

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

TEIKA YVETTE COOKE,  
Appellant,

DOCKET NUMBER  
DC-0752-10-0760-I-3

v.

DEPARTMENT OF DEFENSE,  
Agency.

DATE: September 11, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Martin F. McMahon, Esquire, and Stephen G. DeNigris, Esquire,  
Washington, D.C., for the appellant.

Steven J. Weiss, Esquire, 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

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On review, the appellant disagrees with the administrative judge's finding that the condition subsequent that terminated the indefinite suspension action occurred on July 28, 2011, when the agency learned that the U.S. Attorney did not intend to further prosecute her in District or Superior Courts.<sup>2</sup> Petition for Review (PFR) File, Tab 1. Among other things,<sup>3</sup> she contends that the administrative judge misread *Lund v. Department of Defense*, [41 M.S.P.R. 115](#) (1989), as upholding the continuation of an indefinite suspension on the grounds that a dismissed indictment was subject to immediate reinstatement. PFR File, Tab 1 at 7-8. However, the administrative judge did not cite *Lund*. See Initial Decision (ID) at 12. Moreover, he correctly found that, depending on the particular circumstances of a case, a dismissal of an indictment may not necessarily constitute the conclusion of criminal proceedings. See *id.*

Additionally, the appellant argues that the government's intent to bring further criminal proceedings in Superior Court does not constitute a pending criminal proceeding, and, therefore, the criminal proceedings at issue in this appeal concluded when the indictment was dismissed without prejudice on February 3, 2011. PFR File, Tab 1 at 9. However, this argument is inconsistent

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<sup>2</sup> On review, neither party challenges the administrative judge's findings regarding the validity of the indefinite suspension action. Thus, we need not further address them on review.

<sup>3</sup> On review, the appellant asserts that the administrative judge improperly analogizes the facts in this case to the facts in *Drain v. Department of Justice*, [108 M.S.P.R. 562](#), ¶ 10 (2008), where the employee was indefinitely suspended because of an ongoing criminal investigation. PFR File, Tab 1 at 10-11. However, the appellant overlooked the fact that the Board in *Drain* also relied upon evidence that criminal matters had not yet been finally resolved in finding that the agency properly continued the indefinite suspension action. See Initial Decision at 14; see also *Drain*, [108 M.S.P.R. 562](#), ¶ 10.

with the appellant's assertions on appeal below that the criminal matter was still pending on April 19, 2011. *See* MSPB Docket No. DC-0752-10-0760-I-3, Initial Appeal File, Tab 14 at 7, 12. In any event, the appellant has shown no error in the administrative judge's finding that, based on the U.S. District Court judge's dismissal of the indictment without prejudice in anticipation of further prosecution of the appellant's criminal case in D.C. Superior Court, criminal proceedings had not yet concluded on February 3, 2011. *See* ID at 12-13.

The appellant also disagrees with the administrative judge's application of *Jarvis v. Department of Justice*, [45 M.S.P.R. 104](#), 109-10 (1990), in which the Board found that permitting an employee to continue working while criminal charges were outstanding would neither serve the government's nor the employee's best interest. PFR File, Tab 1 at 10. She alleges that future criminal charges are not outstanding criminal charges. *Id.* However, we agree with the administrative judge that the rationale behind continuing indefinite suspension actions until criminal proceedings have concluded applies to this case based on the unique ability of the U.S. Attorney for the District of Columbia to prosecute the defendant in District of Columbia Superior Court after the U.S. District Court granted the government's request to dismiss the indictment without prejudice. *See* ID at 13.

In sum, the appellant has shown no error in the administrative judge's finding that criminal proceedings did not conclude until the agency learned of the U.S. Attorney's decision not to further prosecute the appellant in District or Superior Courts. Consequently, we discern no reason to disturb the administrative judge's finding that the agency properly continued the indefinite suspension action pursuant to [5 C.F.R. § 752.402](#).

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.

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

The initial decision 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.