UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD W. CASSIDY,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DA-1221-11-0365-B-1

DATE: August 30, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Donald W. Cassidy, The Woodlands, Texas, pro se.

Jeff Rosenblum, Esquire, and Matthew Edward Bradley, 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 remand initial decision issued by the administrative judge, which denied his request for corrective action in this individual right of action (IRA)

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

appeal. 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.[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. 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).

BACKGROUND

In an initial decision dated July 19, 2011, the administrative judge dismissed the appellant's IRA appeal for lack of jurisdiction on the ground that the appellant had failed to nonfrivolously allege that he had made a protected disclosure. MSPB Docket No. DA-1221-11-0365-W-1, Initial Appeal File, Tab 22. In an Opinion and Order dated April 25, 2012, the Board reversed the administrative judge's initial decision, finding that the appellant had nonfrivolously alleged the Board's jurisdiction, and remanded the appeal for further adjudication. MSPB Docket No. DA-1221-11-0365-B-1, Remand File,

[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.

Tab 1; *Cassidy v. Department of Justice*, 118 M.S.P.R. 74 (2012). The Board found that the appellant had nonfrivolously alleged that he had made protected disclosures and that, based on the knowledge/timing test, his protected disclosures were a contributing factor in his nonselections for an Immigration Judge position in San Antonio, Texas, and an Immigration Judge position in Houston, Texas. *Cassidy*, 118 M.S.P.R. 74, ¶¶ 9-15. After holding the requested hearing, the administrative judge issued a remand initial decision denying the appellant's request for corrective action. Remand File, Tab 15, Remand Initial Decision at 2. The administrative judge found that the appellant had proven by preponderant evidence that he made protected disclosures and that the disclosures were a contributing factor in the nonselections based on the knowledge/timing test, *id.* at 7-8, but that the agency had proven by clear and convincing evidence that it would not have selected the appellant for either of the two positions regardless of his protected disclosures, *id.* at 16 (citing *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012)).

The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. On review, the appellant argues that the administrative judge misconstrued the record and made factual findings unsupported by the evidence. *Id.* at 9-16. The agency has filed a substantive response in opposition to the appellant's petition for review.[3] PFR File, Tab 3.

DISCUSSION OF ARGUMENTS ON REVIEW

To obtain corrective action, the appellant must meet his initial burden of establishing by preponderant evidence that his whistleblowing activity was a contributing factor in the personnel actions in dispute. 5 U.S.C. § 1221(e)(1);

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[3] The agency attaches alleged new evidence in the form of a copy of the hearing transcript. PFR File, Tab 3 at 19-291. Although a hearing transcript does not meet the criteria of "new evidence" under 5 C.F.R. § 1201.115, it may nevertheless be considered by the Board as part of the record in this appeal. *See Bain v. Department of Justice*, 15 M.S.P.R. 515, 517 n.1 (1983).

McCarthy v. International Boundary & Water Commission, 116 M.S.P.R. 594, ¶ 39 (2011), *aff'd*, 497 F. App'x 4 (Fed. Cir. 2012). The administrative judge found, based on the knowledge/timing test, that the appellant met such burden here, and we discern no reason to disturb this finding. Remand Initial Decision at 7-8; *see Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 21 (2010) (once an appellant has satisfied the knowledge/timing test, he has demonstrated that a protected disclosure was a contributing factor in a personnel action, even if a reasonable fact finder could not conclude that the whistleblowing was a contributing factor in the personnel action after a complete analysis of all of the evidence). The burden of proof then shifts to the agency to establish by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity. *See McCarthy*, 116 M.S.P.R. 594, ¶ 42. We agree with the administrative judge's determination that the agency demonstrated by clear and convincing evidence that it would not have selected the appellant for either position absent his protected disclosures. Remand Initial Decision at 9-16.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The first two of these factors appear to be the most pertinent in this appeal.[4]

[4] The third factor in the *Carr* formulation has obvious relevance where the action in question is a disciplinary action, i.e., the appellant claims he was punished or punished more harshly than non-whistleblowers who were not punished or punished more leniently. This factor has much less relevance where the contested action is a nonselection, as it would be highly unlikely that the selectee would also have made protected disclosures.

Here, upon consideration of these factors, the administrative judge found that: (1) the agency had legitimate reasons for not selecting the appellant for either position, mainly that two Immigration Judges had raised concerns regarding the appellant's temperament and that his interview for the Houston position was not overly impressive; (2) other than the circumstantial evidence with respect to the knowledge/timing test, the evidence of record failed to show that any of the individuals involved in the selection process had any motive to retaliate against the appellant for making his protected disclosures; and (3) the agency also failed to select a similarly situated non-whistleblower for the Houston position. Remand Initial Decision at 9-16.

On review, the appellant argues that the administrative judge erred in considering the comments made by the two Immigration Judges regarding his temperament, which were made during the reference check and vouchering process for the San Antonio position, because the comments were tainted by retaliatory motive.[5] PFR File, Tab 1 at 9. Specifically, the appellant argues that Judge Larry Dean, the person to whom he made the protected disclosures and the person charged with vouchering the appellant for the position, retaliated against him for his whistleblowing activities by influencing the selecting officials "with his inflammatory and unsubstantiated vouchering." *Id.* He also argues that Judge Howard Rose, whom Judge Dean contacted during the vouchering process and who was the subject of his protected disclosures, made the most damaging remarks as a form of retaliation. *Id.* For the following reasons, we disagree.

First, the administrative judge found that Judge Dean frequently received complaints similar to those made by the appellant and that his job responsibilities included investigating those complaints. Remand Initial Decision at 16. The administrative judge noted that the appellant's witness, Brett Anthony Bradford,

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[5] The term "vouchering" is synonymous with vetting and was performed on all individuals who interviewed and were under consideration for forwarding to the selection panel for the San Antonio position. Remand File, Tab 10 at 70.

testified that he had made complaints to Judge Dean similar to those lodged by the appellant and that he did not believe Judge Dean retaliated against him in any way. *Id.* at 14. The administrative judge additionally found that Judge Dean did not inform Judge Rose about the appellant's disclosures and that there was no evidence in the record that showed that Judge Rose was aware that the appellant had made the protected disclosures to Judge Dean. *Id.* at 14-15. The administrative judge also found that there was no evidence in the record that showed that Judge Law, who also contributed negative feedback regarding the appellant's temperament during the vouchering process, was aware of the appellant's disclosures to Judge Dean. *Id.* at 15. Moreover, she found that Judge Dean followed established vouchering procedures, including checking additional references not listed by the applicant as references, when he conducted the voucher for the appellant and that Judge Dean only contacted Judge Rose about the appellant during the vouchering process because another judge recommended that he do so. *Id.* at 14-15. The administrative judge also found that Judge Dean had checked additional references when vouchering Anibal Martinez, the selectee for the position, just as he had done for the appellant, and that there were no complaints revealed regarding the temperament of Mr. Martinez. *Id.* at 14. The administrative judge further found that Judge Dean did not have any conversations with the selecting officials regarding the candidates for the San Antonio position. *Id.* at 14. Based on these findings of fact, the administrative judge found that the selecting officials had valid reasons for the appellant's non-selection, which were revealed through a properly-executed vouchering process, and that the evidence of record failed to show that either Judge Dean or Judge Rose had any motive to retaliate against the appellant. *Id.* at 14-16.

Although the appellant disagrees with many of the administrative judge's findings of fact, he sets forth no basis to disturb these findings. For instance, the appellant challenges the administrative judge's finding that Judge Rose was

unaware of the appellant's disclosures about him, claiming that there is "little doubt" that Judge Rose knew that the appellant made the complaints about him. PFR File, Tab 1 at 13. The appellant, however, has set forth no evidence to support his assertion or otherwise substantively challenge the administrative judge's credibility findings in that regard. Remand Initial Decision at 14-16; *see Diggs v. Department of Housing & Urban Development*, 114 M.S.P.R. 464, ¶ 8 (2010) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so).[6] The appellant also asserts that Judge Dean misrepresented the facts during his testimony when he claimed that he performed the same vouchering process for all the candidates and when he claimed that he did not inform Judge Rose of the appellant's disclosures. PFR File, Tab 1 at 10. The appellant also faults the administrative judge for "giving no weight to Dean's questionable character," *id.*, and claims that the administrative judge's conclusions that Judge Dean and Judge Rose lacked a retaliatory motive against the appellant were "inconsistent with common sense," *id.* at 13. The appellant's assertions, however, are mere disagreement with the administrative judge's explained findings of fact and credibility determinations, which are supported by the record and entitled to deference. Remand Initial Decision at 9-16; *see Diggs*, 114 M.S.P.R. 464, ¶ 8.

We note that the administrative judge found that neither Judge Rose nor Judge Law (the two individuals who contributed negative comments regarding the appellant's temperament during the vouchering process) was aware of the

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[6] Although the administrative judge did not make any explicit demeanor-based credibility determinations in the remand initial decision, she heard live testimony, and her credibility determinations must be deemed to be at least implicitly based upon witness demeanor. *See Little v. Department of Transportation*, 112 M.S.P.R. 224, ¶ 4 (2009).

appellant's protected disclosures when they provided the comments and, although the appellant claims their comments were "unsubstantiated" because they were based on office gossip, he has not alleged that Judge Dean in any way altered their comments or persuaded them to provide negative feedback. PFR File, Tab 1 at 9, 11. In addition, the administrative judge credited the testimony of Judge Dean. Remand Initial Decision at 14-16. Significantly, Judge Dean testified that it was part of his job duties to receive and investigate complaints regarding Immigration Judges, such as the appellant's. Hearing Transcript at 149-52. Further, pursuant to agency guidance on vouchering, Judge Dean testified that he contacted the individuals that the appellant listed as his references as well as other individuals who may have had personal knowledge of the appellant's qualifications, interviewed Judge Rose at the suggestion of another Immigration Judge, made notes of all of the conversations that took place during the vouchering process, and forwarded them to the Office of the Chief Immigration Judge as instructed. Hearing Transcript at 159-65, 169; Remand File, Tab 10 at 70. Judge Dean also testified that the comments he recorded during the vouchering process were an accurate reflection of the conversations that took place and that he did not discuss the vouchering of the appellant after submitting his notes on the subject. Hearing Transcript at 159-65, 169. Under these circumstances, we find that the agency has shown that it would not have selected the appellant for the San Antonio position absent his protected disclosures based on comments made during a properly-executed vouchering process, and that any retaliatory motive on the part of Judge Dean was weak. Accordingly, we agree with the administrative judge that the agency met its burden with respect to the San Antonio position by clear and convincing evidence. Remand Initial Decision at 9-16.

With respect to the Houston position, the appellant claims that the administrative judge should have discounted the testimony of Judge Thomas Snow, a member of the selection panel, regarding the appellant's poor

interview for the position because he was negatively influenced by the voucher for the San Antonio position. PFR File, Tab 1 at 9-11. He also claims that the selection panel was dismissive and uninterested in the interview as a result of the tainted voucher. *Id.* at 7-8. As set forth below, these assertions once again constitute mere disagreement with the administrative judge's explained findings of fact and credibility determinations, which are supported by the record and entitled to deference. *See Diggs*, 114 M.S.P.R. 464, ¶ 8.

First, the administrative judge noted that Judge Brian O'Leary, who ranked the candidates for the position with Judge Snow, testified that, despite his and Judge Snow's concerns regarding the appellant's temperament that were revealed during the vouchering process for the San Antonio position, they nevertheless ranked the appellant as the number one candidate for the Houston position because he was the best qualified candidate when compared to the other candidates. Remand Initial Decision at 13; Hearing Transcript at 224. The administrative judge also noted that Judge Snow testified that, because the panel was not overly impressed with the appellant as a result of his interview, the panel decided to also interview the number two and three candidates for the position. Remand Initial Decision at 13; Hearing Transcript at 249-51. The administrative judge further noted that Judge Snow testified that the panel selected the candidate who had originally been ranked number three for the position. Remand Initial Decision at 13; Hearing Transcript at 253. Consequently, the administrative judge found that, in addition to not selecting the appellant, the agency also did not select the number two candidate for the position, as a result of his interview, and that the record failed to show that the number two candidate ever engaged in whistleblowing. Remand Initial Decision at 15. Further, the administrative judge found that, when Judge Dean interviewed the appellant during the first round of interviews for the Houston position, his written comments showed that he gave the appellant a good recommendation and that he made no mention regarding any negative feedback he had received during the

vouchering process for the San Antonio position. *Id.* at 14. The administrative judge additionally found that the evidence failed to show that either Judge Snow or Judge O'Leary were aware of any disclosures or had any motive to retaliate against the appellant. *Id.* at 15-16. Based on these findings, the administrative judge concluded that the agency showed by clear and convincing evidence that it would not have selected the appellant for the Houston position absent his protected disclosures. *Id.*

We agree with the administrative judge and find that the agency has shown that it would not have selected the appellant for the Houston position absent his protected disclosures based upon the results of his interview with the selection panel. We find unpersuasive the appellant's assertions that Judge Snow was dismissive during the interview before the selection panel due to the comments made during the San Antonio vouchering process considering Judge Snow and Judge O'Leary agreed to rank the appellant as the number one candidate for the position despite their knowledge of other Immigration Judges' concerns regarding his temperament. Hearing Transcript at 224. In addition, there is no evidence in the record that any member of the selection panel knew of the appellant's protected disclosures, and Judge Dean, who interviewed the appellant for the Houston position in the first round, gave him a good recommendation and made no mention of the negative feedback he had received regarding the appellant's temperament. Remand File, Tab 10 at 130. We thus find that any motive on the part of the agency to retaliate against the appellant was weak. Further, we agree with the administrative judge that the agency's failure to select the number two candidate, who was not alleged to be a whistleblower but who was otherwise similarly situated to the appellant because he, too, was originally ranked higher than the selectee prior to the interview, undermines the appellant's claim that his

monselection was in retaliation for whistleblowing.[7] Remand Initial Decision at 15-16. Accordingly, we agree with the administrative judge that the agency met its burden with respect to the Houston position by clear and convincing evidence. *Id.* at 9-16.

Our reviewing court has provided guidance that a proper analysis of the clear and convincing evidence issue requires that all the evidence be weighed together; both the evidence that supports the agency's case and the evidence that detracts from it. *Whitmore*, 680 F.3d at 1368. Here, the record reflects that the administrative judge considered the relevant evidence as a whole under the *Whitmore* standard, made findings of fact and credibility determinations supported by the record, and concluded that the agency proved by clear and convincing evidence that it would not have selected the appellant for either Immigration Judge position absent his protected disclosures. Remand Initial Decision at 9-16. The appellant has set forth no basis on review to disturb these findings.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

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[7] The appellant argues on review that the administrative judge's class of similarly situated persons was "too narrow and illogical." PFR File, Tab 1 at 14. The appellant claims that the proper class of comparator individuals would be the national pool of Immigrations and Customs Enforcement managers, like the appellant, who applied for Immigration Judge positions. *Id.* We find this argument unpersuasive. In determining whether individuals are proper comparator individuals for purposes of *Carr* factor three, the Board requires the potential comparator individuals to be "similarly situated" to the whistleblower. *See Whitmore*, 680 F.3d at 1373. Here, the potential pool of unidentified, comparator individuals proposed by the appellant, to the extent they exist, would not be considered similarly situated under *Carr* because they would not have applied for the same vacancies as the appellant and thus would have competed against different individuals under different conditions for a different position.

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 review of this final decision by the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.