

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

LUCIA M. ZIOBRO,
Appellant,

DOCKET NUMBER
PH-531D-12-0070-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: February 4, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Matthew A. Rizzo, 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. 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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\(b\)](#).

An employee is entitled to receive a within-grade increase (WIGI) if she is performing at the "fully successful" level or better at the end of the statutory waiting period. *See* [5 U.S.C. § 5335\(a\)](#) (an employee is entitled to a periodic step increase so long as she has completed the applicable waiting period, has not received an equivalent increase in her rate of basic pay during the waiting period, and is performing at an acceptable level of competence); [5 C.F.R. § 531.404\(a\)](#) (for purposes of granting or denying a within-grade increase, "acceptable level of competence" means "fully successful" or better).

At the appellant's June 14, 2011 mid-term-progress review, the agency informed her that she needed to make significant improvement in several areas under Critical Element 3 of her performance plan, Relating with Others and

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.

Providing Professional Service. Initial Appeal File (IAF), Tab 4, Subtabs 4j, 4l at 5. After the appellant's performance continued to decline, and on the basis of her then unacceptable performance in that critical element, the agency subsequently placed the appellant on a performance improvement plan and denied her WIGI. *Id.*, Subtabs 4h-4i. The appellant requested that the agency reconsider its decision to deny her WIGI, and the agency denied the request. *Id.*, Subtabs 4c, 4e; *see* [5 C.F.R. § 531.410](#). The appellant filed a timely appeal. IAF, Tab 1.

The appellant withdrew her hearing request and the administrative judge determined on the written record that the agency established by substantial evidence that the appellant was performing at the unacceptable level on Critical Element 3.³ IAF, Tab 23, Initial Decision (ID) at 10-11; IAF, Tab 7 at 4. The administrative judge also determined that the appellant failed to establish that the agency committed harmful procedural error when it failed to base its WIGI decision on her most recent rating of record, dated September 30, 2010, for which she earned an Excellent rating on Critical Element 3 and a summary rating of Outstanding. ID at 11-12. In her timely petition for review, the appellant only challenges the administrative judge's determination that she failed to establish that affirmative defense. Petition for Review File (PFR File), Tab 1. She does not challenge the administrative judge's substantive determination that the agency established her unacceptable performance on Critical Element 3 by substantial evidence. *See id.*

An agency's failure, like here, to base its denial of a within-grade salary increase on an employee's most recent rating of record constitutes a procedural,

³ In appeals from the denial of within-grade salary increases, the Board applies the substantial evidence test. *Afifi v. Department of the Interior*, [33 M.S.P.R. 282](#), 284-85 (1987). The Board defines substantial evidence as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.” [5 C.F.R. § 1201.56\(c\)\(1\)](#). It is “a lower standard of proof than preponderance of the evidence.” *Id.*

not a substantive, error. *Bowden v. Department of the Army*, [59 M.S.P.R. 662](#), 666-67 (1993). Moreover, harmful error under [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#) cannot be presumed; the appellant must establish that the agency's procedural error was likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. *E.g., id.* at 667-68; [5 C.F.R. § 1201.56\(c\)\(3\)](#). The appellant must prove such harmful procedural error by a preponderance of the evidence. *Bowden*, 59 M.S.P.R. at 668; [5 C.F.R. § 1201.56\(b\)\(1\)](#).

In her petition for review, the appellant asserts that the agency's failure to base its WIGI decision on her most recent rating of record caused it to reach a decision different than it would have reached in the absence of that error because it was required to base that decision on her most recent rating of record. PFR File, Tab 1 at 3. Thus, the appellant argues that even if her performance was unacceptable at the time that the agency denied her WIGI, the agency could not use that as the basis for denying her a WIGI because, pursuant to [5 C.F.R. § 531.404\(a\)](#), it must award the WIGI based on her most recent rating of record. *Id.*

However, contrary to the appellant's assertion, the regulations do not prohibit a negative acceptable level of competence determination in a situation where, like here, a WIGI decision is not consistent with the employee's most recent rating of record. *Bowden*, 59 M.S.P.R. at 668 n.6; *Cf. Lee v. Department of Labor*, [110 M.S.P.R. 355](#), ¶ 11 (2008) (an agency is not estopped by a prior satisfactory appraisal from taking a performance-based action against an employee at any time during the appraisal cycle, where her performance in a critical element becomes unacceptable). In such a case, the regulations instruct the agency to resolve the inconsistency by preparing a new appraisal. *Bowden*, 59 M.S.P.R. at 668 n.6; [5 C.F.R. § 531.404\(a\)\(1\)](#). The regulations only prohibit the use of determinations that pre-date the most recent rating of record. *See* [5 C.F.R. § 531.404\(a\)\(2\)](#) ("The rating of record used as the basis for an acceptable

level of competence determination for a within-grade increase must have been assigned no earlier than the most recently completed appraisal period”). Moreover, the agency’s failure to base its determination on the employee’s most recent rating of record does not entitle an employee to a WIGI, which under [5 U.S.C. § 5335](#)(a) “may not be granted by default but must be earned by successful performance under the principles of pay-for-performance.” *Bowden*, 59 M.S.P.R. at 669 (citing *Griffith v. Federal Labor Relations Authority*, [842 F.2d 487](#), 495-96 (D.C. Cir. 1988)). Accordingly, we agree with the administrative judge that the appellant failed to establish her affirmative defense of harmful procedural error.

**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.