

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

BETSY J. FALLACARO,
Appellant,

DOCKET NUMBER
PH-0752-12-0132-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: December 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Betsy J. Fallacaro, Washington, D.C., pro se.

Elliot M. Carlin, Esquire, and Robert J. Steeves, Jr., Esquire, New York,
New York, 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 alleged reduction in grade and/or pay appeal for lack of

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

jurisdiction. 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.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). 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\(b\)](#).

On review, the appellant reasserts that she suffered a reduction in pay when the agency reassigned her to a position with a lower maximum rate of basic pay than her former position. Petition for Review (PFR) File, Tab 1 at 5. She alleges that the administrative judge failed to consider *Phillips v. Merit Systems Protection Board*, 2009 U.S. App. Lexis 590, Case No. 2008-3251 (Fed. Cir. Jan. 14, 2009) (unpublished), in which the Federal Circuit considered the maximum pay rate for Phillips' present and former positions in determining whether Phillips suffered a reduction in grade and/or pay. *Id.* However, we discern no reason why the administrative judge should have relied upon the Federal Circuit's unpublished decision in *Phillips*, in which our reviewing court summarily

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.

concluded that the Board correctly found that Phillips' reassignment to a position with a higher basic pay and the same maximum pay rate as her former position did not result in a reduction in pay. *Phillips*, 2009 U.S. App. Lexis 590 at *1; *see Mauldin v. U.S. Postal Service*, [115 M.S.P.R. 513](#), ¶ 12 (2011) (the Board may rely on unpublished Federal Circuit decisions if it finds the court's reasoning persuasive).

Our reviewing court has held that a reduction in pay must be ascertainable at the time of the personnel action, not at some future date. *McEnery v. Merit Systems Protection Board*, [963 F.2d 1512](#), 1514 (Fed. Cir. 1992) (citing *Garbacz v. United States*, [656 F.2d 628](#), 633 (Cl. Ct. 1981)). Here, the appellant's advancement to the maximum rate of pay as a GS-14 Program Analyst is purely speculative – it cannot be ascertained “without reference to anticipated future developments.” *McEnery*, 963 F.2d at 1515 (quoting *Garbacz*, 656 F.2d at 633). Thus, the administrative judge correctly found that the appellant's allegations, even if true, fail to establish an ascertainable reduction in pay at the time of her reassignment. *See* Initial Decision (ID) at 9.

Additionally, the appellant reasserts that the Office of Personnel Management (OPM) Criteria for IRS Broadbanding System states that movement of an employee to a position with a lower maximum rate of basic pay constitutes a reduction in grade, and that movement to a position with the same maximum rate of basic pay constitutes a reassignment. PFR File, Tab 1 at 4-5, 15. However, she has shown no error in the administrative judge's finding that the OPM Criteria for IRS Broadbanding System only applies to movement of an employee to a lower band than the employee's former band – not to an employee's reassignment to a position under a different pay classification system. *See* ID at 5.

The record evidence and the applicable law support the administrative judge's findings that: (1) the appellant's rate of basic pay as a GS-14-05 Program Analyst is \$119,794, which is higher than the rate of basic pay in her former

position as an IR-01 Supervisory Associate Advocate, which was \$119,598, and therefore the appellant failed to nonfrivolously allege that her reassignment resulted in a reduction in pay; (2) the potential loss of future basic pay does not constitute a constructive demotion that is appealable before the Board; (3) examining the representative rates of pay for the positions at issue, the agency reassigned the appellant to a GS-14-05 position, which is higher than the representative rate of the appellant's former position (a GS-14-04); and (4) the appellant failed to nonfrivolously allege that the Board has jurisdiction to review her movement to a position within a different position classification system. *See* ID; Initial Appeal File, Tab 6, subtabs 4b, 4e, 4f, subtab 4j at 2; *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings 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).

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.