

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

ROBERTO A. GANDIA,
Appellant,

DOCKET NUMBER
SF-0752-11-0563-C-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: September 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

James L. Wright, Sacramento, California, for the appellant.

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

DISCUSSION OF ARGUMENTS ON REVIEW

For the first time on review, the appellant asserts that the agency did not award him all the back pay to which he was entitled. Petition for Review (PFR) File, Tab 1 at 5-6. Specifically, the appellant contends that he was placed in a nonpay status from January 5, 2011, until his initial removal on April 11, 2011, and that he was entitled to back pay for that amount of time. *Id.* The Board need not consider this argument because the appellant has failed to show that it is based on new and material evidence not previously available despite the party's due diligence. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

Further, in his petition for review, the appellant reiterates his argument that the agency did not comply with the Board's final decision in *Gandia v. U.S. Postal Service*, MSPB Docket No. SF-0752-11-0563-I-2, when it removed him immediately upon his reinstatement without ever actually returning him to duty. PFR File, Tab 1 at 5; Compliance Appeal File (CAF), Tab 4 at 3. The administrative judge addressed this argument in the compliance decision, and correctly found that it lacked merit because "the reversal of the first removal action on due process grounds does not foreclose the agency's right to take a new 'constitutionally correct' removal action on the same charges." CAF, Tab 6, Compliance Decision at 4; *cf. Lopes v. Department of the Navy*, [116 M.S.P.R. 470](#), ¶ 13 (2011). Because the administrative judge's finding is supported by the weight of the record evidence and the applicable law, we discern no reason to disturb this finding. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate

inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

Further, the Board need not consider the documents that the appellant submits for the first time on review because they do not show that the agency failed to comply with the Board's final decision in the underlying appeal and, accordingly, are not material. See *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Additionally, the remaining documents that the appellant submits with his petition for review are already in the record below and, therefore, are not new. Compare PFR File, Tab 1 at 42-45, with CAF, Tab 4 at 20-23; 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). Thus, these documents do not provide a basis to disturb the compliance decision.

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

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.