

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

LEELA H. SHERMAN,
Appellant,

DOCKET NUMBER
SF-0752-12-0193-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: August 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Sandra R. Fordjour, Esquire, Arlington, Texas, for the appellant.

Timothy E. Heinlein, Esquire, San Francisco, California, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 petition for review of the initial decision that concluded that she did not make a nonfrivolous allegation of an involuntary resignation and denied her request for a hearing on jurisdiction. On petition for review, the appellant complains that she was improperly denied a jurisdictional hearing, the agency effectively removed the appellant without any of the procedural protections of [5 U.S.C. § 7513](#), the administrative judge “incorrectly considered the Agency’s evidence regarding the purported settlement agreement as dispositive” and used that evidence to dismiss the appeal for lack of jurisdiction, and the Stipulation violated [5 C.F.R. § 715.202](#)(a), (b) and [20 C.F.R. § 10.15](#). Petition for Review (PFR) File, Tab 1 at 6-7.

The appellant’s arguments are not persuasive. We discern no error with the administrative judge’s analysis, or his conclusion that the appellant failed to make a nonfrivolous allegation that her resignation was involuntary, particularly where the appellant did not dispute that she voluntarily signed the Stipulation, she did not otherwise claim that the Stipulation was invalid because it was unlawful or the product of fraud or mutual mistake, and the agency processed her resignation in accordance with the terms of that Stipulation. *See* Initial Appeal File (IAF), Tabs 14, 17. Because the appellant did not make a nonfrivolous allegation that her resignation was involuntary, she was not entitled to a hearing or the procedural protections of [5 U.S.C. § 7513](#). *See, e.g., Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643 (Fed. Cir. 1985) (an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary resignation or retirement only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness); *Spiegel v. Department of the Army*, [2 M.S.P.R. 140](#), 141 (1980) (an involuntary resignation is tantamount to a removal).

We construe the appellant's argument regarding the administrative judge's improper consideration of the agency's evidence as an allegation of a violation of *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994). The Board held in *Ferdon* that, in determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling her to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Id.* The only "evidence" submitted by the agency below was a December 8, 2011 letter that the appellant's then-attorney sent to the agency, which noted that the agency "did not complete its portion" of the Stipulation until April 2010. *See* IAF, Tab 15. The administrative judge acknowledged this evidence in the background portion of the initial decision and noted that the appellant did not retire or resign. *See* IAF, Tab 17, Initial Decision at 2 (explaining that the agency inadvertently omitted this document from its response and he accepted it late). However, the administrative judge did not appear to rely on this letter in his analysis of the issues in this appeal. More importantly, because the appellant did not make a prima facie showing of jurisdiction, there is not a *Ferdon* issue.

Finally, we are not persuaded that the Stipulation violated any of the regulations cited by the appellant. PFR File, Tab 1 at 7. Because the Board lacks jurisdiction over the appellant's involuntary resignation appeal, it also does not have jurisdiction over her claims of discrimination, harmful error, and other prohibited personnel practices. *See Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980) (prohibited personnel practices are not an independent source of Board jurisdiction), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

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.ca9c.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.