UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES R. WELCOME, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER AT-0752-12-0317-I-1 DATE: February 5, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

James R. Welcome, Pensacola, Florida, pro se.

Bob D. Brown, Pensacola, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 removal appeal as moot. 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 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).

In the initial decision, the administrative judge dismissed the appellant's removal appeal as moot, finding that the undisputed evidence shows that the agency canceled the appellant's removal and deleted all references to that action from his Official Personnel Folder (OPF), and there are no outstanding allegations of unlawful discrimination. Initial Appeal File (IAF), Tab 14, Initial Decision (ID) at 3. The appellant argues on review that the appeal is not moot

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[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.

because: (1) there are outstanding issues of unlawful discrimination; and (2) an adverse action is still in place. Petition for Review (PFR) File, Tab 1 at 4-5.

Although the appellant claims on review that there are outstanding issues of unlawful discrimination, he did not raise any affirmative defenses during the proceedings before the administrative judge. *See* IAF, Tab 1 at 4. Further, the appellant did not raise his claims of race discrimination and retaliation for his prior protected equal employment opportunity activity until he filed his reply to the agency's response to the petition for review. PFR File, Tab 5 at 7-10. The appellant has not presented any evidence or argument that he was unaware of the basis for these claims when his appeal was filed. *Marr v. U.S. Postal Service*, 49 M.S.P.R. 196, 201 (1991). In addition, he has not shown that his claims are based on new and material evidence that was unavailable prior to the close of the record below despite his due diligence. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980); 5 C.F.R. § 1201.115(d). Therefore, the administrative judge correctly found that there were no outstanding issues of unlawful discrimination, and we have not considered the discrimination and retaliation claims that the appellant raises initially on review. *See Burge v. Department of the Air Force*, 82 M.S.P.R. 75, ¶ 31 (1999).

The appellant seems to make two arguments in support of his contention that an adverse action is still in place. First, he asserts that a Notification of Personnel Action Form (SF-50) incorrectly stating that he was removed effective February 7, 2011, was placed in his OPF and his financial records at the Defense Finance and Accounting Service (DFAS). PFR File, Tab 1 at 5. Second, he states that DFAS has sent him two notices of overpayment since the alleged rescission of his removal. *Id.* at 6.

We find these arguments unpersuasive. Although the agency generated a SF-50 which erroneously indicated that the appellant was removed on February 7, 2011, *see* PFR File, Tab 1 at 17, it subsequently corrected this mistake by replacing the incorrect SF-50 with an SF-50 showing his removal date as

February 7, 2012. IAF, Tab 12 at 39-41. Moreover, the agency later removed both of these SF-50s from the appellant's OPF because of his February 3, 2012 retirement. IAF, Tab 8 at 20.

As for the appellant's argument that the agency did not completely rescind the removal action because DFAS has sent him two notices of overpayment of wages and benefits, the documentation submitted on review shows that the agency's rescission of the appellant's removal and his retirement on February 3, 2012, resulted in an overpayment for 24 hours of sick leave covering February 3, 6, and 7, 2012. PFR File, Tab 4 at 13-14. Contrary to the appellant's apparent assertion on review, the notices of overpayment from DFAS do not indicate that an adverse action is still in place. *See* PFR File, Tab 2 at 7, 13. Rather, they merely notify the appellant that he has received an overpayment.

Lastly, we note that the agency and the appellant have filed several documents on review. PFR File, Tab 1 at 10-19; Tab 2; Tab 4 at 13-86; Tab 5 at 13-24. The Board generally will not consider evidence submitted for the first time on review absent a showing that the documents and the information contained in the documents were unavailable before the record closed despite due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989).

Some of the documents that the appellant submits on review are already part of the record. *Compare* PFR File, Tab 1 at 11, 13, 14-15, 17, *with* IAF, Tab 10, Tabs 2f, 2g, 2i at 4. Evidence that is already a part of the record is not new. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). Also, almost

all of the documents submitted on review predate the close of the record, and the party submitting these documents has made no showing that these documents, or the information contained in them, were unavailable before the record closed despite the party's due diligence. Therefore, the Board need not consider them. *See Avansino*, 3 M.S.P.R. at 214. A few of the documents are new evidence in that they post-date the close of the record in the proceeding before the administrative judge. *See* PFR File, Tab 4 at 13-14. However, none of the documents submitted on review are material to the outcome of this appeal because they fail to show that any of the administrative judge's findings are erroneous or that a different outcome is warranted. *See Russo*, 3 M.S.P.R. at 349. Therefore, they provide no basis to disturb the initial decision.

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. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.