

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

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
SF-4324-12-0050-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, 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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 appellant argues that the administrative judge improperly considered Barton McPeak's military service in his consideration of the appellant's Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) appeal. That the agency selected a veteran for the position is relevant to the analysis of whether the appellant was discriminated against on the basis of his military service, and the administrative judge's findings on this issue did not serve as a comparison between Mr. McPeak's military service and the appellant's military service. The administrative judge found that the selecting official's decision to select a veteran and designate the appellant as a second alternate for the position was consistent with his declaration that he did not discriminate on the basis of military service. We discern no error in his finding.

In a USERRA action, there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of the evidence, that it would have taken the action despite the protected status. *Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1014 (Fed. Cir. 2001). An appellant must show evidence of discrimination other than the fact of nonselection and membership in the protected class. *Id.* at 1014-15. As the administrative judge found, the appellant did not make a showing that his military service was a motivating or substantial factor in the agency's decision not to select him for the position. Although the appellant argues that he was the best qualified for the position, the Board's function in a USERRA appeal is not to determine whether the agency chose the best applicant but rather to determine whether the appellant has proven that the agency discriminated against him on the basis of his prior military experience. *See Becwar v. Department of Labor*, [115 M.S.P.R. 689](#), ¶ 7 (2011),

aff'd, 467 F. App'x 886 (Fed. Cir. 2012); *Fahrenbacher v. Department of the Navy*, [85 M.S.P.R. 500](#), ¶ 33 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, [240 F.3d 1009](#) (Fed. Cir. 2001).

Finally, the appellant's references to *Dow v. General Services Administration*, [117 M.S.P.R. 616](#) (2012); *Massie v. Department of Transportation*, [118 M.S.P.R. 308](#) (2012); and *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (2012), do not affect the outcome of his appeal. *Dow* concerned the agency's compliance with a Board order after a finding of a Veterans Employment Opportunities Act of 1998 violation. [117 M.S.P.R. 616](#), ¶¶ 6, 15-17, 19. The *Whitmore* and *Massie* decisions concerned the Board's consideration of all of the pertinent evidence in an individual right of action appeal to determine whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the whistleblowing activity once the appellant has made a prima facie showing of whistleblower retaliation. *Whitmore*, 680 F.3d at 1368, 70-72, 77; *Massie*, [118 M.S.P.R. 308](#), ¶¶ 6-8. The appellant has not articulated a reason to revisit his claims in light of these decisions. As discussed above, the appellant failed to make an initial showing of discrimination, and we find that the administrative judge appropriately weighed the evidence in the record to deny corrective action.

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. 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.