

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

ANDREW MIDDLEMAN,  
Appellant,

DOCKET NUMBERS  
PH-315H-11-0277-I-1  
PH-0752-11-0530-I-1

v.

DEPARTMENT OF THE TREASURY,  
Agency.

DATE: August 2, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Linda Bauer, Hoboken, New Jersey, for the appellant.

Alison K. Sablick, Esquire, and Elliot M. Carlin, Esquire, New York, New York, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

The appellant has filed petitions for review in these cases asking us to reconsider the initial decisions issued by the administrative judges. We grant petitions such as these only when significant new evidence is presented to us that

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

was not available for consideration earlier or when an 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](#)).

On March 7, 2011, the agency terminated the appellant, a non-preference eligible, for unacceptable performance while he was serving a 1-year trial period. Initial Appeal File (IAF) I (MSPB Docket No. PH-315H-11-0277-I-1), Tab 3, Subtabs 4b, 4c, 4s. The appellant filed an appeal of his termination and the administrative judge dismissed the appeal for lack of jurisdiction without holding the requested hearing, finding that the appellant was not an “employee” under [5 U.S.C. § 7511](#)(a)(1)(C). IAF I, Tab 8, Initial Decision I. On September 16, 2011, the appellant filed a petition for review of that initial decision, Petition for Review File (PFR File) I (MSPB Docket No. PH-315H-11-0277-I-1), Tab 1, and another initial appeal concerning the same March 7, 2011 termination, IAF II (MSPB Docket No. PH-0752-11-0530-I-1), Tab 1. The administrative judge in the second appeal issued a decision based on the written record dismissing the appeal under the doctrine of collateral estoppel. IAF II, Tab 6, Initial Decision II. The appellant has filed a timely petition for review of Initial Decision II. PFR II (MSPB Docket No. PH-0752-11-0530-I-1), Tab 1.

We have joined the appellant’s two above-captioned appeals for adjudication. [5 C.F.R. § 1201.36](#)(a)(2). Joinder is appropriate here because it will expedite the processing of these petitions for review and will not adversely affect the interests of the parties. *Boechler v. Department of the Interior*, [109 M.S.P.R. 542](#), ¶ 14 (2008), *aff’d*, 328 F. App’x 660 (Fed. Cir. 2009).

Upon thorough review of the record, we affirm the administrative judges’ findings that the Board does not have jurisdiction over the appellant’s appeals because the appellant does not satisfy the definition of “employee”

under [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#).<sup>2</sup> Initial Decision I at 3; Initial Decision II at 3. In his petitions for review, the appellant does not challenge these findings but rather claims that the appeals were properly before the Board because of his allegation that the agency failed to accommodate his disability. PFR File I, Tab 1; PFR File II, Tab 1. The Board, however, has no independent jurisdiction to consider his disability discrimination claim because the Board lacks jurisdiction over the appellant's termination during his trial period. *See Hurston v. Department of the Army*, [113 M.S.P.R. 34](#), ¶ 11 (2010).

In the appellant's petition for review of Initial Decision I,<sup>3</sup> the appellant additionally claims that the administrative judge erred in dismissing his appeal because he improperly denied him a hearing. PFR File I, Tab 1. We find, however, that the administrative judge correctly concluded that the appellant has no right to a jurisdictional hearing because he failed to make specific assertions of fact, which, if proven, would establish Board jurisdiction. *See Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006) (en banc).

Accordingly, after fully considering the filings in these appeals, we conclude that there is no new, previously unavailable, evidence and that the administrative judges made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petitions for review.

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<sup>2</sup> In Initial Decision II, the administrative judge dismissed the appeal under the doctrine of collateral estoppel and noted that, even if the matter could be relitigated, the appellant was not an employee with appeal rights under [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#). Initial Decision II at 2-3. Because we agree that the appellant does not satisfy the jurisdictional criteria for an "employee" under [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#), we dismiss the appeal for lack of jurisdiction rather than under the doctrine of collateral estoppel.

<sup>3</sup> We find that a question exists regarding the timeliness of the appellant's petition for review of Initial Decision I, but we have not decided that issue because the appellant has failed to meet the review criteria under [5 C.F.R. § 1201.115](#) on the merits of his petition.

Except as modified by this Final Order, the initial decisions of the administrative judges are the Board's final decisions.

**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.