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

**2011 MSPB 97**

Docket No. SF-0432-10-0699-I-1
SF-1221-11-0039-W-1

**Janice R. Smets,**

**Appellant,**

**v.**

**Department of the Navy,**

**Agency.**

November 23, 2011

Brook L. Beesley, Alameda, California, for the appellant.

Katherine Howard, China Lake, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

## OPINION AND ORDER

¶1 The appellant has petitioned for review of initial decisions that affirmed the agency's removal action and denied the appellant's request for corrective action in an individual right of action (IRA) appeal. We JOIN these appeals under 5 C.F.R. § 1201.36(b), DENY the petitions for review and AFFIRM the initial decisions AS MODIFIED by this Opinion and Order, still AFFIRMING the removal action and DENYING the request for corrective action.

## BACKGROUND

¶2 After the agency proposed the appellant's removal from her GS-12 Contract Specialist position for unacceptable performance under 5 U.S.C. chapter 43, the appellant filed an IRA appeal asserting that the proposal was based on reprisal for whistleblowing. MSPB Docket No. SF-1221-11-0039-W-1 (IRA Appeal), Initial Appeal File (IAF), Tab 1 at 5, 16-24. After the agency removed the appellant based on the same charge, MSPB Docket No. SF-0432-10-0699-I-1 (Removal Appeal), IAF, Tab 7, Subtabs 4G, 4H, the appellant appealed the removal and asserted age and disability discrimination, harmful error, retaliation for equal employment opportunity (EEO) activity, and whistleblower reprisal. Removal Appeal, IAF, Tab 1 at 5-6, Tab 13 at 3-4, Tab 16 at 3, and Tab 29 at 2.

¶3 Based on the written record after the appellant withdrew her request for a hearing, the administrative judge denied the appellant's request for corrective action and affirmed the removal action. IRA Appeal, IAF, Tab 23; Removal Appeal, IAF, Tab 34. The administrative judge held that the Board had jurisdiction over the IRA appeal because the appellant exhausted her remedy with the Office of Special Counsel, was subjected to a personnel action, and reasonably believed that she was disclosing violations of law, rule, or regulation. IRA Appeal, IAF, Tab 23 at 5-7. Nevertheless, the administrative judge found that the appellant did not show that her disclosures were a contributing factor in the proposed removal because the disclosures were not made to the proposing official and there was no evidence that the proposing official was aware of the disclosures. *Id*. at 9-10. The administrative judge also found that the agency showed by clear and convincing evidence that it would have proposed the appellant's removal absent the protected disclosures because it presented strong evidence in support of its proposed removal and the appellant failed to establish any motive by the proposing official to retaliate against her. *Id*. at 10-22.

¶4 In the removal appeal, the administrative judge found that the Office of Personnel Management approved the agency's performance appraisal system, the

appellant's performance standards were valid and communicated to her by the agency, the agency provided her with a reasonable opportunity to demonstrate acceptable performance, and the appellant's performance in the Execution of Duties critical element was unacceptable. Removal Appeal, IAF, Tab 34 at 4-12. The administrative judge also found that the appellant did not prove harmful error, age or disability discrimination, retaliation for EEO activity, or reprisal for whistleblowing activity. *Id*. at 12-26.

¶5 Regarding the appellant's claim of disability discrimination, the administrative judge noted that "[a]s a sanction for the appellant's failure to participate in the agency's noted deposition, she was precluded from supplementing the record with any additional evidence with regards to the disability discrimination claim," and that "[d]espite this order, the appellant in her final submission included medical documentation from her treating physician." *Id*. at 17 n.2. On the merits of the disability discrimination claim, the administrative judge concluded that (1) the appellant did not show that she had a disabling medical condition or requested an accommodation, (2) the agency articulated a legitimate nondiscriminatory reason for its action, i.e., her unacceptable performance, (3) declarations from the relevant agency officials indicated that they were unaware of any disability and did not base their decisions on a disability, and (4) the appellant failed to produce any evidence showing that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against her. *Id*. at 17-18.

¶6 The appellant has filed petitions for review challenging both initial decisions. The appellant alleges regarding her removal that the administrative judge erred when she sanctioned the appellant on the day of the hearing "to testify on her own behalf as an approved hearing witness and . . . to present *affirmative defense(s)* of prehearing and supplemental prehearing submissions of record." Removal Appeal, Petition for Review (PFR) File, Tab 3 at 2. She makes a similar argument in her IRA petition for review. IRA Appeal, PFR File, Tab 3

at 2-3.[*] In this regard, the appellant's representative contends that he did not receive the agency's motion for sanctions until April 27, 2011, the day after the hearing, and that the administrative judge, who received the agency's motion by e-filing on the same day it was submitted, April 19, 2011, did not issue a show-cause order before the hearing notifying the appellant that she could be sanctioned as an approved witness to testify at the hearing. Removal Appeal, PFR File, Tab 3 at 2-3. The appellant thus contends that the administrative judge's actions were inconsistent with the Board's policy and practice, as reflected in chapter 3, paragraph 7 of the Judge's Handbook, to place parties on notice of an intent to impose sanctions and provide parties with an opportunity to show why sanctions should not be imposed. *Id*. at 3. The appellant also asserts that the administrative judge was biased against her based on statements the administrative judge made during the hearing that the conduct of the appellant's representative was highly inappropriate and unprofessional. *Id*. at 3-4.

## ANALYSIS

¶7 On April 15, 2011, the administrative judge issued an Order noting that the appellant and her representative did not appear for the appellant's scheduled

---

[*] The appellant also contends that the administrative judge improperly rejected her witness requests because the appellant's representative did not speak with certain proposed witnesses and thus could not make a proffer of their testimony. IRA Appeal, PFR File, Tab 3 at 3-5. The appellant has not shown, however, that the administrative judge abused her discretion to exclude witnesses under 5 C.F.R. § 1201.41(b)(8), (10) upon finding that the appellant's representative did not follow the administrative judge's instructions and the testimony in question was not otherwise relevant. *See Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985); Hearing Transcript at 5, 7, 9-12, 14-16. Although the appellant submits a letter from her doctor indicating that the appellant was distraught, coughing, and had difficulty breathing on April 18, 2011, that those symptoms were associated with stress related to the deposition to be conducted that day, and that it was impossible for the appellant to complete the deposition, IRA Appeal, PFR File, Tab 3 at 7, the appellant has not shown or even alleged that the letter was unavailable before the record closed below despite her due diligence, *see Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Thus, we do not consider it.

deposition on February 15, 2011, and that after the deposition was rescheduled for February 25, 2011, the appellant indicated that she could not attend due to a death in the family. Removal Appeal, IAF, Tab 28 at 2. The administrative judge noted that the agency's representative had noticed the appellant's deposition for April 18, 2011, and ordered the appellant to appear for that deposition. *Id*. The administrative judge notified the appellant that "[f]ailure to appear may result in sanctions including barring the appellant to present testimony at the hearing." *Id*.

¶8 On April 19, 2011, the agency filed a motion for sanctions asserting that it had unsuccessfully attempted to secure the appellant's deposition testimony on numerous prior occasions, that during an April 14, 2011 prehearing conference it had made an oral motion to compel the appellant's attendance at an April 18, 2011 deposition, and that the administrative judge issued an order on April 15, 2011, compelling the appellant's attendance at the deposition. IRA File, Tab 19 at 4-5. The agency asserted that the appellant appeared for the deposition on April 18, 2011, without her representative, asked that her representative be "teleconferenced in," but failed to request teleconferencing capabilities in advance. *Id*. at 5. The agency asserted that the facility in question did not have teleconferencing capabilities and that several alternatives were discussed, including using the speakerphone function on the appellant's or the agency representative's cell phones, contacting base security and escorting the appellant and the court reporter on base, finding an adequate conference room in a nearby facility off base, or moving forward with the deposition and permitting the appellant to object to lines of questioning. *Id*. at 5-6. The agency asserted that while these alternatives were being investigated the appellant announced that she needed to go to the doctor and left the deposition. *Id*. at 6. The agency claimed that this was its third attempt to depose the appellant, that it sought to obtain clarification of the testimony of proposed witnesses, that the appellant should be prohibited from providing testimony at the hearing, and that certain witnesses

should be prohibited from testifying at the hearing. *Id*. at 6-7. The agency noted that it had attempted to confer with the appellant's representative before filing the motion but his fax machine was not functioning and his voicemail box was full. *Id*. at 7. The certificate of service for the agency's motion for sanctions indicated that it had been e-filed to the administrative judge and the appellant and faxed to the appellant's representative on April 19, 2011. *Id*. at 8, 13.

¶9 At the April 26, 2011 scheduled hearing, the appellant's representative requested a decision based on the written record. Hearing Transcript at 46. The agency then raised its pending motion for sanctions. *Id*. The agency requested that the appellant be either prohibited from testifying in toto or prohibited from testifying as to those matters beyond her appeal form, including her "late allegations of disability discrimination and any reprisal allegations that are beyond the paper record." *Id*. at 46-47. The administrative judge approved the agency's request, holding that the appellant "can have a decision based on the record" but she "will not be able to provide any declaration or affidavit in respect to any further submission." *Id*. at 47. The administrative judge clarified that

> During the prehearing conference, the appellant raised an affirmative defense of disability discrimination. Prior to that the only allegation that had been raised was based on age and whistleblower reprisal.
>
> When Mr. Beesley [the appellant's representative] was asked to elaborate on whatever this defense was in terms of disability, Mr. Beesley could not even articulate what the disability was. And as I stated in my summary, that you were to provide more specific information as to your allegation, and I asked that that information be received by April 19, 2011. You did not provide any additional information and, therefore, that allegation will not be allowed.
>
> You will not be able to pursue that. And the appellant will not be able to provide any more information in terms of this allegation regarding disability discrimination. That is not in the record as of this moment.

*Id*. at 47-48. The administrative judge held that "[y]ou may not supplement the record in any way, shape, or form dealing with any allegation regarding discrimination based on disability." *Id*. at 49.

¶10 After the appellant's representative again requested a decision based on the written record, the administrative judge noted,

> Mr. Beesley, I just want to note for the record that I am very disturbed about your tactic here this morning. This is not the first time that you have done this, and I think that is what is abusive.

*Id*. at 49-50. When asked by the appellant's representative whether he had engaged in some misconduct, the administrative judge indicated "[t]hat you would come down here, have everyone appear because you walked in the door this morning knowing that you were going to request a decision based on the record." *Id*. at 50. The administrative judge noted that the appellant's representative had done this before, and that she found his conduct "highly inappropriate and very unprofessional." *Id*. The administrative judge again informed the appellant's representative that she found it highly inappropriate and unprofessional because he "walked in here today knowing that you were going to request a decision based on the record." *Id*. at 51-52. The administrative judge also informed the appellant's representative that he was being very discourteous in packing up his things while the hearing was still on the record and the parties were attempting to identify a date for final submissions. *Id*. at 52-53.

¶11 An administrative judge may impose sanctions upon a party as necessary to serve the ends of justice. 5 C.F.R. § 1201.43. When a party fails to comply with an order, the administrative judge may "[p]rohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information." 5 C.F.R. § 1201.43(a)(2). The imposition of sanctions is a matter within the administrative judge's sound discretion, and absent a showing that such discretion has been abused, the administrative judge's determination will not be found to constitute reversible error. *Bilger v. Department of Justice*, 33 M.S.P.R. 602, 607 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table).

¶12 The appellant has not shown that the administrative judge abused her discretion when she precluded the appellant from submitting additional evidence regarding her claim of disability discrimination after the appellant did not comply with the administrative judge's order to appear for a deposition. *See Simon v. Department of Commerce*, 111 M.S.P.R. 381, ¶¶ 12, 14 (2009) (although the administrative judge "went too far" in striking the appellant's affirmative defenses as a sanction for her failure to respond to an order regarding affirmative defenses, the administrative judge might have achieved the same result consistent with the Board's regulations by barring the appellant from presenting evidence regarding her affirmative defenses); *Wagner v. Department of Homeland Security*, 105 M.S.P.R. 67, ¶¶ 13, 15 (2007) (an appropriate sanction for the appellant's failure to respond to the agency's discovery requests would have been to preclude the appellant from putting on evidence in support of any defense or rebuttal to the charges with respect to which he had not provided discovery responses; such a sanction is "just" under the Federal Rules of Civil Procedure because it recognizes that although "relevant and perhaps dispositive evidence is being excluded, fairness dictates that evidence be subject to fair testing by the opposing party in an even[-]handed process") (internal citations omitted). To the extent that the appellant claims that the administrative judge precluded her from testifying, the appellant withdrew her request for a hearing and requested a decision based on the written record *before* the administrative judge ruled on the motion for sanctions. Thus, any failure to testify resulted from the appellant's withdrawal of her hearing request, not from any action by the administrative judge.

¶13 Although the appellant contends that the administrative judge erred in imposing the sanction because she did not first provide written notice of an intent to impose a sanction and an opportunity to respond, the appellant has identified no Board regulation or other authority supporting such a requirement. While chapter 3, paragraph 7 of the Judge's Handbook, entitled "Acknowledgment and

Show Cause Orders," does provide that "the Board requires that even beyond jurisdiction, the [administrative judge] must provide an explanation of the burdens and methods of proof of any claim as to which the appellant has some or all of the burden of proof or production in an appeal," it does not require written notice and an opportunity to respond prior to imposing sanctions for a party's failure to comply with an administrative judge's written order that notifies the party that sanctions may be imposed for failure to comply. In fact, chapter 8, paragraph 9 of the Judge's Handbook provides that administrative judges have the authority to order the taking of depositions, and that the Board has upheld the imposition of sanctions for a party's failure to comply with discovery orders.

¶14 As set forth above, the sanction at issue prohibited the appellant from presenting additional evidence regarding her claim of disability discrimination. Because such a claim of discrimination may not be brought in an IRA appeal, the appellant has not shown that the administrative judge's sanction affected her substantive rights in the IRA appeal. *See Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991) (IRA appeals are not subject to the provisions of 5 U.S.C. § 7701 or § 7702; thus, the Board lacks the authority to decide, in conjunction with an IRA appeal, the merits of an allegation of discrimination), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), *and modified on other grounds by Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 323 n.13 (1994).

¶15 We also find that the administrative judge's comments regarding the unprofessional and disrespectful actions by the appellant's representative did not show bias, but were reasonable, appropriate responses to the actions of the appellant's representative and within the administrative judge's authority to control the proceedings. In making a claim of bias 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 her

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)). Although the administrative judge may have become understandably frustrated with the appellant's representative under the circumstances described above, the appellant has not overcome the presumption of administrative judge honesty and integrity, nor has he established that the administrative judge showed a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Liteky*, 510 U.S. at 555 ("judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge"; "*[n]ot* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.") (emphasis in original).

¶16 Accordingly, we DENY the appellant's petitions for review in these cases.

## ORDER

¶17 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS in MSPB Docket No. SF-0432-10-0699-I-1

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 Codes, 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 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.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS in MSPB Docket No. SF-1221-11-0039-W-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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*, 931 F.2d 1544.

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.