

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

RAKHMATULLA ASATOV,
Appellant,

DOCKET NUMBER
PH-3330-12-0145-I-1

v.

AGENCY FOR INTERNATIONAL
DEVELOPMENT,
Agency.

DATE: January 2, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Rakhmatulla Asatov, Plainville, Connecticut, pro se.

Raghav Kotval, Washington, D.C., 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 of 1998 (VEOA). 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.

Under VEOA, a preference eligible who alleges that an agency has violated his rights under any statute or regulation relating to veterans' preference, and who has exhausted his rights under that section before the Department of Labor, may file an appeal with the Board. [5 U.S.C. § 3330a\(a\)\(1\)](#), (d); *Ruffin v. Department of the Treasury*, [89 M.S.P.R. 396](#), ¶ 11 (2001). To be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency's selection violated one or more of his statutory or regulatory veterans' preference rights. *Dale v. Department of Veterans Affairs*, [102 M.S.P.R. 646](#), ¶ 10 (2006).

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.

The Foreign Service Act provides a separate statutory hiring authority for Foreign Service employees, and much of title 5 does not apply to them. [22 U.S.C. §§ 3941-3952](#). By statute, the agency head has the authority to make appointments (with exceptions not relevant here) and to promulgate regulations governing appointments. [22 U.S.C. § 3943](#). The agency is required by statute to consider veteran or disabled veteran status as “an affirmative factor” in making appointments. [22 U.S.C. § 3941\(c\)](#). Section 3941(c) is a statute related to veterans’ preference. *Isabella v. Department of State*, [102 M.S.P.R. 259](#), ¶ 11 n.1 (2006).

The appellant, a preference eligible, applied for the position of Foreign Service Officer Program Economist. Initial Appeal File (IAF), Tab 1 at 5. The agency’s policy was to award all preference-eligible applicants five additional points without regard to any disability, and, in accordance with its policy, the agency awarded the appellant five points during the application review phase. IAF, Tab 1 at 9, Tab 3, Subtab 2. As a result, the appellant’s application was forwarded for further consideration, whereupon it was determined that he did not possess the minimum educational requirements for the position. IAF, Tab 1 at 9, Tab 3, Subtab 1 at 5, Subtab 2 at 1-7, Subtab 4 at 3. Because VEOA prohibits an agency from denying a preference eligible the opportunity to compete but does not provide that veterans will be considered for positions for which they are not qualified, the administrative judge correctly found that the appellant is not entitled to corrective action under VEOA. *See Dale*, [102 M.S.P.R. 646](#), ¶ 13.

The appellant asserts that the administrative judge’s decision is inconsistent with the Board’s decision in *Isabella*. Petition for Review (PFR) File, Tab 6 at 5. We disagree. In *Isabella*, the Board held that title 5, including VEOA, applies to the appointment process for Foreign Service Diplomatic Security Special Agent Positions. The Board expressly stated, however, that, although VEOA may apply to Foreign Service officer appointments because [5 U.S.C. § 3941\(c\)](#) is a statute related to veterans’ preference, it need

not determine at that time whether it had jurisdiction over VEOA appeals filed by Foreign Service Officer candidates. [102 M.S.P.R. 259](#), ¶ 11 n.1. VEOA ensures that a preference eligible employee, such as the appellant, has the opportunity to apply for such vacancies. [5 U.S.C. § 3304](#)(f)(1); *Abell v. Department of the Navy*, [343 F.3d 1378](#), 1383 (Fed. Cir. 2003). The appellant received every consideration he was entitled to receive under VEOA as an applicant for a Foreign Service Officer position, and, therefore, it was not necessary for the administrative judge to address whether title 5 applies to the appellant as a Foreign Service Officer candidate.

The appellant also argues that the administrative judge failed to address his contention that 5 C.F.R. part 302 applies in this case. PFR File, Tab 6 at 3; IAF, Tab 28 at 7. The administrative judge did not address the application of 5 C.F.R. part 302 but instead found that “the appellant would not have a right of appeal under 5 C.F.R. part 300 because the position in question was in the excepted service; 5 C.F.R. part 300 applies to the competitive service.” Initial Decision at 5-6. The appellant correctly argues that 5 C.F.R. part 302 applies to appointments in the excepted service. *Jarrard v. Social Security Administration*, [115 M.S.P.R. 397](#), ¶ 10 (2010). Even assuming that [5 C.F.R. § 302.201](#)(a) applies here, that regulation requires an agency to grant five additional points to preference eligibles under [5 U.S.C. § 2108](#)(3)(A). It is undisputed that the agency complied with the veterans’ preference provision set forth in [5 C.F.R. § 302.201](#)(a) when it raised the appellant’s initial system rating score from 94 to 99. IAF, Tab 3, Subtab 2 at 5. Therefore, although the administrative judge did not address the appellant’s argument concerning 5 C.F.R. part 302, her failure to do so was not prejudicial to the appellant’s substantive rights and provides no basis for reversal of the initial decision. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

The appellant also argues that the administrative judge is biased against pro se appellants and contends that she demonstrated that bias by not providing him

with more guidance. PFR File, Tab 6 at 6. An allegation of bias by an administrative judge must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist, and must be supported by an affidavit. *Lee v. U.S. Postal Service*, [48 M.S.P.R. 274](#), 280-82 (1991). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). The appellant did not support his bias claims with an affidavit. We find nothing in the record to show that the administrative judge was unable to render a fair judgment.

The appellant asserts that the administrative judge's rulings were arbitrary, capricious, and violated the provisions of [5 U.S.C. § 706](#), the Administrative Procedure Act (APA). PFR File, Tab 6 at 4-5. Section 706 of the APA concerns judicial review of agency actions and is not applicable to Board proceedings. *See Lee*, 48 M.S.P.R. at 281.

We also find no merit in the appellant's contention that he was improperly required to "disclose the contents of his VEOA appeal." An appellant is required to state in his appeal the reasons why he believes the agency's actions are wrong. [5 C.F.R. § 1201.24\(a\)\(4\)](#). Furthermore, at the time this appeal was filed, the Board's regulations also required the appellant to submit any documents relevant to his appeal. [5 C.F.R. § 1201.24\(a\)\(7\)](#) (Jan. 1, 2012). Similarly lacking in merit is the appellant's assertion that the administrative judge did not rule on his discovery-related motions. IAF, Tab 24.

The appellant claims that the administrative judge abused her discretion by not conducting a hearing. PFR File, Tab 6 at 4. A VEOA complainant does not have an unconditional right to a hearing before the Board, and the Board may dispose of a VEOA appeal on the merits without a hearing. *See Haasz v.*

Department of Veterans Affairs, [108 M.S.P.R. 349](#), ¶ 9 (2008); [5 C.F.R. § 1208.23\(b\)](#) (a hearing “may be provided” in a VEOA appeal if the appellant requests one or if a hearing is necessary to resolve issues of jurisdiction or timeliness). Because there are no genuine issues of material fact in this case and the administrative judge properly determined that the agency must prevail as a matter of law, we find that the appellant was not entitled to a hearing. *See Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶ 12 (2007) (the Board may decide a VEOA claim on the merits without a hearing when there is no genuine issue of material fact and one party must prevail as a matter of law).

The appellant raises new arguments on review and has attached what he asserts is new and material evidence that was unavailable prior to the close of the record below. PFR File, Tabs 1, 8. Specifically, he asserts that the agency has a “neutral policy toward applicants’ proficiency in foreign languages,” this policy adversely affected his ability to compete, and the policy violates [42 U.S.C. § 2000e-2](#) and 29 C.F.R. part 1606. PFR File, Tabs 1 at 4 and 8 at 4. To support this claim, the appellant has submitted a copy of a September 2009 GAO Report concerning the Department of State entitled “Comprehensive Plan Needed to Address Persistent Foreign Language Shortfalls.” PFR File, Tab 8 at 6-46. However, because the appellant did not raise this argument below, we have not considered it on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). Furthermore, the appellant did not show that the 2009 GAO report was new or unavailable before the record closed despite his due diligence, and, therefore, we have not considered it for a first time on review. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980).

In addition, the appellant argues that he would have raised his discrimination claim in the context of this VEOA appeal. PFR File, Tab 1. Although the letter from the agency dismissing his discrimination complaint as untimely filed was issued after the April 9, 2012 close of the record below, *see* IAF, Tab 24, and is thus new, it is not material evidence that warrants a different

outcome. The Board defers to the employing agency's and to the Equal Employment Opportunity Commission's (EEOC) determinations regarding the timeliness of discrimination complaints. *See Cloutier v. U.S. Postal Service*, [89 M.S.P.R. 411](#), ¶ 6 (2001); *Nabors v. U.S. Postal Service*, [31 M.S.P.R. 656](#), 660 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table). Because the appellant elected to file his discrimination complaint with the agency and the agency subsequently dismissed his complaint as untimely, the appellant's avenue of appeal was to the EEOC, not the Board. *See Nabors*, 31 M.S.P.R. at 660.

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 the date of this order. 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 about the United States Court of Appeals for the Federal Circuit 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.