

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT W. CARTER,
Appellant,

DOCKET NUMBER
PH-0752-10-0672-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: April 20, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL

Norman Jackman, Esquire, Lincoln, New Hampshire, for the appellant.

Wendy Anne Blanchard, Esquire, Windsor, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

A Postal Service employee may file a Board appeal under chapter 75 only if he is covered by 39 U.S.C. § 1005(a) or 5 U.S.C. § 7511(a)(1)(B). 5 U.S.C. § 7511(b)(8); *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996). As the administrative judge correctly informed the appellant, for the Board to have jurisdiction to decide a Postal employee appeal, the employee must: (1) be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity; and (2) must have completed 1 year of current continuous service in the same or similar positions. Initial Appeal File (IAF), Tab 2 at 2; *Toomey*, 71 M.S.P.R. at 12. In his response to the administrative judge's order on jurisdiction, the appellant asserted that he was a Mail Processing Clerk, Grade 06/O, he was not a preference eligible, and he reasserted his claim that his removal was the result of discrimination. IAF, Tab 5 at 4. He did not allege that he was a managerial or supervisory employee or that he engaged in personnel work in other than a purely nonconfidential clerical capacity. Thus, we find no error in the administrative judge's decision dismissing the appeal for lack of jurisdiction based on the written record.

For the first time on review, the appellant makes the conclusory assertion that he worked in a supervisory capacity and he handled confidential information at some unspecified date during his lengthy postal career. Petition for Review File, Tab 1 at 3-4. Nonetheless, he does not explain why he failed to provide this information below in his response to the administrative judge's order on jurisdiction and he has not shown that his argument is based on new and material evidence that was unavailable before the record closed despite due diligence. Thus, the Board need not consider his new argument on review. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Further, in the absence of an otherwise appealable action, the Board cannot consider his affirmative defense based on discrimination as an independent source of

jurisdiction. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

Accordingly, after fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**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. 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.