

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS L. TODD,
Appellant,

DOCKET NUMBER
DC-0432-11-0640-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: March 16, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

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

Patricia A. Miller, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

The agency removed the appellant from his excepted service position with the Federal Bureau of Investigation (FBI) based on alleged unacceptable performance. The appellant contended that he was entitled to appeal the action as a removal under 5 U.S.C. chapter 43 and as a suitability action under 5 C.F.R. part 731. The administrative judge found that the Board lacks jurisdiction over his appeal.

On review, the appellant asserts that the administrative judge erred by finding that, because he was not an “employee” under [5 C.F.R. § 752.401](#)(d)(9), he had no chapter 43 appeal rights under [5 C.F.R. § 432.106](#)(a)(4). We agree with the administrative judge that the Board lacks jurisdiction over this appeal.

The right to appeal an action based on unacceptable performance to the Board derives from statute, specifically [5 U.S.C. § 4303](#)(e). Only preference eligible individuals, individuals in the competitive service, and individuals in the excepted service who are covered by subchapter II of chapter 75 may appeal a chapter 43 action to the Board. *Pennington v. Department of Veterans Affairs*, [57 M.S.P.R. 8](#), 10 (1993). The appellant is not in the competitive service and he is not preference eligible. Employees of the FBI are explicitly excluded from coverage under subchapter II of chapter 75. [5 U.S.C. § 7511](#)(b)(8); *Patterson v. Department of Justice*, [52 M.S.P.R. 651](#), 653 (1992). Therefore, the appellant is not among the categories of employees with appeal rights under chapter 43, and the Board lacks jurisdiction over his appeal.

The appellant also asserts that the administrative judge erred by failing to find that the Board has jurisdiction over his appeal as a suitability action taken under 5 C.F.R. part 731. We agree that the administrative judge should have addressed this issue, but her failure to do so did not prejudice the appellant’s substantive rights. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282

(1984). The rights and procedures contained in the suitability regulations at 5 C.F.R. part 731 only apply to “covered positions.” [5 C.F.R. § 731.101](#)(a). “Covered positions” are positions in the competitive service or the career Senior Executive Service, or excepted service positions in which the incumbent can be noncompetitively converted to the competitive service. *Gamble v. Department of the Army*, [111 M.S.P.R. 529](#), ¶ 11 n.2 (2009); [5 C.F.R. § 731.101](#)(b). The appellant has not made a nonfrivolous allegation that he could be noncompetitively converted to the competitive service. Therefore, even assuming arguendo that the agency took action under part 731, the Board still lacks jurisdiction over the appellant’s appeal.

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 the Board’s final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board’s final decision in this matter. [5 C.F.R. § 1201.113](#). 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.