

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

TERRY L. KENNINGTON,
Appellant,

DOCKET NUMBER
DE-1221-11-0367-W-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: August 23, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Terry L. Kennington, Salt Lake City, Utah, pro se.

Richard I. Anstruther, Esquire, San Francisco, California, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 the petition for review, the appellant challenges the initial decision dismissing his individual right of action (IRA) appeal for lack of jurisdiction. The appellant argues, among other things, that: 1) the administrative judge erred in denying him a hearing and declining to consider evidence; 2) he has new evidence; 3) the administrative judge erred in finding that he failed to exhaust his administrative remedies before the Office of Special Counsel (OSC); and 4) the administrative judge incorrectly found that he failed to establish jurisdiction over his appeal.

The appellant was not entitled to a hearing on his IRA appeal until he established Board jurisdiction under the standard set forth in *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). *See, e.g., McCarty v. Environmental Protection Agency*, [105 M.S.P.R. 74](#), ¶ 6 (2007). As discussed below, he has failed to show that the administrative judge erred in finding that he did not establish jurisdiction.

The appellant has not shown that the administrative judge abused her discretion by not accepting evidence. The appellant is apparently referring to the administrative judge's September 26, 2011 Order, in which she acknowledged receiving multiple telephonic messages from him but stated that she would not consider them to be part of the record. The administrative judge stated that the appellant's messages specifically noted that his calls had "nothing to do with [the Board] case." Initial Appeal File (IAF), Tab 14. She further informed the appellant that he must communicate in writing. *Id.* The record does not indicate that the appellant attempted to submit anything in writing that was received by the regional office until after the administrative judge had already issued her initial decision. IAF, Tabs 15, 16. Given that the appellant has not contested the administrative judge's statements, he has failed to show that her refusal to

consider his messages provides a basis for finding an abuse of discretion. *See, e.g., Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 (2012).

The appellant apparently cites as evidence that was unavailable before the record closed below his December 25, 2011 motion with copies of papers from the Treasury Inspector General for Tax Administration (TIGTA) showing the case closed without an internal investigation. Petition for Review (PFR) at 3; PFR File, Tab 1. He apparently contends that he attempted to submit this motion and documents below, and that the administrative judge erred in rejecting them. He apparently asserts that the administrative judge erred in not considering them because his OSC complaint stated that TIGTA failed to investigate his claims of harassment, retaliation, constitutional right violations, discrimination, and false claims; TIGTA admitted this; and his supervisors recommended his termination after his whistleblowing activity. PFR at 3, 5-6.

The appellant has not explained why his motion and the TIGTA documents, which are dated March 21, 2011, were unavailable, despite his due diligence, before the record closed below on September 14, 2011. *See* IAF, Tab 12 at 2. Indeed, he apparently admits that he had the documents before then. PFR at 7. Thus, he has not shown that the Board should consider them, or the arguments based upon them, on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); *see also Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). In any event, the appellant has not explained how the documents warrant a different outcome in his appeal. He apparently argues that numbers appearing in the “Employee ID #” fields of the documents are actually dollar amounts showing improper conduct. PFR at 7. His theory that the numbers are dollar amounts because they are formatted with commas is mere speculation. Thus, his argument does not provide a basis for granting Board review. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

The appellant apparently asserts that the administrative judge erred in finding that he did not exhaust his remedies before OSC because he received an OSC letter giving him the right to file an appeal within 60 days and he did so. In addition, he asserts that other employees had religious rights that were denied him and that retaliation against him should have been investigated. He apparently asserts that his managers should have reported his claims to TIGTA and should have recommended that he report the incidents to TIGTA. He apparently asserts that equal employment opportunity personnel failed to investigate his allegations that the agency retaliated against him after putting him in situations that caused him to discuss religion and beliefs. He also asserts that TIGTA failed to take action.

The administrative judge correctly found that exhaustion requires not only a final determination by OSC notifying the appellant of his right to appeal to the Board, but also a showing that the appellant gave OSC a sufficient basis to pursue an investigation of his complaint. Initial Decision (ID) at 7; *see, e.g., Ward v. Merit Systems Protection Board*, [981 F.2d 521](#), 526 (Fed. Cir. 1992). In that regard, the administrative judge addressed the issues raised by the appellant, considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. Under these circumstances, we find no reason to disturb her findings. *See, e.g., Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

Moreover, the appellant failed to satisfy other criteria for establishing a nonfrivolous allegation of Board jurisdiction. Specifically, the administrative judge found that, in his February 2011 OSC complaint, the appellant never identified a “personnel action” other than his termination. ID at 9. She further found that it was undisputed that the appellant’s alleged protected disclosures occurred after his termination. ID at 9. The record supports the administrative judge’s finding that the appellant failed to identify a personnel action that occurred after the alleged protected disclosures he made in this OSC complaint.

See, e.g., IAF, Tab 1 at 6, 18, Tab 5 at 1. Thus, even if the appellant had engaged in protected disclosures, he failed to make a nonfrivolous allegation that they contributed to a personnel action because they occurred after his termination.² Therefore, the Board lacks jurisdiction over his IRA appeal. *See, e.g., Kukoyi v. Department of Veterans Affairs*, [111 M.S.P.R. 404](#), ¶ 11 (2009).³

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:

² We note that the appellant contended below that he was not contesting his termination; rather, he claimed whistleblower retaliation for actions taken after his termination, including the agency's failure to investigate allegations of misconduct by other agency employees related to incidents that led up to his termination. IAF, Tabs 1, 5, 7. Although the Whistleblower Protection Act allows an IRA appeal to be prosecuted by an employee, former employee, or applicant for employment, the statute requires a "personnel action" that was taken with respect to an employee or applicant for employment, and it does not extend to cover a claim by a former employee complaining of an agency action taken after the termination of his employment. *See Nasuti v. Merit Systems Protection Board*, 376 F. App'x 29, 33-34 (Fed. Cir. 2010). Therefore, the appellant's claimed post-termination actions could not constitute a "personnel action" for the purposes of establishing a nonfrivolous allegation of Board jurisdiction.

³ After the record closed on review, the appellant filed a reply to the agency's response. PFR File, Tabs 2, 4. The Board does not need to consider it because it does not contain evidence or arguments based on evidence that was not readily available before the record closed on review. *See* [5 C.F.R. § 1201.114](#)(b), (i).

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.