

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

BARRY C. PRETLOW,
Appellant,

DOCKET NUMBER
DA-0752-10-0516-B-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: April 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL^{*}

Barry C. Pretlow, Midwest City, Oklahoma, pro se.

Michael J. Taber, Esquire, Tinker AFB, Oklahoma, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

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. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative

^{*} A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant reasserts that the administrative judge was biased against him in the initial and remand proceedings in this removal appeal and should have granted his recusal motion. Petition for Review (PFR) File, Tab 3 at 4-5; Tab 4 at 8-9. 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. *McCarthy v. International Boundary and Water Commission, U.S. and Mexico*, [116 M.S.P.R. 594](#), ¶ 28 (2011). An administrative judge's conduct during the course of a Board proceeding will warrant 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)); *McCarthy*, [116 M.S.P.R. 594](#), ¶ 28.

We find that the appellant's assertions of bias, based on the administrative judge's findings and conclusions in the initial decision and remand initial decision, are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See, e.g., Caracciolo v. Department of the Treasury*, [105 M.S.P.R. 663](#), ¶ 14 (2007) (the fact that an administrative judge has made rulings in an appellant's previous appeal with which the appellant does not agree does not form a sufficient basis to require an administrative judge to recuse himself). Further, an administrative judge's rulings alone, even if erroneous, are insufficient to establish bias or incompetence mandating disqualification. *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶ 11 (2004).

The appellant has raised numerous assertions regarding the agency's charges, the agency's evidence in support of its charges, the administrative

judge's rulings in the initial decision, and the Board's rulings on review of the initial decision. PFR File, Tab 3 at 4-9; Tab 4 at 5-9, 12-20. We find that these assertions are not relevant to the administrative judge's rulings regarding the appellant's affirmative defenses addressed in the remand initial decision that is presently before the Board on review.

The appellant appears to assert that he presented evidence that established the knowledge and timing test method of proving the third criterion of a claim of retaliation for having engaged in prior protected activity in violation of [5 U.S.C. § 2302\(b\)\(9\)](#), which is, that the adverse action could have been retaliation under the circumstances. PFR File, Tab 3 at 7; *see Pyun v. Social Security Administration*, [111 M.S.P.R. 249](#), ¶ 11 (2009); *see also Warren v. Department of the Army*, [804 F.2d 654](#), 656-58 (Fed. Cir. 1986). However, this assertion fails to show any basis for relief because the initial decision reflects that the administrative judge found that the appellant had satisfied the first three criteria for proving the defense of retaliation for prior protected activity. Remand Appeal File (RAF), Tab 23, Remand Initial Decision (RID) at 5. The administrative judge went on to find, however, that the appellant failed to prove that affirmative defense because he failed to prove the fourth criterion, that there was a genuine nexus between his prior protected activity and the adverse action. RID at 5-6; *see Pyun*, [111 M.S.P.R. 249](#), ¶ 11; *see also Warren*, 804 F.2d at 658. As the administrative judge correctly found, in order to prove a genuine nexus between the agency's alleged retaliatory motive and the adverse action, the appellant must prove that the adverse action was taken because of the protected activity. RID at 2-3, 5-6. *See Keller v. Department of the Army*, [113 M.S.P.R. 557](#), ¶ 12 (2010); *Pyun*, [111 M.S.P.R. 249](#), ¶ 12.

If the appellant is actually attempting to claim that the administrative judge erred in finding that he failed to prove the genuine nexus criterion, we see no error in the administrative judge's reasoned analysis finding that the appellant failed to present evidence establishing a motive on the part of the proposing or

deciding official to retaliate against him as a result of his prior activities with the Office of Inspector General (OIG) or the Office of Special Counsel (OSC). RID at 6. Thus, we agree with the administrative judge that the appellant failed to present evidence proving that the adverse action was taken because of his prior protected OIG or OSC activity, as required to prove a violation of [5 U.S.C. § 2302\(b\)\(9\)\(C\)](#). RID at 5-6.

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 remand 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 20013

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.