

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

MICHAEL W. TOWNSEND,
Appellant,

DOCKET NUMBER
CH-0752-01-0096-I-2

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: October 2, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL *

James R. Hefflin, Denver, Colorado, for the appellant.

Carl E. Stahl, Esquire, Steamboat Springs, Colorado, for the appellant.

Sarah E. Diouf, Esquire, Silver Spring, 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. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

On review, the appellant asserts that, although he raised a claim below under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the administrative judge “excluded” this claim from his “Order to Show Cause regarding jurisdiction.” To the extent that the appellant is claiming that the administrative judge should have addressed the USERRA claim in his summary of the prehearing conference and in the initial decision, we agree.

Nevertheless, the administrative judge provided the appellant with a detailed explanation of the standards and burdens of proving jurisdiction and the merits in such an appeal, and the appellant provided minimal allegations in response. Refiled Appeal File (RAF), Tab 7 at 2 (“The complaints of discrimination commenced in 1995 culminating into Constructive Suspensions, USERRA violations, and ending with the agency terminating the appellant while he was receiving OWCP [Office of Workers’ Compensation Programs] benefits.”); *id.*, Tab 15 at 1-2 (asserting an involuntary resignation on August 15, 1999, “due to not being accommodated for his approved OWCP work related injury, and based upon his Military Service in the U.S. Army Reserves”). Even assuming that these allegations meet the criteria for establishing jurisdiction over a USERRA appeal, the appellant did not respond to the administrative judge’s inquiry regarding whether he had chosen to first file a complaint with the Secretary of Labor and exhaust those procedures or file directly with the Board. Thus, he has not established jurisdiction over his USERRA claim. *See Heckman v. Department of the Interior*, [106 M.S.P.R. 210](#), ¶ 17 (2007).

Regarding the appellant’s argument that the administrative judge was biased against him, the appellant has not shown that he raised this claim as soon as practicable after he had reasonable cause to believe that grounds for

disqualification existed and did not support his claim with an affidavit or sworn statement. *See Lee v. U.S. Postal Service*, [48 M.S.P.R. 274](#), 280-82 (1991); [5 C.F.R. § 1201.42](#)(b). In any event, the appellant did not show that the administrative judge's conduct during the course of this proceeding evidenced a deep-seated favoritism or antagonism that would make fair judgment impossible, *see Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002), and his argument based on an alleged statistical bias is unsupported and otherwise unavailing, *see Eldeco, Inc. v. National Labor Relations Board*, [132 F.3d 1007](#), 1010 (4th Cir. 1997); *In re International Business Machines Corp.*, [618 F.2d 923](#), 929 (2d Cir. 1980). Thus, he has not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

After the record closed on review, the appellant requested that the Board disqualify the agency's representative, sanction the agency, and refer the agency's representative to the Office of Special Counsel (OSC) because of alleged "fraud." A party who challenges the designation of a representative on the ground that it involves a conflict of interest or a conflict of position must do so by filing a motion with the administrative judge within 15 days after the date of service of the notice of designation. [5 C.F.R. § 1201.31](#)(b). The agency designated the representative in question during the proceedings below on September 29, 2011. RAF, Tab 14. The appellant's March 18, 2012 challenge is not only untimely filed after the close of the record on review, but also more than 15 days after the date of service of the notice of designation. Accordingly, the appellant's challenge to the agency's representative is untimely filed, *see Mahaffey v. Department of Agriculture*, [105 M.S.P.R. 347](#), ¶ 5 n.4 (2007), and not a basis for granting the appellant's related motions. Although the appellant requests that the Board forward this case to OSC, he has not identified any provisions that would authorize the Board to do so under the factual circumstances of this case. *Cf.* [5 U.S.C. § 1221](#)(f)(3) (if the Board determines

that there is reason to believe that a *current employee* may have committed a prohibited personnel practice, the Board shall refer the matter to OSC to investigate and take appropriate action).

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 expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

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

The initial decision, as supplemented by this Final Order, constitutes 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.