

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

CECIL AVERY,
Appellant,

DOCKET NUMBER
DC-3330-11-0902-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: July 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Cecil Avery, Union, Kentucky, pro se.

Scott Stauffer, APO, APO/FPO Europe, 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. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 appellant asserts on review that, while the agency had direct hire authority and did not have to select him, once it selected him for the position, the Veterans Employment Opportunities Act of 1998 (VEOA) [5 U.S.C. § 3304\(f\)\(2\)](#), entitled him to receive a career or career-conditional appointment. Petition for Review (PFR) File, Tab 1. However, under [5 U.S.C. § 3304\(a\)\(3\)](#), an agency may, under certain circumstances, directly appoint candidates to positions without regard to the veterans' preference provisions of [5 U.S.C. §§ 3309-3318](#). Here, the agency advertised the IT Specialist position for which the appellant was initially selected under OPM Direct Hire Authority and, therefore, was authorized to make its selection without regard to of [5 U.S.C. §§ 3309-3318](#). Initial Appeal File (IAF), Tab 5 at 7. The appellant argues that [5 U.S.C. § 3304\(f\)\(2\)](#) nonetheless provides him with an entitlement to veterans' preference rights. However, [5 U.S.C. § 3304\(f\)\(3\)](#) explicitly provides that “[t]his subsection shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law.” Thus, because the hiring procedure for this vacancy is explicitly exempt by law from complying with veterans' preference requirements, 5 U.S.C. § 3304(f)(2) does not confer upon the appellant an entitlement to veterans' preference.

The appellant also argues that the administrative judge erred by relying upon a “nonexist[ent] HQ, EUCOM policy” regarding the hiring process of annuitants. PFR File, Tab 1 at 7. Although neither party has included a copy of the EUCOM policy or the Department of Defense (DoD) requirements for hiring reemployed annuitants, we have obtained DoD Instruction 1400.25, Volume 300 from the Official Department of Defense Website for DoD Issuances (http://www.dtic.mil/whs/directives/corres/html/CPM_table2.html). See [5 C.F.R.](#)

[§ 1201.64](#) (the Board may take official notice of matters that can be verified). That instruction “establishes and implements policy, establishes uniform DoD-wide procedures, provides guidelines and model programs, delegates authority, and assigns responsibilities regarding civilian personnel management within the Department of Defense.” It contains, inter alia, explicit hiring procedures and guidelines for reemploying annuitants that require additional paperwork and specific approving authority. In this instance, the record reflects that “approval authority in EUCOM to hire an annuitant would be the Chief of Staff.” IAF, Tab 5 at 27. Thus, we reject the appellant’s contentions regarding the absence of agency policies concerning reemploying annuitants.

The appellant submits for a first time on review documents entitled Job Vacancy Applicant Rankings and email correspondence concerning the scheduling of an interview. PFR File, Tab 1 at 9-17. The documents are dated prior to the close of the record below and, thus, are not new. Furthermore, the appellant has made no showing that these documents were unavailable before the record closed, despite his due diligence. Therefore, we have not considered them. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); [5 C.F.R. § 1201.115](#).

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:

William D. Spencer
Clerk of the Board

Washington, D.C.