UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARLENE R. STENEHJEM, Appellant, v. DEPARTMENT OF ENERGY, Agency.	DOCKET NUMBER SF-0752-11-0364-I-1 DATE: January 25, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Carlene R. Stenehjem, Milwaukie, Oregon, pro se.

Kathy L. Black, Portland, Oregon, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the 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).

The Board lacks jurisdiction over an action taken pursuant to a last-chance agreement (LCA) in which an appellant waives her right to appeal to the Board. *E.g.*, *Lizzio v. Department of the Army*, 110 M.S.P.R. 442, ¶ 7 (2009), *aff'd*, 374 F. App'x 973 (Fed. Cir. 2010). To establish that a waiver of appeal rights in an LCA should not be enforced, an appellant must show one of the following: (1) she complied with the LCA; (2) the agency materially breached the LCA or acted in bad faith; (3) she did not voluntarily enter into the LCA; or (4) the LCA resulted from fraud or mutual mistake. *Id*.

In pertinent part, the terms of the LCA required the appellant to document all her requests for retroactive approval of absences for immediate or non-routine health reasons with a signed statement on letterhead from her healthcare provider certifying that it was not advisable for the appellant to work during the requested absence and providing specific information including a diagnosis and a prognosis. Initial Appeal File (IAF), Tab 5 at 62-63. The administrative judge initially found that the appellant clearly, unequivocally, and decisively waived her right to appeal her removal pursuant to the LCA and then turned to the appellant's specific allegations of compliance with the LCA. Initial Decision (ID) at 7. The administrative judge ultimately found that the appellant failed to make a nonfrivolous allegation that she complied with the LCA. ID at 8-9.

Specifically, the administrative judge determined that the appellant failed to nonfrivolously allege that she provided the agency with the required timely medical documentation supporting her November 2010 absences for health-related reasons. ID at 8-9. The administrative judge found that the appellant's conflicting statements of whether she had timely submitted the required documentation did not rise to the level of a nonfrivolous allegation of

compliance with the LCA. ID at 8. Moreover, the administrative judge found that even if the appellant had timely submitted the medical releases that she provided in support of her claim of compliance with the LCA, they were insufficient to meet the requirements set forth in the LCA. ID at 9; *see* IAF, Tab 5 at 62-63. The administrative judge found the appellant's excuse for the insufficiency of that documentation, that her physician would not provide the required medical information in the release because of concerns about the Health Insurance Portability and Accountability Act, was unpersuasive because her physician had included such information in a July 2009 release, and the agency had found that documentation acceptable. ID at 9; *see* IAF, Tab 5 at 50. We agree with the administrative judge's analysis.

In her petition for review, the appellant claims she was not left with much of a choice whether to sign the LCA. Petition for Review (PFR) File, Tab 1 at 1. However, the fact that an appellant must choose between two unpleasant alternatives, such as signing the LCA or facing immediate removal, does not render her choice involuntary. *E.g.*, *Bahrke v. U.S. Postal Service*, 98 M.S.P.R. 513, ¶ 12 (2005).

The appellant argues for the first time in her petition for review that she did not think she was subject to the LCA while she was working on a detail. PFR File, Tab 1 at 1. She also asserts for the first time in her petition for review that a deputy in the agency's legal office told her it was up to the appellant's supervisor on her detail whether to honor the LCA. *Id.* The appellant further argues for the first time that the agency added terms and conditions to the LCA and that one of her supervisors took projects away from her and otherwise denied her work during a performance improvement plan. *Id.* The Board will not consider arguments raised for the first time in a petition for review absent a showing that the are based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant makes no such showing.

With her petition for review, the appellant provides a June 29, 2011 letter from her Chiropractic Physician, Dr. Milam. PFR File, Tab 1 at 3. 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. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant makes no such showing. Further, to constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite the appellant's due diligence when the record closed. *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). Although Dr. Milam's letter is dated June 29, 2011, the information in it concerns the appellant's medical documentation for her November 5 and 17, 2010 absences. PFR File, Tab 1 at 3. The appellant does not assert that the information was unavailable despite her due diligence before the date that the administrative judge set for the close of the record below. *See* IAF, Tab 2 at 2.

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. 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.