

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

HENRY E. GOSSAGE,
Appellant,

DOCKET NUMBER
SF-3330-11-0227-I-1

v.

DEPARTMENT OF LABOR,
Agency.

DATE: August 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Henry E. Gossage, Olympia, Washington, pro se.

Bruce L. Brown, Esquire, and Matthew Vadnal, Esquire, Seattle,
Washington, 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.² We grant

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

² Although the Clerk of the Board granted the appellant's motion to consolidate this appeal with his appeal under the Uniformed Services Employment and Reemployment

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](#)).

In his January 5, 2011 acknowledgment order, the administrative judge informed the appellant that his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) appeared to be untimely filed, and ordered the appellant to file evidence and argument showing that his appeal was timely filed or that the doctrine of equitable tolling should be applied. Initial Appeal File (IAF), Tab 2. The appellant, however, failed to respond. In an initial decision dated May 23, 2011, the administrative judge determined that the appellant's appeal was untimely filed and that equitable tolling did not apply. IAF, Tab 15, Initial Decision. We agree with those findings.

In his petition for review, the appellant challenges the administrative judge's ruling on timeliness, asserting for the first time that his appeal of the Board's March 2009 Final Order to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) was dismissed in October 2009 because his then-counsel failed to timely file his opening brief. Petition for Review (PFR) File, Tab 1 at 56. He then states that, in July 2010, his then-counsel submitted a motion for leave to file an opening brief to the Federal Circuit, which was denied in November 2010. *Id.* The Board, however, has not considered this argument because the appellant has not shown that it is based on new and material evidence not previously available despite his due diligence. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

Rights Act of 1994, MSPB Docket Number SF-4324-11-0228-I-1, we have severed the appeals because we find they do not contain sufficiently related factual or legal issues.

The appellant also attaches documents relating to the timeliness issue on review that he did not submit below. These include a letter from the Office of Special Counsel, dated June 22, 2011, with an attached case-profile report regarding his VEOA complaint that confirms that the agency closed his case as of July 3, 2001, and a letter, dated July 12, 2011, from Greg Mercer confirming that his office notified him by letter, dated July 18, 2001, that it had closed its investigation of the appellant's VEOA complaint. PFR File, Tab 7 at 7-11 (pages marked 1-5). Although these documents may be new, they are not material to the appeal, and the Board therefore has not considered them. *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).

In his supplement to the petition for review, in an apparent attempt to persuade the Board to apply equitable tolling, the appellant alleges for the first time that the administrative judge engaged in "deception and trickery" in this appeal. PFR File, Tab 7 at 2. This argument lacks merit because the appellant fails to allege any facts that would warrant application of the doctrine of equitable tolling. *See Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 96 (1990). Moreover, there is a presumption of honesty and integrity on the part of administrative judges that can only be overcome by a substantial showing of personal bias, and the Board will not infer bias based on an administrative judge's rulings on issues. *Williams v. U.S. Postal Service*, [87 M.S.P.R. 313](#), ¶ 12 (2000). Conclusory allegations of bias or the fact that an administrative judge ruled against a party are insufficient to demonstrate bias. *Id.* An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed.

Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). Here, the appellant's vague allegations simply do not satisfy these standards.

The appellant also argues the merits of his case on review, attaching several documents in support thereof. PFR File, Tabs 1, 7. All of the documents, however, are dated prior to the close of the record below, and the appellant does not allege that any of the documents were unavailable to him despite his due diligence. Therefore, the Board has not considered them. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980).

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 regarding the timeliness of the appellant's VEOA claim 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.