

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

PATRICK H. OGUMA,
Appellant,

DOCKET NUMBER
SF-831E-12-0128-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: December 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Patrick H. Oguma, Keaau, Hawaii, pro se.

Thomas L. Styer, Washington, D.C., 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 affirmed the Office of Personnel Management (OPM)'s decision dismissing as untimely

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

filed the appellant's application for disability retirement. 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).

On review, the appellant argues that the administrative judge erred in denying the "Motion Request for Ex Parte Communication" that he submitted in response to the administrative judge's close-of-record notice. Initial Appeal File (IAF), Tabs 18, 20. The ex parte communication to which the appellant referred was allegedly between his former employing agency's Deputy EEO Officer and various agency heads who the appellant had named as alleged discriminating officials in one or more of the EEO complaints he had filed, in retaliation for which, he claims, the agency removed him. *Id.*, Tab 18. The administrative judge denied the motion on the basis that the Board's regulations do not give the

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.

Board authority to address communications that occur within an agency or that do not otherwise involve decision-making officials of the Board. *Id.*, Tab 21.

The appellant argues that, in denying his motion, the administrative judge failed to apply [5 C.F.R. § 1201.102](#) (Prohibition on ex parte communications), and § 1201.103 (Placing communications in the record; sanctions). These regulations, as the appellant acknowledges, refer to oral or written communication between a decision-making official of the Board and an interested party to the proceeding. Petition for Review (PFR) File, Tab 1 at 2; [5 C.F.R. § 1201.101](#)(a), (b)(2). Because the appellant's claim does not involve any Board decision-maker, he has not shown error in the administrative judge's denial of his motion. The appellant also claims that the administrative judge violated section 554(d)(2) of the Administrative Procedure Act (APA) which addresses ex parte communications under that statute. However, Board proceedings are excluded from the APA's requirements. [5 U.S.C. § 554](#)(a)(2); *Pope v. Department of Transportation*, [12 M.S.P.R. 93](#), 98 n.3 (1982).

The appellant next argues that the administrative judge erred in failing to appoint counsel for him under *French v. Office of Personnel Management*, [37 M.S.P.R. 496](#), 499 (1988) (in a disability retirement appeal, the Board has authority to request pro bono representation for an appellant who asserts that he is incompetent). The appellant refers to the medical reports he submitted below, arguing that they showed that he is unable to represent himself. The administrative judge considered those reports, but, in denying the appellant's motion, found that they only described conditions affecting his physical, not mental, health. IAF, Tab 12. While that is largely true, among the reports the appellant submitted is a brief note from a licensed psychologist dated December 27, 2010, stating that the appellant is suffering from a severe anxiety disorder. *Id.*, Tab 5 at 1. To the extent the administrative judge erred in failing to consider this report which arguably addresses the appellant's mental health, that error was not prejudicial to his substantive rights because the statement is insufficient to

establish that he is incompetent. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). In addition, although the appellant challenged the administrative judge's ruling with a sworn statement in which he asserted that he takes anti-depressants and other medications to stabilize his severe anxiety and panic disorders, IAF, Tab 14, that statement does not establish that he is mentally incompetent because the Board requires medical evidence supporting subjective opinions of mental incompetence. *See, e.g., Arizpe v. Office of Personnel Management*, [88 M.S.P.R. 463](#), ¶ 9 (2001). We conclude, therefore, that the appellant has failed to show that the administrative judge erred in not appointing counsel for him.

The appellant also argues that the administrative judge erred in failing to rule on his "Motion Request for Postponement of [the] Hearing" that was scheduled for February 17, 2012. The appellant asserts that he filed this pleading on February 2, 2012, along with a sworn statement. He has included with his petition for review a copy of the motion and the sworn statement, PFR File, Tab 1 at 19-20, but only the sworn statement appears in the record below, IAF, Tab 14, even though the accompanying certificate of service refers to the motion for postponement. *Id.* In the summary of prehearing conference that the administrative judge issued on February 9, 2012, he stated that no motions were outstanding, *id.*, Tab 16, suggesting that he never received the appellant's motion for postponement of the hearing.³ Because the record contains no evidence that the appellant ever filed his motion for postponement with the administrative judge, we cannot find that he erred in not ruling on it. In any event, because the

³ The administrative judge did, during that prehearing conference at which the appellant did not appear, reschedule the hearing for February 27, 2012. IAF, Tab 16. But because the appellant failed to provide his contact information or confirm that he would appear at the hearing, as ordered, failed to respond to another of the administrative judge's orders, and failed to indicate whether he intended to testify, as ordered, the administrative judge canceled the hearing and set a date for close of the record. *Id.*, Tab 18.

appellant did not object below to the administrative judge's failure to rule on his motion, he is precluded from now challenging it. *Gonzalez v. Department of Transportation*, [109 M.S.P.R. 250](#), ¶ 13 (2008).

Finally, the appellant alleges on review that the administrative judge failed to address his numerous miscellaneous claims, including disability discrimination, falsification, enforced leave, and retaliation for filing an EEO complaint. The appellant has not shown that any of these issues has any bearing on the timeliness of his application for disability retirement, which is the dispositive issue in this case. Moreover, none of these miscellaneous issues was included in the "issues to be heard" that the administrative judge set out in his summary of the prehearing conference. IAF, Tab 16 at 2-3. He advised the parties that any objections or exceptions to his summary must be received within 10 days of the date of the order (February 9, 2012) or be deemed waived. *Id.* at 7. The appellant failed to file an objection and so cannot be heard to complain that these issues were not considered. *Crowe v. Small Business Administration*, [53 M.S.P.R. 631](#), 635-36 (1992).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision

without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 the date of this order. 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.