

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

MICHAEL W. HIGGINS,
Appellant,

DOCKET NUMBER
DA-0752-11-0039-I-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: November 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Michael W. Higgins, Forest Park, Oklahoma, pro se.

Preston L. Mitchell, Esquire, and Michael J. Taber, Esquire, Tinker Air Force Base, Oklahoma, 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, which sustained the appellant's removal. Generally, we grant petitions such as this one only

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. 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.

The agency removed the appellant for excessive absences. The decision to remove provided that the action was nondisciplinary. The appellant filed an equal employment opportunity (EEO) complaint, and, after the agency issued a final agency decision (FAD) finding no discrimination, the appellant filed a timely Board appeal. The administrative judge sustained the agency's action and found that the appellant failed to prove discrimination.

In his petition, the appellant asserts that, although he had filed three EEO complaints and the appeal was based on all those complaints, the initial decision considered only one of the complaints. The record shows that the appellant filed three EEO complaints, one regarding the proposed and effected removal for excessive absence (9V1M10001), one regarding the agency's rescission of his

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

health benefits and life insurance (9V1M10057), and one regarding a rescinded proposal to remove for inability to perform the duties of his position (9V1M09229). The agency issued one FAD making findings on all of the issues in the three complaints. Initial Appeal File (IAF), Tab 7, Subtab 4d. The FAD afforded the appellant appeal rights to the Board. *Id.* at 18. The FAD provided that, “[i]f the complainant elects to appeal this final decision, the appeal must be filed with the Merit Systems Protection Board (MSPB), not the Equal Employment Opportunity Commission (EEOC).” *Id.*

Claims concerning the federal employee life insurance and federal employee health insurance programs are beyond the Board's jurisdiction. *See Richards v. Office of Personnel Management*, [97 M.S.P.R. 291](#), ¶¶ 5-6 (2004); *Campbell v. Office of Personnel Management*, [90 M.S.P.R. 68](#), ¶¶ 8-10 (2001). Further, the Board has no jurisdiction to review a notice of proposed removal. *See Grant v. Department of the Air Force*, [15 M.S.P.R. 288](#), 290 n.3 (1983). Thus, issues concerning life insurance, health insurance, and a notice of proposed removal are not otherwise appealable actions. The Board does not have jurisdiction over discrimination claims absent an otherwise appealable action. *See 5 U.S.C. § 7702(a)(1)*; *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1342–43 (Fed. Cir. 2006) (en banc). The administrative judge properly addressed only the appellant's allegation of discrimination regarding his removal, an otherwise appealable action. *See, e.g., Sage v. Department of the Army*, [108 M.S.P.R. 398](#), ¶ 8 (2008). The FAD did not distinguish the otherwise appealable action, removal, from the non-otherwise appealable actions it addressed. If the appellant has further appeal rights regarding his allegations of discrimination involving life and health insurance and the notice of proposed removal for inability to perform, they lie with the EEOC and the courts, not with the Board.

The appellant also argues that he was eligible for a discontinued service retirement at the time of his removal and that the agency therefore should have allowed him to retire instead of removing him. It appears that the appellant is

correct that he meets the requirements for a discontinued service annuity under [5 U.S.C. § 8336\(d\)\(1\)](#).³ However, we find that the appellant's retirement eligibility did not preclude the agency from going forward with the removal action as it was otherwise entitled to do.

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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

³ We make no definitive finding at this time on the appellant's eligibility for a discontinued service annuity because that is the responsibility of the Office of Personnel Management (OPM) in the first instance. The appellant may apply to OPM for a discontinued service annuity even though he was separated by removal rather than by retirement.

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.