

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

MILO D. BURROUGHS,  
Appellant,

DOCKET NUMBER  
SF-3330-12-0255-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**THIS FINAL ORDER IS NONPRECEDENTIAL\***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

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 relied upon the unsworn declaration of the selecting official to deny his Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) appeal on the merits. The selecting official declared “under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 U.S.C. Section 1746).” Initial Appeal File, Tab 4 at 56. Thus, his declaration had the same force and effect of a sworn statement. *See* [28 U.S.C. § 1746](#); *see also* *Donato v. Department of Defense*, [34 M.S.P.R. 385](#), 389 (1987). Further, aside from simply asserting that the selecting official had knowledge of his prior USERRA appeal and failed to select him for the position in retaliation for his protected activity, the appellant failed to submit any evidence indicating that the selecting official engaged in any retaliatory behavior against the appellant in violation of [38 U.S.C. § 4311\(b\)](#). *See* *Brasch v. Department of Transportation*, [101 M.S.P.R. 145](#), ¶ 13 (2006); *see also* *Becker v. Department of Veterans Affairs*, 373 F. App’x 54, 58 (Fed. Cir. 2010) (unpublished). Thus, the administrative judge properly denied the appellant’s request for corrective action.

The appellant also argues that the Board should consider the initial decision in light of new case law. He cites 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). PFR File, Tabs 3, 4. These decisions, however, do not affect the outcome of his appeal. *Dow* concerned the agency’s compliance with a Board order to place the appellant in either the same position or one substantially equivalent after a finding of a Veterans Employment Opportunities Act of 1998 (VEOA) violation. [117 M.S.P.R. 616](#), ¶¶ 6, 15-17, 19. As the administrative

judge correctly found, there is no VEOA claim at issue here. Both *Whitmore* and *Massie* concern the Board's consideration of all of the pertinent evidence in the record to evaluate whether the agency met its burden in an individual right of action appeal 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. The appellant failed to make a showing of retaliation based on protected USERRA activity, 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](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.