

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

YONG I. FENLON,
Appellant,

DOCKET NUMBER
SF-0432-04-0076-C-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: September 13, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Norman Jackman, Esquire, Lincoln, New Hampshire, for the appellant.

Wilbur Lee, Camp Pendleton, 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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 enforcement in which she alleged that the agency breached the parties' 2004 settlement agreement when it failed to remove documentation of her proposed removal. Compliance File (CF), Tab 1. The appellant contended without elaboration that the agency had done so when it produced copies of that documentation in a current Board action. *Id.* In her acknowledgment order, the administrative judge gave the appellant notice of her burden to prove the agency's alleged breach by a preponderance of the evidence and ordered the agency to respond to the appellant's petition. CF, Tab 2. In its response, the agency provided evidence that it had purged the required documents from the appellant's Official Personnel File (OPF) and explained that the parties' settlement agreement did not provide for the disposition of any other records from any other location. CF, Tab 4. The appellant did not respond to the acknowledgment order and made no further submissions regarding the merits of her petition for enforcement. The administrative judge issued an initial decision in which she denied the appellant's petition. CF, Tab 12, Initial Decision (ID).

The appellant filed a timely petition for review in which she repeats the allegations that she made in her appeal below. Petition for Review File (PFR File), Tab 1. She argues that the agency's production of copies of the rescinded removal to her in a current Board action proved that the agency failed to remove the documents in accordance with the parties' agreement. *Id.* at 1. The agency responds in opposition. PFR File, Tab 3.

First, we note that the appellant's perfunctory assertions in her petition for enforcement are insufficient to carry her ultimate burden to establish by preponderant evidence that the agency breached the parties' settlement agreement. CF, Tab 1; *see Allen v. Department of Veterans Affairs*, [112 M.S.P.R. 659](#), ¶ 7 (2009), *aff'd* 420 F.App'x 980 (Fed. Cir. 2011); *Miller v. Department of*

Health & Human Services, [41 M.S.P.R. 385](#), 390-91 (1989) (“the burden of proof rests on the party asserting that the settlement agreement has been breached”). Other than her initial assertions, recounted above, the appellant provided no evidence or argument below to support her claim that the agency breached the settlement agreement. In her petition for review, the appellant argues for the first time that the parties’ agreement “effectively promised her a clean record” and that “the agreement must be construed as requiring that the agency’s communications with third parties reflect what the replacement [Notification of Personnel Action] SF-50 shows, i.e., that she resigned, and that it not disclose the circumstances of the removal.” PFR File, Tab 1 at 6. 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. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The appellant makes no such showing.

Moreover, the appellant’s argument is without merit. The parties’ settlement agreement required the agency, in pertinent part, to purge the SF-50 form for the appellant’s removal from her OPF and replace it with an SF-50 form showing that the appellant resigned for personal reasons. *Fenlon v. Department of the Navy*, MSPB Docket No. SF-0432-04-0076-I-1, Tab 9, Exhibit A (Settlement Agreement) at 2. The agency provided the sworn declaration of Thomas R. Avey, its designated representative in that prior matter, *see id.* at 7, that he personally ensured the agency’s compliance with the parties’ agreement, CF, Tab 4 at 9-10. The agency also provided a copy of the replacement SF-50 form, which indicates that the appellant resigned for personal reasons. *Id.* at 11. Thus, the record reflects that the agency honored the portion of the agreement which required it to purge the appellant’s OPF.

Further, it does not appear that the agency provided any documents to a third party, but rather that the appellant herself, albeit indirectly, produced the copy of the settlement agreement at issue here during her appeal of a subsequent

2011 removal action. *See* CF, Tab 6 at 5-7; *Fenlon v. Department of the Navy*, MSPB Docket Nos. SF-0752-11-0459-I-1, SF-11-0752-0459-I-2. Nevertheless, even if the agency produced the settlement agreement, the agreement itself does not prohibit such disclosure, but instead requires the parties not to “disclose or discuss the terms of this settlement with other agency officials except those who may have a need to know in the course of their official duties or as otherwise required by law or regulation.” Settlement Agreement at 5. As the following discussion indicates, Mr. Wilbur Lee, the agency’s representative in both this compliance matter and in the appellant’s 2011 removal appeal, had such a need to know.

In the settlement agreement, the appellant agreed that she would “not apply nor accept a position with the Department of the Navy any time in the future from the effective date of her signing of the settlement agreement.” Settlement Agreement at 4. Subsequently, in July 2008, the appellant accepted a position with the Department of the Navy. CF, Tab 8 at 5, 11. In the appeal of her 2011 removal from that position, following her refusal to answer deposition questions regarding her prior employment, the appellant e-mailed a copy of the settlement agreement to Mr. Avey, who in turn e-mailed the agreement to Mr. Lee. CF, Tab 6 at 5, 11. Mr. Lee clearly had a need to know this information in the course of his official duties in both this compliance matter and in defending the appellant’s 2011 removal appeal. Moreover, it is for this very reason that the Board has sanctioned the maintenance of removal-related documents in other agency files. *E.g.*, *Fernandez v. Department of Justice*, [88 M.S.P.R. 315](#), ¶¶ 6-7 (2001); *Baig v. Department of the Navy*, [66 M.S.P.R. 269](#), 275 (to require the agency to expunge its appeal or litigation file would leave the agency defenseless in the event the appellant breaches the settlement agreement), *aff’d* 64 F.3d 677 (Fed. Cir. 1995) (Table). In a case like this where a disciplinary action was reversed pursuant to a settlement agreement, “an agency may retain a separate file containing documents related to the disciplinary action as long as the agency observes appropriate

safeguards against unauthorized disclosures.” *Baig*, 66 M.S.P.R. at 275. The fact that this did not arise until the appellant appealed her 2011 removal from a position that violated a provision in the settlement agreement at issue, and then only because the appellant herself produced a copy of the agreement, indicates that the agency kept the promise of confidentiality it made to the appellant and that it observed appropriate safeguards in its retention of the file in question.

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.