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

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| GLORIA A. MARTINEZ,<br>Appellant,<br><br>v.<br><br>DEPARTMENT OF THE ARMY,<br>Agency. | DOCKET NUMBER<br>DE-0752-12-0061-I-1<br><br><br><br>DATE: February 7, 2013 |

# THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Jeff A. Massey, Esquire, Colorado Springs, Colorado, for the appellant.

Benjamin J. Kinsley, Esquire, Fort Carson, Colorado, 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

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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]

In her petition for review, the appellant challenges the initial decision of the administrative judge that dismissed her removal appeal as untimely filed. Petition for Review (PFR) File, Tab 1. Specifically, the appellant challenges the administrative judge's finding that she failed to show good cause for the more than 4-year delay in filing her appeal. *Id.* at 3. Generally, an appeal must be filed within 30 days after the effective date of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The Board will waive the time limit for filing a Board appeal if good cause for the delay is shown. 5 C.F.R. § 1201.22(c). To establish good cause for the untimely filing of an appeal, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). An appellant who was not provided a required notice of appeal rights does not need to show that she exercised due diligence in attempting to discover her appeal rights; the question is whether she was diligent in filing an appeal after she learned she could do so. *See Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995).

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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.

The appellant argues on review that the agency failed to prove it ever provided her with a copy of the final decision to remove and, therefore, failed to prove it ever provided her with Board appeal rights. PFR File, Tab 1 at 3. The appellant, however, signed a copy of the decision to remove acknowledging its receipt on April 12, 2007, and, as noted by the administrative judge, the decision to remove contained the required notice of the right to file an appeal with the Board and the time limit for doing so. Initial Appeal File (IAF), Tab 7, Subtab 4h; IAF, Tab 16 (Initial Decision) at 7. Therefore, contrary to the appellant's argument, the record shows that the appellant was on notice of her Board appeal rights at the time the agency issued the decision to remove.[3]

The appellant also argues that, even if the Board finds that the agency provided her with a copy of the decision to remove, the administrative judge erred in finding that the appellant did not show good cause for the delay. PFR File, Tab 1 at 3. The appellant, however, has set forth no reason to disturb the reasoned findings of the administrative judge that the appellant did not establish good cause for the more than 4-year delay in filing her Board appeal. Initial Decision at 6-8; *see Melendez v. Department of Homeland Security*, 112 M.S.P.R. 51, ¶ 14 (2009) (the Board will not excuse filing delays based on asserted

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[3] The record reflects that the appellant sought corrective action from the Office of Special Counsel (OSC) before filing her Board appeal. IAF, Tab 1 at 1, Tab 14 at 68. In his analysis of the appeal, the administrative judge noted that the appellant may not have made a knowing election of the OSC remedy under 5 U.S.C. § 7121(g). Initial Decision at 6 n.3. We find that the appellant did not make a valid election under section 7121(g) when she sought redress through OSC prior to filing her Board appeal because the agency did not notify the appellant of her right to seek corrective action from OSC, and the consequences attaching thereto, in the decision to remove. Although the Board held in *Feiertag v. Department of the Army*, 80 M.S.P.R. 264, ¶ 7 (1998), that an election of remedies made pursuant to section 7121(g) is binding regardless of whether the "the individual is aware of all of his options, and of the effect that pursuing a particular option will have on his ability to pursue other options," *Feiertag* is distinguishable from the present appeal because it involved only a 6-day suspension whereas the present appeal concerns a removal, which is an adverse action appealable to the Board.

confusion where the appellant has been placed on clear notice of a filing time limit).

Accordingly, after fully considering the filings in this appeal, 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).

**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.

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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both.

Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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 about the United States Court of Appeals for the Federal Circuit 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. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.