

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

JOHN-PIERRE BANEY,
Appellant,

DOCKET NUMBER
DA-4324-12-0108-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: February 4, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John-Pierre Baney, Seagoville, Texas, pro se.

Natalie Holick, Kansas City, Kansas, 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 the appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision regarding the appellant's Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) allegations. [5 C.F.R. § 1201.113](#)(b). However, we FORWARD the appellant's allegation of reprisal for whistleblowing activity to the Office of Regional Operations for docketing as an individual right of action (IRA) appeal and adjudication as appropriate.

On petition for review, the appellant complains that he was denied a hearing, and he was not allowed evidence or witnesses. Petition For Review (PFR) File, Tab 1 at 3. He also claims that: he has an unconditional right to a hearing; he was harassed by his supervisors because he had made a whistleblowing disclosure; the agency attorney committed perjury and obstructed justice; and employers are prohibited from retaliating against an employee who

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.

files a USERRA complaint, testifies in a USERRA proceeding or exercises a right under USERRA. *Id.* at 4-5.

The appellant makes no specific challenge to the administrative judge's finding that collateral estoppel barred his leave-related USERRA claims or that his remaining USERRA claims were too vague to even characterize, and we discern no error with the administrative judge's decisions in this regard. The appellant also offers no evidence to support his assertion of agency counsel misconduct. Because the appellant has not demonstrated that the Board has jurisdiction over any of his USERRA allegations, he is not entitled to a hearing. *See, e.g., Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶¶ 17-18 (2008) (once an appellant has established Board jurisdiction over his USERRA claim, he has an unconditional right to a hearing on the merits of his claim).

We have also considered the appellant's contention on review that he was harassed by his supervisors because he had made a whistleblowing disclosure. PFR file, Tab 2 at 4. The appellant's initial appeal paperwork did not include an allegation of reprisal for whistleblowing activity, Initial Appeal File (IAF), Tab 1, but it appears that he included such an allegation in his Motion for a Formal Hearing and Order on USERRA Jurisdiction. *See* IAF, Tab 5 at 1, 3. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985). Here, however, the administrative judge did not specifically give the appellant notice of his jurisdictional burden in an IRA appeal. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). We therefore forward this claim to the Office of Regional Operations for docketing and adjudication as an IRA appeal.³

³ It is not clear if the appellant's allegations of reprisal for whistleblowing activity are based on the same set of facts as his leave-related USERRA allegations and/or were raised in his other matters, and if so, whether the reprisal allegations would also be

**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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov.

barred by collateral estoppel. We leave this issue for the administrative judge to determine, as appropriate, in the first instance.

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.