

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

DARYLE ROCCO,
Appellant,

DOCKET NUMBER
CH-0752-10-0476-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: July 11, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Glenn L. Smith, Esquire, Grand Rapids, Michigan, for the appellant.

Nathan R. Mellman, Esquire, Chicago, Illinois, 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. 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 appellant brought this appeal alleging that his resignation was involuntary and, thus, subject to Board jurisdiction. He argues that, during the reduction in force (RIF) avoidance process, the agency should have noncompetitively placed him in the EAS-25 position, suggesting that it was nothing more than a position upgrade of his EAS-24 position with no significant changes in duties or responsibilities. He further contends the agency's failure to place him in the EAS-25 position shows that it improperly targeted him to be impacted by the RIF. The administrative judge considered this claim but, upon review of the pertinent documents, found that there were significant differences in the positions such that the appellant was not entitled to be non-competitively placed in the EAS-25 position. Initial Decision (ID) at 47-48.

The appellant also argues that he was subject to a de facto demotion when he was offered EAS-16 or 17 level positions (which he declined) and not available higher level positions for which he was qualified. The administrative judge considered this claim but found, based on the record evidence, that the agency was not required by the Employee and Labor Relations Manual or internal policy to assign impacted non-preference eligible employees, either voluntarily or involuntarily, to vacant positions that would least impact their grade or salary. ID at 45.

The initial decision reflects that the administrative judge considered the evidence as a whole and drew appropriate inferences. In doing so, he arrived at the well-reasoned conclusion that the appellant failed to establish that the RIF was in any way personal to him or that the agency manipulated the RIF process to subject him to separation and force his retirement. Notwithstanding the

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\(c\)](#).

appellant's disagreement with the administrative judge's findings, we discern no reason to disturb them.² *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

A retirement action is involuntary if the agency made misleading statements upon which the employee reasonably relied to his detriment. *Scharf v. Department of the Air Force*, [710 F.2d 1572](#), 1574-75 (Fed. Cir. 1983). In his petition for review, the appellant reasserts that the Board has jurisdiction over his claimed forced retirement because he was denied information as to his options that was necessary in order for him to make an informed choice about retirement. PFR File, Tab 3 at 26, 32, 35-37. The administrative judge thoroughly recounted the appellant's claim that the agency failed to provide him with sufficient information during the RIF, ID at 7-9, 15-19, but did not make any specific findings as to whether, in connection with the RIF avoidance process or the RIF itself, the agency provided the appellant with misleading or insufficient information as to his options, thereby rendering involuntary his decision to retire. *See, e.g.*, IAF, Tab 7 at 5-7; Tab 15 at 3; and Tab 42 at 24. We have reviewed the record and find that the appellant has not identified any such misleading representations upon which he relied to his detriment. Nor do we find that he

² The appellant argues that the administrative judge improperly restricted the scope of discovery on the issue of why other individuals were noncompetitively promoted in the 2009 RIF. Petition for Review (PFR) File, Tab 3 at 30-31. When the agency failed to respond to his satisfaction, the appellant filed a motion to compel, Initial Appeal File (IAF), Tab 30, to which the agency responded in opposition. *Id.*, Tab 33. The appellant asserts that, during the status conference, the administrative judge denied the motion, and he (the appellant) preserved his objection for review. The summary of the status conference does not include any rulings on discovery. *Id.*, Tab 39. Even if the appellant is correct in his assertions, it is well established that administrative judges have broad discretion in regulating discovery and, absent a showing of abuse of discretion, the Board will not find reversible error. *Vores v. Department of the Army*, [109 M.S.P.R. 191](#), ¶ 14 (2008), *aff'd*, 324 F. App'x 883 (Fed. Cir. 2009). Given that we have found no reason to disturb the administrative judge's finding that the appellant was not entitled to be placed in the EAS-25 position, he has not shown that the administrative judge abused his discretion as to this purported discovery ruling.

otherwise established his claim. He acknowledged that he had four options: to retire, go on leave without pay for 30 days during which time he could continue to apply for positions, be separated, or take a 7-8 grade demotion. IAF, Tab 42 at 23-24; PFR File, Tab 3 at 26. The fact that none of these options was to his liking, and that he wished for others, does not establish that his retirement was involuntary. *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984).

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.