

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

DONALD LEE ROBINSON,
Appellant,

DOCKET NUMBER
CH-3330-11-0845-I-1

v.

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
Agency.

DATE: December 26, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Donald Lee Robinson, Hilliard, Ohio, pro se.

Thomas G. Massouras, Esquire, Chicago, Illinois, 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, which denied his request for corrective action under the Veterans Employment Opportunities

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Act (VEOA) of 1998. 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

In his petition for review, the appellant, a 30% disabled preference eligible and GS-12 Project Manager with the agency, challenges the initial decision denying corrective action in his VEOA appeal. The appellant argues, among other things, that the administrative judge incorrectly found that he was not denied a right to compete under two vacancy announcements for a GS-15 Supervisory Loan Specialist: Announcement No. F11-MP-476789-2gft (Vacancy ID 476789), a merit promotion announcement; and Announcement No. F11-DE-477511-2gft (Vacancy ID 477551), a delegated examining posting that was open to the general public. He asserts that she improperly did not consider whether the agency erred in finding that he was not qualified for the position. Petition for

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.

Review (PFR) File, Tab 1 at 4-5, 9-10, 12. He also argues that she incorrectly found that the agency did not violate his veterans' preference rights when it reposted the position as a GS-15 Director of Lender Quality Assurance under Announcement No. F11-MP-528921-2CL, a merit promotion announcement, and selected a non-preference eligible, who was a former GS-14 employee with the agency, as a reinstatement eligible. PFR File, Tab 1 at 5-8, 10-12. He further contends that the agency violated its own regulations. PFR File, Tab 1 at 12-13.

The appellant has not shown that the administrative judge erred in finding that he was not denied his right to compete under the vacancy announcements for the Supervisory Loan Specialist position. The appellant was referred under both vacancy announcements for the GS-15 Supervisory Loan Specialist position and interviewed under vacancy announcement F11-MP-476789-2gft, but the agency did not make any selection under these vacancy announcements. Initial Appeal File (IAF), Tab 15, Subtabs 2c, 2d; Tab 27, Subtab 3i at 1. An agency may cancel a vacancy announcement without violating a preference eligible's right to compete if it does not act in bad faith. *See, e.g., Abell v. Department of the Navy*, [343 F.3d 1378](#), 1383-85 (Fed. Cir. 2003); *Jones v. Department of Veterans Affairs*, [113 M.S.P.R. 385](#), ¶ 12 (2010); *Dean v. Consumer Product Safety Commission*, [108 M.S.P.R. 137](#), ¶ 11 (2008). Here, the agency interviewed the appellant for the GS-15 Supervisory Loan Specialist position and provided the interviewers' sworn declarations describing the reasons for not selecting him, i.e., that he lacked the necessary experience and knowledge for the position. IAF, Tab 27, Subtab 4f at 1-2; Tab 34, Subtab A at 1-2. In his petition for review, the appellant has not identified specific evidence to refute these declarations; rather, he simply reiterates his belief that the interview went well and that he is qualified for the position if his equivalent experience is taken into account. PFR File, Tab 1 at 5, 10. Therefore, he has not shown that the agency acted in bad faith in canceling the vacancy announcement.

The appellant has also not shown that the administrative judge committed any error that prejudiced his substantive rights in connection with the GS-15 Director of Lender Quality Assurance position because the appellant failed to establish Board VEOA jurisdiction in connection with that vacancy announcement. To establish Board jurisdiction over a VEOA appeal, an appellant must, among other things, exhaust his administrative remedies before the Department of Labor (DOL). *See, e.g., Graves v. Department of Veterans Affairs*, [117 M.S.P.R. 491](#), ¶ 11 (2012); *Burroughs v. Department of the Army*, [115 M.S.P.R. 656](#), ¶¶ 9-10, *aff'd* 445 F. App'x 347 (Fed. Cir. 2011). Here, the record does not show that the appellant's DOL complaint specifically addressed the agency actions in connection with this vacancy announcement because the appellant filed his DOL complaint on August 29, 2011; the agency did not advertise the position until August 31, 2011; DOL issued its decision on September 8, 2011, finding no violation with respect to only the Supervisory Loan Officer position vacancy; and the agency did not select the individual for the Director of Lender Quality Assurance position until September 19, 2011. IAF, Tab 1 at 4, 10; Tab 5 at 9; Tab 27, Subtab 5b; Tab 31 at 4; Tab 34, Ex. A at 2; Tab 31 at 4; Tab 34, Subtab B at 3, Subtab D at 2-3. Thus, to the extent that the initial decision is unclear, we DISMISS the appellant's VEOA appeal concerning the Director of Lender Quality Assurance position for lack of jurisdiction. *See, e.g., Graves*, [117 M.S.P.R. 491](#), ¶ 11. Because of this, we find it unnecessary to address the appellant's other arguments concerning this vacancy announcement. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (stating that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

The appellant also contends that the agency violated its own procedural guidelines. PFR File, Tab 1 at 12-13; IAF, Tab 27, Subtabs 3c, 3d, 3h. The appellant has not specifically explained how any agency error harmed him by showing that the error was likely to have caused the agency to reach a different

conclusion from the one that it would have reached in the absence or cure of the error. Thus, he has not shown that his contention warrants reversing the initial decision. *Cf. Doe v. Department of Justice*, [118 M.S.P.R. 434](#), ¶ 31 (2012) (stating that an agency's procedural error does not warrant reversal of an employee's removal unless the employee has shown that the error was harmful under [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#)).

**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:

William D. Spencer
Clerk of the Board

Washington, D.C.