

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

ROBERT WADE WHITMORE,  
Appellant,

DOCKET NUMBER  
DC-0752-09-0890-I-1

v.

DEPARTMENT OF LABOR,  
Agency.

DATE: December 15, 2010

**THIS FINAL ORDER IS NONPRECEDENTIAL**

Christine Erickson, Esquire, and Paula Dinerstein, Washington, D.C., for  
the appellant.

James V. Blair, Esquire, Jamila B. Minnicks, and Jennifer Dillard,  
Washington, D.C., 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 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).

On review, the appellant reiterates his argument that the agency failed to prove the charges, the removal penalty was not within the bounds of reasonableness, and the agency failed to prove by clear and convincing evidence that it would have taken the removal action absent his making disclosures protected under the Whistleblower Protection Act. However, we agree with the administrative judge's thorough analysis that correctly concluded that the agency proved its charges, selected a reasonable penalty, and established by clear and convincing evidence that it would have taken the same action absent the appellant's whistleblowing activity.

Further, we find that the appellant failed to show adjudicatory error by the administrative judge. The administrative judge did not abuse her discretion in denying some of the appellant's discovery requests. Particularly, the administrative judge allowed discovery of relevant information relating to the charges, the appellant's affirmative defenses, and whether the agency had met its clear and convincing evidence burden. *See McGrath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 7 (1999). Additionally, the administrative judge did not abuse her discretion in denying the appellant's request for a subpoena duces tecum for a saliva sample from his supervisor. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (witnesses have a separate privacy interest in preventing the government from obtaining the vast array of data that can be ascertained through an analysis of a DNA sample). Further, the administrative judge did not abuse her discretion in denying some of the parties' requested witnesses. *See Sanders v. Social Security Administration*, 114 M.S.P.R. 487, ¶ 10 (2010). Finally, we defer to the administrative judge's credibility determinations as they are based explicitly on the observation of the demeanor of witnesses testifying at a hearing and the appellant has not presented "sufficiently sound"

reasons for overturning those determinations. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

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 final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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

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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.