

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

JOHN-PIERRE BANEY,
Appellant,

DOCKET NUMBER
DA-0752-12-0158-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: August 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John-Pierre Baney, Seagoville, Texas, pro se.

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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant filed a petition for review challenging the administrative judge's decision to dismiss his involuntary retirement appeal for lack of jurisdiction. On review, the appellant claims that he was denied a hearing and he was not allowed to present evidence and/or witnesses, he states that employers are "prohibited from retaliating against an employee who files a complaint under [the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA)], testifies in a [USERRA] proceeding, participates in a USERRA investigation, or exercises a right under USERRA," and claims that he had been retaliated against since 2003. Petition for Review File, Tab 1 at 3, 5. These arguments do not warrant reversal of the initial decision. Importantly, after the appellant clarified the nature of his claim, the administrative judge afforded him an additional opportunity to submit evidence and argument regarding his claim of an involuntary retirement and his allegations of a USERRA violation related to that claim, *see* Initial Appeal File, Tab 10,² and the appellant filed no further submissions. We agree with the administrative judge that the agency's decision to mandatorily retire the appellant is consistent with [5 U.S.C. § 8425\(b\)](#), the appellant does not challenge the administrative judge's reliance on this statutory provision, nor does he complain on review that he was not a "law enforcement officer" or that the agency otherwise did not comply with the requirements of section 8425(b). Because the appellant did not make a nonfrivolous allegation of Board jurisdiction over his claim of an

² The administrative judge noted in this Order that the appellant's USERRA claims that were not related to his involuntary retirement claim would be heard by the administrative judge in the appellant's appeal that was then-pending at the Washington Regional Office. *Id.*; *see Baney v. Department of Justice*, MSPB Docket No. DA-4324-12-0108-I-1.

involuntary retirement, he was not entitled to a hearing. *See, e.g., Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643 (Fed. Cir. 1985) (an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary resignation or retirement only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness).

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.