

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

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
SF-4324-12-0350-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 29, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 has filed a petition for review in which he requests reconsideration of the record; reiterates his Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA), Veterans' Preference Act of 1944 (VPA), and veterans' preference arguments;² and argues that the Board should reconsider his appeal in light of *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (Fed. Cir. 2012). Petition for Review (PFR) File, Tabs 1, 3, 4. The appellant has also submitted additional untimely documents, including a response to the agency's response to his petition for review and "sworn evidence" with accompanying documentation. PFR File, Tabs 6, 8.

We have reviewed the record and agree with the administrative judge's conclusion that the appellant did not prove by preponderant evidence that his military history or his participation in protected USERRA activity was a substantial or motivating factor in the agency's decision not to select him for the position at issue in this appeal. Further, we find unavailing the appellant's arguments that the agency's actions with respect to his veterans' preference rights are evidence of discrimination or retaliation. The record reflects that the appellant was allowed to compete under the merit promotion vacancy announcement and was ranked first, with veterans' preference, under the external vacancy announcement. That the agency canceled the position rather than select the appellant does not, in itself, demonstrate that the agency discriminated against

² The appellant made clear that he was not bringing a claim under the Veterans Employment Opportunities Act of 1998. Initial Appeal File, Tab 2 at 1.

the appellant on the basis of his military history or retaliated against him due to any participation in protected activity under USERRA.³

Further, the VPA does not provide a basis for Board jurisdiction. *See Burroughs v. Department of the Army*, [116 M.S.P.R. 292](#), ¶¶ 11-12, *appeal dismissed*, 446 F. App'x 293 (Fed. Cir. 2011). Finally, the appellant has not demonstrated that the evidence submitted after the close of the record on review is new and material or that it warrants disturbing the initial decision. *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (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:

³ *Whitmore* concerned the Board's consideration of all of the pertinent evidence in an individual right of action appeal to evaluate whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the whistleblowing activity once the appellant has made a prima facie showing of whistleblower retaliation. *Whitmore*, 680 F.3d at 1368, 1370-72, 1377. We do not discern any error in the administrative judge's evaluation of the evidence in the record, and the appellant has not articulated a reason to revisit his claims in light of this decision.

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.