

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

CHARLES A. HUYCK,
Appellant,

DOCKET NUMBER
DE-3443-12-0101-I-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: November 13, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Charles A. Huyck, Sioux City, Iowa, pro se.

K. Keian Weld, 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 and the agency has filed a cross-petition for review² of the initial decision that dismissed this appeal for

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

lack of jurisdiction on the ground that the appellant's position excludes him from coverage of the appeal provisions of Title 5. 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](#)).

On review, the appellant alleges that the agency rescinded his detail or assignment to Indian Health Service (IHS) and that the Indian Health Manual applies to Public Health Service Commissioned Corps officers working for IHS under Section 7-2.3.B. Petition for Review (PFR) File, Tab 1 at 2-3. To support these arguments, which he raises for the first time on review, he submits a copy of the Indian Health Manual and emails regarding his rescinded detail. *Id.* at 13-16, 22-23. However, the appellant has not shown that this evidence was unavailable prior to the close of the record below, despite his due diligence, and therefore the Board need not consider this evidence on review. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Because the appellant has not shown that these arguments are based on new and material evidence that was unavailable prior to the close of the record below, despite his due diligence, the Board need not consider them on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit*

² The agency does not dispute the administrative judge's findings. *See* Petition for Review (PFR) File, Tab 3. It appears that the agency has filed a cross-petition for review for the sole purpose of setting forth alternative bases for dismissing the appellant's appeal for lack of jurisdiction in the event that the Board does not affirm the initial decision. *See id.* at 3-5. Because we are affirming the initial decision, we need not reach the alternative bases for dismissing the appeal for lack of jurisdiction presented by the agency.

Systems Protection Board, [759 F.2d 9](#), 10 (Fed. Cir. 1985). Adverse action appeal rights are not afforded to an employee whose agency or position has been excluded from the appointing provisions of Title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of Title 5, United States Code. [5 C.F.R. § 752.401\(d\)\(12\)](#).

On review, neither the appellant nor the agency disputes that the appellant was appointed as a commissioned officer in the Commissioned Corps of the Public Health Service. As a commissioned officer with the Commissioned Corps, the appellant was appointed without regard to the civil service laws and was compensated without regard to the Classification Act of 1923. See [42 U.S.C. § 204\(a\)\(2\)](#). The administrative judge correctly determined that the appellant's position is not subject to the appointing provisions of Title 5, and therefore the appellant lacks the right to bring an appeal of an alleged adverse action before the Board. See Initial Decision (ID) at 4; see also *Fishbein v. Department of Health and Human Services*, [102 M.S.P.R. 4](#), ¶ 17 (2006); [5 C.F.R. § 752.401\(d\)\(12\)](#). To the extent the appellant reasserts that the agency coerced him to resign as a result of its discriminatory acts, the administrative judge properly found that the Board lacks the authority to hear the merits of the alleged constructive removal matter because the Board lacks jurisdiction over the appellant's appeal. See PFR File, Tab 1 at 3-4; ID at 4-5; see also *Schmittling v. Department of the Army*, [219 F.3d 1332](#), 1337 (Fed. Cir. 2000).

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 the cross-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. 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.