

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

ROBERT M. MILLER,
Appellant,

DOCKET NUMBER
CB-7121-12-0008-V-1

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION,
Agency.

DATE: July 16, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Robert M. Miller, San Francisco, California, pro se.

Judith H. Thomsen, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a request for review of an October 6, 2011 Step Three grievance decision. For the reasons set forth below, we DISMISS the appellant's request for review for lack of jurisdiction.

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On May 29, 2011, the appellant filed a grievance on his own behalf, claiming, among other things, that the agency's investigation of allegations that the appellant was sexually harassing women resulted in the issuance of a May 3, 2011 Letter of Warning² and other tangible employment actions and was unfair and violated the law. Request for Review (RFR) File, Tab 3 at 19-27. After denying the appellant's Step One and Step Two grievances, the agency denied the Step Three grievance on October 6, 2011. *Id.* at 9-17. In its Step Three grievance decision, the agency informed the appellant that: Step Four of the grievance process was available only to those individuals represented by the Union; the Union may, "at its option, appeal the grievance, in writing[,] to Step Four of the negotiated grievance procedure or refer [the] grievance directly to arbitration"; and "[a]ny appeal to arbitration, bypassing Step Four, must be . . . [sent to the appropriate agency official] . . . within twenty [20] work days from receipt of this Step Three grievance decision." *Id.* at 16. The Union took no action after the Step Three grievance decision.

On January 27, 2012, however, the appellant filed the instant request for review of the agency's Step Three grievance decision. RFR File, Tab 1. In his request, the appellant stated that he received the Step Three grievance decision on October 6, 2011, and he alleged sex discrimination. *See id.*

The Office of the Clerk of the Board (OCB) issued a notice, explaining that the appellant's filing appeared to be a request for review of a final decision on a grievance. RFR File, Tab 2. OCB informed the appellant that such a request for review must include: a statement of the grounds on which review is requested; references to evidence of record or rulings related to the issues before the Board; arguments in support of the stated grounds that refer specifically to relevant documents and that include relevant citations of authority; and legible copies of

² The Letter of Warning is not in the record.

the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. *Id.*

The appellant filed a timely response, in which he argued, among other things, that the Board should have jurisdiction over the agency's Step Three grievance decision since he alleged "a patently unfair grievance process that was not subject to consideration by an arbitrator because neither the union nor the Agency chose to take the matter to arbitration." RFR File Tab 3. He also asserted that the agency's action was discriminatory and constituted harmful error, and the agency took numerous tangible employment actions against him. *Id.* He stated that the "timeliness of the Request for Review was inhibited by the Agency's improper and inadequate notification of Appellant's rights as required by law and the Agency's own policies." *Id.* at 7. The agency filed a response to the appellant's request for review, and it argued that the appellant's request for review was untimely and that none of the appellant's claims were within the Board's jurisdiction.³ *See* RFR File, Tab 6.

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The appellant must prove jurisdiction by preponderant evidence. [5 C.F.R. § 1201.56\(a\)\(2\)](#). The Board may review a final grievance decision if the action appealed is otherwise appealable to the Board, and the appellant has raised an allegation of prohibited discrimination under [5 U.S.C. § 2302\(b\)\(1\)](#) in connection with the action appealed. [5 U.S.C. § 7121\(d\)](#); *Edwards v. Department of Veterans*

³ The agency also indicated that the appellant filed a separate appeal, *Miller v. Federal Deposit Insurance Corporation*, MSPB Docket No. SF-3443-12-0301-I-1, which involved the same facts as in the instant request for review. *See* RFR File, Tab 6 at 3. We note that, in that matter, the administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction, and the appellant filed a petition for review of that initial decision. We do not address the merits of that matter herein.

Affairs, [90 M.S.P.R. 382](#), ¶ 3 (2001); *Gustave-Schmidt v. Department of Labor*, [87 M.S.P.R. 667](#), ¶ 4 (2001); *Parks v. Smithsonian Institution*, [39 M.S.P.R. 346](#), 349 (1988); see 5 C.F.R. § 1201.154(d).

Although the appellant alleged discrimination, he has not satisfied the remaining criteria. Importantly, the agency’s Step Three grievance decision was not a final decision. Article 47 of the applicable collective bargaining agreement (CBA) states that, “[i]f the grievant is not satisfied with the Step Three or Four decision, as applicable,” the Union may refer the matter to arbitration within twenty (20) workdays after receipt of the written decision. RFR File, Tab 6, Subtab B at 14. Because the CBA provides for arbitration, and the Union did not refer the matter to arbitration, there is no “final decision” within the meaning of section 7121(d). See *Gustave-Schmidt*, [87 M.S.P.R. 667](#), ¶ 4 (noting that an arbitration decision is a final grievance decision); *Parks*, 39 M.S.P.R. at 349 (explaining that a final decision, which is appealable to the Board under [5 U.S.C. § 7121](#)(d), “is the arbitrator's decision in cases where the grievance procedure provides for arbitration as the last resort”). Moreover, the appellant has not identified any agency action that is otherwise appealable to the Board. See, e.g., [5 U.S.C. §§ 7512](#), 7513 (noting that a removal, a suspension for more than 14 days, a reduction in pay, a reduction in grade, and a furlough of 30 days or less, are actions that may be appealed to the Board). Finally, the Board does not have jurisdiction over the appellant’s claims of harmful error and discrimination, standing alone. *Heath v. U.S. Postal Service*, [107 M.S.P.R. 366](#), ¶ 5 (2007) (citing *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982)). For these reasons, we dismiss the appellant’s request for review for lack of jurisdiction.⁴

⁴ Because of our disposition, we need not address the apparent untimeliness of the request for review.

**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 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 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.