

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

KAREN MCGETRICK,
Appellant,

DOCKET NUMBER
NY-0752-12-0295-I-1

v.

SOCIAL SECURITY
ADMINISTRATION,
Agency.

DATE: March 21, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Daniel Kravetz, New York, New York, for the appellant.

David B. Myers and John M. Kelly, Esquire, New York, New York, 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 initial decision, which dismissed her appeal for lack of jurisdiction because the appellant's reassignment did not involve a loss of grade or pay. Generally, we grant petitions such as this

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)). 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, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant worked in the agency's East Harlem Field Office in the position of Claims Representative, GS-7. Initial Appeal File (IAF), Tab 6 at 44 of 117. In June 2011, the agency placed the appellant on a 120-day performance assistance plan based upon an assessment that her performance was not acceptable in one performance element. *Id.* at 69 of 117. At the end of the 120-day period, the agency determined the appellant's performance was still unacceptable in the performance element. *Id.* at 110-12 of 117. The agency proposed to reassign the appellant from her Claims Representative position to a Teleservice Representative position at the agency's Jamaica Teleservice Center. *Id.* at 67 of 117. The appellant and her union representative provided the deciding official both an oral reply and a written reply. *Id.* at 45 of 117. The deciding official affirmed the decision and directed the appellant's reassignment

at the same grade, step, and pay to the Teleservice Representative position. *Id.* at 44, 47 of 117.

The appellant initiated a Board appeal challenging the involuntary reassignment. IAF, Tab 1 at 4. The appellant alleged that her involuntary reassignment was a reduction in grade, pay, or band, and resulted in the denial of a within-grade increase for 2011 and 2012. *Id.* at 4-5. The appellant alleged harmful error and discrimination based on race, age, and disability. *Id.* at 7, 10. The agency filed a motion to dismiss for lack of jurisdiction because the appellant did not suffer an appealable action. IAF, Tab 6 at 16-18, 23 of 117. The administrative judge issued an order that the appellant show evidence and argument that the Board has jurisdiction over the appeal. IAF, Tab 7. The appellant responded to the order and argued that the Board has jurisdiction because she suffered a reduction in pay. IAF, Tab 8 at 1. The appellant claimed the agency referred to her reassignment as a demotion and that her future pay was reduced because the Claims Representative position had a full performance level of a GS-11 versus a GS-8 in the Teleservice Representative position. *Id.* at 2. During a status conference with the parties, the appellant withdrew her claim regarding the denial of within-grade increases. IAF, Tab 12 at 1-2. The appellant submitted a second response to the administrative judge's order, arguing that the agency improperly placed her in the wrong step when it reassigned her to the Teleservice Representative position and that the agency could have reassigned the appellant to other positions at the same location with higher full performance levels. IAF, Tab 13 at 1-3.

The administrative judge found that the appellant did not suffer a loss of grade or pay and that the loss of promotion potential does not constitute a loss of grade. IAF, Tab 15, Initial Decision (ID) at 3-4. The administrative judge also found that the appellant did not suffer a constructive demotion because her former position was not upgraded. ID at 4. Because the appellant did not suffer an appealable action, the administrative judge found that the appellant failed to

establish that the Board has jurisdiction over her appeal and dismissed the appeal. ID at 4-5.

The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The appellant argues that the administrative judge erred in considering the full performance level of a position to be the same as promotion potential and that the two concepts are different. PFR File, Tab 1 at 1. The appellant also argues that, upon her reassignment to the position of Teleservice Representative, she was improperly placed at the GS-7 level, instead of the GS-8 level. PFR File, Tab 1 at 2. The agency has responded in opposition to the petition for review. PFR File, Tab 3.

The appellant did not experience a reduction in pay as a result of the agency's involuntary reassignment.

The appellant acknowledges that the Claims Representative and Teleservice Representative positions she occupied are both GS-7 positions. PFR File, Tab 1 at 1. The appellant argues that a reduction in pay resulted because the full performance level of each position is different and that it is a “near-certainty” that an individual will advance to the highest grade in the position. *Id.* The appellant argues that having “promotion potential” is different than “full performance level” because “promotion potential” requires one to apply and compete for the position but a person does not have to apply and compete to reach “full performance level.” *Id.* Because the appellant had a “near-certainty” of reaching the highest grade of GS-11 in the Claims Representative position, the appellant argues she was reduced in pay and that the cases relied upon by the administrative judge in her decision are not applicable. *Id.*

The appellant appears to rely solely on the terminology used by the parties to claim a distinction between the present appeal and *Marcheggiani v. Department of Defense*, [90 M.S.P.R. 212](#) (2001). In *Marcheggiani*, the appellant alleged a constructive demotion when another employee was selected for a position which the appellant alleged was a newly created career ladder position.

Marcheggiani, [90 M.S.P.R. 212](#), ¶ 5. The Board found that an alleged loss of opportunity for a career ladder promotion resulting from a lateral reassignment is not a constructive demotion. *Id.*, ¶ 10. In making its decision regarding career ladder promotions, the Board relied upon its decision in *Burrell v. Environmental Protection Agency*, [81 M.S.P.R. 427](#), ¶ 12 (1999), which looked at promotion potential. There is no evidence in the record that the Claims Representative progression from GS-7 to GS-9 to GS-11 is any different from the career ladder referenced in *Marcheggiani* or the promotion potential in *Burrell*. We find that the full performance level for each job in this appeal reflects the promotion potential for the positions.

Our reviewing court has also held that a reduction in pay arises “only when an ascertainable lowering, at the time of the personnel action, of an employee’s present or future pay occurs.” *Chaney v. Veterans Administration*, [906 F.2d 697](#), 698 (1990). Though the appellant argues that it was a “near-certainty” that she would advance to the GS-11 position, both the GS-7 and GS-9 positions place limits on the promotion potential for the positions stating, “the appropriate manager may noncompetitively promote the trainee to the next grade provided work at the higher level continues to exist, the employee has demonstrated the ability to perform it, and the trainee meets time-in-grade and other administrative requirements.” PFR File, Tab 1 at 1; IAF, Tab 13 at 19, 21. Because the appellant’s progression through the Claims Representative positions was not guaranteed but speculative based on the language of the actual position descriptions, we find there was not a certain or definitive lowering of pay. Therefore, the appellant did not suffer a reduction in pay when the agency reassigned her to the Teleservice Representative position.²

² The appellant admits in her petition for review that both her prior and reassigned positions have been established for many years and provides no evidence of the Claims Representative position being upgraded; therefore, we affirm the administrative judge’s finding that the appellant did not incur a constructive demotion. ID at 4; *see* PFR File,

The Board lacks jurisdiction over the appellant's remaining claims.

The appellant continues to argue in her petition for review, as she did below, that the agency's reassignment was due to discrimination based on age, race, and physical disability, and also adds a claim of reprisal for engaging in protected equal employment opportunity activity. PFR File, Tab 1 at 2; IAF, Tab 1 at 7,10. However, because the appellant has not asserted an appealable action, the Board lacks jurisdiction over the appellant's discrimination claims. *See Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 31 (2009). The appellant also argues that the agency should have promoted her to a GS-8 Teleservice Representative position instead of a GS-7 position because she was still doing Teleservice Representative work in the Claims Representative position, and she should be credited with that time toward progression to the next grade. PFR File, Tab 1 at 2. As previously mentioned, an appeal challenging a reassignment without loss of grade or pay is not an appealable action to the Board. *See* [5 U.S.C. § 7512](#); *Pierce v. Merit Systems Protection Board*, [242 F.3d 1373](#), 1375 (Fed. Cir. 2001). The appellant has provided no applicable law, rule, or regulation that provides jurisdiction over her assertion of a denied promotion. Because the appellant did not suffer an appealable action, the appeal must be dismissed.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

Tab 1; *see also* *Marcheggiani*, [90 M.S.P.R. 212](#), ¶ 7 (a constructive demotion occurs when an employee is reassigned without loss of grade or pay, her former position is upgraded due to issues of a new classification standard or correction of a classification error, and she meets the legal and qualification requirements for promotion to the upgraded position).

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.