

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

RONNIE HARPER,  
Appellant,

DOCKET NUMBER  
DC-0353-11-0751-I-2

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: November 19, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Francisco Pecunia-Vega, Fayetteville, North Carolina, for the appellant.

Edith S. Rosen, Charlotte, North Carolina, 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, which dismissed the appellant's suspension appeal as untimely filed. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).<sup>2</sup> After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. 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\(b\)](#).

As relevant here, the appellant has allegedly been affected by three distinct agency actions: (1) On June 3, 2010, the agency issued a decision denying the appellant's request for reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), *Harper v. U.S. Postal Service*, MSPB Docket No. DC-4324-10-0594-I-1, Initial Appeal File (IAF), Tab 6 at 42-43; (2) Although the appellant remained on the agency's employment rolls, the agency carried him in a nonduty nonpay status, which the appellant alleged was tantamount to a suspension, *Harper v. U.S. Postal Service*, MSPB Docket No. DC-0353-11-0751-I-1, IAF, Tab 7; (3) It appears that, on August 22, 2011, the agency issued the appellant a letter stating that it would issue him a

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<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

PS-50 documenting his separation from service effective June 7, 2010, *Harper v. U.S. Postal Service*, MSPB Docket No. DC-0353-11-0751-I-2, IAF, Tab 4 at 27.

As to the first action, the denial of the appellant's reemployment request, that was the subject of a previous Board appeal, which the appellant withdrew. *Harper*, MSPB Docket No. DC-4324-10-0594-I-2, IAF, Tabs 11-13. Based on the information available to the Board, it appears that the appellant has conceded that he has no reemployment rights under USERRA and that he is no longer contesting the issue. In any event, the appellant has made it very clear that his request for reemployment under USERRA is not an issue in the instant appeal. *Harper*, MSPB Docket No. DC-4324-10-0594-I-1, Tab 7.

As to the second action, we find that the alleged suspension is the subject of the instant appeal. *Id.* However, for the reasons explained in the initial decision, and by the agency on review, we agree with the administrative judge's decision to dismiss the appeal based on the appellant's failure to meet the refiling deadline. *Harper*, MSPB Docket No. DC-4324-10-0594-I-2, Tab 7, Initial Decision (ID). Although the Board has found that a dismissal without prejudice should not become a trap to deprive an unwary appellant of his day in court, *Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶ 6 (2007), we find that this is not what has happened here. Rather, we agree with the administrative judge that the refiling deadline set forth in the dismissal without prejudice was perfectly clear, the appellant's 3-month refiling delay was significant, the agency stands to be prejudiced by the filing delay, and the appellant was represented at all relevant times during these proceedings. *Harper*, DC-0353-11-0751-I-2, ID at 5-7 & n.5; *see generally Sherman v. U.S. Postal Service*, [118 M.S.P.R. 265](#), ¶ 9 (2012) (factors that the Board will consider in determining whether to excuse an untimely refiling). Although there are some factors weighing in the appellant's favor, including that this was the first dismissal without prejudice in this case and that the agency consented to it, we find that, on balance, the factors weighing against the appellant must prevail. We have considered the appellant's arguments

on petition for review, but we find that they really do not pertain to the issues discussed above. We therefore affirm the initial decision dismissing the instant suspension appeal with prejudice.

Nevertheless, we agree with the appellant that he has effectively been denied the right to appeal the third agency action, i.e., his removal from federal service. The agency has introduced unnecessary confusion into this matter by conflating the removal with the denial of reemployment under USERRA. The agency's arguments in both grievance decisions and in the instant Board appeal reflect its misconception that the removal and the denial of reemployment are somehow the same action. They are not. Even the February 16, 2012 notice of appeal rights that the agency issued after twice being ordered to do so, once in a Step B decision and once by an arbitrator, appears to refer back to the June 3, 2010 denial of reemployment. *Harper*, MSPB Docket No. DC-0353-11-0751-I-2, Tab 1 at 3-4. The agency's notice should instead have referred to its August 22, 2011 action separating the appellant from service. In any event, despite the confusing nature of the appeal rights notice, the appellant attempted to exercise his Board appeal rights within 30 days of receiving it. *Id.*, Tab 1. The administrative judge himself was apparently confused by the appeal rights notice because he docketed the appellant's submission as an untimely refiling of the instant suspension appeal. We find, however, that the appellant was attempting to appeal an entirely different matter, i.e., his removal.

For the reasons explained above, we find that the appellant has diligently attempted to pursue his right to appeal his August 22, 2011 removal and that any delay in appealing that action is entirely attributable to the agency. We therefore FORWARD the appellant's petition for review to the regional office for docketing as a timely removal appeal.

**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](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.