

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

HORTENCIA R. LEIJA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,

Agency.

DOCKET NUMBER(S)
DA-0752-11-0588-I-1
DA-0353-11-0513-I-1
DA-0752-11-0537-I-1

DATE: December 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Anthony Rogers, San Antonio, Texas, for the appellant.

Thomas Herpin, Esquire, Houston, Texas, 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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\(b\)](#).

DISCUSSION OF ARGUMENTS ON REVIEW

On review, the appellant argues that the administrative judge committed procedural error during the hearing by refusing to allow her representative to call witnesses approved for her case. Petition for Review (PFR) File, Tab 1 at 1-2. Specifically, the appellant asserts that, although witnesses were approved for both sides, the agency examined the witnesses first and her representative was then restricted to only cross-examination of the witnesses. *Id.* She contends the witnesses were then dismissed after the agency finished questioning them, and the administrative judge refused to recall the witnesses so that her representative could question them. PFR File, Tab 1 at 2. The appellant argues that she was

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.

harmed by this ruling because she was not able to question the witnesses about relevant evidence, including asking Christopher Long, Chief Technician for Imaging Services, about the April 21, 2011 work release note from Dr. Sanjay Misra. *Id.*

However, the record does not support the appellant's claims in this regard. Hearing CD (HCD). At the beginning of the hearing, the administrative judge clarified the process of questioning witnesses who were approved for both parties, and he advised the parties that the agency representative would question the witnesses first and the appellant's representative could then question them for the appellant's case. *Id.* The administrative judge stated that each representative would then have the opportunity to cross-examine the witnesses. *Id.* During the examination of the witnesses, the administrative judge asked the appellant's representative several times if he had any more questions for the witnesses. *Id.* As to the questioning of Mr. Long, the appellant's representative "passed the witness" to the agency's representative for cross-examination without ever questioning him as to whether he had ever received Dr. Misra's "full release." *Id.* Further, even after Mr. Long testified that the agency did not seek out additional medical documentation to verify that the appellant's limitations were permanent, the appellant's representative never questioned Mr. Long on cross-examination as to whether he had any knowledge of Dr. Misra's medical release. *Id.* In addition, the record reflects that the administrative judge allowed the appellant's representative much latitude in questioning the witnesses. *Id.* Because the parties had the opportunity to fully question the witnesses, the administrative judge denied the appellant's request to recall several witnesses for new testimony. *Id.* Although the appellant is unhappy with the administrative judge's hearing-related ruling, the appellant has failed to show any error by the administrative judge in this regard.

The appellant also argues that the administrative judge erred by finding that she had not provided Dr. Misra's work release to the agency as she claimed

she did. PFR File, Tab 1 at 5. However, the evidence does not support the appellant's claims in this regard. Specifically, the appellant's representative never mentioned the medical release in his May 15, 2011 letter to Rachonda Gonzales, Chief, Human Resources Management Service, in which he states that he wished to appeal the classification of the GS-4 Medical Support Position offered to the appellant. Initial Appeal File-588 (IAF-588), Tab 20, Subtab E. Furthermore, even though the appellant and her representative orally replied to the removal notice on June 9, 2011, neither one of them ever mentioned the "full release" from her physician. IAF-588, Tab 23 at 54. Moreover, the appellant stated in her June 9 oral response that "[m]y doctor said with the help of a lift or another tech which it should have been all along, I could do my job. He's said this over and over and they have the paperwork." *Id.* Thus, based on the inconsistencies in the record, the administrative judge correctly relied on *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), to discredit the appellant's testimony and find it more likely than not that the appellant never informed the agency prior to her termination that Dr. Misra had released her to full duty. Initial Decision (ID) at 7-8.

The appellant has submitted documents for the first time with her petition for review which she contends show that the agency, prior to removing her, was aware that Dr. Misra had released her to return to full duty without restrictions. PFR File, Tab 1 at 3-5. She asserts that these documents were not submitted below because she could not have reasonably been expected to provide evidence to support her claim that she had faxed the medical release to the agency. *Id.* The appellant also argues that it is the agency's burden to prove that it did not receive Dr. Misra's work release rather than her burden to prove that she had provided the work release to the agency. *Id.* at 4.

In a removal based upon a refusal to accept a reassignment, the agency has the initial burden of coming forward with evidence showing a legitimate management reason for the reassignment, that the employee had adequate notice

of the reassignment, and that the employee refused to accept the reassignment. *See Taylor v. Department of Health & Human Services*, [40 M.S.P.R. 106](#), 110, *aff'd*, [891 F.2d 299](#) (Fed. Cir. 1989); *see also Curran v. Department of the Treasury*, [714 F.2d 913](#), 915 (9th Cir. 1983). Such showing is generally sufficient to establish a prima facie case that the reassignment was for legitimate management considerations. If the appellant produces sufficient evidence to rebut the agency's evidence, the agency must come forward with further evidence relating the reassignment to the efficiency of the service. *Id.*

Here, we agree with the administrative judge that the agency has shown that the reassignment was taken for legitimate management reasons, i.e., the appellant had permanent lifting restrictions which precluded her from performing the essential duties of her Diagnostic Radiological Technician position. Thus, the burden was on the appellant to rebut the agency's evidence by showing that she had provided the agency with the April 21, 2011 medical work release from Dr. Misra. The appellant has failed to meet this burden.

On review, the appellant has submitted several work-related e-mails, documents from her OWCP appeal file, and copies of her representative's fax log, and she asserts that these documents meet her burden of proof. PFR File, Tab 1 at 18-19, 21-56. However, these documents are not new, and the appellant has made no showing that these documents were unavailable before the record closed despite her due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Furthermore, these documents are also not material because they do not show that the agency was aware of Dr. Misra's work release prior to removing her. Thus, we have not considered them.

The appellant also argues that the administrative judge erred by dismissing her restoration appeal for lack of jurisdiction. PFR File, Tab 1 at 7. The appellant contends that she was released to full duty on April 21, 2011, and that the agency did not make every effort to restore her to her former position. *Id.* However, the appellant's argument is based on her mistaken premise that she has

shown that she provided the agency with the April 21, 2011 medical-release-to-work form prior to her removal. Because we have found that the appellant failed to make such a showing, she has shown no error by the administrative judge in this regard.

In addition, the appellant contends that, with regard to her constructive suspension appeal, the agency's placing her on leave without pay (LWOP) under the Family and Medical Leave Act of 1993 (FMLA), while she was in an administrative leave status, constituted a constructive suspension. PFR File, Tab 1 at 8-9. The dispositive issue in a constructive suspension case is generally whether the employee or agency initiated the disputed leave. *See Tedesco v. Department of the Air Force*, [90 M.S.P.R. 367](#), 371, ¶ 8 (2001). Here, the record reflects that on May 12, 2011, the appellant initiated a request for 4 hours of FMLA leave every afternoon so that she could care for her mother who had suffered a stroke and needed to attend doctor appointments and rehabilitation therapy. IAF-588, Tab 20, Subtab K at 1-3. On May 23, 2011, the appellant was placed on "home duty" status, and on June 10, 2011, the appellant was placed in an administrative leave status. At no time did the appellant ever withdraw the FMLA request, and she testified that while on administrative leave she used the afternoons to care for her mother and to take her for medical treatment. HCD (appellant's testimony). Moreover, both agency letters placing the appellant in home duty or administrative-leave status explicitly notified her that, "if you desire to take leave, you must do so in accordance with existing leave policies and procedures, you must call Imaging Services, Chief Technologist, Mr. Christopher Long or designee, in advance and request appropriate leave such as annual, sick, or leave without pay (LWOP)." IAF-588, Tab 20, Subtab K at 7-8, 13-14. Thus, in light of the facts that the appellant was required to request leave in accordance with agency-leave policies and her testimony that she spent the afternoons taking her mother to medical appointments, we see no merit to her argument that she was constructively suspended because the agency placed her in

a FMLA-LWOP status in the afternoons as she had requested. Accordingly, the appellant has failed to show that she was constructively suspended. ID at 10-11.

Finally, with regard to the appellant's contention that the agency discriminated against her based on her disability, the administrative judge thoroughly addressed this issue in the initial decision, and 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 reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same). Accordingly, the appellant has shown no basis upon which to disturb the initial decision.

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.