

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

ANDREW MARSHALL, JR.,
Appellant,

DOCKET NUMBER
DC-1221-12-0084-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Andrew Marshall, Jr., Woodbridge, Virginia, pro se.

Julie Rebecca Zimmer, Baltimore, Maryland, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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).

DISCUSSION OF ARGUMENTS ON REVIEW

As noted by the administrative judge, the Board has jurisdiction over an individual right of action (IRA) appeal if the appellant has exhausted his administrative remedies before the Office of Special Counsel (OSC) and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Initial Appeal File (IAF), Tab 9, Initial Decision (ID) at 2; *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 6 (2011).

We agree with the administrative judge's finding that the appellant failed to satisfy his burden of establishing exhaustion under 5 U.S.C. § 1214(a)(3). ID at 3. The administrative judge issued an order on jurisdiction directing the appellant to show that he exhausted his remedies before OSC. IAF, Tab 3 at 2. However, the appellant failed to assert below or on review that he filed a complaint with OSC seeking corrective action regarding the agency's reclassification action. PFR File, Tab 1. Because the appellant failed to meet his jurisdictional burden, he was not entitled to a merits hearing. *See Berry v. Department of Commerce*, 101 M.S.P.R. 385, ¶ 4 (2006).

On review, the appellant contends that the administrative judge erred by characterizing his appeal as an IRA appeal and instead appears to argue that the administrative judge should have considered his whistleblowing claim as an affirmative defense in the context on his reclassification appeal. PFR File, Tab 1

at 3-4. The Board has jurisdiction over whistleblower claims only when they are raised in connection with an otherwise appealable action or when they come before the Board in the context of an IRA appeal. *See Davis v. Department of Defense*, 103 M.S.P.R. 516, ¶ 7 (2006); 5 C.F.R. § 1209.2(b)(1) and (2). Because the Board found that it lacked jurisdiction over the appellant's reclassification appeal, it lacked jurisdiction to consider the appellant's whistleblowing claim as an affirmative defense. *See Marshall v. Veterans Administration*, DC-3443-11-0954-I-1, Final Order at 4-5 (July 3, 2012); *see also Davis*, 103 M.S.P.R. 516, ¶ 7.

The appellant also alleged that the agency's action was based on discrimination and nepotism, and constituted a hate crime and harmful error. Petition for Review File, Tab 1 at 1-3, 6, 9-12. None of the appellant's additional arguments, absent an otherwise appealable action, allege an action over which the Board has jurisdiction. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Accordingly, the appellant has not provided a basis for the Board to consider his appeal. Based on the foregoing, the appellant has failed to show that the administrative judge erred in dismissing his appeal for lack of jurisdiction. Moreover, the Board need not consider the documents the appellant submits for the first time on review because they do not pertain to the exhaustion issue and, accordingly, are not material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

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.caafc.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.