

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

GRETEL DIAZ,

Appellant,

DOCKET NUMBER

NY-315H-12-0020-I-1

v.

DEPARTMENT OF THE TREASURY,

Agency.

DATE: July 17, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Gretel Diaz, Bayamon, Puerto Rico, pro se.

Parker E. Thoeni, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, 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

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 does not dispute that she was a probationary employee, with less than 1 year of current continuous service. Initial Appeal File (IAF), Tab 1, Tab 4, Subtab 1 at 4, Subtabs 4a, 4f; Petition for Review File (PFR File), Tab 1 at 3. Although the appellant was previously employed with the Federal Emergency Management Agency (FEMA), there was at least a 15-month break in the period between her separation from FEMA, and the start of her position with the Internal Revenue Service.<sup>2</sup> IAF, Tab 1 at 12, Tab 4, Subtab 4d, Subtab 4e at 35, 41-43. Such a break was sufficient to render her service not “current [and] continuous.” See *Fitzgerald v. Department of the Air Force*, [108 M.S.P.R. 620](#), ¶ 7 (2008) (“current continuous service” for competitive service employees means “a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday”); see also [5 C.F.R. § 752.402](#) (identically defining “current continuous employment”). As such, the appellant does not meet the statutory definition of an “employee” as set forth in [5 U.S.C. § 7511](#)(a)(1)(A). See *McCormick v. Department of Air Force*, [307 F.3d 1339](#), 1341-43 (Fed. Cir. 2002). Thus, the administrative judge correctly concluded that the appellant cannot appeal her termination to the Board under chapter 75, subchapter II of title 5 of the United States Code. See 5 U.S.C. § 7513(d) (providing Board appeal rights to an “employee”).

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<sup>2</sup> The administrative judge erroneously identified the appellant’s break in employment as being “approximately three months,” Initial Decision at 5, when it was, in fact, approximately 1 year and 3 months. However, this error does not affect the jurisdictional analysis.

Further, the appellant has not challenged the administrative judge's determination that she failed to make a non-frivolous allegation of a claim within the Board's jurisdiction under [5 C.F.R. § 315.806](#). Specifically, the appellant does not take issue with the administrative judge's finding below that she did not make non-frivolous allegations of discrimination based on her marital status or for partisan political reasons, and she does not make any new claims of discrimination. PFR File, Tab 1; *see* [5 C.F.R. § 315.806\(b\)](#). Further, the appellant has not claimed that her termination was procedurally defective. *See* [5 C.F.R. § 315.806\(c\)](#). Instead, she only argues the merits of the agency's decision to terminate her. PFR File, Tab 1 at 7-8. The Board cannot consider the appellant's arguments regarding the merits of her appeal because she has shown no error in the administrative judge's conclusion that the Board lacks jurisdiction over her appeal. *See Fassett v. U.S. Postal Service*, [76 M.S.P.R. 137](#), 139, *appeal dismissed*, 132 F.3d 49 (Fed. Cir. 1997) (Table).

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 and AFFIRM the initial decision that dismissed this appeal for lack of jurisdiction.<sup>3</sup>

#### **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:

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<sup>3</sup> Because we dismiss this appeal on jurisdictional grounds, we need not address the question of the timeliness of the petition for review.

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.