

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

JAMES M. VELEZ,  
Appellant,

DOCKET NUMBER  
PH-315H-11-0398-I-1

v.

SOCIAL SECURITY  
ADMINISTRATION,  
Agency.

DATE: September 21, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Benjamin Palewicz and Thomas J. Gagliardo, Baltimore, Maryland, for the appellant.

Kathleen Louise Henley Petty and Lauren Donner Chait, Baltimore, Maryland, 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

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

his probationary termination appeal for lack of jurisdiction without holding the requested hearing. 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 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 argues that the Board has jurisdiction over his appeal under [5 C.F.R. § 315.806](#)(b) based on his claim of marital status discrimination. Petition for Review (PFR) File, Tab 3 at 5. In determining whether an appellant has established jurisdiction under [5 C.F.R. § 315.806](#)(b), the Board follows a two-step process. *Green-Brown v. Department of Defense*, [118 M.S.P.R. 327](#), ¶ 5 (2012). First, the appellant must make nonfrivolous claims of jurisdiction, i.e., factual allegations that, if proven, would establish that his termination was based on partisan political reasons or marital status. *Id.* An appellant who makes such nonfrivolous claims is entitled to a jurisdictional hearing at which he must then prove the basis for jurisdiction, i.e., that his termination was based on partisan political reasons or marital status, by a preponderance of the evidence. *Id.*

To make a nonfrivolous allegation of marital status discrimination, an appellant must allege facts which, taken as true, would show that he was treated differently because of his marital status or facts that go to the essence of his status as married, single, or divorced. *Marynowski v. Department of the Navy*, [118 M.S.P.R. 321](#), ¶ 9 (2012). An appellant's allegations regarding marital status discrimination must be “more than mere conjecture.” *Smirne v. Department of the Army*, [115 M.S.P.R. 51](#), ¶ 8 (2010) (quoting *Ellis v. Department of the Treasury*, [81 M.S.P.R. 6](#), ¶ 13 (1999)).

The administrative judge found, and we agree, that the appellant failed to nonfrivolously allege that P.O. was a valid comparator or that his performance problems were substantially similar to his own for purposes of his marital discrimination claim. Initial Appeal File (IAF), Tab 21, Initial Decision at 9-10

(citing *Williams v. Department of the Navy*, [99 M.S.P.R. 626](#), ¶ 17 (2005) and *Meyers v. Equal Employment Opportunity Commission*, [45 M.S.P.R. 488](#), 492 (1990)). For instance, the administrative judge found that the appellant did not allege that P.O. failed to “follow job-related directions, processes, procedures, and protocols,” which was one of the bases for the appellant’s termination. *Id.* at 7; *see* IAF, Tab 6 at 31. Specifically, the administrative judge found that the agency considered the appellant’s difficulty taking direction from his mentors, including displaying aggressiveness toward them, in deciding to terminate him, and that there was no indication in the record that the comparator, “P.O.,” exhibited any of those same deficiencies. Initial Decision at 7-9. Because the agency terminated the appellant in large part because of those deficiencies, the administrative judge correctly concluded that the appellant failed to nonfrivolously allege that he was treated differently than P.O. *Id.* at 9. We note that, in making these findings, the administrative judge relied only on the appellant’s own evidence, including the deposition transcripts, spreadsheets, and review summaries, and did not weigh disputed evidence. *Id.* at 7 (citing *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994)).

On review, the appellant claims that the allegation that he failed to “follow job-related directions, processes, procedures, and protocols” relates to his behavior and not to his performance, which was the stated reason for termination. PFR File, Tab 3 at 15. Therefore, it appears that the appellant is challenging the administrative judge’s finding that P.O.’s performance problems were not substantially similar to his own. These arguments, however, constitute mere disagreement with the administrative judge’s explained and reasoned findings of fact explained above, which are supported by the record and entitled to deference. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997).

Even if the appellant had made a nonfrivolous allegation that he and P.O. were similarly situated for purposes of establishing marital status discrimination, however, the appellant has failed to set forth facts that, if proven, would establish

that he was treated differently than P.O. *because of* his marital status.<sup>2</sup> Indeed, while Celeste Stanley and Denise Detweiler admitted during their deposition testimony that they were aware of the appellant's marital status because he told them he was married, there are no allegations in the record that either one of them - or anyone else at the agency - ever referenced the appellant's marital status in any way. IAF, Tab 19 at 8, 410. Accordingly, we believe that the appellant has failed to allege any facts that, if proven, would raise an inference that the agency's reasons for terminating him were based upon discriminatory animus. *See Smirne*, [115 M.S.P.R. 51](#), ¶ 8; *cf. Green-Brown*, [118 M.S.P.R. 327](#), ¶ 7 (the appellant's statement challenging the agency's assertions regarding her alleged time and attendance problems, taken together with the appellant's statements alleging that, by his remarks, her supervisor targeted her as a single mother, are sufficient to constitute nonfrivolous allegations that her termination was based on her marital status); *Marynowski*, [118 M.S.P.R. 321](#), ¶ 9 (appellant's allegations that her supervisor showed a keen interest in her marital status, and was jealous that she had a husband, and that her fixation on the appellant's marital status caused her to lose training opportunities, constituted a nonfrivolous allegation of marital status discrimination); *Smirne*, [115 M.S.P.R. 51](#), ¶ 11 (the appellant's sworn statement that she did not have the performance problems asserted by the agency, taken together with her statements that she was the only single, pregnant, newly hired secretary and the only new secretary terminated are sufficient to constitute nonfrivolous allegations that her termination was based on her marital status). Therefore, because the administrative judge properly found that the appellant failed to make a nonfrivolous allegation of jurisdiction, the appellant had no right to a jurisdictional hearing. *See Green-Brown*, [118 M.S.P.R. 327](#), ¶ 5.

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<sup>2</sup> We note that the appellant and P.O. were two of twenty-four people who joined the agency at the same time and went through the training program together. IAF, Tab 19 at 43-44 (deposition testimony of Ms. Detweiler).

Because the Board lacks jurisdiction over the appellant's probationary termination appeal, it does not have jurisdiction over his claims of harmful procedural error and discrimination. *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).

Accordingly, 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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.