

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

CELIA B. ESPINOZA,  
Appellant,

DOCKET NUMBER  
DA-0752-11-0657-I-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: August 17, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Gary Shelton, Cibolo, Texas, for the appellant.

Erich W. Schwartze, III, Esquire, Houston, Texas, 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

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 asserts that the administrative judge should not have dismissed her appeal without a hearing on the basis that she “failed to show that her resignation was involuntary.” Petition for Review (PFR) at 2. She contends that witnesses would have corroborated her assertions that the agency coerced her resignation by creating a hostile working environment and making her working conditions so unbearable that she felt compelled to resign. *Id.*

The initial decision as a whole makes clear that the administrative judge determined that the appellant failed to make a non-frivolous allegation that her resignation was involuntary, not that she failed to prove it by preponderant evidence. Therefore, the administrative judge did not err in dismissing the appeal without granting the appellant a hearing. *See, e.g., Gibeault v. Department of the Treasury*, [114 M.S.P.R. 664](#), ¶ 6 (2010). The appellant has not shown that the administrative judge erred in finding her unsworn statement not sufficiently probative to constitute a non-frivolous allegation that her resignation was involuntary. *See, e.g., Scott v. Department of Justice*, [69 M.S.P.R. 211](#), 228 (1995), *aff’d*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

The appellant asserts that the administrative judge erred in finding that she failed to raise facts that, if proven, could show that her resignation was obtained through duress, coercion, or misrepresentation, or that her working conditions were made so difficult by the agency that a reasonable person in her position would have felt compelled to resign. PFR at 2. She reiterates excerpts from her response to the administrative judge’s show-cause order on jurisdiction. PFR at 3; Initial Appeal File (IAF), Tab 8; Initial Decision (ID) at 3-4.

The appellant’s reiteration of arguments she made below, without explaining how the administrative judge erred in addressing those arguments,

does not meet the Board's review criteria. *See, e.g., Jackson v. Office of Personnel Management*, [89 M.S.P.R. 302](#), ¶ 5 (2001). In any event, the appellant's mere disagreement with the administrative judge's explained factual findings does not show error in those findings or provide a basis for Board review. The initial decision shows that the administrative judge applied the correct law in determining that the appellant failed to make a non-frivolous allegation that her resignation was involuntary. *See, e.g., Brown v. U.S. Postal Service*, [115 M.S.P.R. 609](#), ¶¶ 9-17, *aff'd*, *Brown v. Merit Systems Protection Board*, 469 F. App'x 852 (Fed. Cir. 2011); *Searcy v. Department of Commerce*, [114 M.S.P.R. 281](#), ¶¶ 12-14 (2010). Further, it shows that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. Under these circumstances, we find no reason to disturb her findings. *See, e.g., Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

The appellant asserts that the administrative judge did not take into consideration other extenuating circumstances, which she raised in connection with her proposed removal, in determining what would cause a reasonable person to resign. Those circumstances included her impending divorce, inability to meet financial and dependent obligations, loss of home, and loss of health care benefits. PFR at 3-4. The administrative judge could not have considered these circumstances, even if relevant, because the appellant's written reply to the proposed removal does not mention them and her oral reply is not in the record. Thus, the Board need not consider her argument on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

The appellant asserts that the evidence shows that she was attempting to maintain her employment by filing written and oral responses to the agency's charges and asking for progressive discipline even though she did not believe that the charges were valid. She apparently contends that her resignation was involuntary because the agency knew that the reason for her removal could not be

substantiated. In that regard, she states that her resignation was obtained by agency misrepresentation because the specifications underlying the charge were performance-related. PFR at 4.

The appellant has failed to show that the administrative judge erred in finding that the appellant failed to make a non-frivolous allegation that her resignation was involuntary on the basis that the agency knew that her removal could not be substantiated. The administrative judge considered the appellant's response to the administrative judge's jurisdictional order, in which the appellant asserted that the agency knew that the reason for the "threatened removal" could not be substantiated. In that response, the appellant had asserted that the specifications underlying the removal were performance-related, she did not have direct supervision of the Eligibility and Enrollment Office in charge of verifying patient eligibility, the agency was unwilling to acknowledge that she had not authorized services or supervised staff who determined eligibility, and the agency did not want to make good on debts for services already rendered. ID at 4; IAF, Tab 8 at 3. We find that the administrative judge correctly determined that the appellant was simply faced with the unpleasant choice of either resigning or opposing an adverse action, which does not rebut the presumed voluntariness of her ultimate choice of resignation. *See, e.g., Schultz v. United States Navy*, [810 F.2d 1133](#), 1136-37 (Fed. Cir. 1987); *Green v. Department of Veterans Affairs*, [112 M.S.P.R. 59](#), ¶ 8 (2009).

The appellant asserts that, in an October 24, 2011 letter, the Texas Workforce Commission awarded her unemployment benefits, stating that its investigation found that her employer fired her for a reason that was not misconduct connected to the work. PFR at 4-5. The appellant has not asserted that the letter, which is dated before the close of the record below, IAF, Tab 7, was unavailable before the record closed despite her due diligence, and, thus, has not shown that the Board should consider it on review. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). In any event, the appellant has not

actually submitted the letter. Her mere characterization of its finding does not show error in the administrative judge's determination that her resignation was not an appealable removal. *See, e.g., Cirella v. Department of the Treasury*, [108 M.S.P.R. 474](#), ¶ 19 (2008) (stating that although unemployment compensation decisions are worthy of consideration, they are not dispositive), *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008).

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](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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.