

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

MARSHA L. PAYTON,
Appellant,

DOCKET NUMBER
AT-1221-11-0957-W-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: July 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Marsha L. Payton, Holly Hill, Florida, pro se.

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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

The appellant filed a September 20, 2011 appeal in which, among other things, she contended that the agency failed to restore her to her former position in retaliation for protected whistleblowing. Initial Appeal File (IAF), Tab 1 at 10. The administrative judge gave the appellant notice of the elements and burdens of establishing jurisdiction over an individual right of action (IRA) appeal. IAF, Tab 3. In her jurisdictional response, among many other things unrelated to her IRA appeal, the appellant claimed without elaboration that: “My protected Disclosure is Whistleblower.” IAF, Tab 4 at 2. She also cited the August 30, 2011 letter of the Office of Special Counsel (OSC), which she had included with her initial appeal. *Id.*, see IAF, Tab 1 at 8. Without holding the requested hearing, the administrative judge found that although the appellant had exhausted remedies before OSC, she failed to identify any disclosure protected under [5 U.S.C. § 2302\(b\)\(8\)](#) or that any such disclosure was a contributing factor in the agency’s failure to restore her to her previous position. IAF, Tab 5, Initial Decision (ID) at 2; IAF, Tab 1 at 2. Thus, the administrative judge found that the appellant failed to establish jurisdiction over her IRA appeal. ID at 3. The appellant filed a petition for review of that decision, along with a supplement and three subsequent submissions.² Petition for Review File, Tabs 1, 3, 5-7. The agency did not respond.

The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous

² The Board has not considered the appellant’s submissions dated March 2, May 7, and May 23, 2012, because they were filed after the close of the record on review and the appellant failed to show that they were not readily available before the record closed. See Petition for Review File, Tabs 2, 5-7; [5 C.F.R. § 1201.114\(i\)](#).

allegations that: (1) She engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). Although, as noted above, the administrative judge found that the appellant had “exhausted remedies before [OSC],” none of the appellant’s submissions below or on review identify any disclosures allegedly protected under [5 U.S.C. § 2302\(b\)\(8\)](#), or indicate that she raised any such disclosures before OSC. Indeed, the August 30, 2011 letter from the OSC that the appellant cited in her appeal below and cites again on review does not contain any substantive information about the appellant’s whistleblowing claims. Thus, it is not at all clear exactly what claims the appellant may have exhausted before OSC. Moreover, to the extent that the appellant alleges that a 2001 EEO complaint is a protected disclosure, it is well settled that an equal employment opportunity (EEO) complaint is not a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#), but rather is protected activity under [5 U.S.C. § 2302\(b\)\(9\)](#). *Spruill v. Merit Systems Protection Board*, [978 F.2d 679](#), 689-92 (Fed. Cir. 1992). Therefore, because the appellant failed to identify any disclosure allegedly protected under [5 U.S.C. § 2302\(b\)\(8\)](#), we find that the appellant failed to nonfrivolously allege that she made a disclosure protected under the Whistleblower Protection Act,³ and we agree with the administrative judge that the appellant failed to establish jurisdiction over her IRA appeal.

³ To the extent that the analysis in the initial decision suggests that the administrative judge incorrectly based her jurisdictional determination on the appellant’s failure to establish, rather than to nonfrivolously allege that she made a disclosure protected by the WPA, *see Yunus*, 242 F.3d at 1371, our review of the record indicates that, in fact, the appellant failed to identify a single alleged protected disclosure. Consequently, any adjudicative error in this regard did not affect the appellant’s substantive rights. *See* ID at 3; *see also Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

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 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.