

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

DWIGHT A. DAVIES,
Appellant,

DOCKET NUMBER
CH-0752-12-0140-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Terrence J. Benshoof, Esquire, Glen Ellyn, Illinois, for the appellant.

LTC Richard L. Todd, Fort McCoy, Wisconsin, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On review, the appellant argues that he did not have an opportunity to obtain and present evidence below because of the “very short time allowed for reply” to the administrative judge’s order on the issue of whether he had completed his probationary or trial period prior to his termination. Petition for Review (PFR) File, Tab 1 at 2.

Administrative judges have wide discretion in the conduct of proceedings. *Boutin v. U.S. Postal Service*, [115 M.S.P.R. 241](#), ¶ 8 (2010); [5 C.F.R. § 1201.41](#). Furthermore, appellants are expected to comply with all orders issued by the Board’s administrative judges. *Mendoza v. Merit Systems Protection Board*, [966 F.2d 650](#), 653 (Fed. Cir. 1992) (en banc).

Here, the administrative judge provided a 15-day time limit for the appellant to respond to her order on the issue of jurisdiction over the termination. Initial Appeal File (IAF), Tab 2 at 2. The appellant failed to respond to the order or request an extension of time. On review, he does not claim that the order was unclear or that any incident reduced the time limit to respond, and he offers no explanation for not requesting an extension of time. Under these circumstances, the appellant has not shown that the administrative judge abused her discretion in setting the time limit for the response to her order. *See, e.g., Boutin*, [115 M.S.P.R. 241](#), ¶ 8 (the administrative judge did not abuse his discretion in denying the appellant’s request for a postponement and providing him 7 days to respond to a show cause order).

For the first time on review, the appellant contends that he has a right to appeal to the Board because he is an “employee” as that term is defined at [5 U.S.C. § 7511](#)(a). He argues that he held an identical position under the “Warrior’s in Transition” program for more than a year and submits three documents that purportedly support his claim. PFR File, Tab 1 at 2, 7-10.

The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). Furthermore, the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

Here, the appellant submits (1) an order dated February 1, 2010, directing him to report on February 7, 2010, for participation in a medical treatment program while retained on active duty status; (2) an “Officer Evaluation Report,” dated September 10, 2011; and (3) a November 5, 2010 amendment to the February 1, 2010 order. Each of these documents and the information contained therein predate January 3, 2012, the date that the record closed below for the submission of evidence on the question of jurisdiction over the termination. IAF, Tab 2 at 3. Apart from the appellant’s unsupported allegation that he did not have enough time to present evidence below, he offers no other reason for his failure to submit these documents. PFR File, Tab 1 at 7-10.

Furthermore, the appellant points to nothing in any of the documents that would change the outcome of the initial decision relative to the completion of his trial period prior to his termination, even though he asserts that “the attached orders . . . , supported by the attached efficiency [evaluation], are evidence that [he] held the identical position in excess of one year, which give[s] the Board jurisdiction.” PFR File, Tab 1 at 2. In this regard, the administrative judge correctly determined that [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#) provides that, as a preference eligible in the excepted service, the appellant had to complete “1 year of current

continuous service in the same or similar positions” in order to have appeal rights to the Board. Initial Decision (ID) at 2. Prior to issuing the initial decision, the administrative judge notified the appellant that [5 C.F.R. § 752.402](#)(b), in relevant part, provides that “[c]urrent continuous employment means a period of employment or service . . . in Federal civilian employment.” IAF, Tab 2 at 4; *see* ID at 2-3. The documents that the appellant submits on review demonstrate that he had previous military service instead of Federal civilian service. Thus, the Board need not consider the appellant’s argument, which he raises for the first time on review, because he has not shown that it is based on new and material evidence not previously available despite his due diligence.

The appellant does not contest the administrative judge’s dismissal of his Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) claim on the ground that he presented no basis for the Board to assume jurisdiction, ID at 3, and we discern no reason to disturb this finding, *see McAfee v. Social Security Administration*, [88 M.S.P.R. 4](#), ¶ 13 (2001) (an administrative judge may dismiss a USERRA appeal for lack of jurisdiction only if the appellant has been placed on specific notice of what he must show or allege to establish jurisdiction and the appellant fails to make such a showing).

In the absence of Board jurisdiction over the termination, the administrative judge properly did not adjudicate the appellant’s discrimination claims. *See Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff’d*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982) (prohibited personnel practices under [5 U.S.C. § 2302](#)(b) are not an independent source of Board jurisdiction).

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.