

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

GLORIA J. SANFORD,
Appellant,

DOCKET NUMBER
DE-3443-12-0133-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: September 11, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Gloria J. Sanford, Aurora, Colorado, pro se.

Nanette Gonzales, Esquire, Lakewood, Colorado, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

On review, the appellant contends that the administrative judge erred in dismissing her appeal with prejudice and that, instead, he should have dismissed it without prejudice.² Petition for Review (PFR) File, Tab 1 at 4. For the following reasons, the appellant's argument fails to provide a basis to disturb the initial decision.

After the appellant requested to withdraw her appeal, the administrative judge sought clarification regarding whether she wished to withdraw it with or without prejudice. Initial Appeal File (IAF), Tab 15 at 4, Tab 26 at 2. The administrative judge cited the correct standard for withdrawal of an appeal, informing the appellant that it was an act of finality, and, in the absence of unusual circumstance, the Board will not reinstate an appeal once it has been withdrawn. IAF, Tab 26 at 2; *see Carson v. Department of the Army*, [118 M.S.P.R. 58](#), ¶ 5 (2012). In response to the administrative judge's order, the appellant stated that she wished to withdraw her appeal as premature because she did not realize that she needed to exhaust her administrative remedies with the Office of Special Counsel (OSC) prior to filing a Board appeal. IAF, Tab 30 at 4.

The administrative judge then issued an order to show cause informing the appellant that he intended to grant her motion to withdraw her appeal, and that the dismissal of the appeal would be without prejudice to her filing a subsequent individual right of action (IRA) appeal alleging that her nonselection was reprisal

² We note that the appellant does not specify whether she is arguing that the administrative judge erred in dismissing her nonselection appeal with prejudice, or whether she is asserting that the dismissal of her appeal should be without prejudice to her filing an individual right of action appeal. Petition for Review (PFR) File, Tab 1.

for whistleblowing, and with prejudice as to all other claims arising from her nonselection. IAF, Tab 31 at 3. The administrative judge further advised the appellant that he intended to dismiss the appeal unless he received a written objection from her. *Id.* The appellant did not object to the administrative judge's proposed dismissal of her appeal. Having failed to do so, the appellant may not now simply change her mind and raise her objection to the Board. *Cf. Tarpley v. U.S. Postal Service*, [37 M.S.P.R. 579](#), 581 (1988) (failure to object below to an administrative judge's ruling precludes the raising of such an objection on petition for review). Accordingly, the appellant has failed to show that the administrative judge erred in dismissing her nonselection appeal as withdrawn.

Further, to the extent the appellant is arguing that she should not be precluded from filing a claim of whistleblower retaliation following exhaustion with OSC, the administrative judge stated in the initial decision that the dismissal of the appellant's appeal would be without prejudice to her filing a potential IRA appeal. IAF, Tab 32, Initial Decision at 3.

On review, the appellant reiterates her claim that the administrative judge was biased against her. PFR File, Tab 1 at 4; IAF, Tab 27 at 4-5. In making a claim of bias against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Smets v. Department of the Navy*, [117 M.S.P.R. 164](#), ¶ 15 (2011). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if her comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). Here, the appellant's conclusory claims of bias, none of which involves extrajudicial conduct, do not overcome the presumption of honesty and integrity that accompanies an administrative judge. *See Simpkins v. Office of Personnel Management*, [113 M.S.P.R. 411](#), ¶ 5 (2010).

In her petition for review, the appellant submits a copy of a document containing e-mails that she previously submitted to the administrative judge. *Compare* PFR File, Tab 1 at 11, *with* IAF, Tab 27 at 6. This document does not provide a basis to disturb the initial decision because it is already part of the record below and, accordingly, does not constitute new evidence for purposes of [5 C.F.R. § 1201.115\(d\)\(1\)](#).³ *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980) (evidence that is already a part of the record is not new).

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 issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

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

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

³ With her petition for review, the appellant also submits a copy of a pleading that she submitted below. *Compare* PFR File, Tab 1 at 9-10, *with* IAF, Tab 27 at 4-5. In that pleading, the appellant argued that the administrative judge was biased against her. IAF, Tab 27 at 4-5. To the extent the appellant is submitting a copy of this pleading on review to reiterate her claim of bias against the administrative judge, as discussed above, any such claim lacks merit.

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.