

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

LORNA P. RYAN,
Appellant,

DOCKET NUMBER
AT-0353-11-0113-I-2

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 2, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lorna P. Ryan, Loxahatchee, Florida, pro se.

Daniel P. Gimmy, Esquire, Pembroke Pines, Florida, 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 that was not available for consideration earlier or when the administrative judge

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 Board appeal challenging the termination of her limited duty assignment pursuant to the agency's National Reassessment Process. *Ryan v. U.S. Postal Service*, MSPB Docket No. AT-0353-11-0113-I-1, Initial Appeal File (IAF), Tabs 1, 2. In a December 10, 2010 initial decision, the administrative judge dismissed the appellant's appeal without prejudice to refile within 30 days after the appellant's receipt of a decision in her grievance/arbitration of her restoration claim or on or before December 9, 2011, whichever date was earlier. IAF, Tab 22 at 2-3. Although the appellant received a copy of the settlement agreement resolving her grievance by September 24, 2011, and did not refile her appeal until December 6, 2011, *see* Refiled Appeal File (RAF), Tab 1 at 5, Tab 4 at 1, she argues that her refiled appeal was nonetheless timely because the agency failed to comply with the settlement agreement and, therefore, the December 9, 2011 filing deadline applied. Petition for Review (PFR) File, Tabs 1, 3.

We find this argument unpersuasive. Pursuant to the refile instructions in the December 10, 2010 initial decision, the time limit for refile the appeal began to run when the appellant received notice of the decision regarding her grievance. *See* IAF, Tab 22 at 2-3. In this case, that occurred when the appellant received the signed settlement agreement, i.e., no later than September 24, 2011. The events that transpired after she received the settlement agreement, in particular, the agency's alleged noncompliance with the agreement, are irrelevant to the timeliness issue. Consequently, the refile deadline was October 24, 2011, and the refiled appeal was untimely by 43 days. RAF, Tab 1.

If a party fails to file an appeal by the date set in an administrative judge's order, the appeal will be dismissed as untimely unless the appellant presents a good reason for the delay. *See* [5 C.F.R. § 1201.22\(c\)](#). The Board has generally

held that its dismissal without prejudice practice should not become a trap that would deny an unwary pro se appellant of the opportunity to have her case decided on the merits. *Gaddy v. Department of the Navy*, [100 M.S.P.R. 485](#), ¶ 13 (2005). Accordingly, the Board has identified specific standards for determining whether good cause exists for excusing an untimely refiled appeal of a matter previously dismissed without prejudice. *See Nelson v. U.S. Postal Service*, [113 M.S.P.R. 644](#), ¶ 8 (2010), *aff'd sub nom. Nelson v. Merit Systems Protection Board*, 414 F. App'x 292 (Fed. Cir. 2011). These include the following: the appellant's pro se status; the timeliness of the initial appeal; the appellant's demonstrated intent throughout the proceedings to refile the appeal; the length of the delay in refiling; confusion surrounding and arbitrariness of the refiling deadline; the number of prior dismissals without prejudice; the agency's failure to object to the dismissal without prejudice; and the lack of prejudice to the agency in allowing the refiled appeal. *Id.* Although the administrative judge did not provide the appellant with notice of the good cause standard for refiled appeals and did not apply that standard in his initial decision, *see* RAF, Tab 3, Initial Decision at 4, these errors did not affect the outcome, and, therefore, are not grounds for overturning the initial decision, *see Nelson*, [113 M.S.P.R. 644](#), ¶ 8.

We note that the appellant is pro se, there was only one dismissal without prejudice, the agency did not object to the dismissal, and the agency has not claimed prejudice in allowing the refiled appeal. However, for the reasons set forth below, we find that those factors are outweighed by other factors.

First, the 43-day filing delay is not minimal. *See Gaines v. U.S. Postal Service*, [96 M.S.P.R. 504](#), ¶ 7 (2004) (a filing delay of 37 days is not minimal). Also, in the December 10, 2010 initial decision dismissing the appeal without prejudice to refiling, the administrative judge made it clear that, if the appellant wished to proceed with the appeal, it was her responsibility to refile the appeal in a timely manner. IAF, Tab 22 at 3 n.2. Moreover, prior to issuing that decision, the administrative judge held a status conference with the parties in which he

explained to the appellant what a dismissal without prejudice entailed and notified her that, if she did not refile her appeal in accordance with the time periods set forth in the initial decision, her refiled case could be dismissed with prejudice for untimeliness. *See* IAF, Tab 21.

Further, the appellant did not demonstrate an intent throughout the proceedings to refile the appeal. Rather, it appears that she only decided to refile the appeal because she has been unable to resolve her dispute with the agency about its compliance with the settlement agreement.² Lastly, the appellant has not demonstrated that she exercised ordinary prudence or due diligence in assuring that her appeal was timely refiled. For instance, the appellant has not alleged that she contacted the Board to clarify whether the agency's alleged failure to comply with the settlement agreement had any effect on the refiling deadline. Under these circumstances, we find that the appellant failed to show good cause for the delay in refiling her appeal.

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

² To the extent that the appellant is objecting to the agency's alleged noncompliance with the settlement agreement, the Board has no authority to enforce a settlement agreement reached in another forum. *See Johnson v. U.S. Postal Service*, [108 M.S.P.R. 502](#), ¶ 8 n.5 (2008), *aff'd*, 315 F. App'x 274 (Fed. Cir. 2009).

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.