UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHERRY D. HILL, Appellant, v. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER DA-0351-11-0284-I-1 DATE: February 4, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Terrence J. Johns, New Orleans, Louisiana, for the appellant.

Cheri G. Alsobrook and Thomas E. Dunn, New Orleans, Louisiana, 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 reversed her demotion pursuant to a reduction in force (RIF). Generally, we grant

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

In her petition for review, the appellant contests the relief ordered by the administrative judge. Petition for Review File (PFR File), Tab 1. Specifically, the appellant challenges the administrative judge's decision "not to order immediate relief (i.e. placement into rightful positions as of 10/31/05 and back-pay)." *Id.* at 4. For the following reasons, we find that the administrative judge ordered the appropriate relief under the circumstances.

As part of its burden of proving that it properly applied the RIF regulations, the agency must show that it afforded the appellant the proper assignment rights. *McMillan v. Department of the Army*, 84 M.S.P.R. 476, ¶ 18

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[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.

(1999). As described by the administrative judge, there are two types of assignment rights involving the displacement of another employee: bumping and retreating. Initial Appeal File, Tab 32 (Initial Decision) at 10; *Warren v. Department of Defense*, 87 M.S.P.R. 426, ¶ 13 (2001). However, an employee may bump or retreat to a position only if she is qualified for that position. 5 C.F.R. § 351.701(a), (b), (c).

Here, the administrative judge found that the agency failed to meet its burden of proof that it afforded the appellant her reassignment rights under the RIF regulations because, despite several opportunities to provide complete documentation regarding the RIF, the agency failed to provide sufficient information to allow her to make findings as to whether its qualifications determinations were correct or whether it properly determined the appellant's bump and retreat rights. Initial Decision at 17. The administrative judge also noted that, while the appellant challenged the agency's determination that she was not qualified for or entitled to reassignment to a position above the GS-05 level, she did not submit any evidence to show that she was, in fact, qualified for any of the identified positions at the GS-06 or GS-07 level. *Id.* Therefore, because the record was unclear as to whether the appellant was qualified for or entitled to reassignment to any of the identified positions at or below the GS-07 level, the administrative judge ordered the agency to reassess the appellant's qualifications for those positions and to place her in one of those positions (or a position of like grade, pay, tenure, and commuting area) only if the agency found her to be qualified. *Id.* at 27.

In the absence of evidence that the appellant was qualified for one of the identified positions at the GS-06 or GS-07 level, we find that the administrative judge properly ordered the agency to reassess the appellant's qualifications for those positions rather than immediately place her in a position for which she may not be qualified. 5 C.F.R. § 351.701(a); *see McKenna v. Department of the Navy*, 101 M.S.P.R. 426, ¶¶ 2, 6 (2006); *cf. Flores v. U.S. Postal Service*, 75

M.S.P.R. 546, 551-52 (1997) (where the appellant offered evidence that was contrary to the agency's wholly conclusory evidence regarding the appellant's alleged lack of qualifications for a specific position for which the appellant alleged he was qualified, the Board found that the agency failed to meet its burden of proving that it provided the appellant with the appropriate assignment rights under the RIF regulations and ordered restoration to the position). Therefore, the appellant has set forth no reason to disturb the relief ordered by the administrative judge.[3]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

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[3] If, after the agency reassesses her qualifications, the appellant is not satisfied with the agency's decision, she may challenge that decision in a petition for enforcement. *See McKenna*, 101 M.S.P.R. 426, ¶ 2.

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.