

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

LEE E. JOHNSON,
Appellant,

DOCKET NUMBER
DC-1221-12-0091-W-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 22, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lee E. Johnson, Pembroke, Massachusetts, pro se.

Christina Anne Cotter, Washington, D.C., 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

On review, the appellant challenges the administrative judge's dismissal of his individual right of action (IRA) appeal for lack of jurisdiction based on his failure to nonfrivolously allege that he was subjected to a covered personnel action under the Whistleblower Protection Act (WPA).² Petition for Review (PFR) File, Tab 1 at 6-14. The appellant asserts that the agency's placement of allegedly derogatory information (i.e., the February 14, 2008 memorandum regarding the "Management Referral of Employee Misconduct, 07-01-610 (Johnson)") in his personnel file after he resigned constitutes a "corrective action" under 5 U.S.C. § 2302(a)(2)(A)(iii). We find that the administrative judge properly dismissed this appeal because the appellant failed to nonfrivolously allege that the agency action giving rise to his complaint is a personnel action

² Before an individual may file an IRA appeal with the Board, he must first seek corrective action from the Office of Special Counsel (OSC). If 120 days have passed since he filed a request for corrective action with OSC and he has not received a termination letter informing him that the investigation into his complaints is completed, the individual may file an IRA appeal with the Board. 5 U.S.C. § 1214(a)(3)(B). If an individual files an IRA appeal with the Board before OSC issues a termination letter and before 120 days have passed, he has failed to exhaust his remedy with OSC and the Board lacks jurisdiction. *See Ratliff v. General Services Administration*, 66 M.S.P.R. 394, 397, *appeal dismissed*, 52 F.3d 344 (Fed. Cir. 1995) (Table). Documents in the record indicate that the appellant filed a complaint with OSC on May 19, 2011. The administrative judge made no findings on whether the appellant exhausted his OSC administrative remedy. Nevertheless, this IRA appeal is now ripe for adjudication because 120 days have passed since the appellant filed his complaint with OSC. *See* 5 U.S.C. § 1214(a)(3)(B); *Ratliff*, 66 M.S.P.R. at 397.

under the WPA, but base that conclusion on reasons other than those cited by the administrative judge in the initial decision.

The WPA expressly requires that the personnel action be taken “with respect to an employee in, or applicant for, a covered position in an agency....” 5 U.S.C. § 2302(a)(2)(A). Citing this statutory language, the Federal Circuit Court of Appeals in *Nasuti v. Merit Systems Protection Board*, 376 F. App’x 29, 33-34 (Fed. Cir.), *cert. denied*, 131 S.Ct. 393 (2010) held that the WPA does not encompass a claim by a former employee complaining of an agency action taken after the termination of his employment. While a former employee may bring a claim under the WPA, 5 U.S.C. §1221(a), the statute requires that the challenged personnel action be taken while the individual was an employee or applicant for employment. *Id.* In the instant appeal, the placement of the derogatory information into the appellant’s personnel file occurred after his termination from employment and is, therefore, not a personnel action as defined by 5 U.S.C. § 2302(a)(2)(A). *Id.*

The appellant’s reliance on *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984) is misplaced because that case does not address the dispositive issue here, i.e., whether the agency’s alleged action constitutes a personnel action under 5 U.S.C. § 2302(a)(2)(A). PFR File, Tab 1 at 10-11. Similarly, his argument that the administrative judge should have considered evidence regarding the agency’s methods in investigating and obtaining the allegedly derogatory information is likewise unavailing absent a nonfrivolous allegation that these actions occurred prior to the appellant’s resignation. PFR File, Tab 1 at 11-12 citing *Russell v. Department of Justice*, 76 M.S.P.R. 317 (1997).

The appellant also contends that the administrative judge was biased. PFR File, Tab 1 at 4-6. For example, he asserts that the administrative judge refused to engage in ex parte communications and stated that the

appellant was “peppering the board.” *Id.* However, these bare assertions fail to establish a deep-seated antagonism towards the appellant that would make fair judgment impossible, in order to overcome the presumption of the administrative judge’s honesty and integrity. *See Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002); *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980).

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.