duties, disclosures made to a supervisor about the supervisor’s own misconduct, and disclosures containing information that had been previously disclosed, constituted a clarification of the definition of a protected disclosure under existing law and should be applied to cases pending before the Board. Conversely, the Board has found that WPEA § 101(b)(1), involving the expanded IRA appeal rights in 5 U.S.C. § 2302(b)(9), did not constitute a clarification of existing law and did not have retroactive application. *See, e.g., Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶¶ 7-8 (2015); *Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶¶ 6-7 (2014); *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶¶ 8-15 (2014). However, even if we apply

the amendment in WPEA § 101(a) to our analysis, a different outcome is not warranted.

Importantly, the appellant has not identified any legislative history in which the Senate or the House expressed an intent to change the longstanding precedent of the Board and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) that section 2302(b)(8) does not protect disclosures involving allegations of discrimination or EEO matters.⁶ *See, e.g., DeGrella v. Department of the Air Force*, 2022 MSPB 44, ¶ 13 (stating that, when legislating, Congress is presumed to know an existing statute’s interpretation). Moreover, he cites to no case law or other authority to support his assertion that disclosures involving violations of discrimination law are protected under 5 U.S.C. § 2302(b)(8).

We also decline to revisit the Board’s decision in its Remand Order. Under the law of the case doctrine, a tribunal will not reconsider issues that have already been decided in an appeal, unless there is new and material evidence adduced at a subsequent trial, controlling authority has made a contrary decision of law, or the prior decision was clearly erroneous and would work a manifest injustice. *O’Connell v. Department of the Navy*, 73 M.S.P.R. 235, 240 (1997). The appellant has not identified, and we are not aware of, any exception to the law of the case doctrine that would warrant revisiting the Board’s Remand Order. To the contrary, as discussed herein, the Board’s decisions in *Reese v. Department of the Navy*, 2025 MSPB 1, ¶ 31, and *Edwards*, 2022 MSPB 9, ¶¶ 10-23, reaffirm the longstanding principle that allegations of discrimination and reprisal that fall under Title VII, i.e., matters that can be pursued through the EEO process and

⁶ Rather, the WPEA Senate Report discussed cases such as *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1996), *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), and *Meuwissen v. Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000), which involved disclosures made to persons in a position to remedy wrongdoing, disclosures made as part of an employee’s normal job duties, and disclosures of information already known, respectively, and it stated that “[t]hese holdings are contrary to congressional intent.” S. Rep. No. 112-155 at 4 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 593.

before the Equal Employment Opportunity Commission (EEOC), are excluded from the protections of 5 U.S.C. § 2302(b)(8). The Board has held that separate remedies exist for redressing claims of discrimination and claims of reprisal for whistleblowing; claims must be brought under the appropriate statutory scheme. *Edwards*, 2022 MSPB 9, ¶ 17.

We have considered the appellant's remaining assertions on review, but they do not warrant a different outcome. For example, the appellant asserts that the Board erred in its holding in *Edwards*.⁷ RPFR File, Tab 2 at 7-10. The appellant acknowledges that the Board's decision in *Edwards* was affirmed by the Federal Circuit, but he encourages us to "ignore" the court's decision because, among other things, it was a nonprecedential decision and decisions from the Federal Circuit are "no longer controlling" in whistleblower reprisal cases. *Id.* at 9. We are not persuaded by this assertion. Although historically the Board has been bound by precedent from the Federal Circuit, appellants may now file petitions for judicial review of Board decisions in whistleblower reprisal cases with any circuit court of appeals of competent jurisdiction. 5 U.S.C. § 7703(b)(1)(B). However, the appellant has not identified on review any authority from any circuit court of appeals that calls into question the Board's decision in *Edwards*. To the contrary, *Edwards* is consistent with authority from other circuit courts. *Edwards*, 2022 MSPB 9, ¶¶ 15-17.

Additionally, in his petition for review, the appellant briefly mentions *Reese*, which was then-pending at the Board, and he notes that the issue in *Reese*

⁷ In his petition for review supplement, the appellant includes an information sheet from the U.S. House of Representatives, Office of the Whistleblower Ombuds. RPFR File, Tab 4 at 5, 17-18. In this document, the Office of the Whistleblower Ombuds stated, among other things, that the Board's decision in *Edwards* "clarified and restricted its jurisdiction," "overturned its own related case precedent," and "muddie[d] the waters." *Id.* at 18. Under 5 C.F.R. § 1201.115, the Board generally will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record was closed before the administrative judge despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 213-14 (1980). However, even if we consider this evidence, a different outcome is not warranted.

involved whether disclosures to a supervisor regarding a violation of EEO law were protected under 5 U.S.C. § 2302(b)(9)(A) and (b)(9)(C). RPFR File, Tab 2 at 8-9. Since the appellant filed his petition for review, the Board issued its decision in *Reese*, which, as noted above, reaffirms that allegations of discrimination and reprisal that fall under Title VII are excluded from the protections of 5 U.S.C. § 2302(b)(8). *Reese*, 2025 MSPB 1, ¶ 31. The Board's conclusion in *Reese* is outcome determinative in this matter.

The Board in *Reese* also evaluated whether Ms. Reese's activity was protected by 5 U.S.C. § 2302(b)(9)(A)(i) and (b)(9)(C). *Id.*, ¶¶ 41-52. However, *Reese* is distinguishable because Ms. Reese's protected activity and personnel actions occurred after the effective date of the WPEA, which expanded IRA appeal rights to include activity protected by 5 U.S.C. § 2302(b)(9)(A)(i) and (b)(9)(C). *See Colbert*, 121 M.S.P.R. 677, ¶ 7. By contrast, all of the appellant's disclosures and personnel actions occurred well before the effective date of the WPEA. Thus, even if we construed the appellant's assertion on review to mean that disclosures (2) and (3) were protected by 5 U.S.C. § 2302(b)(9)(A)(i) or (b)(9)(C), the Board has held that these expanded appeal rights were not retroactive. *See Colbert*, 121 M.S.P.R. 677, ¶ 7 (finding that the expanded IRA appeal rights provided by the WPEA that were set forth in 5 U.S.C. §§ 2302(b)(9)(A)(i) and (b)(9)(C) were not retroactive); *see also Edwards*, 2022 MSPB 9, ¶¶ 29-33 (finding that the amendment to 5 U.S.C. § 2302(b)(9)(C), which added protection for disclosures made to "any other component responsible for internal investigation or review," as set forth in section 1097(c)(1) of the 2018 National Defense Authorization Act, Pub. L. No.

115-91, 131 Stat. 1283 (2017), was not retroactive). Thus, these expanded appeal rights do not apply to this matter.⁸

Finally, we have considered the appellant's assertions that he "prove[d] his case" before the U.S. District Court for the Southern District of Ohio, which he claims "involved the same nonselection and same disclosures as those in the present case," and that the agency was "collaterally estop[ped] . . . from denying the same facts." RPFR File, Tab 2 at 10-11. We have found and reviewed the district court opinion. Regarding his single-motive age discrimination claim, the Magistrate Judge considered direct and circumstantial evidence and determined, among other things, that the appellant engaged in activity protected by the Age Discrimination in Employment Act (ADEA) when he opposed the agency's consolidation plan because it had a disparate impact on older employees, and the agency knew of this activity, but the appellant did not rebut the agency's legitimate, nondiscriminatory reasons for the nonselection, including that the appellant had "deficiencies in [his] skill set" and the selectee was "more qualified." *Barta v. Austin*, Civil Action No. 2:20-cv-1641, 2022 WL 1749051 at *4-8 (S.D. Ohio Mar. 18, 2022), *reconsideration denied*, 2022 WL 1061934 (S.D. Ohio Apr. 8, 2022). Regarding his mixed-motive claim, the Magistrate Judge found that the appellant's ADEA-protected activity was a motivating factor in the nonselection, but the appellant was not entitled to reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of a decision, which was the only relief that the appellant sought therein, because he

⁸ The appellant also asserts that, in *Tao v. Merit Systems Protection Board*, 855 F. App'x 716 (Fed. Cir. 2021), the Board "made concessions [which were] inconsistent with the present claim that the [w]histleblower statu[t]es do not protect activity protected by the Equal Employment Opportunity laws." RPFR File, Tab 2 at 9. The appellant does not specifically identify which concessions were inconsistent, and our review of the decision itself reveals no inconsistency involving 5 U.S.C. § 2302(b)(8). However, all of Dr. Tao's disclosures, activity, and personnel actions occurred well after the effective date of the WPEA. *Tao*, 855 F. App'x at 717-18. Therefore, it was appropriate for the Board and the court to alternatively consider whether Dr. Tao's activity was protected by 5 U.S.C. § 2302(b)(9).

did not show that it was the “but-for” cause. *Id.* at *8-9 (citing *Babb v. Wilkie*, 140 S. Ct. 1168, 1177-78 (2020)).

Under the doctrine of collateral estoppel, once an adjudicatory body has decided a factual or legal issue necessary to its judgment, that decision may preclude relitigation of the issue in a case concerning a different cause of action involving a party to the initial case. *Hau v. Department of Homeland Security*, 123 M.S.P.R. 620, ¶ 13 (2015), *aff’d sub nom. Bryant v. Merit Systems Protection Board*, 878 F.2d 1320 (Fed. Cir. 2017). Collateral estoppel, or issue preclusion, is appropriate when (1) the issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination of the issue in the prior action was necessary to the resulting judgment, and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *Id.* The Board has discretion to decline to apply collateral estoppel, even if the elements are met. *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988).

It is not clear from the appellant’s petition for review which “facts” the agency is “collaterally estop[ped]” from denying as a result of the district court opinion or how collateral estoppel applies to this matter. RPFR File, Tab 2 at 11. It is also not immediately apparent that the district court case involved the same nonselection and same disclosures, as the appellant asserts. From the contextual information in the opinion, such as the identity of the selectee and the members of the hiring panel, it appears that the district court matter involved the vacancy for the position of Assistant General Counsel, Accounting and Commercial Law Directorate. RID at 16-17. However, the Magistrate Judge referred to the position as a Supervisory Attorney Advisor position. *Barta*, 2022 WL 1749051 at *1. Moreover, the district court opinion referenced the appellant’s opposition to the consolidation plan as his protected activity, but it is not clear that this

opposition was expressed during the IR investigation or involved disclosures (2) and (3).⁹ In the absence of such clarity, we decline to apply collateral estoppel.¹⁰

The appellant's remaining assertions on review do not warrant a different outcome.

The agency filed a motion in limine, seeking to exclude evidence regarding, in pertinent part, the “Base Realignment and Closure” or the resulting OGC consolidation and/or age discrimination or disparate treatment that the appellant claims resulted from the consolidation. B-1 AF, Tab 47. The appellant opposed this motion. B-1 AF, Tab 48. The administrative judge granted the motion at the start of the hearing. B-1 AF, Tab 52-1. On review, the appellant asserts that it was improper for the administrative judge to exclude any discussion of his EEOC case and/or the consolidation because it violated his due process rights. RPFR File, Tab 2 at 11-12. In pertinent part, the appellant asserts that the administrative judge directed one of his witnesses to comply with the order in limine and the witness’s testimony was “profoundly limited.” *Id.* He also asserts that, even though the administrative judge was bound by the Board’s Remand Order regarding the dismissal of disclosures (2)-(3) relating to “EEO violations,” he should have been allowed to discuss these disclosures and the “environment related to these disclosures.” *Id.* at 12.

An administrative judge has broad discretion to regulate the course of the hearing and to exclude evidence and witnesses that have not been shown to be relevant, material, and nonrepetitious. *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 4 (2011); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985); 5 C.F.R. § 1201.41(b)(10). To obtain reversal of an initial decision

⁹ The appellant states on review that the disclosure in the district court matter was made to his supervisor and “also to about 15 other attorney employees including the wrongdoer[, the GC,] who was also the Agency Ethics Official as well as the Deputy Agency Ethics Official.” RPFR File, Tab 2 at 8 n.3.

¹⁰ Even if we determined that the same nonselection and disclosures were involved in the district court matter and this matter, the appellant has not explained how the application of collateral estoppel warrants a different outcome in this IRA appeal.

on these grounds, the petitioning party must show on review that a relevant witness or evidence, which could have affected the outcome, was disallowed. *See Thomas*, 116 M.S.P.R. 453, ¶ 4. The appellant has not made such a showing. Indeed, the evidence that the agency sought to exclude related to disclosures over which the Board does not have jurisdiction, the appellant does not explain how the witness's testimony on these issues could have changed the outcome of this IRA appeal, and he did not prove that his due process rights were violated in this regard.

The appellant also asserts on review that the administrative judge improperly disallowed "evidence produced in prior administrative actions and [EEOC] investigation and litigation." RPFR File, Tab 2 at 12. To the extent that he is referring to the administrative judge's decision to exclude as not relevant transcripts from an EEOC hearing on the appellant's discrimination complaints, several witnesses from the EEOC matter were approved as witnesses in this matter, and we discern no abuse of discretion with the administrative judge's decision to exclude the transcripts as irrelevant. B-1 AF, Tab 43 at 11 n.5.

The appellant also asserts that the administrative judge improperly denied admission of an email, which he claimed would impeach the testimony of an agency investigator who said that she did not recall the appellant making any disclosures to her, because he did not provide the email to the agency during discovery. RPFR File, Tab 2 at 13-14. In relevant part, the appellant acknowledges that the remand initial decision "state[d] that the document is part of the record," but he asserts that it was "extremely difficult" to cross-examine the investigator without the email. *Id.*

This assertion does not warrant a different outcome. In the remand initial decision, the administrative judge acknowledged the investigator's testimony, but she noted that the record contained an email exchange in which the appellant provided the investigator information about the beach house rental, which was the subject of disclosure (4). RID at 7; W-2 AF, Tab 7 at 7; B-1 AF, Tab 54-1

(testimony of the investigator). The administrative judge found that it was more likely than not that the appellant disclosed the allegations about the beach house to the investigator during or shortly after IR's 2009 investigation of the GC. RID at 7. Additionally, in evaluating disclosure (5) (relating to the flower fund), the administrative judge gave the investigator's testimony little weight because she failed to recall her email correspondence with the appellant concerning the beach house disclosure, and she also concluded that the appellant disclosed the flower fund issue to the investigator. RID at 8; B-1 AF, Tab 54-1 (testimony of the investigator). Therefore, even if the administrative judge erred in not allowing the appellant to question the investigator about this email, it is an adjudicatory error that is not prejudicial to the appellant's substantive rights and provides no basis for reversal of the remand initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Finally, the appellant asserts that the administrative judge was biased against him. *See, e.g.*, RPFR File, Tab 2 at 15 (stating that the administrative judge "admirably and zealously advance[ed]" the agency's position). 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 not presented such evidence in this regard.¹¹

¹¹ In the conclusion section of his petition for review, the appellant seems to challenge the administrative judge's finding that he did not prove that the GC knew or suspected that the appellant made disclosures (1), (4)-(5). RID at 11-13. For example, he asserts that it is "clear" that the GC "could ascertain who made [the disclosure about his travel violations]." RPFR File, Tab 2 at 15. He also asserts that, due to "the presence of his

NOTICE OF APPEAL RIGHTS¹²

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).

best friend [] at the bar,” the GC “would be able to figure out the identity of the whistleblower.” *Id.* The remand initial decision reflects the administrative judge’s thoughtful analysis of this issue, and we are not persuaded that the administrative judge erred in this regard. Accordingly, because we agree with the administrative judge that the appellant did not prove his prima facie case, we do not proceed to the clear and convincing analysis. *Clarke v. Department of Veterans Affairs*, 121 M.S.P.R. 154, ¶ 19 n.10 (2014), *aff’d*, 623 F. App’x 1016 (Fed. Cir. 2015).

¹² Since the issuance of the remand 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.¹³ 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).

If you submit a petition for judicial 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

¹³ 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