

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

LOUIS C. HEYWARD,
Appellant,

DOCKET NUMBER
PH-0731-10-0240-I-3

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: January 28, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Louis C. Heyward, Bedford, Massachusetts, pro se.

Michelle L. Perry, Esquire, 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 dismissed this appeal for failure to prosecute. Generally, we grant petitions such

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 Office of Personnel Management (the agency) ordered the Department of Veterans Affairs to separate the appellant and cancel his eligibility for reinstatement to his current position. The agency also debarred the appellant from competition for or appointment to any covered position in the federal service for 3 years. Initial Appeal File (IAF) I-1, Tab 1. The appellant appealed the agency's action, registering as an e-filer and providing an email address. *Id.* At no time during proceedings below, which involved two dismissals without prejudice and two refiled appeals, did the appellant note a change in his e-mail address. During proceedings in the second refiled appeal, the appellant participated in one telephone conference, IAF I-3, Tab 6; however, he could not be reached for the prehearing conference, *id.* The administrative judge postponed

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.

the hearing and ordered the appellant to contact the Regional Office. IAF I-3, Tab 7. When the appellant did not contact the office, the administrative judge ordered the appellant to show cause why his appeal should not be dismissed for failure to prosecute. IAF I-3, Tab 8. When the appellant did not respond to the show cause order, the administrative judge dismissed the appeal for failure to prosecute. IAF I-3, Tab 9.

In his petition, the appellant states only that he expected to receive the hearing order by U.S. mail. Petition for Review (PFR) File, Tab 1. However, as noted, the appellant registered as an e-filer. Although the appellant alleges that he received some documents from the Board by U.S. mail and some by electronic mail, the certificates of service consistently show service on the appellant by electronic mail. *See* IAF-1, Tabs 2, 5; IAF I-2, Tabs 2, 3, 5; IAF I-3, Tabs 2, 3, 4, 6, 7, 8, 9. The appellant has failed to support his allegation that the Board service was inconsistent with the appellant's registration as an e-filer. Further, the appellant did not make any responses to the administrative judge's orders, and he does not address in his petition for review why he did not respond to numerous electronically served orders. Accordingly, we find that the appellant not only failed to make a good faith attempt to comply with the administrative judge's instructions, he made no attempt at all and has exhibited a lack of basic due diligence. *See Williams v. U.S. Postal Service*, [116 M.S.P.R. 377](#), ¶ 7 (2011); [5 C.F.R. § 1201.43\(b\)](#). Under these circumstances, the appellant failed to show that the administrative judge erred in dismissing his appeal for failure to prosecute. *See Holland v. Department of Labor*, [108 M.S.P.R. 599](#), ¶ 9 (2008).

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. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.