

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

KENNETH SWINGER,  
Appellant,

DOCKET NUMBER  
AT-0752-11-0607-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: August 2, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Kenneth Swinger, Belton, South Carolina, pro se.

Lance Hughey, Esquire, Fort McCoy, Wisconsin, 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

---

\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The agency removed the appellant, effective April 8, 2011, for failure to maintain a basic condition of employment, i.e., membership in the Selected Reserve. Initial Appeal File (IAF), Tab 6, Subtab 4b. In his petition for review, the appellant challenges the initial decision of the administrative judge that affirmed the removal by continuing to assert that the agency removed him in violation of [10 U.S.C. § 10216](#) and Army Regulation 140-315. Petition for Review File (PFR File), Tab 1.

Section 10216(a)(1)(B) of Title 10 of the United States Code provides that a military technician (dual status), such as the appellant, “is required as a condition of that employment to maintain membership in the Selected Reserve.” The Standard Form 50s documenting the appellant’s initial appointment and subsequent promotion reiterate that requirement. IAF, Tab 6, Subtabs 4j, 4k. On review, the appellant submits a prior version of [10 U.S.C. § 10216\(g\)](#), presumably in support of his claim that he should not have been removed. PFR File, Tab 1 at 7. Not only is the provision cited by the appellant no longer in effect, but it also expressly applies only to individuals who separated or retired on or before October 30, 2000. *Id.* As noted above, the appellant was removed in April 2011. IAF, Tab 6, Subtab 4b. The current version of [10 U.S.C. § 10216\(g\)](#) applies to military technicians (dual status) who lose such status as the result of a combat-related disability. [10 U.S.C. § 10216\(g\)\(1\)](#). The appellant, however, lost his membership in the Army Reserve because of his obstructive sleep apnea, which the agency determined was not a combat-related injury. IAF, Tab 6, Subtabs 4f at 1, 4g at 3, 4i at 1. Therefore, neither version of [10 U.S.C. § 10216\(g\)](#) supports the appellant’s argument that his removal was contrary to law.

Army Regulation 140-315, paragraph 8d(2) provides that, for individuals appointed after December 8, 1983, like the appellant, failure to maintain military reserve membership constitutes a failure to meet a condition of employment. The appellant argues that the agency should not have removed him because his loss of reserve membership was not within his control. PFR File, Tab 1. Whether the loss of reserve membership was within the individual's control, however, is only material if that individual was appointed on or before December 8, 1983. Army Regulation 140-315, paragraph 8d(1).

We find, therefore, that the appellant failed to maintain a basic condition of employment, i.e., membership in the Selected Reserve, in accordance with [10 U.S.C. § 10216](#) and Army Regulation 140-315. Under these circumstances, we find that the penalty of removal is reasonable. *See, e.g., Kjeldsen v. Department of the Air Force*, [78 M.S.P.R. 370](#), 372 (1998).

We note that the appellant submitted additional documents after the close of the record on review. PFR File, Tabs 7, 8. Because the appellant has not shown that his submissions are both based on information not readily available before the record closed on review despite his due diligence and are of sufficient weight to warrant a different outcome in his appeal, they are not new and material evidence and we have not considered them. *See Ellis v. Department of Navy*, [117 M.S.P.R. 511](#), ¶ 12 (2012); [5 C.F.R. § 1201.114](#)(i).

Accordingly, 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. The initial decision of the administrative judge is the Board's final decision. [5 C.F.R. § 1201.113](#).

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

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:

-----  
William D. Spencer  
Clerk of the Board

Washington, D.C.