UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KELLEY LACOMBE, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER PH-0752-12-0136-I-1 DATE: November 29, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Barbara J. Collins, Esquire, Hartford, Connecticut, for the appellant.

David Reusch, Esquire, Groton, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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. Generally, we grant petitions such as this 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).

It is well settled that, with the exception of cases involving the U.S. Postal Service, an appellant must elect a negotiated grievance procedure or a Board appeal in contesting a removal, and, upon initiating either procedure, she has made an irrevocable election. 5 U.S.C. § 7121(e)(1); *Atanus v. Merit Systems Protection Board*, 434 F.3d 1324, 1325-28 (Fed. Cir. 2006); *Jones v. Department of the Navy*, 898 F.2d 133, 134 (Fed. Cir. 1990); *Martinez v. Department of Justice*, 85 M.S.P.R. 290, ¶ 10 (2000). Where, as here, the appellant undisputedly

---

[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.

elected to first challenge her removal through the negotiated grievance procedure, this rule precludes her Board appeal notwithstanding the union's decision not to arbitrate her grievance. The subsequent failure to reach arbitration is no basis on which to assert jurisdiction. *See Martinez*, 85 M.S.P.R. 290, ¶ 10; *Hall v. U.S. Postal Service*, 26 M.S.P.R. 233 (1985) (election of arbitration remedy is binding notwithstanding subsequent dissatisfaction with the choice; the Board is not a guarantor of merits of review in the grievance/arbitration process).

The appellant's contention is incorrect that, because the union elected to forego arbitration, the determination at Step 3 of the negotiated grievance procedure constitutes a reviewable final decision. Because the collective bargaining agreement provides for arbitration, and the union did not refer the matter to arbitration, there is no reviewable "final decision" within the meaning of 5 U.S.C. § 7121(d). *See Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, ¶ 4 (2001) (noting that an arbitration decision is a final grievance decision); *Parks v. Smithsonian Institute*, 39 M.S.P.R. 346, 349-50 (1998) (a final decision, which is appealable to the Board under 5 U.S.C. § 7121(d), "is the arbitrator's decision in cases where the grievance procedure provides for arbitration as the last resort").[3]

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

---

[3] In light of our disposition, we find it unnecessary to reach the appellant's contention on review that her appeal was timely filed.

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.