

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

PAUL P. BARRY,  
Appellant,

DOCKET NUMBER  
CH-3330-12-0426-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: December 6, 2012

**THIS ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Paul P. Barry, El Paso, Texas, pro se.

Carrie Schaffner, Esquire, Rock Island, Illinois, for the agency.

**BEFORE**

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

**REMAND 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 dismissed his appeal under the Veterans Employment Opportunities Act (VEOA) for lack of jurisdiction. Generally, we grant petitions such as this one only when:

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).<sup>2</sup> For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Order.

#### **DISCUSSION OF ARGUMENTS ON REVIEW**

The appellant, an honorably retired veteran, applied for a Supervisory Logistics Management Specialist position under vacancy announcement NCBG11113838R. Initial Appeal File (IAF), Tab 1 at 10, Tab 4 at 7. He was not referred to the selecting official because the agency determined that he was not qualified for the position. IAF, Tab 1 at 9. Subsequently, he filed a VEOA complaint with the Department of Labor (DOL) regarding the agency's alleged denial of his right to compete for the vacancy, and DOL closed its investigation into his complaint. *Id.* at 12.

The appellant filed a Board appeal seeking corrective action under VEOA, alleging that the agency denied him the right to compete for the Supervisory Logistics Management position. IAF, Tabs 1, 4. Without holding the requested

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<sup>2</sup> 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.

hearing, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 6, Initial Decision (ID) at 1-2. The administrative judge found that the appellant failed to make a nonfrivolous allegation that he is a preference eligible because his discharge certificate, DD-214, showed that he retired with the rank of Major after 20 years of service and he does not allege that he is a disabled veteran. ID at 2.

We discern no error with the administrative judge's conclusion that the appellant was not a preference eligible because the appellant falls squarely within the exclusions identified in [5 U.S.C. § 2108\(4\)](#). Pursuant to [5 U.S.C. § 2108\(4\)](#), and subject to certain exceptions inapplicable here, a retired member of the armed forces is not included in the definition of preference eligible "unless the individual is a disabled veteran" or "retired below the rank of major or its equivalent." On review, the appellant argues, however, that the administrative judge erred in dismissing the appeal on this basis because the appellant filed his VEOA appeal as a veteran pursuant to [5 U.S.C. § 3304\(f\)\(1\)](#), and not as a preference eligible. Petition for Review File, Tab 1 at 4. We agree with the appellant's argument on this issue.

The statute at [5 U.S.C. § 3304\(f\)\(1\)](#) reads:

Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

Emphasis added. We find that the administrative judge erred in dismissing this appeal for lack of jurisdiction based on the appellant's non-preference eligible status because the appellant has consistently alleged that he was filing his appeal as a veteran who retired from the armed forces under honorable conditions after 3 years or more of active service pursuant to [5 U.S.C. § 3304\(f\)\(1\)](#). IAF, Tab 1 at 5, Tab 4

at 4. For this reason, we reverse the initial decision. *See Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 24 (2007).

Because of the administrative judge's determination, he did not address whether the appellant met his "right to compete" jurisdictional burden, set forth below. The administrative judge properly informed the appellant that, in order to establish Board jurisdiction over a "right to compete" VEOA claim under [5 U.S.C. § 3330a\(a\)\(1\)\(B\)](#), he must: (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (i) he is a veteran within the meaning of [5 U.S.C. § 3304\(f\)\(1\)](#), (ii) the actions at issue took place on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act, and (iii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of 5 U.S.C. § 3304(f)(1). IAF, Tab 3 at 4; *Styslinger*, [105 M.S.P.R. 223](#), ¶ 31.

The appellant demonstrated that he exhausted his remedy with DOL, and he made a nonfrivolous allegation that he is a veteran who separated from the armed forces under honorable conditions after 3 years or more of active service and that the actions at issue took place on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act. IAF, Tab 4 at 4-7; *see Styslinger*, [105 M.S.P.R. 223](#), ¶ 31. The appellant also made a nonfrivolous allegation that the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of [5 U.S.C. § 3304\(f\)\(1\)](#), satisfying the criteria in [5 U.S.C. § 3330a\(a\)\(1\)\(B\)](#), because his pleadings contain a statement that he is not a current federal employee and he submitted emails showing that the agency evaluated his qualifications for the position under merit promotion procedures. IAF, Tab 1 at 9-11, Tab 4 at 4; *see Styslinger*, [105 M.S.P.R. 223](#), ¶ 31. The Board has held that VEOA should be broadly construed in favor of veterans and in light of its statutory purpose to assist

veterans in obtaining federal employment. *Willingham v. Department of the Navy*, [118 M.S.P.R. 21](#), ¶¶ 14-15 (2012). Therefore, construing the appellant's allegations liberally, the appellant has established the Board's jurisdiction.

Accordingly, we remand this appeal for a hearing on the merits of the appellant's VEOA claim.

### **ORDER**

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.