

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

BRIAN A. DAIELLO,  
Appellant,

DOCKET NUMBER  
DC-3330-10-0784-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: May 13, 2011

**THIS FINAL ORDER IS NONPRECEDENTIAL**

Brian A. Daiello, APO, APO/FPO Europe, pro se.

C. Daniel Gibson, Fort Stewart, Georgia, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or 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).

The administrative judge dismissed the appellant's Veterans Employment Opportunities Act of 1998 (VEOA) appeal for failure to state a claim upon which relief can be granted. Initial Appeal File (IAF), Tab 8 at 4-6.\* Such a disposition is appropriate in this case because, taking the appellant's allegations as true and drawing all reasonable inferences in his favor, he cannot prevail as a matter of law. *See Alford v. Department of Defense*, 113 M.S.P.R. 263, ¶ 12 (2010). In concluding that the appellant has not stated a claim for which relief can be granted, we do not rely on any documentary evidence or information other than the appellant's pleadings. *See Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 8 (2008).

The appellant alleged that the agency failed to apply his veterans' preference "entitlement," as a 10 point, 30% or more disabled veteran, when it considered his application and failed to select him for a position filled through internal merit promotion procedures. IAF, Tab 1 at 5. It is well-established, however, that merit promotion procedures merely allow preference eligibles the right to compete for positions but do not award any ranking preferences that a preference eligible would otherwise receive under competitive examination procedures. *See Dean v. Consumer Product Safety Commission*, 548 F.3d 1370, 1373 (Fed. Cir. 2008); *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶¶ 12-13 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007); *Perkins v. U.S. Postal Service*, 100 M.S.P.R. 48, ¶ 9 (2005); 5 C.F.R. § 211.102(c). The appellant has alleged that the position for which he was considered was filled through merit promotion procedures. Thus, he fails to state a claim that the agency violated

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\* The administrative judge found that the appellant did not establish that his complaint to the Department of Labor was timely filed or that equitable tolling was warranted. IAF, Tab 8 at 4. To the extent that she relied on this finding to dismiss the appellant's claim, we VACATE that portion of the initial decision because the Department of Labor made a decision on the merits, thereby waiving any timeliness issues. IAF, Tab 4 at 4; *see Letchworth v. Social Security Administration*, 101 M.S.P.R. 269, ¶ 4 n.2 (2006); *Waddell v. U.S. Postal Service*, 94 M.S.P.R. 411, ¶ 12 (2003).

VEOA in not selecting him for the Supervisor Chief of Law Enforcement position. IAF, Tab 1 at 5.

The appellant also argues that the agency committed a prohibited personnel practice by hiring a retired member of the armed forces in a Department of Defense civilian position during the 180-day period immediately after his retirement in violation of 5 U.S.C. § 3326. Absent a viable VEOA claim or other appealable action, the Board cannot consider the appellant's allegations of prohibited personnel practices. *Haasz*, 108 M.S.P.R. 349, ¶ 10; *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 16 (2007). Further, to the extent that the appellant argues that 5 U.S.C. § 3326 is a statute relating to veterans' preference, he has not made a nonfrivolous allegation that the agency violated *his* rights under a statute relating to veterans' preference, and the Board lacks jurisdiction over such a claim. *See Jones v. Department of Veterans Affairs*, 113 M.S.P.R. 385, ¶ 9 (2010); *Letchworth v. Social Security Administration*, 101 M.S.P.R. 269, ¶ 7 n.5 (2006).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

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](http://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.