

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

ANJALI A. MUNSON,  
Appellant,

DOCKET NUMBER  
CH-0752-12-0107-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: February 4, 2013

**THIS ORDER IS NONPRECEDENTIAL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

Thomas Esparza, Rock Island, Illinois, for the appellant.

Teresa J. Watmore, Esquire, Warren, Michigan, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**REMAND 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 the appeal as untimely filed. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact;

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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> For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

The appellant argues on review that the Board should waive her untimely filing due to errors on the part of the agency. Petition for Review (PFR) File, Tab 1. We find that the appellant's arguments, concerning misinformation and filing delay on the grounds that her union representative scheduled a meeting to discuss her removal with management after the filing deadline had passed, do not provide a basis for waiving the filing deadline. However, because we find that the agency provided inadequate notice to the appellant regarding her Board appeal rights, a waiver of the filing deadline is justified.

The Board's regulations provide that when an agency issues a decision notice on a matter that is appealable to the Board, the agency must provide the employee with the following:

- (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal; [and]
- (b) A copy, or access to a copy, of the Board's regulations.

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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.

[5 C.F.R. § 1201.21](#). There is no dispute that the agency's decision letter failed to provide the appellant with notice of the time limits for appealing to the Board. Initial Appeal File (IAF), Tab 10, Subtab 4(g). Further, although the agency states in its decision letter that "[a] copy of the rules and regulations of the MSPB and a copy of the MSPB Appeal Form are enclosed," IAF, Tab 10, Subtab 4(g), these documents are not part of the record. The statement in the decision letter, without more, does not meet the notice requirements in section 1201.21, and therefore, it is insufficient as such notice. *Cf. Shiflett v. U.S. Postal Service*, [839 F.2d 669](#), 674 (Fed. Cir. 1988). In any event, compliance with subsection (b) of section 1201.21 provides no basis for excusing noncompliance with subsection (a). *Cf. Walls v. Merit Systems Protection Board*, [29 F.3d 1578](#), 1582 (Fed. Cir. 1994) (although the agency attached the Board's regulations to its decision letter, the pro se appellant was not on notice of the filing deadline where the notice failed to specify whether the time limit was in calendar or working days).

Moreover, as stated above, section 1201.21(a) requires an agency's decision letter to include notice of "the requirements of § 1201.22(c)." That latter section provides:

If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

The agency's decision letter does not contain this language, and our reviewing court has held that good cause existed where, among other things, this language was omitted. *Larido v. Merit Systems Protection Board*, 248 F. App'x 184, 186-87 (Fed. Cir. 2007) (non-precedential); *cf. Tatum v. Merit Systems Protection Board*, F. App'x 554 (Fed. Cir. 2012) (remanding for the Board to consider whether defective notice constituted good cause for the delay).

Here, even though the appellant does not expressly assert that her appeal was untimely filed because she was unaware of the deadline for filing an appeal,

this is not dispositive of whether good cause exists for waiving the filing deadline. Rather, the Board has stated that whether the appellant was notified, or otherwise aware, of the time limit is one factor, among others, that the Board will consider. *Nicholas v. Office of Personnel Management*, [96 M.S.P.R. 34](#), ¶ 7 (2004). Thus, an inadequate notice of Board appeal rights that contributes to an untimely filing may, depending on the circumstances and alone or in combination with other factors, constitute good cause for the delay if the appellant acted with due diligence upon discovering the right to appeal. *See Walls*, 29 F.3d at 1580 (ambiguity in the agency's notice of appeal rights, combined with the appellant's pro se status, his averments of emotional stress and strain, and the minimal 2-day delay, constituted good cause for the filing delay); *Foley v. Department of Health & Human Services*, [84 M.S.P.R. 402](#), ¶¶ 7-13 (1999).

In addition, the Board has held that, as a general matter, an agency's failure to notify an employee of his or her Board appeal rights under circumstances requiring it to do so will justify a waiver of the filing deadline. *Boulware v. Office of Personnel Management*, [70 M.S.P.R. 136](#), 139 (1996); *Gingrich v. U.S. Postal Service*, [67 M.S.P.R. 583](#), 587 (1995). Thus, the "critical and controlling fact" in the determination to excuse an untimely filing by an appellant who should have received notice of her appeal rights from the agency, but did not, is not the alleged lack of diligence on the appellant's part, but the violation by the agency of regulations requiring that notice of appeal rights be given. *Gingrich*, 67 M.S.P.R. at 587 (citing *Shiflett*, 839 F.2d at 670-73).

For the reasons discussed above, we find that the agency's failure to comply with [5 C.F.R. § 1201.21](#) justifies a waiver of the filing deadline. The agency has not alleged or shown that it was substantially prejudiced by the appellant's filing delay. *See Walls*, 29 F.3d at 1583-84. Accordingly, we waive the time limit for filing this appeal and remand the appeal for adjudication on the merits.

**ORDER**

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.