

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

MATTHEW C. MCGAUGH,  
Appellant,

DOCKET NUMBER  
DA-3443-11-0672-I-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: August 27, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Matthew C. McGaugh, Mansfield, Texas, pro se.

John T. LeMaster, Esquire, 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 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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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). Adverse actions include removal, reduction in grade, reduction in pay, suspensions for more than 14 days, or furlough for 30 days or less. [5 U.S.C. §§ 7512](#), 7513. In order for a reassignment to fall within the Board's adverse action jurisdiction under 5 U.S.C. chapter 75, it must result in a reduction in grade or a reduction in pay.<sup>2</sup> [5 U.S.C. § 7512](#)(3), (4); *Loggins v. U.S. Postal Service*, [112 M.S.P.R. 471](#), ¶ 10 (2009).

Here, the appellant has filed a petition for review in which he does not dispute that there has been no change in his pay or his work schedule. Petition for Review (PFR) File, Tab 1. He argues on review that, regardless of the official paperwork, the Board has jurisdiction over his appeal because he suffered a loss in grade and duties when he was temporarily assigned the duties of a lower-graded position.

However, a temporary assignment such as is at issue here, without a reduction in grade or pay, is not an appealable adverse action. *Dixon v. U.S. Postal Service*, [64 M.S.P.R. 445](#) (1994), *aff'd sub nom. Scorcia v. U.S. Postal Service*, 77 F.3d 503 (Fed. Cir. 1996) (Table). Moreover, even assuming arguendo that the appellant has been reassigned, the Board has similarly held that a reassignment action that does not result in a reduction in pay or grade, even if the appellant's duties were diminished, is not appealable to the Board. *Loggins*, [112 M.S.P.R. 471](#), ¶ 10. With regard to the appellant's assertion that he was reassigned even though the official documents do not reflect the reassignment,

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<sup>2</sup> We note that the appellant's reliance on 5 C.F.R. part 9701 is misplaced because part 9701 only applied to effected Department of Homeland Security employees and because the regulation was rescinded in 2008. *See* 73 Fed. Reg. 58,435 (Oct. 7, 2008).

absent an official change in position assignment, an employee who assumed the duties of a lower-graded position has not suffered an appealable action. *Kukish v. U.S. Postal Service*, [68 M.S.P.R. 360](#), 363 (1995).

To the extent the appellant may be arguing that the administrative judge erred by denying him a hearing, the administrative judge correctly found that he is not entitled to a hearing. PFR File, Tab 1; IAF, Tab 15. To be entitled to a hearing, an appellant need only raise nonfrivolous allegations that the Board has jurisdiction over his appeal. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006). In this instance, the appellant has provided no evidence or argument showing that his reassignment resulted in a reduction of grade or pay. Thus, the appellant has failed to raise a nonfrivolous allegation that the Board has jurisdiction over his appeal.

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.