

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

RAKHMATULLA ASATOV,
Appellant,

DOCKET NUMBER
PH-3330-12-0120-I-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: September 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Rakhmatulla Asatov, Plainville, Connecticut, pro se.

Todd S. Milliard, Arlington, Virginia, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In the petition for review, the appellant challenges the initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). Petition for Review (PFR) File, Tab 1. The appellant argues that the agency and the administrative judge have misinterpreted [32 U.S.C. § 709](#). *Id.* The administrative judge thoroughly addressed this issue 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) (stating that there is no reason to disturb the initial decision where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

The appellant also argues that the administrative judge erred in relying on the legislative history for [32 U.S.C. § 709](#) in determining that veterans' preference does not apply to dual status technicians, and he contends that the administrative judge should have looked to the earlier enactment of Public Law 89-554, 80 Stat. 422 of 1966. PFR File, Tab 1. However, Public Law 89-554 is the law that enacts and codifies the laws in Title 5. Employment of National Guard technicians is governed by [32 U.S.C. § 709](#). The agency contends that the "plain language in § 709(g) explicitly prohibits the application of veterans' preference to National Guard technician appointments." Initial Appeal File, Tab 6 at 5. We do not find the language in § 709(g) to be so plain or explicit with regard to application of veterans' preference without reverting to the legislative history to discern congressional intent. *See Chevron U.S.A., Inc. v. National Resources Defense Council*, [467 U.S. 837](#), 842-845 (1984). The legislative history of [32 U.S.C. § 709](#) is quite clear in expressing congressional intent that veterans' provisions in Title 5 not be applied to National Guard technician

appointments. *See* H.R. Rept. 90-1823 at 331-2 (Aug. 13, 1968). Therefore, we conclude that the appellant was not entitled to the veterans' preference provisions of Title 5. In addition, the appellant has attached a letter dated January 13, 2012, from the Department of Labor (DOL) - VETS as evidence that he exhausted his remedy with DOL. PFR File, Tab 1 at 6. The letter states that the appellant filed a written complaint after the 60-day filing deadline and that DOL-VETS determined that the reasons for his late filing are insufficient to waive the statutory 60-day filing requirement. *Id.* A failure to meet the 60-day deadline of [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#) for filing a complaint with the Secretary of Labor does not deprive the Board of jurisdiction over a VEOA claim; such failure is a basis, however, for denying a request for corrective action unless the appellant establishes a basis for applying equitable estoppel. *Hayes v. Department of the Army*, [111 M.S.P.R. 41](#), ¶ 12 (2009). Here, although the administrative judge did not definitively find that the Board has jurisdiction over this appeal, the administrative judge correctly assumed jurisdiction since the appellant has exhausted his remedy with DOL. *Id.*

However, the appellant has not shown that he was actively pursuing his judicial remedies by filing a defective complaint during the statutory period, or that he had had been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Rather, the record indicates that the appellant's failure to file a timely DOL complaint was a result of his own lack of due diligence in preserving his legal rights, which is not grounds for equitable tolling. *Hayes*, [111 M.S.P.R. 41](#), ¶¶ 10-12. Accordingly, equitable tolling does not apply, and the appellant's request for corrective action must also be denied based on a failure to meet the time limit for filing a complaint with DOL set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). *Id.*, ¶ 12.

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. 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.