

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

PENNY L. LANDVOGT,
Appellant,

DOCKET NUMBER
CH-0831-11-0684-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Penny L. Landvogt, Janesville, Wisconsin, pro se.

Roxann Johnson, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In the proceeding below, the administrative judge affirmed the Office of Personnel Management (OPM)'s decision finding the appellant ineligible to receive an annuity under the Civil Service Retirement System based on service she performed from 1969 to 1983 with the Department of Agriculture's Extension Service as an Instructor at the University of Wisconsin, Madison - Extension. The administrative judge found that, because the appellant had requested and received a refund of retirement deductions for that period of employment, she had no annuity rights based on the refunded service. 5 U.S.C. § 8342(a). The administrative judge considered the appellant's assertion that she could not recall whether, or find any record showing that, she actually received the refund, but the administrative judge found that the appellant's unsworn, uncorroborated denial of receipt did not establish that she did not receive the refund authorized by OPM in 1983, especially in light of the 28-year time lapse from the date OPM authorized the refund to the date she first sought benefits.

In her petition for review, the appellant does not challenge the administrative judge's finding that she filed for a refund of her retirement contributions. She continues to argue, however, that OPM failed to prove that she ever received the funds. In this regard, the appellant alleges for the first time on review that the administrative judge applied the wrong legal standard and should have relied upon provisions in the Uniform Commercial Code that address the sufficiency of a written instrument to pay money. Because this is not an argument that the appellant raised below, the Board need not now consider it. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously

available despite the party's due diligence). Moreover, the appellant has failed to show how the Uniform Commercial Code, which is a uniform law governing commercial transactions that has been adopted by the states, has any application to OPM's decision regarding her claim to a federal retirement annuity. To the extent the appellant's argument challenges the way in which the administrative judge assigned the burden of proof in this case, the appellant has not shown error. *Manoharan v. Office of Personnel Management*, 103 M.S.P.R. 159, ¶ 12 (2006) (where the appellant denies receipt of a refund of retirement contributions, OPM's normal business records compiled in the ordinary course of business are entitled to substantial weight, and the appellant bears the burden of proving such nonreceipt by preponderant evidence).

The appellant alleges that she exercised due diligence by checking with all the likely institutions that would have records relating to the receipt of any pension payments she would have received from OPM, such as her bank, the Internal Revenue Service, and the University of Wisconsin Extension Personnel Department. She asserts that, with the exception of the latter², she was told that the others do not have records going that far back. The appellant has failed to show that this is new and material evidence that was unavailable before the record was closed despite her due diligence. Therefore, the Board need not consider it. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

The appellant asserts that, during the proceeding below, OPM failed to contact her regarding possible settlement of this appeal. However, the record reflects that the agency indicated during the prehearing conference that there was no possibility of settlement. Initial Appeal File, Tab 6.

² Contrary to the appellant's assertion, the record contains a letter to her from the University of Wisconsin – Extension which stated that her initial appointment was not covered under the Civil Service Retirement System. Initial Appeal File, Tab 5, Subtab 2b at 6.

With her petition for review, the appellant has submitted a copy of a group long term disability policy issued by the Boston Mutual Life Insurance Company with an effective date of August 1, 1969, and a partial copy of her Social Security Earnings Record through 1989. Petition for Review File, Tab 1 at 4-5. Because the appellant has not established that these documents were unavailable before the record closed below, despite her due diligence, the Board need not consider them. *Avansino*, 3 M.S.P.R. at 214.

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.