

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

MICHAEL J. BRADY,
Appellant,

DOCKET NUMBER
DA-3443-12-0017-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: September 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Michael J. Brady, El Paso, Texas, pro se.

Sunita Bhaga Mahtabfar, El Paso, 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 that dismissed his appeal for lack of jurisdiction. We grant petitions such as this one only when

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge 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](#)). For the reasons discussed below, we AFFIRM the initial decision AS MODIFIED.

In his petition for review, the appellant reasserts his position that the Board has jurisdiction over his appeal as an employment practices claim. Petition for Review (PFR) File, Tab 1 at 3. Specifically, he alleges that the Board has jurisdiction over his appeal because time-in-grade requirements are employment practices under [5 C.F.R. § 300.101](#), which are within the Board's jurisdiction. *Id.* (citing *Dowd v. United States*, [713 F.2d 720](#), 724 (Fed. Cir. 1983)).

An applicant for employment who believes that an employment practice applied to him by the Office of Personnel Management (OPM) violates a basic requirement in [5 C.F.R. § 300.103](#) is entitled to appeal to the Board. [5 C.F.R. § 300.104\(a\)](#). The Board has jurisdiction under [5 C.F.R. § 300.104\(a\)](#) when two conditions are met: first, the appeal must concern an employment practice that OPM is involved in administering; and, second, the appellant must make a nonfrivolous allegation that the employment practice violated one of the “basic requirements” for employment practices set forth in [5 C.F.R. § 300.103](#). *Burroughs v. Department of the Army*, [116 M.S.P.R. 292](#), ¶ 15 (2011). The United States Court of Appeals for the Federal Circuit has found that, in order for the Board to have jurisdiction over an employment practices appeal, it is “necessary that the challenged employment practice have been applied to the applicant as the basis for the adverse hiring decision.” *Dow v. General Services Administration*, [590 F.3d 1338](#), 1342 (Fed. Cir. 2010); see [5 C.F.R. § 300.104\(a\)](#) (an applicant is entitled to relief from an unlawful employment practice that “was applied to him”).

Here, the appellant challenges an employment practice as applied to Vinroy Douglas in that he claims Mr. Douglas did not have the requisite time in grade when he was selected for the vacancy at issue. PFR File, Tab 1 at 3. Because the appellant has not alleged that the employment practice was misapplied to him, he has not satisfied his jurisdictional burden with respect to his employment practices claim. *See Dow*, 590 F.3d at 1342. Accordingly, the Board lacks jurisdiction over his appeal.

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.