

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

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
AT-3330-11-0749-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

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

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, which denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)). For the following reasons, we VACATE the initial decision and DENY the appellant's request for corrective action under VEOA with respect to his claim concerning the minimum educational requirement for the position.

The appellant's arguments on review are unavailing. First, the arguments and documentation on review concerning a position advertised under vacancy announcement number SCBK10656871 are irrelevant here because this appeal concerns vacancy announcement SCKB10053129R. Petition for Review File, Tab 1 at 2. Second, we decline to consider the appellant's employment practices claim because it was adjudicated as a separate appeal and dismissed as withdrawn. MSPB Docket No. AT-300A-11-0077-I-1, Initial Decision (Nov. 4, 2010)² & Erratum (Nov. 9, 2010). Additionally, the appellant did not argue below that he was discriminated against on the basis of military service, and, absent any argument that he is asserting a new Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) claim based on information that was previously unavailable to him despite his due diligence, the Board will not consider his new arguments on review. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). Further, as the Board has found in one of the appellant's prior appeals, the Veterans' Preference Act of 1944 does not provide an independent 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, with respect to his discovery argument, the appellant made only a cursory discovery request as a part of his response to the administrative judge's acknowledgment order, he failed to

² The appellant did not file a petition for review, and the initial decision became final on December 9, 2010.

file a motion to compel, and he has not explained what evidence he hoped to obtain through additional discovery or how his rights were prejudiced by the alleged denial of that evidence. Initial Appeal File, Tab 4; *see King v. Department of the Navy*, [98 M.S.P.R. 547](#), ¶ 10 (2005), *aff'd*, 167 F. App'x 191 (Fed. Cir. 2006); *Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table).

At issue on review is the Board's jurisdiction over the VEOA claims adjudicated below. Before filing a VEOA appeal with the Board, an appellant must file a complaint with the Department of Labor (DOL) containing "a summary of the allegations that form the basis for the complaint." [5 U.S.C. § 3330a\(a\)\(2\)\(B\)](#); [5 C.F.R. § 1208.23\(a\)\(4\)](#). The purpose of this requirement is to afford DOL the opportunity to conduct an investigation that might lead to corrective action before involving the Board in the case. *Burroughs v. Department of the Army*, [115 M.S.P.R. 656](#), ¶ 9, *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). Accordingly, only those matters that were raised to DOL are properly before the Board in a VEOA appeal. *See id.*, ¶¶ 9-10. The only matter that the appellant raised was his contention that the agency had improperly applied a minimum educational requirement to the Lead Aerospace Engineer position vacancy at issue. Initial Appeal File, Tab 1 at 2. Accordingly, that is the only issue over which the Board has jurisdiction in this appeal, and the only one that may be considered.³ Therefore, we vacate the initial decision because it denied corrective action on claims that were not properly exhausted with DOL, and were therefore outside of the Board's jurisdiction, and we make findings below over the appellant's minimum educational requirements argument, which is the single

³ In addition to demonstrating that he properly exhausted with DOL by showing that he complained to DOL regarding the specific matter in the appeal and showing that DOL decided not to take corrective action, the appellant demonstrated jurisdiction over the remaining elements of a VEOA appeal. *See Hillman v. Tennessee Valley Authority*, [95 M.S.P.R. 162](#), ¶ 9 (2003).

matter over which the Board exercises jurisdiction in this appeal. *See id.*, ¶¶ 10-11.

Although the administrative judge did not analyze the appellant's claim that the agency improperly applied a minimum educational requirement, the appellant has not identified any dispute of material fact regarding this claim, and we find that the record is sufficiently developed for us to adjudicate the merits of this claim on review. *Burroughs*, [115 M.S.P.R. 656](#), ¶ 11. The Board has had occasion to analyze this same claim by this appellant with respect to his nonselection to an Aerospace Engineer position within the same series and agency, and we incorporate that analysis by reference. *Id.*, ¶¶ 12-13. The appellant's claim in this appeal is similarly unavailing because the minimum educational requirement of which the appellant complains was established by the Office of Personnel Management (OPM), and therefore falls within the exception of [5 U.S.C. § 3308](#), i.e., OPM has determined that "the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education." *Id.*, ¶ 12; *see also Burroughs v. Department of the Army*, 446 F. App'x 278, 281 (Fed. Cir. 2011) (nonprecedential); *Burroughs v. Department of the Army*, 445 F. App'x 347, 349-50 (Fed. Cir. 2011) (nonprecedential). Moreover, there is nothing in the record indicating that the agency's nonselection of the appellant for the vacancy at issue was in any way related to a determination that he failed to meet minimum educational requirements. Thus, we deny the appellant's request for corrective action.

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.