UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HELEN F. WHELAN, Appellant,	DOCKET NUMBER SF-0752-12-0628-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: April 1, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

James L. Wright, Sacramento, California, for the appellant.

Deborah C. Winslow and Rhonda Lunsford, San Francisco, California, 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 of the initial decision, which sustained the charges of negligent performance of duties and lack of candor, found that the appellant did not prove any of her affirmative defenses, and

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

affirmed the demotion penalty. 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. *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, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant was demoted from the position of EAS-22 Manager, Customer Services, to the position of EAS-17 Supervisor, Customer Services, based on charges of negligent performance of duties and lack of candor. *See* Initial Appeal File (IAF), Tab 4, Subtabs 4A, 4C. The appellant asserted several affirmative defenses, including sex and age discrimination, retaliation for prior equal employment opportunity (EEO) activity, retaliation for whistleblowing activity, harmful procedural error, denial of due process, and prohibited personnel practices. *See* IAF, Tab 33. A hearing was held. *See* Hearing Transcripts (HTs) I-II. The appellant did not testify. *See* HT II. The administrative judge issued an initial decision that (1) sustained all of the specifications and the charge of negligent performance of duties; (2) sustained all but three of the specifications

related to the lack of candor charge[2] and sustained the lack of candor charge; (3) found that the appellant did not prove any of her affirmative defenses; and (4) upheld the demotion penalty. *See* IAF, Tab 51, Initial Decision (ID).

The appellant filed a petition for review, the agency filed a response, and the appellant filed a reply. *See* Petition for Review (PFR) File, Tabs 3-5. In her petition for review, the appellant challenges nearly every finding made by the administrative judge in the initial decision, submits "new" evidence and alleges administrative judge bias. *See* PFR File, Tab 3 & Attachments. The appellant's arguments on review largely mirror those that she made below. *Compare* PFR File, Tab 3, *with* IAF, Tab 48.

The administrative judge properly sustained the charges of negligent performance of duties and lack of candor, found that the appellant did not prove any of her affirmative defenses, and affirmed the demotion penalty.

The administrative judge thoroughly analyzed the testimonial and documentary evidence and supported his findings with numerous citations to the record. He also made several credibility determinations to support his conclusions that the agency proved both charges and that the appellant did not prove her affirmative defenses. *See, e.g.*, ID at 18-19 & n.19, 27, 47. 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. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The appellant has not presented such sufficiently sound reasons. Based on our review of the record and the administrative judge's thorough analysis of the pertinent issues, we affirm the initial decision. *See, e.g.*, *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06

[2] Neither party challenges the administrative judge's conclusions with respect to these specifications, and we discern no error with the administrative judge's decisions in this regard.

(1997) (finding no reason to disturb the administrative judge's findings when the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). We briefly address some of the appellant's contentions on review.

With respect to the October 31, 2011 specification in the negligent performance of duties charge, the appellant contends that she left early for an appointment that day; thus, the supervisor in charge was responsible for the tub of delayed First Class Hot Case mail that was found, ostensibly hidden near a Zone 15 supervisor desk, and he was also responsible for reporting the delayed mail. PFR File, Tab 3 at 8-9; *see* IAF, Tab 48 at 12-13. The administrative judge addressed this argument in the initial decision. *See* ID at 14-16. We discern no error with the administrative judge's conclusion that: (1) the mail was under the appellant's managerial control on this date; (2) the mail was not delivered or reported; (3) the appellant was responsible for establishing procedures for timely delivery of mail, for reporting any such delays and for preventing mail from being hidden; and (4) the appellant failed to exercise the degree of care commensurate with the duties of her position as Manager. ID at 15-16; *see, e.g.*, IAF, Tab 4, Subtabs 4HH (the position description for the Manager Customer Services position states, among other things, that the incumbent "[m]anages the delivery and collection services, dispatch, mail distribution," and ensures that "administrative functions are performed and that reports are prepared and submitted as required"). We also agree with the administrative judge that the agency proved this specification.

Even if we found that the administrative judge erred in sustaining this specification, there is ample evidence to support his conclusion that the agency proved the charge of negligent performance of duties based on the remaining specifications. ID at 4-20; *see Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

With respect to the lack of candor charge, the agency alleged as one of its specifications in the proposal notice that the appellant, during the December 1, 2011 investigative interview, claimed to have no recollection of the incident involving mail found on October 14, 2011. *See* IAF, Tab 4, Subtabs 4C (proposal notice), 4F (notes from investigative interview). The agency further alleged that the appellant's response was less than forthright as she was interviewed about the delayed mail by the auditor on this date. IAF, Tab 4, Subtab 4C. In the initial decision, the administrative judge noted that the auditor testified that she spoke with the appellant on October 14, 2011, and he found it "less than credible" that the appellant would not recall having been interviewed by an agency auditor on this date regarding delayed mail found at her facility. ID at 24-25 (citing HT II at 385). Moreover, he found the appellant's "argumentative" behavior during the investigative interview indicated an element of deception by attempting to avoid responding fully to what was being asked of her. ID at 25.

On review, the appellant asserts that the administrative judge erred when he found her not credible in this regard, explaining that the investigative interview was conducted 6 weeks after the incident in question, and arguing that the importance of a timely investigation is that "an individual's memory is fresh and they have best recall of an incident." PFR File, Tab 3 at 17-19. She contends that her responses do not evince a lack of candor, but rather, a lack of recollection. *Id.* at 18.

We discern no error with the administrative judge's analysis in this regard. Importantly, the appellant did not dispute the administrative judge's construction of the charge, namely that the agency must prove that the appellant provided incorrect or incomplete information, or failed to disclose something which, under the circumstances, should have been disclosed, and that the appellant's actions involved an element of deception. ID at 20-21 (citing *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶¶ 10-11 (2012); *Social Security Administration v. Steverson*, 111 M.S.P.R. 649, ¶ 12 (2009)); *see* IAF, Tab 33 at 7 (the appellant's

agreement with the construction of the charge). There was no evidence that the appellant and the auditor had such regular or routine conversations about delayed mail that the appellant might reasonably fail to remember the October 14, 2011 conversation. To the contrary, based on the context of the conversation, i.e., an agency auditor discussing with the manager of the facility specific problems that she found in that facility, we share the administrative judge's skepticism of the appellant's lack of recollection regarding the October 14, 2011 conversation. We agree with his decision not to credit the appellant's explanation regarding this specification and to find that her actions involved an element of deception. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (noting that a witness may not be credible based on the inherent improbability of the witness's version of events). We therefore affirm the initial decision in this regard.

Even though the administrative judge did not sustain all of the specifications related to this charge, we discern no error with his decision to sustain the lack of candor charge based on the sustained specifications. *See Burroughs,* 918 F.2d at 172.

We have also considered the appellant's arguments regarding her affirmative defenses of sex discrimination, reprisal for EEO activity, reprisal for whistleblowing, due process violations and harmful error, but none warrant a different outcome. For instance, the appellant argued below and on review that the agency violated her due process rights because the deciding official was not "impartial," as he was "involved in the investigation, gathering, reviewing the data, assisting [the proposing official] with developing the file, [and] formulating the corrective action." PFR File, Tab 3 at 9; *see* IAF, Tab 48 at 62-63 (claiming that the proposing and deciding officials "conspired together"). The administrative judge rejected this assertion in the initial decision. *See* ID at 29-30.

The Board recently reiterated a long-standing proposition that it would be a violation of due process "to allow an individual's basic rights to be determined

either by a biased decisionmaker or by a decisionmaker in a situation structured in a manner such that [the] 'risk of unfairness is [i]ntolerably high.'" *Martinez v. Department of Veterans Affairs*, 119 M.S.P.R. 37, ¶ 6 (2012) (citing *Svejda v. Department of the Interior*, 7 M.S.P.R. 108, 111 (1981), which quoted *Withrow v. Larkin*, 421 U.S. 35, 58 (1975)). We find no such intolerably high risk of unfairness here. Indeed, the fact that the deciding official was the Postmaster for the region, HT I at 309, who was aware of recent instances of delayed mail issues in the appellant's facility and who had made decisions in the appellant's prior disciplinary matters, does not automatically disqualify him from being the deciding official in this matter. *See Baldwin v. U.S. Postal Service*, 26 M.S.P.R. 383, 387 (1985) (the fact that [the deciding official] was somewhat familiar with the facts concerning the appellant's case and had concurred with proposing the removal action does not proscribe his appointment as the deciding official); *Svejda*, 7 M.S.P.R. at 111-12 (finding that even when a prior decision is reversed on procedural grounds, the deciding official in the earlier matter is not barred "simply for that reason" from performing the same function when the removal proceedings are reinstituted). Because we do not find any evidence to show that the deciding official acted improperly in his decision in this matter, the administrative judge correctly determined that the appellant did not prove her claim of a due process violation in this regard.

Even if we alternatively considered the appellant's allegation of a due process violation as a claim of harmful procedural error, *see Ward v. U.S. Postal Service*, 634 F.3d 1274, 1281 (Fed. Cir. 2011), the appellant fares no better. Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). The appellant has not met her

burden to show that the agency committed a procedural error, or that if it did, that it would have reached a different conclusion in this matter.

The appellant also argues that the deciding official improperly considered prior discipline regarding a proposed letter of warning (LOW) in lieu of a time-off suspension for which she never received a decision letter, and she contends that the deciding official lied when he testified that the LOW decision letter had been issued. PFR File, Tab 3 at 3, 5-6; IAF, Tab 48 at 37, 61-63; *see* IAF, Tab 4, Subtabs 4A (decision letter in the instant matter, which referenced a June 17, 2011 decision letter regarding the LOW), 4CC (decision letter regarding the LOW). We note that there was a discrepancy in the record, as the deciding official stated in his June 30, 2011 EEO affidavit that, as of June 29, 2011, no decision on the proposed LOW had been issued, but the LOW decision letter itself bears the issuance date of June 17, 2011. *Compare* IAF, Tab 42 (affidavit), *with* IAF, Tab 4, Subtab 4CC; *see* IAF, Tab 41 (the deciding official's deposition transcript from the Board proceeding); IAF, Tab 29, Subtab 4LL (an excerpt of the deciding official's testimony in the EEO matter). The administrative judge credited the deciding official's explanation that, at the time he signed the affidavit, the letter was being reviewed by the labor relations and law departments, the letter was subsequently issued but the date on the letter was not changed to reflect its actual issuance date. ID at 46-47; *see* HT I at 332-334, 346-50 (the deciding official's testimony). In particular, the administrative judge found that the deciding official was "a convincing witness who testified in a forthright and consistent manner" and his explanation regarding the delayed issuance of the decision letter was "credible and logical." ID at 46-47. Here, too, the appellant has not persuaded us that the administrative judge's credibility determination was erroneous. *See Haebe*, 288 F.3d at 1301. Based on our review of the record, we discern no error with the administrative judge's conclusion in this regard, or with the deciding official's consideration of the

LOW in his penalty analysis. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981).

We have also considered the appellant's disparate treatment claim. We discern no error with the administrative judge's conclusion that the appellant did not prove disparate treatment for the purposes of establishing unlawful sex discrimination based on comparator evidence. *See* ID at 34-35; *see also Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 44 (2010) (explaining that to prove such a claim, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees, meaning they must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances). We have alternatively considered her claim of disparate treatment as it relates to the reasonableness of the penalty. *See Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010) (the appellant's allegation that the agency treated him disparately to another employee, without a claim of prohibited discrimination, is an allegation of disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty). In this context, we agree with the administrative judge that none of the identified comparators were alleged to have committed the same or similar misconduct on numerous occasions as the appellant nor have these comparators been subjected to prior discipline like the appellant. *See* ID at 47; *see Lewis*, 113 M.S.P.R. 657, ¶ 15 (explaining that there must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly situated employees differently). Thus, her disparate treatment claim fails in both contexts.

The appellant's "new" evidence does not warrant reversal of the initial decision.

The appellant provided "new" evidence that purportedly shows deteriorating operational conditions at the appellant's facility since her demotion;

the agency's failure to hold "prior and current male manager[s] accountable for their operations"; includes the Daily Spreadsheet Employee Everything Report for employee R.R.; and a January 25, 2013 "statement" by a retiring employee. *See* PFR File, Tab 3, Attachments. She asserts that this evidence "impeaches the Agency's evidence, arguments, and the [] initial decision." PFR File, Tab 3 at 30.

The Board may grant a petition for review when a petitioner presents new and material evidence that, despite the petitioner's due diligence, was not available when the record closed. *See* 5 C.F.R. § 1201.115(d). To constitute "new" evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). The Board will not grant a petition for review based on new and material evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). In addition, evidence offered merely to impeach a witness's credibility is not generally considered new and material. *See Bucci v. Department of Education*, 42 M.S.P.R. 47, 55 (1989). Here, the appellant has not shown that the information contained in her submissions on review were, despite her due diligence, previously unavailable when the record closed. Furthermore, the evidence is offered to impeach the credibility of the agency's witnesses, and the appellant has not shown that it is of sufficient weight to warrant a different outcome from the initial decision. Therefore, she has not provided new and material evidence that would justify granting her petition for review under section 1201.115(d).

There is no evidence of administrative judge bias.

The appellant also alleges that the administrative judge was biased. *See* PFR File, Tab 3 at 24. 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)). There is no such evidence in this record, and we do not find that the administrative judge was biased.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision. There are several options for further review set forth in the paragraphs below. You may choose only one of these options, and once you elect to pursue one of the avenues of review set forth below, you may be precluded from pursuing any other avenue of review.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request 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 your request 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, NE
Suite 5SW12G
Washington, D.C. 20507

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. 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices described in 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 by 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.

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.