

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

JAMES M. WEED,
Appellant,

DOCKET NUMBER
CH-0752-12-0022-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 30, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

James M. Weed, Radcliff, Kentucky, pro se.

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant asserts on review that the start date of his appointment to a GS-07 position should be moved back from November 11, 2012, to June 6, 2011. Petition for Review (PFR) File, Tab 1 at 4. The appellant contends that because he began a GS-06 appointment on June 7, 2010, he would have been eligible to compete for GS-07 positions on his one-year anniversary date. *Id.*

The appellant fails to show that he would have been promoted to a GS-07 position on his one-year anniversary date. The established rule is that one is not entitled to the benefit of a position until he has been appointed to it. *United States v. Testan*, [424 U.S. 392](#), 402 (1976). “Only if some provision of law mandates a promotion during the interim period, perhaps if the employee could ‘clearly establish’ that he would in fact have been promoted, would the agency be required to reinstate him at that higher level.” *Boese v. Department of the Air Force*, [784 F.2d 388](#), 390 (Fed. Cir. 1986) (quoting *Power v. United States*, [597 F.2d 258](#), 261–62 (Ct. Cl. 1979)). The appellant has not identified any law mandating such a promotion, nor has he clearly established that he would have been promoted. Instead, he argues that we should presume that he would have been able to compete for and obtain a GS–07 pay grade had he not been serving under his Veterans Recruitment Appointment. PFR File, Tab 1 at 4. The appellant’s assertion that he would have been promoted is, at best, speculative. Accordingly, the appellant has not met his burden of showing that his promotion to a GS-07 pay grade should be retroactive to June 6, 2011. *See Naekel v. Department of Transportation*, 850 F.2d 682, 684 (1988) (mere speculation of promotion is insufficient to establish entitlement to a retroactive promotion).

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.