

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

JEROME MANSFIELD,
Appellant,

DOCKET NUMBER
PH-3330-13-0368-I-1

v.

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
Agency.

DATE: July 2, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Jerome Mansfield, Mount Laurel, New Jersey, pro se.

Courtney E. Christman and Richard Johnson, 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 of the initial decision, which denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). Generally, we grant petitions such as this

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)). 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 and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

The appellant, a preference-eligible veteran, applied for a competitive-service GS-9 Criminal Investigator position with the agency under Vacancy Announcement No. 13-HUDIG-043P (Vacancy No. 043P), which was open to the public. Initial Appeal File (IAF), Tab 1 at 14, Tab 11 at 25. In Vacancy No. 043P, the agency announced its intention to fill two vacancies and informed applicants of a separate merit promotion announcement by stating that: "Current permanent Federal employees with competitive status, former Federal employees who have reinstatement eligibility, and individuals who are eligible to apply under special appointing authorities may wish to apply under 13-HUDIG-042A."² IAF, Tab 11 at 25. The appellant only applied under Vacancy No. 043P. *Id.*; IAF, Tab 14 at 8-9.

² A position filled under the merit promotion process is only open to persons already employed by the agency and to veterans. *Dean v. Consumer Product Safety Commission*, [548 F.3d 1370](#), 1373 (Fed. Cir. 2008). Under the merit promotion process, the veteran gets the advantage of the opportunity to apply and compete for vacancies that are otherwise open only to current agency employees. *See id.*

In Vacancy No. 043P, the agency informed applicants that it would use the category rating procedure to rank and select eligible candidates and that qualified candidates would be assigned to categories A, B, or C, depending on the extent and quality of their experience and education related to the position. IAF, Tab 11 at 28. The agency explained that it would apply veterans' preference after assessing the applicants and it would list preference eligibles at the top of their assigned category and consider them before nonpreference eligibles in that category. *Id.* The agency also stated that it would place preference eligibles with service-connected disabilities of 10% or more at the top of the highest category depending on the position and grade level of the job. *Id.* In the announcement, the agency required applicants claiming veterans' preference to submit a Certificate of Release or Discharge From Active Duty (DD-214), or other official documentation from a branch of the Armed Forces or the Department of Veterans Affairs, showing service dates and discharge type and requiring 10-point preference eligibles to submit additional documentation, including, inter alia, an Application for 10-point Veterans' Preference (SF-15). *Id.* at 30.

On his application for Vacancy No. 043P, the appellant claimed that he was entitled to a 5-point veterans' preference. *Id.* at 10, 21. Despite his failure to provide a DD-214 to support his asserted veterans' preference, the Human Resources (HR) Specialist who processed the applications assigned the appellant to the bottom of Category C based on his self-assessment scores and granted him a tentative 5-point veterans' preference to advance his position within Category C. *Id.* at 10. However, the HR Specialist did not refer the appellant's application to the selecting official because she only referred applicants who scored in the highest category, A, to the selecting official for Vacancy No. 043P. *Id.* All of the applicants in Category A were preference eligible, and the agency was in the process of selecting one of them when the appellant appealed. IAF, Tab 14 at 9. To fill the other vacancy, the agency selected a preference eligible veteran who, unlike the appellant, applied under the merit promotion announcement. *Id.*

The appellant filed a complaint with the Department of Labor (DOL) alleging a violation of his veterans' preference rights. *See* IAF, Tab 1 at 13. DOL conducted an investigation and concluded that there was no violation because the appellant did not submit veterans' preference documentation with his job application and his score was too low for placement in the referral category. *Id.* The appellant subsequently filed this VEOA appeal with the Board and submitted the following documents: (1) a copy of the May 6, 2013 investigation closure letter he received from DOL; (2) notices from USA Jobs regarding the status of his application under Vacancy No. 043P; (3) April 21, 2013 Veterans' Preference Claim Receipts from DOL; and (4) email correspondence from DOL's Veterans' Employment and Training Service regarding the status of his file on May 9, 2013. IAF, Tab 1. The agency filed evidence and argument in opposition to the appellant's VEOA appeal and provided supplemental information as ordered by the administrative judge. IAF, Tab 11, Tab 13 at 2, 14. The appellant offered no argument or additional evidence to support his appeal, although the administrative judge offered him the opportunity to do so before the record closed. IAF, Tab 13 at 2.

Based on the written record, the administrative judge issued an initial decision denying the appellant's request for corrective action.³ IAF, Tab 15, Initial Decision (ID) at 6. The administrative judge found that the appellant received his requested 5-point veterans' preference to advance within Category C, and he failed to show that the agency violated any of his statutory or regulatory veterans' preference rights. ID at 6. The appellant filed a petition for review alleging for the first time that he has a service-connected disability of more than 30%, and therefore the agency violated his veterans' preference rights by placing him in Category C instead of in Category A. Petition for Review (PFR) File, Tab 1 at 3. The appellant further asserts that he filed a veteran's compensation claim

³ The appellant did not request a hearing on his appeal form. IAF, Tab 1 at 2.

on July 30, 2008, and that the Department of Veterans Affairs admitted to Congress that it has a backlog; therefore, he “should not be penalized for not filing as a disabled veteran.” *Id.*

The agency filed a response in opposition to the appellant’s petition for review, arguing that he requested a 5-point veterans’ preference on his application, and he failed to submit any documentation showing that he was a disabled veteran with a service-connected disability of 30% or greater. PFR File, Tab 3 at 6. In reply to the agency’s response, the appellant argues that the agency “was clueless” in the hiring process and “did not follow [Office of Personnel Management] regulations for category rating.”⁴ PFR File, Tab 4 at 3.

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) (citation omitted). Under category rating, an examining agency defines two or more quality categories; candidates are assessed and those with similar proficiency are placed in the same category. Within each quality category, the agency must list preference eligibles ahead of individuals who are not preference eligibles. *See* 5 U.S.C. § 3319(b). “For other than scientific and professional positions at GS-9 of the General Schedule (equivalent or higher), qualified preference eligibles who have a compensable service-connected disability of 10 percent or more shall be listed in the highest quality category.” *Id.* An agency may not select a nonpreference eligible ahead of a preference eligible in the same category unless it seeks and receives approval for a pass over. *Launer v. Department of the Air Force*, [119 M.S.P.R. 252](#), ¶ 7 (2013) (citing [5 U.S.C. § 3319](#)). An agency may assign

⁴ The appellant filed an additional pleading on September 9, 2013, which the Board rejected because its regulations do not allow it and because the appellant did not request leave from the Clerk of the Board by filing a motion describing the nature and need for the additional pleading. PFR File, Tab 5; *see* [5 C.F.R. § 1201.114](#)(a)(5).

numerical scores for purposes of placing applicants in categories, but veterans' preference points are not added to such scores. *Launer*, [119 M.S.P.R. 252](#), ¶ 7; see [5 C.F.R. § 337.304](#)(b).

The appellant has admitted that he only asserted a 5-point veterans' preference when he applied for the position under Vacancy No. 043P, and it is undisputed that the agency placed him in Category C based on his self-assessment and questionnaire responses on his application. IAF, Tab 11 at 21. If the appellant had claimed on his application that he had a compensable service-connected disability of 10% or more and submitted the required documentation to establish his status, he would have been entitled to be placed in Category A ahead of all nonpreference eligibles; further, under those circumstances, the agency could not select a nonpreference eligible under Vacancy No. 043P without obtaining permission to pass over the appellant. See *Launer*, [119 M.S.P.R. 252](#), ¶ 9 (citing [5 U.S.C. § 3319](#)(b), (c)(2)). Here, however, the appellant did not claim on his application that he had a compensable service-connected disability of 10% or more, and the appellant does not allege that when he applied for the position he submitted documentation that established he had a service-connected disability of 10% or more. We therefore find that the agency did not violate his rights for failing to treat him as if he had that status in processing his application for Vacancy No. 043P under the category rating procedure. See IAF, Tab 11 at 21; see also *Launer*, [119 M.S.P.R. 252](#), ¶ 9; *Badana v. Department of the Air Force*, [104 M.S.P.R. 182](#), ¶ 14 (2006) (although the appellant claimed that the agency should have afforded him the rights of a disabled veteran when he applied for a position, he was not entitled to relief under VEOA because he did not submit, with his job application, evidence to establish his status as a disabled veteran). Moreover, as previously noted, the agency selected a preference-eligible applicant under the merit promotion announcement to fill one of the vacant positions, the appellant did not apply under that announcement, and he does not allege that the agency violated his

veterans' preference rights by selecting one of the merit promotion applicants. IAF, Tab 14 at 8-9.

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

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.