UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MAX E. MACHNIK, JR.,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-3330-12-0197-I-1

DATE: November 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Max E. Machnik, Jr., Starke, Florida, pro se.

Corey J. Thompson, Gainesville, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed an apparently untimely petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which denied his request for redress under the Veterans Employment

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Opportunities Act (VEOA), 5 U.S.C. § 3330a(d). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).[2] After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review on the merits, without deciding whether the appellant has shown good cause for the apparent untimeliness (by 1 day) of his petition for review. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The appellant does not dispute the administrative judge's findings that the agency considered the appellant for the Food Service Worker position under merit promotion procedures, found him qualified, interviewed him, and selected someone else. The agency thus gave the appellant bona fide consideration for the Food Service Worker position, thereby honoring his right to compete under 5 U.S.C. § 3304(f)(1). *See Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶ 10 (2008). Furthermore, as the administrative judge found, the appellant was not entitled to veterans' preference because selection

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[2] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

under merit promotion procedures is made without regard to veterans' preference. *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶¶ 22-23 (2006). The administrative judge was also correct to conclude that the appellant's claims of age and disability discrimination cannot be considered in this VEOA appeal. *See Letchworth v. Social Security Administration*, 101 M.S.P.R. 269, ¶ 12 n.8 (2006). The appellant's assertion on review that the agency did not give enough weight to his past training when it selected another candidate does not establish that the agency violated his right to compete. His request on review that he be considered for another position under a noncompetitive appointing authority is properly directed to the agency, not the Board, and in any event does not demonstrate error in the initial decision.

We modify the initial decision in one respect, however. The administrative judge dismissed the appeal for failure to state a claim upon which relief may be granted, but in so doing she relied in part on documentary evidence submitted by the agency. When such evidence is considered, dismissal for failure to state a claim upon which relief may be granted is inappropriate. *Williamson v. U.S. Postal Service*, 106 M.S.P.R. 502, ¶ 9 n.* (2007). We nevertheless decide this case without remanding it for the hearing the appellant requested in his petition for appeal because, under the undisputed material facts, the agency made its selection under merit promotion procedures and did consider the appellant's application; therefore, the appellant is not entitled to relief as a matter of law. *See Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶¶ 9-11 (2008). We therefore deny the appellant's request for redress under the VEOA.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.