

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

VERNON JOHNSON, SR,  
Appellant,

DOCKET NUMBER  
SF-0752-11-0829-I-1

v.

DEPARTMENT OF THE NAVY,  
Agency.

DATE: July 31, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Daphne E. Barbee, Esquire, Honolulu, Hawaii, for the appellant.

Jude Klena, Virginia Beach, Virginia, 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 that was not available for consideration earlier or when the administrative judge

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

In his petition for review, the appellant disputes the underlying reasons for the revocation of his security clearance. Petition for Review (PFR) File, Tab 1 at 2, 4-6. However, it is well settled that the Board has no authority to review the substance of an agency's decision in this regard and that, when an employee challenges an adverse action based on the denial, suspension, or revocation of a security clearance, the Board's review is limited to determining whether a security clearance was denied, whether it was a requirement of the employee's position, and whether the procedures of [5 U.S.C. § 7513\(b\)](#) were followed. *E.g.*, *Norrup v. Department of the Navy*, [87 M.S.P.R. 444](#), ¶ 4 (2001); *see Department of the Navy v. Egan*, [484 U.S. 518](#), 530-31 (1988). Consequently, the Board may not review the merits of the agency's decision to revoke the appellant's security clearance. Here the administrative judge determined that the appellant's position required a security clearance and that the agency followed the required procedures. Initial Appeal File, Tab 12, Initial Decision (ID) at 9-10. The document that the appellant submits with his petition for review, a reprint of a May 28, 2009 news article referring to a lawsuit involving Countrywide Financial Corp., is not material, and, because it is dated before the close of the record below, it is also not new. 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.

With respect to the appellant's argument that he should have been reassigned, PFR File, Tab 1 at 5, the Board's review is limited to looking at whether the agency has a formal policy requiring reassignment and, if so, whether a position to which the appellant could be reassigned exists, *e.g.*, *Blagaich v.*

*Department of Transportation*, [90 M.S.P.R. 619](#), ¶ 16 (2001), *aff'd*, 63 F. App'x 476 (Fed. Cir. 2003). Based on the declaration of the agency's Director of the Office of Civilian Human Resources, in which he stated that no such policy exists, as well as the appellant's failure to identify one, the administrative judge found that the agency did not have such a policy. ID at 9. The appellant fails to show that the administrative judge erred in this regard.

Ultimately, the appellant failed to nonfrivolously allege that his choice to retire rather than face removal was involuntary. Although he asserts on review that he did not want to retire and that, if he had not done so, he would have been removed, *e.g.*, PFR File, Tab 1 at 3, it is well established that a choice between unpleasant alternatives does not render that choice involuntary, *cf. Schultz v. U.S. Navy*, [810 F.2d 1133](#), 1136-37 (Fed. Cir. 1987) (the fact that an employee is faced with the unpleasant choice of either resigning or opposing a potential removal action does not rebut the presumed voluntariness of his or her ultimate choice of resignation). Moreover, there is nothing in the record to indicate that the agency knew that it could not prevail on the appellant's proposed removal. *E.g., Barthel v. Department of the Army*, [38 M.S.P.R. 245](#), 250-51 (1988) (if an appellant shows that an agency knew that it would not prevail on a proposed adverse action, the proposed action is coercive and the resulting retirement is involuntary). Thus, the administrative judge correctly dismissed the appeal for lack of jurisdiction.

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.