

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

ELAINE WELLS,
Appellant,

DOCKET NUMBER
AT-0752-16-0206-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: September 30, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL *

Michael D.J. Eisenberg, Esquire, Washington, D.C., for the appellant.

Joved Gonzalez-Rivera, Esquire, San Juan, Puerto Rico, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed for lack of jurisdiction her appeal of her separation from service upon the expiration of her time-limited excepted-service appointment. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 administrative 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. 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, 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\(b\)](#).

¶2 Effective November 4, 2012, the agency selected the appellant for a GS-9 Social Worker position in an excepted-service time-limited appointment not to exceed November 4, 2015. Initial Appeal File (IAF), Tab 4 at 42. Effective November 3, 2015, the appointment expired, and the appellant was terminated. *Id.* at 35. The appellant filed an appeal which the administrative judge dismissed for lack of jurisdiction upon finding that the termination of an employee upon the expiration of a time-limited appointment is not appealable to the Board. IAF, Tab 15, Initial Decision at 1, 3-4.

¶3 In her petition for review, the appellant reiterates arguments made below and rejected by the administrative judge, but she does not identify any error of fact or law that warrants setting aside the initial decision. The law is clear that an employee's separation from Federal service upon the expiration of a time-limited appointment is not an adverse action appealable to the Board. *Edwards v. Department of the Air Force*, [120 M.S.P.R. 307](#), ¶ 7 (2013); *Clark v. Department of the Army*, [78 M.S.P.R. 502](#), 505 (1998). Whether the appellant meets the definition of "employee" under [5 U.S.C. § 7511](#) and had completed her trial period is irrelevant to whether she can appeal the expiration of her time-limited

appointment. *Edwards*, [120 M.S.P.R. 307](#), ¶ 7 (2013); *Scott v. Department of the Air Force*, [113 M.S.P.R. 434](#), ¶ 9 (2010). Therefore, the administrative judge correctly dismissed the appeal for lack of jurisdiction.

¶4 The appellant has submitted many documents with her petition for review. It appears that these documents are already a part of the record below. Evidence that is already a part of the record is not new, and, therefore, we have not relied upon them. *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980).

¶5 Finally, after the close of the record on review, the appellant moved for leave to file an erratum to correct the appellant's reply to the agency's response to the petition for review. Petition for Review File, Tab 6. Without actually ruling on the motion, we note that it includes language correcting the original reply, which we have incorporated as part of the appellant's reply.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (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 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.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.