

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

JUAN J. VILLARREAL,
Appellant,

DOCKET NUMBER
DA-0752-12-0058-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: December 31, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Francisco Rivera, Brownsville, Texas, for the appellant.

Gregory J. Zitkiewicz, Laredo, Texas, 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 of his alleged reduction in pay for lack of jurisdiction.

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Generally, we grant petitions such as this one only 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. We AFFIRM the initial decision issued by the administrative judge, which becomes the final order of the Board.

In the petition for review, the appellant, a Supervisory Customs and Border Protection (CBP) Officer, challenges the initial decision dismissing his appeal of his alleged reduction in pay for lack of jurisdiction. The appellant argues, among other things, that the administrative judge erred in finding that he failed to make a nonfrivolous allegation that reduction in his overtime pay did not constitute a reduction in his rate of basic pay under the Customs Officer Pay Reform Act (COPRA). Specifically, he asserts that COPRA requires CBP Officers to be available to work overtime and provides that overtime will be considered basic pay, up to a cap, for retirement purposes. He submits additional statutory and

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.

regulatory citations on review, which we have considered, to support his argument.

The appellant has failed to show that the administrative judge erred in finding that he failed to make a nonfrivolous allegation of jurisdiction.³ COPRA's requirement that the appellant be available for overtime does not mean that overtime was part of his basic pay, and thus, that the Board has jurisdiction over his appeal as a reduction in pay. In that regard, for purposes of Board adverse action jurisdiction, the term "pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." See [5 U.S.C. § 7511\(a\)\(4\)](#). The rate of basic pay means "the rate of pay fixed by law or administrative action for the position held by a [General Schedule] employee before any deductions, including a [General Schedule] rate, a [law enforcement officer] special base rate, a special rate, a locality rate, and a retained rate, but exclusive of additional pay of any other kind." [5 C.F.R. § 531.203](#). "Additional pay" includes premium pay, availability pay, and overtime pay. See, e.g., *Nigg v. Merit Systems Protection Board*, [321 F.3d 1381](#), 1384 (Fed. Cir. 2003) (denial of premium pay, such as overtime or night differential, does not constitute a reduction of pay that is appealable); *Mattern v. Department of the Treasury*, [291 F.3d 1366](#), 1370 (Fed. Cir. 2002) (an employee's reassignment to a position that does not allow for availability pay is therefore not an appealable action because

³ The administrative judge found that, although the appellant requested a hearing, no hearing was necessary because he failed to raise a nonfrivolous allegation of jurisdiction. Initial Decision at 1 n.1. The appellant did not request a hearing in his initial appeal, Initial Appeal File, Tab 1 at 6, although he requested one in his petition for review if the Board found jurisdiction, Petition For Review File, Tab 1 at 2. In any event, any adjudicatory error did not prejudice the appellant's substantive rights because he has failed to make a nonfrivolous allegation of jurisdiction entitling him to a hearing. See, e.g., *Levy v. Department of Labor*, [118 M.S.P.R. 619](#), ¶ 5 (2012) (indicating that, to be entitled to a jurisdictional hearing, an appellant need only raise nonfrivolous allegations that the Board has jurisdiction over his appeal). Therefore, any adjudicatory error provides no basis for reversing the initial decision. See *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

the Board has consistently held that premium pay [such as overtime or night differential] is not part of basic pay, and the loss of or reduction in premium pay, through means within the agency's discretion and not otherwise appealable to the Board, including reassignment, is not appealable as a reduction in pay); *see also* *Martinez v. Merit Systems Protection Board*, [126 F.3d 1480](#), 1482 (Fed. Cir. 1997) (reduction in total pay as a result of reassignment and consequent loss of availability pay does not constitute a “reduction in pay” and therefore does not fall within the Board’s jurisdiction). Absent a statutory exception such as the one Congress created in the Law Enforcement Availability Pay Act, reductions in premium pay are not appealable to the Board. *See Nigg*, 321 F.3d at 1385. Therefore, [5 U.S.C. § 7512](#)(4) does not give the Board jurisdiction over the appeal.

Similarly, COPRA’s provision for overtime as part of basic pay for retirement purposes does not mean that the Board has jurisdiction over his appeal as a reduction in pay. That portion of COPRA is found at [5 U.S.C. § 8331](#)(3)(G). That provision is inapplicable to this appeal, however, because by its terms it relates to the calculation of retirement benefits, not to the question of whether overtime is part of basic pay for purposes of establishing jurisdiction under [5 U.S.C. § 7512](#). *See Nigg*, 321 F.3d at 1385. Thus, the appellant has failed to make a nonfrivolous allegation that he suffered a reduction in basic rate of pay. Therefore, he has failed to meet his burden of proving Board jurisdiction over his appeal.

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 the date of this order. 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.