

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

INEZ O. STEELE,
Appellant,

DOCKET NUMBER
AT-0831-11-0758-A-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: January 11, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lester B. Johnson, III, Esquire, Savannah, Georgia, for the appellant.

Kristine Prentice, 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 addendum initial decision issued by the administrative judge which dismissed as untimely the appellant's motion for attorney fees, filed in

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

connection with her successful challenge to the Office of Personnel Management's decision denying her a lump-sum payment. 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).

The Board's regulations provide that a motion for attorney fees must be filed as soon as possible after the final decision of the Board but no later than 60 days after the date on which a decision becomes final. [5 C.F.R. § 1201.203](#)(d); Initial Decision (ID) at 10. The administrative judge properly found that, in the absence of a petition for review, the October 3, 2011 initial decision became final on November 7, 2011; that in order to be timely, the appellant's fee petition had to be filed by January 6, 2012; and that the petition, which was filed on February

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.

23, 2012, was therefore untimely by 48 days. Addendum Initial Decision (AID) at 4-7.

The administrative judge considered whether the appellant's attorney showed good cause for the untimely filing, concluding that he did not. [5 C.F.R. § 1201.12](#); AID at 3-6. His challenge to her finding on this issue is unavailing. He argues that the filing instructions in the initial decision were unclear and explains the basis for his misunderstanding. Specifically, he argues that he believed that "the filing of the petition for review was a condition precedent" to the filing of his motion for fees. In this regard, he appears to confuse petition for review with petition for judicial review, suggesting that he had to wait until January 6, 2012, to see if the agency filed a petition for review with the Court of Appeals for the Federal Circuit. The initial decision clearly states that finality will occur on November 7, 2011, unless a petition for review is filed by that date, ID at 7, that finality must occur before a petition for review can be filed with the court, *id.* at 8-9, and that, if no petition for review is filed, a fee motion may be filed no later than 60 days after the initial decision becomes final. *Id.* at 10 (emphasis added). The clear language of the initial decision does not support the appellant's attorney's belief that, even though the initial decision became final on November 7, 2011, he had to wait until at least January 6, 2012, i.e., the filing deadline for the government's petition for judicial review, to file his fee motion. As such, the appellant's argument that the Board's instructions were unclear does not establish good cause for this untimely filing.³ See *Caldwell v. Department of the Interior*, [58 M.S.P.R. 54](#), 57 (1993).

The appellant further seeks to excuse the untimely petition by arguing that agency compliance with the initial decision was a necessary predicate to seeking attorney's fees. However, the Board has long held that the date on which the

³ The appellant's attorney might have but apparently did not attempt to clarify his understanding of the filing requirements with the Board.

agency fully complies with the Board order is irrelevant to a determination of whether a motion for an award of attorney fees was timely filed. *Ballentine v. Department of Justice*, [33 M.S.P.R. 28](#), 29 (1987), *aff'd*, 845 F.2d 1033 (Fed. Cir. 1988) (Table).

The appellant's attorney further argues that he could not properly advise the appellant as to whether to seek fees until he knew the exact amount of the lump-sum payment that she would receive. Any such decision on legal strategy does not constitute good cause for the untimely filing as the appellant's attorney was obligated to timely file the motion for fees, and if he, or she, subsequently determined that it was not necessary or prudent to proceed, the motion could have been withdrawn.

The appellant argues that the administrative judge unfairly considered the agency's untimely response to her timeliness order and that such treatment violates the concepts of due process and equal protection. However, the administrative judge did not issue the initial decision until May 18, 2012, thus giving the appellant more than sufficient time to object to the admission of the agency's arguably untimely response. The appellant made no such objection below, and, therefore the Board need not consider it now. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). Because the administrative judge properly found that the fee motion was untimely filed and that good cause was not shown for the delay, she was not required to consider whether the agency was prejudiced by the delay. *See Mata v. Office of Personnel Management*, [53 M.S.P.R. 552](#), 555, *aff'd*, [983 F.2d 1088](#) (Fed. Cir. 1992).

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 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, [126 Stat. 1465](#), 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.