

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

LORI MILLER,

Appellant,

DOCKET NUMBER

SF-0353-12-0370-I-1

v.

DEPARTMENT OF THE NAVY,

Agency.

DATE: April 26, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

James R. Hefflin, Newport Beach, California, for the appellant.

Michael Larsen, Esquire, Twentynine Palms, California, 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 dismissed her restoration appeal for lack of jurisdiction and dismissed her involuntary retirement claim as untimely filed. Generally, we grant petitions

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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.² 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The appellant does not challenge the administrative judge's findings that she failed to establish jurisdiction over her restoration appeal, and we discern no reason to disturb them. Further, the appellant's arguments on review do not warrant disturbing the initial decision. First, with regard to her assertion of bias, the appellant provides no allegations to support such an assertion. An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence a deep-seated favoritism or antagonism that would make fair judgment impossible. See *Young v. U.S. Postal Service*, [115 M.S.P.R. 424](#), ¶ 19 (2010). In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies

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.

administrative adjudicators. *Id.* The appellant makes no such argument in support of her claim. Second, with regard to her argument concerning adjudication of her appeal as a “mixed case,” the Board does not have jurisdiction over her discrimination claims in the absence of jurisdiction over her restoration appeal or any other appealable action. See *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 58 (2012). Third, we find that the administrative judge properly denied her request to withdraw her appeal. See *Keefer v. Department of Agriculture*, [92 M.S.P.R. 476](#), ¶¶ 8-9 (2002). Finally, we find unavailing the appellant’s arguments that the Board should strike the agency’s filings on petition for review because she filed complaints against the agency’s representatives.

We do, however, VACATE the administrative judge’s finding concerning the untimely filing of an involuntary retirement claim. First, the appellant clarified in her pleadings that this appeal concerned a restoration claim only. Initial Appeal File, Tab 1, Tab 5 at 1-6, Tab 11 at 17-18. All of her arguments concerning jurisdiction and timeliness involved her allegations of the agency’s failure to restore her as a partially recovered individual. She distinguished the instant appeal from her involuntary retirement appeal in *Miller v. Department of the Navy*, SF-0752-11-0806-I-1 (*Miller-2*), in which the administrative judge found that the appeal was untimely filed with no good cause shown for the delay. At the time that the administrative judge issued the initial decision in the instant appeal on July 6, 2012, *Miller-2* was pending review with the Board and the Board had not yet issued a final decision concerning the timeliness of the involuntary retirement claim. On July 17, 2012, the Board issued a Final Order in *Miller-2* affirming the administrative judge’s decision to dismiss the involuntary retirement appeal as untimely filed. We find it unnecessary to reconsider the timeliness of the involuntary retirement claim because the appellant did not intend to raise it again in the instant appeal and the Board has issued a Final Order in *Miller-2* resolving the issue. Thus, we VACATE the findings of the administrative judge and decline to review this issue again in the

interest of judicial efficiency. The Board's decision in *Miller-2* is the final decision concerning the timeliness of the involuntary retirement claim raised therein.

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

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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:

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.caafc.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.