

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

NICOLAS RIVAS,  
Appellant,

DOCKET NUMBER  
NY-0752-10-0181-I-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: January 25, 2011

**THIS FINAL ORDER IS NONPRECEDENTIAL**

Ricardo Rivera Ortiz, Carolina, Puerto Rico, for the appellant.

Sherilyn A. DeNinno, Esquire, New York, New York, 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).

On April 28, 2010, the appellant filed a Board appeal of a March 25, 2010 alleged agency action,<sup>\*</sup> and checked boxes to indicate that he was appealing a reduction in grade or pay action and a denial of a within-grade increase (WIGI). Initial Appeal File (IAF), Tab 1 at 5-6. After apprising the appellant of the jurisdictional issues presented by his appeal and affording him an opportunity to submit evidence and argument, the administrative judge issued an initial decision finding, among other things, that: (1) the Board lacks jurisdiction over the denial of a WIGI to a preference-eligible postal service employee; and (2) the appellant's conclusory assertion and documentary submissions, which evidence that the appellant did not receive the grade and pay to which he believed he was entitled, fail to support a nonfrivolous allegation that the agency reduced the appellant in grade or pay. IAF, Tab 7 (Initial Decision). On review, the appellant has failed to demonstrate error in the findings set forth above. We note, for example, that it is well-settled that the Board lacks jurisdiction over the denial of a WIGI to a postal worker. *Burnett v. U.S. Postal Service*, 104 M.S.P.R. 308, ¶ 14 (2006); *Smyth v. U.S. Postal Service*, 31 M.S.P.R. 99, 100 (1986).

On review, the appellant submits a copy of a "Glover/Albrecht Class Action Official Claim Form-1," which he allegedly completed on July 29, 2004. Petition for Review File, Tab 1 at 3-8. As he has not shown that this evidence was unavailable prior to the close of the record on appeal below, despite his due diligence, the Board need not consider it on review. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1). In any event, this evidence is immaterial as it does not support a nonfrivolous allegation that the agency reduced the appellant in grade or pay. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

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<sup>\*</sup> The record does not support that the agency took any action regarding the appellant on or about March 25, 2010.

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.caafc.uscourts.gov](http://www.caafc.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.