

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TYRONE COTTRELL,
Appellant,

DOCKET NUMBER
CH-315H-11-0227-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: February 22, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Adam Jerome Conti, Esquire, Atlanta, Georgia, for the appellant.

Anne E. Burnham, Fort Knox, Kentucky, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

In his petition for review, the appellant challenges the administrative judge's finding that he knowingly supplied incorrect information with the specific intent to mislead or deceive, asserting that the record evidence supports his contention that "he considered the citation to be so minor in nature that it slipped his mind when he completed the form." Petition for Review File (PFR File), Tab 3 at 10. He also alleges that the administrative judge subjectively afforded the charged conduct a far greater significance than the appellant gave it because a firearm was involved. *Id.* These arguments lack merit.

Here, the administrative judge found that the agency showed the appellant acted with reckless disregard for the truth and determined, based upon the totality of the record evidence, that the agency showed the appellant intentionally provided false information on the Declaration for Federal Employment. Initial Appeal File, Tab 21 (Initial Decision). We agree with the administrative judge's explained and reasoned findings, and find the appellant's arguments unpersuasive. In particular, we find that the appellant simply did not provide a plausible explanation for responding that he was not currently under charges for any violation of law on the Declaration for Federal Employment. We further find that the administrative judge did not substitute her subjective assessment of the gravity of the charged conduct over the record evidence because, as the administrative judge correctly noted, the Declaration for Federal Employment did not specify that only serious offenses or felonies needed to be reported. Therefore, the administrative judge properly sustained the charge. *See Crump v. Department of Veterans Affairs*, [114 M.S.P.R. 224](#), ¶ 6 (2010) (the Board may consider plausible explanations for an appellant's provision of incorrect information in determining whether the misrepresentation was intentional, and

intent may be inferred when an appellant makes a misrepresentation with a reckless disregard for the truth).

The appellant also alleges on review that the agency violated his due process rights because it removed him for conduct other than that which was set forth in the proposal letter. PFR File, Tab 3. Specifically, he argues that he was not removed because of his false statement on the Declaration for Federal Employment as the agency purports, but rather because he was transferred in the midst of serving a 75-workday suspension, which he claims is “far more significant than a minor omission on an optional form.” *Id.* at 14.

We agree, however, with the administrative judge’s finding in this regard. There is no indication in the record that the agency relied on any information regarding the appellant’s suspension in proposing or sustaining his removal. Moreover, we disagree with the appellant’s characterization of the charged conduct as minor, and note that the Board has consistently held that the penalty of removal for falsification of government employment documents is within the bounds of reasonableness because such falsification raises serious doubts regarding the appellant’s honesty and fitness for employment. *See, e.g., Christopher v. Department of the Army, 107 M.S.P.R. 580, ¶ 21 (2008); Wayne v. Department of the Navy, 55 M.S.P.R. 322, 330 (1992).*

The appellant further alleges that the administrative judge used the incorrect evidentiary standard in rejecting the appellant’s affirmative defense of retaliation by requiring that he show a “convincing mosaic” of retaliation against him. PFR File, Tab 3. The appellant then notes that the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit have never approved or even considered the “convincing mosaic” analysis and that the Board, therefore, cannot apply it in this appeal because it is bound by Federal Circuit law. *Id.* The appellant also claims that the “convincing mosaic” analysis is inconsistent with *Warren v. Department of the Army, 804 F.2d 654, 658 (Fed. Cir. 1986). Id.*

First, the Federal Circuit does not have jurisdiction over mixed cases under Title VII such as the appellant's; rather, jurisdiction lies with the appropriate United States district court. *See Diggs v. Department of Housing & Urban Development*, No. 2010-3193, 2011 WL 5153618, at *4 (Fed. Cir. Nov. 1, 2011). Accordingly, the administrative judge relied on appropriate precedent and applied the correct evidentiary standard in analyzing the appellant's retaliation claim when she cited decisions of both the Board and the U.S. Court of Appeals for the Seventh Circuit. Second, the Federal Circuit's decision in *Warren* did not construe a matter of discrimination law; it set forth the applicable mode of analysis (prior to the Whistleblower Protection Act of 1989) for evaluating whether a personnel action was taken in retaliation for protected whistleblowing. *Warren*, [804 F.2d 654](#). Nevertheless, the Board relies on *Warren* to analyze claims of retaliation for protected EEO activity and the administrative judge properly applied *Warren* in this appeal. *See, e.g., Kohler v. Department of the Navy*, [108 M.S.P.R. 510](#), ¶ 11 (2008); *FitzGerald v. Department of Homeland Security*, [107 M.S.P.R. 666](#), ¶ 17 (2008).

Accordingly, after fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. 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. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. 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.