

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

JAMIE DAY,

Appellant,

DOCKET NUMBER

AT-315H-12-0295-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,

Agency.

DATE: November 15, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Stan Jankiewicz, Bay Pines, Florida, for the appellant.

T. B. Burton, Esquire, Bay Pines, Florida, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

Only an “employee,” as defined under 5 U.S.C. chapter 75, subchapter II, can appeal to the Board from an adverse action such as a removal. *Barrand v. Department of Veterans Affairs*, [112 M.S.P.R. 210](#), ¶ 8 (2009); see [5 U.S.C. §§ 7511\(a\)\(1\)](#), 7512(1). An appellant bears the burden of establishing Board jurisdiction by a preponderance of the evidence. *Barrand*, [112 M.S.P.R. 210](#), ¶ 8; [5 C.F.R. § 1201.56\(a\)\(2\)](#). An appellant is entitled to a jurisdictional hearing only if she makes a nonfrivolous allegation of Board jurisdiction, i.e., an allegation of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Barrand*, [112 M.S.P.R. 210](#), ¶ 8.

We note that the Standard Form 50 (SF-50) documenting the appellant’s appointment shows that she was appointed to an excepted service position under [38 U.S.C. § 7401\(3\)](#). Initial Appeal File (IAF), Tab 7, Subtab 4j. The Board has found that “[i]ndividuals appointed under [38 U.S.C. § 7401\(3\)](#) are entitled to the same appeal rights regarding disciplinary actions as individuals appointed under title 5 of the United States Code.” *Barrand*, [112 M.S.P.R. 210](#), ¶ 9 (quoting *Pennington v. Department of Veterans Affairs*, [57 M.S.P.R. 8](#), 9-10 (1993)); see [5 U.S.C. § 7511\(b\)\(10\)](#); [5 C.F.R. § 752.401\(d\)\(8\)](#). A nonpreference eligible individual in the excepted service is an “employee” within the meaning of [5 U.S.C. § 7511](#) only if she: (1) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (2) has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#); *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1151 (Fed. Cir. 1999).

The appellant has not presented a nonfrivolous allegation, either below or on review, that she meets these criteria.² The undisputed record evidence shows that the appellant does not satisfy the requirements under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(i\)](#) because she was not serving in an initial appointment pending conversion to the competitive service at the time of her termination. IAF, Tab 7, Subtab 4j. In addition, the appellant does not satisfy the requirements under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#) because she had less than 2 years of federal service to her credit at the time of her termination. *Id.*; IAF, Tab 7, Subtab 4a. Therefore, the administrative judge properly found that the appellant failed to make a nonfrivolous allegation that she was an “employee” within the meaning of [5 U.S.C. § 7511](#), and the Board lacks jurisdiction over her termination under chapter 75. Initial Decision at 3.

We note that the administrative judge found that 5 C.F.R. part 315H was made applicable to the appellant as an excepted service employee within her trial period by [5 C.F.R. § 316.304\(b\)](#), which applies to term appointments. *Id.* at 3. The appellant, however, was not serving a term appointment, IAF, Tab 7, Subtab 4j, and the Board has found that an individual appointed in the excepted service has no regulatory right to appeal under [5 C.F.R. § 315.806](#) because it applies only to individuals in the competitive service, *cf. Ramirez-Evans v. Department of Veterans Affairs*, [113 M.S.P.R. 297](#), ¶ 10 (2010) (holding that [5 C.F.R. § 315.806](#) applies only to individuals in the competitive service); *Barrand*, [112 M.S.P.R. 210](#), ¶ 13 (same). Accordingly, [5 C.F.R. § 315.806\(b\)](#) does not apply to the appellant, and she therefore cannot establish jurisdiction by

² Although the administrative judge did not provide the appellant in the jurisdictional order with proper notice regarding how to establish jurisdiction as a probationary employee in the excepted service, we find that the administrative judge provided proper notice of the appellant’s jurisdictional burden in the initial decision itself, which afforded the appellant the opportunity to meet her jurisdictional burden for the first time on review. IAF, Tab 8 (Initial Decision) at 2; *see Caracciolo v. Department of the Treasury*, [105 M.S.P.R. 663](#), ¶ 11 (2007).

proving that her termination was based on partisan political reasons or marital status. *See Ramirez-Evans*, [113 M.S.P.R. 297](#), ¶ 10. Because the administrative judge ultimately found that the appellant failed to raise a nonfrivolous allegation of partisan political or marital status discrimination, we find that his application of [5 C.F.R. § 315.806\(b\)](#) to the appellant does not alter the outcome of the appeal and does not prejudice the rights of either party. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (finding that adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

Because the appellant does not meet the definition of “employee” under [5 U.S.C. § 7511](#), the Board lacks jurisdiction to consider the appellant’s allegations of discrimination as well as the merits underlying her appeal. *See Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985); *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).

The appellant has submitted several documents on review as alleged new evidence. Petition for Review File, Tab 1 at 7-14. The Board, however, has not considered these documents because they do not contain any evidence that would warrant an outcome different from that of the initial decision. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

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 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.