

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

CAULTON D. ALLEN,  
Appellant,

DOCKET NUMBER  
DC-0752-07-0694-C-5

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: February 1, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Caulton D. Allen, Fort Washington, Maryland, pro se.

Gia Marie Chemsian, Jessica M. Tanner, Esquire, and Kimberly Perkins  
McLeod, 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 of the compliance initial decision that denied his petition for enforcement and a request to reopen the Board's final decision in MSPB Docket No. DC-0752-07-0694-I-1. Generally,

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

we grant petitions for review 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](#)).<sup>2</sup> 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). Further, we DENY the request to reopen the Board's final decision in MSPB Docket No. DC-0752-07-0694-I-1.

On review, the appellant disagrees with the administrative judge's finding that the agency proved that it complied with the terms of the settlement agreement. Petition for Review (PFR) File, Tab 3. He alleges, inter alia, that the administrative judge failed to address credibility issues regarding statements made by Human Resources Officer Jeannette Anderson in her handwritten notes and in her sworn declaration. *Id.* at 4. However, the compliance initial decision reflects that the administrative judge considered the appellant's contention that Anderson committed "perjury" by providing false information in her written statements, but ultimately found no evidence to support that the handwritten notes

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<sup>2</sup> 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.

were backdated as the appellant alleged, or any other evidence that Anderson's written statements contain false information. Compliance Initial Decision (CID) at 6-7. We discern no error in the administrative judge's finding that Anderson's written statements were sufficient to establish the agency's compliance with the terms of the settlement agreement.

For the first time on review, the appellant asserts that Anderson did not draft the handwritten notes attributed to her.<sup>3</sup> PFR File, Tab 3 at 2. To support this new argument, he submits various documents that were drafted and/or signed by Anderson prior to the close of the record on appeal, alleging that they show differences between Anderson's handwriting and the handwriting on the handwritten notes attributed to Anderson in this compliance appeal. *Id.* at 12-19. However, he has not shown that this evidence was unavailable prior to the close of the record on appeal below, despite his due diligence; thus, the Board has not considered this new argument or this alleged new evidence on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

The appellant's general disagreement with the administrative judge's denial of his petition for enforcement fails to establish any error by the administrative judge. For example, the appellant asserts that Anderson's inability to verify his work performance and trustworthiness to a prospective employer implies that he had an unclean record. He asserts that the agency therefore violated provision 12

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<sup>3</sup> To the extent that the appellant submits documents on review that are already a part of the record on appeal, they are not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980); PFR File, Tab 3 at 10, 21.

of the agreement in which it promised that Anderson would provide information contained in Exhibit “C” if contacted for an employment inquiry. PFR File, Tab 3. However, Anderson’s statement that she has limited knowledge as a personnel officer regarding the appellant’s work for the agency fell within the category of information that could be disclosed under section A of Exhibit “C” of the agreement. Her statement does not contravene the essence of the settlement agreement, which is to restrict information that would be given to a prospective employer in order to improve the appellant’s future employment prospects. *See* CID at 6. Thus, we discern no reason to disturb the compliance initial decision that denied the petition for enforcement. *See 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 and Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

In addition to petitioning for review of the compliance initial decision, the appellant has requested that the Board reopen its final decision in his removal appeal under [5 C.F.R. § 1201.118](#). PFR File, Tab 3 at 4-6; Compliance File, Tab 7 at 6-10. He alleges, inter alia, that there was no meeting of the minds regarding the agency’s obligation to give him a “clean record” and its obligation to “truthfully respond as required by law” and that neither the Federal Circuit’s nor the Board’s decisions address the untruthfulness of the agency’s disclosures to the Office of Workers’ Compensation Programs and the agency’s violation of the Privacy Act. PFR File, Tab 3 at 4-6. However, under the revised regulation at [5 C.F.R. § 1201.118](#), the Board will exercise its discretion to reopen an appeal in which it has issued a final order or in which an initial decision has become the Board’s final decision by operation of law only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final. The Board has held that its authority to reopen an appeal “is limited by the requirement that such authority be exercised within a reasonably

short period of time," usually measured in weeks, not years. *Miller v. Department of the Army*, [113 M.S.P.R. 572](#), ¶ 10 (2010).

Here, the record reflects that the appellant filed a petition for review of the July 13, 2006 initial decision that dismissed the removal appeal pursuant to the parties' execution of a settlement agreement, MSPB Docket No. DC-0752-07-0694-I-1, Petition for Review File, Tab 1. On January 29, 2008, the Board issued a final order that denied the petition for review and forwarded the appellant's breach of contract claims to the regional office for re-filing as a petition for enforcement. *Allen v. Department of Veterans Affairs*, MSPB Docket No. DC-0752-07-0694-I-1, Final Order (Jan. 29, 2008). Now, more than 4 years later, the appellant is requesting that the Board reopen its final decision in his removal appeal. As the appellant failed to seek reopening within a reasonably short period of time after the Board issued its January 29, 2008 final order and has failed to show unusual or extraordinary circumstances warranting reopening, we DENY the appellant's request to reopen. *See Miller*, [113 M.S.P.R. 572](#), ¶ 10.

**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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.