

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

JAMES V. DEVENEY,  
Appellant,

DOCKET NUMBER  
DC-3443-11-0955-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: August 10, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL \***

Edward H. Passman, Esquire, Washington, D.C., for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

**BEFORE**

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

**FINAL ORDER**

The agency has filed a petition for review and the appellant has filed a cross petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as these only when

---

\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

significant new evidence is presented to us 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](#)).

We agree with the administrative judge's decision to remand the appeal to the Office of Personnel Management (OPM) for a final decision on the appellant's request to transfer from the Federal Employees' Retirement System (FERS) to the Civil Service Retirement System (CSRS). The Board may take jurisdiction over a retirement matter in the absence of a final decision from OPM when OPM has declined to issue a final decision or has indicated that it will not issue a final decision. *See Powell v. Office of Personnel Management*, [114 M.S.P.R. 580](#), ¶¶ 6-9 (2010); *Luna v. Office of Personnel Management*, [89 M.S.P.R. 465](#), ¶¶ 8-10 (2001); *see also Fitzgerald v. Department of Defense*, [80 M.S.P.R. 1](#), 19-20 (1998), *aff'd*, [230 F.3d 1373](#) (Fed. Cir. 1999). Further, a retirement election may be voidable due to misinformation if a reasonable person would have been confused in the particular circumstances. *See, e.g., Froom v. Office of Personnel Management*, [107 M.S.P.R. 607](#), ¶ 13 (2008); *Lubag v. Office of Personnel Management*, [88 M.S.P.R. 484](#), ¶¶ 9-10 (2001).

The appellant's current employing agency made a decision regarding the validity of his FERS election, and we find unconvincing OPM's argument that it cannot make a final decision in the absence of a decision from the Office of the Chief Administrative Officer of the U.S. House of Representatives, the appellant's former employer that allegedly made errors and gave him incorrect information regarding his retirement coverage. OPM has not provided relevant legal authority on the matter, and we decline to disturb the initial decision on this basis. OPM should seek, from the U.S. House of Representatives or the Federal Deposit Insurance Corporation, any relevant retirement information that it deems necessary to make a final decision.

Finally, we deny the appellant's request to remand the appeal to the administrative judge for a determination on the merits.

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 the cross petition for review and AFFIRM the initial decision of the administrative judge remanding the appeal to OPM for the issuance of a final decision regarding the appellant's request to switch from FERS to CSRS. OPM must issue its decision within 60 days of the date of this Order. If OPM fails to issue a final decision, then the Washington Regional Office will refile the appeal on the appellant's behalf within 80 days of the date of this Order.

**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](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:

-----  
William D. Spencer  
Clerk of the Board

Washington, D.C.