

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

DAVID E. KRISTOFF,  
Appellant,

DOCKET NUMBER  
PH-0752-11-0552-I-1

v.

DEPARTMENT OF AGRICULTURE,  
Agency.

DATE: October 2, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL \***

David E. Kristoff, Saint Johnsbury, Vermont, pro se.

Eileen Fallon Sullivan, Washington, D.C., 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

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In his petition for review, the appellant challenges the initial decision dismissing his appeal as moot. The appellant argues that a question has arisen concerning whether the agency has reccredited to his Thrift Savings Plan (TSP) account the 1% agency automatic contributions that had been forfeited. 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 did not allege below that the agency did not recredit his 1% agency automatic contributions to his TSP account. Initial Appeal File, Tabs 15, 19-20, 23. In addition, the appellant has not alleged or shown that this argument is based on new and material evidence that was not previously available below despite his due diligence. Thus, the Board need not consider it on review. *See White v. U.S. Postal Service*, [117 M.S.P.R. 244](#), ¶¶ 21 n.3, 24 (2012); *Johnson v. Department of the Interior*, [62 M.S.P.R. 212](#), 220 (1994).

In any event, the agency has submitted un rebutted evidence on review demonstrating that the 1% agency automatic contributions in question have been reccredited to the appellant's TSP account with interest. Despite the passage of over 6 months since the agency's submission of this evidence to the Board, the appellant has not filed any pleading contesting the agency's assertions. Under these circumstances, and given the appellant's failure to raise this argument below, the appellant has provided no basis for disturbing the initial decision's conclusion that this appeal should be dismissed as moot.

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 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.