

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

DEBORAH L. SCOGGINS,
Appellant,

DOCKET NUMBER
SF-844E-11-0191-A-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: August 3, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Elaine W. Wallace, Esquire, Oakland, California, for the appellant.

Linnette Scott, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In her petition for review, the appellant challenges the initial decision denying her motion for attorney fees. The appellant argues, among other things, that: 1) the Board retains jurisdiction to award her attorney fees because the Board has held that an appeal may not be dismissed as moot until the agency has submitted acceptable evidence that it has actually afforded the appellant all of the relief to which she would be entitled if the appeal had been adjudicated and she had prevailed; and 2) the Board in *Mynard v. Office of Personnel Management*, [108 M.S.P.R. 58](#) (2008), held that the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, [532 U.S. 598](#) (2001), was not "as restrictive as before" in the context of a post-decision petition for enforcement. The administrative judge thoroughly addressed these issues in the initial decision, and we discern no reason to disturb those well-reasoned findings. See *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (stating that there is no reason to disturb the initial decision when the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same). Unlike *Mynard*, the appellant is not seeking agency compliance with a Board order that altered the legal relationship of the parties, and there is thus insufficient Board imprimatur to entitle her to "prevailing party" status. Instead, this case is factually similar to *Mulero-Echevarria v. Office of Personnel Management*, [93 M.S.P.R. 154](#) (2002), where the Board denied a motion for attorney fees relating to the merits phase of the case under the *Buckhannon* rationale. Therefore, regardless of whether the case on the merits was considered moot, there is no basis for awarding fees.

The appellant also asserts that the administrative judge did not address the OPEN Government Act of 2007, which she claims modified *Buckhannon* and provides that a complainant has substantially prevailed in a suit filed under the Freedom of Information Act (FOIA) if relief has been obtained through a voluntary or unilateral change in position by the agency. This argument is unavailing. The provisions of that Act, *see* [5 U.S.C. § 552\(a\)\(4\)\(E\)](#), apply to FOIA suits. The appellant has not shown that Congress intended the OPEN Government Act of 2007 to apply to cases arising under [5 U.S.C. § 7701\(g\)\(1\)](#). In fact, the OPEN Government Act of 2007 shows that Congress knew how to alter the rule in *Buckhannon* when it wished to do so, but presumably did not intend to do so in the context of Board appeals such as this one. *Cf. Elgin v. Department of the Treasury*, [132 S. Ct. 2126](#), 2134-35 (2012) (finding that [5 U.S.C. § 7703\(b\)\(2\)](#) demonstrated that Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim; that Congress declined to include an exemption from Federal Circuit review for challenges to a statute's constitutionality indicates that Congress intended no such exception).

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 of the administrative judge.

**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.