

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

LINDA SAYYAD,
Appellant,

DOCKET NUMBER
SF-0432-12-0266-I-1

v.

GENERAL SERVICES
ADMINISTRATION,
Agency.

DATE: September 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Christopher D. Vaughn, Esquire, Decatur, Georgia, for the appellant.

Deborah Finch, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In the petition for review, the appellant challenges the initial decision issued by the administrative judge dismissing her mixed-case appeal as untimely filed. Petition for Review (PFR) File, Tabs 1-2. Pursuant to [5 C.F.R. § 1201.154](#)(b)(1), the appellant had 30 days after the date she received the final agency decision (FAD) on her formal equal employment opportunity (EEO) complaint to timely file her Board appeal. The appellant does not dispute the administrative judge's finding that she received the FAD on March 14, 2011. Initial Appeal File (IAF), Tab 10, Initial Decision (ID) at 2. Thus, the filing deadline in this case was April 13, 2011, and the appellant's February 1, 2012 appeal was untimely filed by 9 ½ months. IAF, Tab 1.

The Board will waive the time limit for filing an appeal only upon a showing of good cause for the delay in filing. *Schuringa v. Department of the Treasury*, [106 M.S.P.R. 1](#), ¶ 7 (2007). To establish good cause for the untimely filing of an appeal, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Id.* To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her petition. *Id.*; *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

On review, the appellant reasserts the arguments she raised below, arguing, among other things, that she had good cause for her untimely filing because:

(1) her former representative mistakenly believed that her case could be appealed to the Equal Employment Opportunity Commission (EEOC) and consolidated with two of her previous EEO complaints; (2) the agency's EEO office and the EEOC judge provided uninformed or negligent responses to requests for help from the appellant's representative; and (3) the Board must consider her appeal as timely filed pursuant to [5 U.S.C. § 7702\(f\)](#), which is the statutory savings provision applicable to erroneously filed mixed-case appeals, because she filed a timely EEO complaint following her removal. PFR File, Tab 2 at 2-5; IAF, Tab 4 at 3-5 & Exhibit D at 6.

The administrative judge thoroughly discussed these issues in the initial decision, finding that the FAD in the appellant's EEO complaint informed her that, "[b]ecasue this is a mixed case, this [FAD] may be appealed to the Merit Systems Protection Board (MSPB), not to the EEOC, within 30 calendar days of receipt of this decision." IAF, Tab 4, Exhibit D at 6 (emphasis in original); ID at 3-4. The administrative judge also found that: (1) the evidence did not suggest that the agency or the EEOC misled the appellant into believing that the EEOC had jurisdiction over her complaint; (2) the filing delay was substantial; and (3) her former representative's mistake did not present good cause to waive the filing deadline. ID at 4-6. The administrative judge also considered whether the appeal was timely under [5 U.S.C. § 7702\(f\)](#) and found that the appellant had not shown that she erroneously filed an appeal with the EEOC within the time limit for filing her Board appeal. ID at 6. We discern no reason to disturb those well-reasoned findings. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (stating that there is no reason to disturb the initial decision where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made well-reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

The appellant also argues, for the first time on review, that the agency's former representative informed the EEOC judge that the appellant was planning

to file a third EEO complaint involving her removal and that the EEOC judge in her first EEO case informed the appellant that her cases, “including a likely [removal] case, would be consolidated with the first.” PFR File, Tab 2 at 3. Significantly, the appellant offers no explanation for her failure to raise these arguments below. Because the appellant has not shown that these arguments are based on new and material evidence not previously available despite her due diligence, the Board will not consider them on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

The appellant also submits various documents with her petition for review, most of which she previously submitted on appeal. PFR File, Tab 2, Exhibits A-N; *see* IAF, Tab 2, Tab 4; ID. Evidence that is already a part of the record is not new. *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). Regarding the documents the appellant submits for the first time on review, because she has not shown that these documents or the information contained therein was unavailable despite her due diligence before the record closed, the Board will not consider them. PFR File, Tab 2, Exhibit O; *see Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); [5 C.F.R. § 1201.115](#).

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**

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.