UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEAN TERRILL,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-0752-13-0486-I-1

DATE: July 3, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Gary Terrill, Springfield, Virginia, for the appellant.

Richard Kane, 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 of the initial decision, which dismissed her appeal regarding her termination for lack of jurisdiction. 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

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

Effective January 9, 2009, the Defense Finance & Accounting Service (DFAS) separated the appellant from her GS-13 Financial Systems Analyst position due to a reduction in force (RIF). Initial Appeal File (IAF), Tab 8, Subtab 15 at 2. According to the appellant, she applied for a discontinued service retirement under the Civil Service Retirement System (CSRS) on the day of her separation from DFAS, and her annuity became effective the next day. IAF, Tab 5, Subtab 2 at 1.

Before her separation from DFAS, the appellant registered in the Department of Defense's Priority Placement Program (PPP) and, on January 6, 2009, was offered a Financial Management Analyst position with the Army National Guard. IAF, Tab 8, Subtab 14 at 1. However, her appointment with the Army (hereinafter agency) did not become effective until February 15, 2009. IAF, Tab 8, Subtab 17. The appellant reported for duty at the agency on February 17, 2009. *See* IAF, Tab 5, Subtab 2 at 1, Tab 8, Subtab 16 at 1. The appellant admits that she continued collecting an annuity throughout her employment with the agency. IAF, Tab 1 at 5 ("I was drawing an annuity and I was an employee. I acknowledge both facts."), Tab 7 at 1 ("I am a Reemployed

Annuitant, and I also receive a monthly annuity."), Tab 5, Subtab 9 at 2 ("I am, in fact, an annuitant. I receive a monthly annuity.").

The agency terminated the appellant, effective March 16, 2013, pursuant to an agency memorandum directing that all reemployed annuitants, with a few exceptions, be terminated due to budget constraints. IAF, Tab 11 at 34; *see* IAF, Tab 5, Subtab 7 at 3. The appellant then filed an appeal with the Board regarding her termination, alleging that: (1) the agency improperly classified her as a reemployed annuitant; (2) she was therefore entitled to due process with respect to the termination action; and (3) the termination action was motivated by sex, age, and disability discrimination, and retaliation for reporting sexual harassment and engaging in whistleblowing activity. IAF, Tab 1. She requested a hearing. *Id.* at 2.

The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, without holding a hearing. IAF, Tab 13, Initial Decision (ID). The administrative judge found that: (1) the appellant was a reemployed annuitant because she continued receiving an annuity throughout her reemployment, rather than electing to stop collecting her annuity as permitted by 5 U.S.C. § 9902(g); and (2) the appellant was not entitled to appeal her termination to the Board because, under 5 U.S.C. § 3323(b)(1), reemployed annuitants serve at the will of the appointing authority. ID. The administrative judge also found that the Board would only have jurisdiction over the appellant's whistleblower reprisal claim as an individual right of action (IRA) appeal, and that the Board lacked jurisdiction over the claim because the appellant failed to establish that she exhausted her remedies before the Office of Special Counsel (OSC).[2] ID.

[2] The administrative judge did not explain the disposition of the appellant's Title VII discrimination claims. *See* ID at 6. We therefore clarify that, because we lack jurisdiction over the appellant's termination, we cannot adjudicate her discrimination claims. *See Markon v. Department of State*, 71 M.S.P.R. 574, 578-79 (1996) (the Board has no independent jurisdiction over Title VII discrimination claims).

The appellant has filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. She argues that: (1) the agency "materially altered [her] employment status" by correcting the Standard Form (SF) 50 documenting her appointment to reflect her status as a reemployed annuitant;[3] (2) the cases and statutes the administrative judge cites in the initial decision are inapplicable because individuals who take a discontinued service retirement and are then reemployed via the PPP are a special subcategory of reemployed annuitants and should not be at-will employees; (3) the agency should have informed her that, if she continued collecting an annuity upon reemployment, she would be an at-will employee; (4) the initial decision contains factual inaccuracies; and (5) the agency failed to respond to her discovery requests. *Id.* The agency has filed a response, to which the appellant has replied. PFR File, Tabs 3-4.

The appellant was a reemployed annuitant and, therefore, cannot appeal her termination to the Board.

An individual receiving an annuity may become reemployed in an appointive position for which she is qualified; however, an annuitant so reemployed serves at the will of the appointing authority unless she ceases collecting an annuity upon reemployment. 5 U.S.C. § 3323(b)(1); *see Vesser v. Office of Personnel Management*, 29 F.3d 600, 605 (Fed. Cir. 1994) (actual receipt of an annuity is significant with regard to the at-will status of a reemployed individual); *see also Garza v. Department of the Navy*, 119 M.S.P.R. 91, ¶ 9 (2012) (finding that the appellant's reemployment after discontinued service retirement under the Federal Employees Retirement System was as a reemployed annuitant because his annuity continued upon his

[3] An SF-50 is not a legally operative document controlling on its face an employee's status and rights, and the information contained in the SF-50 does not itself constitute a personnel action. *Scott v. Department of the Air Force*, 113 M.S.P.R. 434, ¶ 8 (2010). Rather, the Board looks at the totality of the circumstances in determining the nature of an appointment. *Id.* Thus, we find this argument to be without merit because any allegedly erroneous correction to the SF-50 documenting the appellant's appointment cannot have "materially altered" her employment status.

reemployment, and that he therefore served at the will of the appointing authority).

Under 5 U.S.C. § 9902(g), an annuitant who becomes reemployed with the Department of Defense[4] continues to receive his annuity unless he elects to be subject to 5 U.S.C. § 8344 within 90 days of being informed of this option. Here, it is undisputed that the appellant was informed of her right to elect to be subject to 5 U.S.C. § 8344, but she allowed the 90-day period to expire without exercising this option and continued collecting her annuity. *See* PFR File, Tab 1 at 14 (the appellant stating that she "let the ninety-day period pass without action"); *see also* IAF, Tab 5, Subtab 9 at 2 (the appellant indicating that the agency gave her the option of terminating her annuity and that she "did not exercise that option" and "continue[d] to receive an annuity"). Therefore, she was a reemployed annuitant and cannot appeal her termination to the Board. *Compare Garza*, 119 M.S.P.R. 91, ¶ 9 (upon reemployment after discontinued service retirement, the appellant's annuity continued pursuant to the relevant statute and, therefore, his employment was as a reemployed annuitant), *with Colbert v. Department of the Army*, 54 M.S.P.R. 492, 495 (1992) (if an annuitant whose annuity is based on an involuntary separation including discontinued service retirement is reemployed in a position subject to 5 U.S.C. chapter 83, subchapter III, payment of the annuity terminates on reemployment and, therefore, his reemployment after discontinued service retirement would not be as a reemployed annuitant). The appellant's claims, that the aforementioned case law[5] and statutes are inapplicable to her and that she was entitled to special status

[4] The Board has held, with respect to 5 U.S.C. § 9902(g), that reemployment with the Department of the Army constitutes reemployment with the Department of Defense. *Poole v. Department of the Army*, 117 M.S.P.R. 516, ¶ 3 n.1 (2012).

[5] The appellant takes issue with the administrative judge's citation to several additional cases, which we have not cited in this Final Order. PFR File, Tab 1 at 15-17. We discern no error in the administrative judge's citation to and application of legal authority in the initial decision.

notwithstanding her continued receipt of an annuity because she was reemployed following a discontinued service retirement, are without merit.

The agency was not required to inform the appellant that she would be an at-will employee if she continued collecting an annuity.

The appellant argues that the agency should have informed her of the consequences of continuing to collect an annuity upon reemployment. PFR File, Tab 1 at 8-9, 14. She cites no legal authority that supports this proposition. However, we note that, when an employee moves to a new position within the same agency, her employing agency must notify her if the new position will affect her career tenure and Board appeal rights. *Park v. Department of Health & Human Services*, 78 M.S.P.R. 527, 534 (1998). To the extent that the appellant is arguing that this requirement is applicable in the instant appeal, she is incorrect because the appellant's at-will status was not a function of her appointment to a new position but, rather, of her choice to continue collecting an annuity upon reemployment. Notably, the appellant was not required to serve a new probationary period. *See* IAF, Tab 11 at 37. Even if the appellant's appointment had affected her appeal rights, the agency would have been under no obligation to determine or inform her of the effect of her new appointment after her departure from DFAS. When an employee moves to a new position at a different agency, the new employing agency is not responsible for determining the consequences of the change of positions. *Park*, 78 M.S.P.R. at 534-35. Although both are part of the Department of Defense, the Army and DFAS are different agencies. *See Smith v. Department of Defense*, 106 M.S.P.R. 228, ¶ 10 (2007) (stating that the Department of the Air Force is a different agency from DFAS); *see also Brown v. Department of the Navy*, 53 M.S.P.R. 537, 542 (1992) (the military departments are to be regarded as separate agencies for purposes related to the appointment and employment of civilian personnel).

The appellant's claim that the initial decision contains factual inaccuracies does not establish a basis for review.

The appellant alleges that the initial decision contains several factual inaccuracies, including: (1) misstating the sequence of events leading up to the appellant's discontinued service retirement, as well as the date of her termination; (2) assuming without proof that the agency terminated other reemployed annuitants; (3) finding that the appellant elected to continue receiving her annuity upon reemployment, although the appellant "did not make an overt decision to retain [her] annuity," but rather "let the ninety-day period pass without action"; and (4) stating that the appellant does not contest the agency's authority to terminate a reemployed annuitant at-will, although the appellant "vigorously oppose[s]" treating discontinued service retirees and individuals reemployed through the PPP as at-will employees. PFR File, Tab 1 at 14-15. Assuming arguendo that the initial decision contains the aforementioned factual errors, the appellant has failed to explain how any such errors are of sufficient weight to warrant a different outcome in this matter. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision); *see also* 5 C.F.R. § 1201.115(a)(1) (any alleged factual error must be material, meaning of sufficient weight to warrant a different outcome from that of the initial decision). Indeed, the appellant simply contends that an individual without any prior knowledge of her appeal "would be less favorably inclined toward [her] appeal" when reading the initial decision. PFR File, Tab 1 at 15.

The agency's failure to respond to the appellant's discovery requests does not warrant reversal of the initial decision.

The appellant's claim that the agency failed to respond to her discovery requests does not establish a basis for review because the appellant admittedly

failed to file a motion to compel.[6] PFR File, Tab 4 at 1; *see Sanderson*, 72 M.S.P.R. at 317; *see also Buscher v. U.S. Postal Service*, 69 M.S.P.R. 204, 210 (1995) (finding that the appellant failed to show any error due to the agency's failure to respond to his discovery requests because, although he timely initiated discovery, he failed to file a motion to compel).

The appellant contends that she was unable to file a motion to compel because the administrative judge dismissed her appeal. PFR File, Tab 4 at 1. However, if the agency's discovery responses were due on June 10, 2013, as the appellant claims, then she should have filed a motion to compel no later than June 20, 2013. *Id.*; *see* 5 C.F.R. § 1201.73(d)(3) (a motion to compel must be filed within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired). The administrative judge did not issue the initial decision until June 25, 2013, 5 days after the appellant's time to file a motion to compel expired, so the issuance of the initial decision clearly did not prevent the appellant from filing a motion to compel. *See* ID.

The appellant also states that she relied on the administrative judge's instructions for the parties to cooperate in discovery and attempt to resolve discovery disputes before seeking the administrative judge's assistance. PFR File, Tab 1 at 11. We find that this does not excuse the appellant's failure to

---

[6] On review, the appellant submits her discovery requests, as well as various communications she had with agency counsel regarding the status of the agency's discovery responses. PFR File, Tab 1, Subtab B. The appellant failed to submit this evidence below with a motion to compel and, therefore, we will not consider it now. *See Sanderson v. Office of Personnel Management*, 72 M.S.P.R. 311, 317 (1996) (finding that the appellant was not entitled to obtain documents on review because he failed to avail himself of the Board's discovery procedures below in attempting to obtain them, including filing a motion to compel), *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table); *see also Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

timely file a motion to compel. In the Acknowledgement Order, the administrative judge advised the parties that the Board's discovery procedures are set forth at 5 C.F.R. § 1201.71-.85. IAF, Tab 2 at 3. The Board's regulations clearly establish a deadline for filing a motion to compel and explain that a motion to compel may be filed if "a party fails or refuses to respond in full to a discovery request." 5 C.F.R. § 1201.73(c)(1), (d)(3).

In any event, we find that the information the appellant indicates that she sought in discovery, i.e., whether any discontinued service retirees elected to be subject to 5 U.S.C. § 8344 upon reemployment, the number of reemployed annuitants who were excepted from the directive to terminate reemployed annuitants, and whether the appellant was a valuable employee, is wholly irrelevant and immaterial to the Board's jurisdiction over her termination. PFR File, Tab 1 at 11, 32-35; *cf. Brace v. Department of Housing & Urban Development*, 13 M.S.P.R. 187, 189-90 (1982) (finding no error in the administrative judge's denial of the appellant's discovery motion where the documents the appellant was attempting to discover were largely irrelevant and immaterial to the issues properly before the Board).

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.

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 review of this final decision by the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. 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:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.