

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

COURTNEY J. MCCOURT,
Appellant,

DOCKET NUMBER
AT-0752-12-0251-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: November 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

James Farris Alexander, Jr., Gainesville, Florida, for the appellant.

Corey J. Thompson, Gainesville, Florida, 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 his removal appeal as moot. Generally, we grant petitions such as this

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

one only when: the initial decision contains erroneous 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](#)).² 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\(b\)](#).

In his petition for review, the appellant challenges the initial decision of the administrative judge that dismissed his removal appeal as moot. Petition for Review (PFR) File, Tab 1. The Board may dismiss an appeal as moot if the agency cancels or rescinds an appealable action. *White v. U.S. Postal Service*, [117 M.S.P.R. 244](#), ¶ 11 (2012). For an appeal to be deemed moot, however, the employee must have received all the relief he could have received if the matter had been adjudicated and he had prevailed. *Id.*

Here, the administrative judge found, and the appellant does not dispute, that the agency canceled the removal action, retroactively restored the appellant to his position, and paid the appellant all back pay and other benefits to which he was entitled. Initial Appeal File (IAF), Tab 12 (Initial Decision) at 3; PFR File,

² 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.

Tab 1 at 1. The appellant argues, however, that he did not receive all the relief he could have received if the matter had been adjudicated and he had prevailed because he is still subject to a last chance agreement (LCA) that he and the agency entered into on September 19, 2011. PFR File, Tab 1 at 1-2; *see* IAF, Tab 5, Subtab 8. The administrative judge correctly found that this argument lacked merit.³ Initial Decision at 4. By signing the LCA, the appellant agreed that the agency would be entitled to effect his removal if he failed to comply with its terms for a 2-year period commencing on September 19, 2011. IAF, Tab 5, Subtab 8. The LCA does not provide for a reduction in the 2-year period for any reason other than the appellant's removal for breach of the agreement. *Id.* The Board must give effect to a settlement agreement, and it lacks the authority to unilaterally modify its terms. *See Harrison v. Veterans Administration*, [44 M.S.P.R. 594](#), 599 (1990). Therefore, even if the appellant had pursued his removal appeal before the Board and prevailed, the Board would lack the authority to release the appellant from the LCA prior to the expiration of the 2-year period as he requests. *See id.* Accordingly, we find that the appellant received all the relief he could have received if the matter had been adjudicated and he had prevailed. *See Rivera v. Social Security Administration*, [109 M.S.P.R. 21](#), ¶ 7 (2008).

We note that, for the first time on review, the appellant alleges that the agency's action "would seem to be disparate treatment" because the agency settled with an unidentified employee but not the appellant. PFR File, Tab 1 at 2. The Board, however, has not considered this argument because the appellant has not shown that it is based on new and material evidence not previously available

³ Although the administrative judge found that the argument lacked merit because the agency had placed the appellant in the situation that he would have occupied had the unjust action not occurred, we find that the argument lacks merit because the appellant received all the relief he could have received if the matter had been adjudicated and he had prevailed. *See Fernandez v. Department of Justice*, [105 M.S.P.R. 443](#), ¶ 6 n.1 (2007).

despite his due diligence. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

**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.