

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

DALE A. PHILYAW,  
Appellant,

DOCKET NUMBER  
AT-0752-11-0581-I-1

v.

DEPARTMENT OF THE TREASURY,  
Agency.

DATE: June 22, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Dale A. Philyaw, Goose Creek, South Carolina, pro se.

Sharon Gipson Allen, Atlanta, Georgia, 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 that dismissed his appeal as untimely filed without good cause shown for the filing delay. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

If an appellant elects to file a Board appeal after filing a timely formal complaint of discrimination with the agency and receiving a final agency decision on his complaint, such an appeal must be filed with the Board “within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue.” [5 C.F.R. § 1201.154](#)(b)(1); *see Williams v. Department of Agriculture*, [106 M.S.P.R. 677](#), ¶ 15 (2007).

Here, it is undisputed that the appellant received the final agency decision regarding his mixed case constructive discharge claim on December 26, 2009, and he filed this appeal on April 10, 2011. Initial Appeal File (IAF), Tab 1; Tab 11, Subtab 4b at 24. Thus, as the administrative judge correctly found, the appellant’s appeal is untimely by more than 14 months. IAF, Tab 14, Initial Decision at 4.

The appellant argues on review that his untimeliness should be excused because he did not consider himself to have two equal employment opportunity (EEO) cases (i.e., the mixed case constructive discharge claim and a hostile work environment claim, which an Equal Employment Opportunity Commission (EEOC) administrative judge dismissed as moot on March 9, 2011, *see* IAF, Tab 11, Subtab 4a), as the agency assigned the same investigator to both cases and he received a letter identifying only the case number for his nonmixed case as his case number. Petition for Review (PFR) File, Tab 1 at 5. We find this argument unpersuasive. The agency issued separate acceptance letters regarding the appellant’s two EEO claims, assigned each claim a separate case number, and in both its acceptance letter and the final agency decision on his constructive discharge claim clearly informed the appellant of the deadline for filing a Board appeal regarding his mixed case complaint. *See* IAF, Tab 10, Exhibit 3; Tab 11, Subtab 4b at 3, 13; Subtab 4c. The Board will not excuse filing delays based on

asserted confusion where the appellant has been placed on clear notice of a filing time limit. *Crook v. U.S. Postal Service*, [108 M.S.P.R. 553](#), ¶¶ 5-6, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008).

The appellant also contends that his 14-month filing delay should be excused because, for the vast majority of that time, his case was being considered by an EEOC administrative judge. PFR File, Tab 1 at 5. We find this argument unpersuasive because it is well settled that waiting for an outcome in another forum will not provide good cause for an untimely appeal. *See Muse v. U.S. Postal Service*, [82 M.S.P.R. 342](#), ¶ 11 (1999). Consequently, the delay in filing an appeal challenging his alleged constructive discharge, while waiting for a decision on his hostile work environment claim, does not constitute good cause for the appellant's late filed appeal.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**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 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.