

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

JOHN PACIOUS,
Appellant,

DOCKET NUMBER
DC-0752-10-0745-I-1

v.

NATIONAL AERONAUTICS AND
SPACE ADMIN,
Agency.

DATE: June 27, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL*

Judith L. Wheat, Esquire, Washington, D.C., for the appellant.

Earl E. Baker, Esquire, Pasadena, California, for the agency.

Frank Mazurek, 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

* This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

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).

After carefully considering the appellant's arguments on review and the agency's response thereto, we conclude that the appellant has not identified any error in the reasoning on which the administrative judge based her credibility determinations and other material factual and evidentiary findings that were prejudicial to his substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Moreover, neither the record nor the initial decision supports the appellant's claim that the witnesses' public speaking abilities or the appellant's alleged disability influenced the administrative judge's credibility determinations. With regard to the appellant's argument that the agency did not provide him with the information he needed to defend his appeal, we find that the administrative judge properly informed the appellant and his attorney of the available discovery procedures in her acknowledgment order but the appellant did not fully utilize those procedures to obtain the additional information he desired. Initial Appeal File, Tab 2 at 3-4; Petition for Review File, Tabs 1, 4. Thus, he may not now claim harm by the agency's failure to assist voluntarily in his proceedings before the Board. *Kinsey v. U.S. Postal Service*, 12 M.S.P.R. 503, 505-06 (1982). Additionally, we find that the appellant has not shown that the administrative judge erred in finding that he failed to establish his affirmative defense of disability discrimination by preponderant evidence.

The appellant also asserts that the administrative judge erred in finding that the agency's failure to preserve the surveillance tape of the incident was not relevant and raises other arguments related to the surveillance tape. Petition for Review File, Tab 1 at 5. He appears to be reasserting part of the "spoliation" claim he made below by raising, in effect, a belated objection to the

administrative judge's denial of his motion for sanctions against the agency for negligently failing to preserve and produce the surveillance tape of the March 25, 2010 incident at the agency's headquarters. Initial Appeal File, Tab 11 at 4. The appellant has not shown based on the record that the administrative judge abused her discretion in denying his motion for sanctions. *See generally Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-51 (4th Cir. 2004) (the imposition of an adverse inference sanction for spoliation of evidence is discretionary). There appears to be no dispute that the agency no longer had surveillance tape of the incident by the time the appellant made his untimely discovery requests. Initial Appeal File, Tab 11 at 6; Petition for Review File, Tab 3 at 8 & n. 2, 9. We find no evidence that the agency was dishonest and acted in bad faith by deliberately destroying evidence to thwart his defense. *See Hildago v. Department of Justice*, 93 M.S.P.R. 645, ¶ 23 (2003) (denying a request for a negative inference in connection with an investigator who destroyed his notes of his interviews with the appellant and testified that it was his practice to destroy his interview notes upon completion of his investigatory reports). The administrative judge did not abuse her discretion under the facts of this case in declining to draw an adverse inference nor would an inference be sufficient to change the outcome here in view of the record as a whole.

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.