

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

FRANKLIN R. PERKINS,  
Appellant,

DOCKET NUMBER  
DA-315I-12-0162-I-1

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DATE: December 5, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Franklin R. Perkins, Rio Rancho, New Mexico, pro se.

Preston L. Mitchell, Esquire, Tinker AFB, 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 dismissed his appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material

---

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).<sup>2</sup> After fully considering the filings in this appeal,<sup>3</sup> 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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

With his petition for review, the appellant attaches his discrimination file in Case No. 9V1M03266, alleging that he lacked the financial means to retrieve the file prior to the close of the record on appeal below, and that the documents contained in the file substantiate his arguments that the demotion action is without merit and that the agency committed wrongful acts against him. Petition for Review (PFR) File, Tab 1. However, the appellant has not shown that the proffered evidentiary submission is material to the jurisdictional issue, and therefore it is of insufficient weight to warrant an outcome different from that of the initial decision; thus, the Board need not consider the appellant's

---

<sup>2</sup> 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.

<sup>3</sup> The appellant filed a reply to the agency's response on June 20, 2012, after the record on review closed; accordingly, the appellant's reply was not considered. *See* Petition for Review (PFR) File, Tabs 2, 4; *see also* [5 C.F.R. § 1201.114\(k\)](#).

discrimination file on review. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

Among other things,<sup>4</sup> the appellant alleges that the agency failed to respond to his request for production of documents. PFR File, Tab 1 at 6. However, the record does not reflect that he moved to compel discovery. Thus, the appellant is precluded from raising this discovery issue for the first time on review. *See Szejner v. Office of Personnel Management*, [99 M.S.P.R. 275](#), ¶ 5 (2005), *aff'd*, 167 F. App'x 217 (Fed. Cir. 2006).

The appellant has shown no error in the administrative judge's finding that he failed to nonfrivolously allege that the Board has jurisdiction over his demotion to a nonsupervisory position.<sup>5</sup> The record evidence and the applicable law support the administrative judge's findings that the appellant was demoted to a nonsupervisory position for failure to satisfactorily complete his probation on an initial appointment to a supervisory position, that the Board only has jurisdiction over the aforementioned action if the demotion was based on partisan political reasons or marital status under [5 C.F.R. §§ 315.907](#) and .908, and that the appellant has not alleged that the agency demoted him based on partisan political reasons or marital status. *See Burton v. Department of the Air Force*, [118 M.S.P.R. 210](#), ¶ 7 (2012); Initial Decision (ID). Thus, we discern no reason to disturb these explained findings.

---

<sup>4</sup> On review, the appellant alleges that the agency violated his veterans' preference rights. PFR File, Tab 1 at 6. However, he did not raise this claim below. If the appellant wishes to pursue this claim, he may file a Board appeal seeking corrective action under the Veterans Employment Opportunities Act of 1998, provided that he has exhausted his administrative remedies with the Department of Labor in accordance with [5 U.S.C. § 3330a\(a\)](#).

<sup>5</sup> Contrary to the appellant's assertions, the administrative judge made no findings regarding the merits of the demotion action. *See* PFR File, Tab 1 at 3, 6-7; Initial Decision (ID). The administrative judge referred to the November 7, 2002 memorandum of demotion merely to show the nature of the action taken against the appellant. *See* ID at 2-3.

On review, the appellant alleges that the administrative judge made no findings regarding his claim that the agency failed to pay the correct amount of a night differential pay. *See* PFR File, Tab 1 at 8-10; Initial Appeal File, Tab 1 at 2, 11-12. The administrative judge did not specifically address this claim in the initial decision but generally found that the appellant failed to nonfrivolously allege that the Board has jurisdiction over any of the alleged wrongful acts committed by the agency. ID at 3. Even if the administrative judge erred in failing to specifically address the appellant's claim, the Board does not have jurisdiction over allegations concerning differential pay because differential pay is not part of an employee's rate of basic pay under [5 U.S.C. § 7511\(a\)\(4\)](#). *See Bell v. Department of Transportation*, [39 M.S.P.R. 210](#), 213 (1988); *Fair v. Department of Transportation*, [4 M.S.P.R. 493](#), 495-96 (1981). An agency action that does not result in a reduction of an employee's "basic rate of pay" is not a reduction in pay within the meaning of [5 U.S.C. § 7512\(4\)](#), and, thus, the Board has no authority to review such an action under [5 U.S.C. § 7701\(a\)](#). *Fair*, 4 M.S.P.R. at 496. Consequently, the administrative judge's failure to specifically address the appellant's differential pay claim does not prejudice the appellant's substantive rights. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

Based on the foregoing, we discern no error in the administrative judge's finding that the appellant failed to make a nonfrivolous allegation of jurisdiction over his appeal and that the Board lacks an independent source of jurisdiction to adjudicate the appellant's affirmative defenses. *See Young v. U.S. Postal Service*, [115 M.S.P.R. 424](#), ¶ 15 (2010); ID at 3. Consequently, the appellant is not entitled to a jurisdictional hearing or a hearing on the merits. *See Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006) (en banc) (if the appellant makes a nonfrivolous allegation of fact that, if proven, would establish the Board's jurisdiction over his appeal, he is entitled to a hearing where he must prove jurisdiction by preponderant evidence);

*Burton*, [118 M.S.P.R. 210](#), ¶ 16 (the Board lacks the authority to address the merits of the underlying appeal where the Board lacks jurisdiction over the matter); *see* PFR File, Tab 1 at 3, 8.

**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:

-----  
William D. Spencer  
Clerk of the Board

Washington, D.C.