

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

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
DA-4324-11-0515-I-1

v.

DEPARTMENT OF
TRANSPORTATION,
Agency.

DATE: August 29, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Milo D. Burroughs, Yelm, Washington, pro se.

Eric E. Anderson, Esquire, Fort Worth, Texas, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

In his petition for review, the appellant argues that the administrative judge failed to adjudicate his claim under [38 U.S.C. § 4311\(b\)](#); that the agency violated his veterans' preference rights in violation of the Veterans' Preference Act of 1944 (VPA); that he was the best qualified candidate for the Aviation Safety Inspection position; that the agency made several errors in the recruiting, rating, referral, and selection process; and that the agency improperly selected a non-veteran who was not qualified. Petition for Review (PFR) File, Tabs 1, 3. For the following reasons, we find that the administrative judge correctly denied corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) because the appellant did not prove by preponderant evidence that his military service was a motivating or substantial factor in his nonselection.

We find unavailing the appellant's argument that the administrative judge failed to adjudicate his USERRA claim under [38 U.S.C. § 4311\(b\)](#). The record reflects that the administrative judge gave the appellant notice of his burden of proof under both [38 U.S.C. § 4311\(a\)](#) & (b), and the appellant did not submit any argument or evidence that the agency's actions were in retaliation for protected activity under [38 U.S.C. § 4311\(b\)](#). Thus, the appellant did not set forth any claim for adjudication under [38 U.S.C. § 4311\(b\)](#) despite notice and an opportunity to do so, and the administrative judge correctly analyzed his USERRA claim under [38 U.S.C. § 4311\(a\)](#). The administrative judge thoroughly addressed the appellant's USERRA claim in the initial decision and we discern no reason to disturb those well-reasoned findings. *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

With respect to the appellant's arguments on review that the agency violated his veterans' preference rights, we have considered his arguments under both the Veterans Employment Opportunities Act of 1998 (VEOA) and the VPA. Although the administrative judge did not explicitly address the appellant's VEOA claims, we have considered them and dismiss them for lack of jurisdiction because VEOA does not apply to the Federal Aviation Administration. *See Morse v. Merit Systems Protection Board*, [621 F.3d 1346](#), 1349-51 (Fed. Cir. 2010); *Belhumeur v. Department of Transportation*, [104 M.S.P.R. 408](#), ¶¶ 4-9, *appeal dismissed*, 224 F. App'x 967 (Fed. Cir. 2007). Further, the VPA does not provide a basis for Board jurisdiction. *See Burroughs v. Department of the Army*, [116 M.S.P.R. 292](#), ¶¶ 11-12, *appeal dismissed*, 446 F. App'x 293 (Fed. Cir. 2011). Finally, insofar as the appellant is arguing that the agency's alleged violations of his veterans' preference rights are evidence of discrimination, we find this argument unavailing. An agency may fill a vacancy by selecting from a merit promotion list even when it advertised the vacancy under both merit promotion and open competitive procedures. *See Brewer v. Department of Veterans Affairs*, [111 M.S.P.R. 563](#), ¶ 8 (2009); *Joseph v. Federal Trade Commission*, [103 M.S.P.R. 684](#), ¶ 11 (2006), *aff'd*, [505 F.3d 1380](#) (Fed. Cir. 2007). Further, under merit promotion procedures, certain veterans must be allowed the right to compete for the positions if the agency is accepting applicants from outside its own workforce; however, the agency is not obligated to award veterans' preference in hiring. *See Joseph*, 505 F.3d at 1383-84. Here, the appellant did not apply for consideration under the merit promotion vacancy announcement and he did not allege or submit evidence indicating that the agency prevented him from applying for the position. Thus, the appellant's veterans' preference arguments do not change the outcome of his USERRA appeal.

The appellant argues that he was "best qualified" for the position and that the selectee was not qualified; however, the Board's function is not to evaluate whether the agency chose the best applicant but rather to determine whether the

appellant has proven that the agency discriminated against him on the basis of his military experience. *See Becwar v. Department of Labor*, [115 M.S.P.R. 689](#), ¶ 7 (2011), *aff'd*, 467 F. App'x 886 (Fed. Cir. 2012); *Fahrenbacher v. Department of the Navy*, [85 M.S.P.R. 500](#), ¶ 33 (2000), *aff'd sub nom.*, *Sheehan v. Department of the Navy*, [240 F.3d 1009](#) (Fed. Cir. 2001). Given that the record reflects that the selecting official was unaware of the appellant or his military experience prior to selecting from the merit promotion list, we agree with the administrative judge that the appellant has not demonstrated that the selecting official's decision to select from the merit promotion list instead of the external announcement was motivated by discrimination on the basis of the appellant's military experience. The record also reflects that the selected applicant had the requisite experience for the position and had been performing in the same position with the Federal Aviation Administration at a different location. Initial Appeal File, Tab 8, Subtabs 4h, 4l, 4n. Regardless of whether there were irregularities in the agency selection process, we find that there is no evidence to suggest that the appellant's military experience was a motivating or substantial factor in any errors or irregularities during the selection process.

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.