

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

DEVON K. COLLEY,
Appellant,

DOCKET NUMBER
PH-4324-11-0467-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Devon K. Colley, Westwood, New Jersey, pro se.

Joel Friedman, Esquire, Picatinny Arsenal, New Jersey, 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

On review, the appellant reiterates his claim that the agency terminated him during his probationary period based upon his military service. Petition for Review (PFR) File, Tab 1 at 5, Tab 2 at 6; Initial Appeal File (IAF), Tab 1 at 5, 8-9. As noted by the administrative judge, the appellant's claim that he was discriminated against based upon his military service falls under the Uniformed Services and Employment and Reemployment Rights Act of 1994 (USERRA). IAF, Tab 27, Initial Decision (ID) at 1.

The administrative judge issued an order informing the appellant of his burden of proof under USERRA and the different methods of proving a USERRA claim. IAF, Tab 3 at 5-6; *see Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013-14 (Fed. Cir. 2001). Further, the administrative judge reviewed all of the record evidence, including both testimonial and documentary evidence, applied the applicable law, and made explained and reasoned findings. ID at 2-11. Of particular note he found credible the deciding official's testimony that she discussed the appellant's performance deficiencies with the appellant prior to his objection to deployment to Afghanistan. ID at 8, 10. Accordingly, we discern no reason to disturb the initial decision denying corrective action under USERRA. ID at 2, 11; *see Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

The appellant further asserts in his petition for review that the evidence submitted by the agency was insufficient to support his termination.² PFR File, Tab 1 at 5, Tab 2 at 6. Because the merits of the agency's action are not before the Board in a USERRA appeal, the Board need not consider this argument. *Williams v. Department of the Navy*, [94 M.S.P.R. 206](#), ¶ 9 n.5 (2003), *aff'd*, 89 F. App'x 724 (Fed. Cir. 2004).

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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

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

² The appellant appears to have also raised this claim below. ID at 10.

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.