

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

BRYAN T. DOYLE,
Appellant,

DOCKET NUMBER
SF-315H-11-0875-I-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: August 22, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Bryan T. Doyle, St. Paul, Minnesota, pro se.

Thomas Magnetti, Esquire, State College, Pennsylvania, 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 in which the administrative judge dismissed the appellant's termination appeal for lack of jurisdiction. We grant petitions such as this one only when significant new evidence is presented to us that was not

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

The Board has held that a temporary appointee only has appeal rights to the Board regarding his removal if, at the time of separation, he had 1 year of current continuous service under an appointment other one than limited to 1 year or less. *Tschumy v. Department of Defense*, 104 M.S.P.R. 488, ¶ 15 (2007); *Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362, ¶ 7, *review dismissed*, 161 F. App'x 945 (Fed. Cir. 2005). At the time of his August 30, 2011 termination, the appellant did not have 1 year of current continuous service under an appointment not limited to 1 year or less. Initial Appeal File (IAF), Tab 6 at 18, 20; Tab 12. Thus, the administrative judge correctly found that the Board has no jurisdiction over the appellant's termination appeal. IAF, Tab 13 (ID) at 5.

In his petition for review, the appellant does not address the issue of jurisdiction but instead argues the merits of his appeal. Petition for Review (PFR) File, Tab 1 at 4. The Board need not consider the appellant's arguments because they are not relevant to the issue currently before the Board – whether the Board has jurisdiction over this appeal. *See Fassett v. U.S. Postal Service*, 76 M.S.P.R. 137, 139 (1997) (arguments on review that address the merits of the agency's removal action, rather than the Board's jurisdiction over the appeal, do not meet the criteria for review).

On review, the appellant seems to reiterate his claim of discrimination based on his appearance, alleging that he was terminated because “a conservative militaristic type was offended by a long haired bearded rock and roller.” PFR File, Tab 1 at 4. In addition, he alleges that his termination violates his First Amendment right to freedom of expression. *Id.* As the administrative judge explained, the Board lacks jurisdiction to review the appellant's claims of discrimination and prohibited personnel practices in the absence of an otherwise

appealable matter. ID at 4. Further, it is well established that the Board has no jurisdiction to review constitutional claims that are not coupled with an independently appealable action. *See Smith v. Department of Defense*, 106 M.S.P.R. 228, ¶ 13 (2007). Thus, for the Board to have jurisdiction over the appellant's claimed constitutional violation, he first must show that the Board has been authorized by law, rule, or regulation to review the agency's decision terminating him. *Id.* As explained above, the appellant has failed to make this showing.

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.