

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

EMILIO DE GUZMAN,
Appellant,

DOCKET NUMBER
SF-0831-12-0027-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: January 17, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Emilio De Guzman, Zambales, Philippines, pro se.

Karla W. Yeakle, 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's (OPM) final decision denying his request

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

to make a deposit into the Civil Service Retirement and Disability Fund. 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](#)). 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\(b\)](#).²

The initial decision in this case was issued on February 7, 2012, and the appellant filed his petition for review on March 22, 2012. It therefore appeared that the petition may have been untimely filed. *See* [5 C.F.R. § 1201.114\(e\)](#) (deadline for filing a petition for review). The appellant, however, explained that he did not receive the initial decision until March 10, 2012, and that his petition for review was timely because he filed it within 30 days of that date. Petition for Review (PFR) File, Tabs 1, 5. Because the appellant resides in the Philippines, we find it believable that he experienced a substantial delay in receiving the initial decision. Considering the appellant's explanation for the apparently

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.

untimely filing and the Board's priority of deciding retirement benefits cases on the merits, *see Bleidorn v. Office of Personnel Management*, [111 M.S.P.R. 456](#), ¶ 9 (2009), we accept the petition for review as timely filed.

Nevertheless, for the reasons explained in the initial decision, we agree with the administrative judge that the appellant is ineligible to make a deposit for his creditable service under [5 U.S.C. § 8334\(c\)](#). Under OPM's regulations, an "employee" entitled to make such a deposit must be either:

- (1) A person currently employed in a position subject to the civil service retirement law; or
- (2) A former employee (whose annuity has not been finally adjudicated) who retains civil service retirement annuity rights based on a separation from a position in which retirement deductions were properly withheld and remain (or have been redeposited in whole or in part) in the Civil Service Retirement and Disability Fund.

[5 C.F.R. § 831.112\(a\)](#).

It is undisputed that the appellant is not currently employed in a position covered under the Civil Service Retirement System. Therefore, he is not an employee entitled to make a deposit under [5 C.F.R. § 831.112\(a\)\(1\)](#). It is also undisputed that no civil service retirement deductions were ever withheld from his pay. Therefore, he is not an employee entitled to make a deposit under the plain language of [5 C.F.R. § 831.112\(a\)\(2\)](#).

However, the Board has found that, notwithstanding an individual's failure to meet the literal requirements of section 831.223(a)(2), he may still be deemed to meet the requirements of that section if he can show that his former employing agency erred in failing to withhold civil service retirement deductions from his pay. That is, an appellant may show that his service was actually covered under the Civil Service Retirement Act and that the agency's failure to withhold the deductions was due to administrative error. *Noveloso v. Office of Personnel Management*, [45 M.S.P.R. 321](#), 324 n.2 (1990), *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (Table); [5 C.F.R. § 831.111\(b\)\(1\)\(ii\)](#).

In this regard, the appellant argues that, when his February 14, 1951 intermittent appointment was converted to an indefinite appointment on December 10, 1951, his service became covered because coverage was no longer excluded under Executive Order 10180 (Nov. 13, 1950). Therefore, the Department of the Navy erred in finding that he was not subject to civil service retirement coverage after that date. PFR File, Tabs 1, 6. We disagree because section 3 of Executive Order 10180 excluded all “nonpermanent” appointments from retirement coverage. Nonpermanent appointments include indefinite appointments such as the one in which the appellant was serving up until his retirement. *Rosete v. Office of Personnel Management*, [48 F.3d 514](#), 516-19 (Fed. Cir. 1995).³

Because the remainder of the appellant’s arguments depend on a finding that his service between 1951 and 1956 was covered, we do not address those arguments individually.

**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

³ Ever since the appellant’s appointment in 1951, excepted indefinite appointments have been excluded from retirement coverage by either executive order or, after 1956, by statute and regulation. *Encardo v. Office of Personnel Management*, [116 M.S.P.R. 301](#), ¶ 8 (2011).

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.