

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

KATHLEEN JOYCE,
Appellant,

DOCKET NUMBER
PH-3443-11-0522-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: September 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Kathleen Joyce, Falmouth, Maine, pro se.

Anthony T. Rice, Esquire, Windsor, Connecticut, 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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 the administrative judge erred in finding that the Board lacks jurisdiction over her appeal. Petition for Review (PFR) File, Tab 1 at 1. It is well settled, however, that the Board generally does not have jurisdiction to review an agency's decision not to select a particular applicant for a position. *Brown v. Office of Personnel Management*, [91 M.S.P.R. 314](#), ¶ 7 (2002); *Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 93 (1992). Although exceptions to this general rule exist in the context of an individual right of action appeal under the Whistleblower Protection Act and when the unsuccessful candidate claims that the agency's decision was in violation of his rights under the Veterans Employment Opportunities Act of 1998 or the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)), the appellant failed to allege that any of these exceptions apply. Therefore, the administrative judge correctly found that the Board does not have jurisdiction over this appeal.

The appellant raises several arguments for the first time on review, including the following: her 1987 resignation was involuntary; the agency made a suitability determination against her; and the agency committed a prohibited personnel practice by not allowing her to compete for employment in violation of [5 U.S.C. § 2302\(b\)\(4\)](#). PFR File, Tab 1 at 1-4. 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). The appellant has made no such showing.

In any event, the Board lacks jurisdiction over the appellant's appeal as a suitability action because no "suitability action" took place. The appellant was simply notified that she was not selected for a specific position. *See* Initial

Appeal File, Tab 5 at 12. The Office of Personnel Management's regulations governing suitability actions specify that a nonselection for a position is not a suitability action. [5 C.F.R. § 731.203](#)(b); *see also Upshaw v. Consumer Product Safety Commission*, [111 M.S.P.R. 236](#), ¶ 8 (2009).

Further, the Board has no jurisdiction over the appellant's prohibited personnel practices claim because it is unaccompanied by an appealable action over which the Board does have jurisdiction. *See Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980) (prohibited personnel practices under [5 U.S.C. § 2302](#)(b) are not an independent source of Board jurisdiction), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

The appellant has filed several documents with her petition for review, including a copy of the initial decision in this appeal. PFR File, Tab 1 at 7-36. The Board generally will not consider evidence submitted for the first time on review absent a showing that the documents and the information contained in the documents were unavailable before the record closed despite due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). 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). 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).

The initial decision is already part of the record and, therefore, not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). The other documents that the appellant submits on review are either undated or predate the close of the record, and the appellant has made no showing that these documents, or the information contained in them, were unavailable before the record closed despite her due diligence.

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. 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.