

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

LOUIS E. DELGADO,
Appellant,

DOCKET NUMBER
DE-315H-12-0275-I-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: February 8, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Louis E. Delgado, South Ogden, Utah, pro se.

Michael D. Bassett, Esquire, Hill Air Force Base, Utah, 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 appellant's 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the appellant 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\(b\)](#).

The appellant argues on review that he was an employee under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#) entitled to challenge his removal before the Board. The administrative judge correctly held that the appellant fits neither definition of employee under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#). *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341 (Fed. Cir. 2002). The appellant was hired by the agency into the competitive service on November 7, 2011, and was terminated during his probationary period on March 15, 2012. Initial Appeal File (IAF), Tab 7 at 12, 17. Although the appellant had a period of prior federal service with the agency, that prior federal service ended with the appellant's voluntary resignation in April 2010. IAF, Tab 7 at 20. The administrative judge correctly held that the appellant could not tack his prior federal service to the period of service from which he was terminated under [5 C.F.R. § 315.802](#) because there was more than a

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.

30-day break in service between the appellant's two periods of federal service. *Hurston v. Department of the Army*, [113 M.S.P.R. 34](#), ¶ 10 (2010); [5 C.F.R. § 315.802\(b\)\(3\)](#). The administrative judge also properly found that the appellant was not an employee under [5 U.S.C. § 7511\(a\)\(1\)\(A\)\(ii\)](#) because of his break in service, which prevented him from showing that he completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less without a break in service of more than a workday at the time of the adverse action. *Claiborne v. Department of Veterans Affairs*, [118 M.S.P.R. 491](#), ¶ 6 (2012).

The appellant, as a probationary employee, could challenge his termination under [5 C.F.R. § 315.806\(b\)](#) if he alleged that the action was taken on the basis of marital status or partisan political reasons. However, he made no such allegation either below or on review.

On review, the appellant cites several regulatory provisions in support of his claim that he is an employee with Board appeal rights. *See* Petition for Review File, Tab 1 at 4-6. However, the cited regulations either do not apply to the appellant, or otherwise do not provide a basis for reversing 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:

William D. Spencer
Clerk of the Board

Washington, D.C.