UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 31

Docket No. SF-3330-12-0711-I-1

Robert M. Miller,

Appellant,

v.

Federal Deposit Insurance Corporation,

Agency.

April 30, 2014

Robert M. Miller, San Francisco, California, pro se.

Thomas J. Sarisky, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 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). *See* Petition for Review (PFR) File, Tab 1. In his initial decision, the administrative judge found that the agency did not violate the appellant's veterans' preference rights when it determined that he was not qualified for a position of employment with the agency. *See* Initial Appeal File (IAF), Tab 48, Initial Decision (ID). On review, the appellant argues that the agency should have given more weight to his prior work experiences and that its failure to do so led to the agency's finding that he was not qualified, and thus

violated his veterans' preference rights under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d). For the reasons that follow, we disagree with the appellant's interpretation of 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d), and we DENY his petition for review and AFFIRM the administrative judge's initial decision denying his request for corrective action under VEOA.

BACKGROUND

¶2 The preference-eligible appellant applied for a competitive service position as an Associate Professor for Leadership and Management (GS-14) with the agency's Corporate University, which provides management and leadership courses and lectures for agency employees. *See* IAF, Tab 5, Subtabs 2s and 2t. Upon reviewing his qualifications and experiences, including his supplemental explanation of his qualifications for the position's education requirements, *id.*, Subtab 2g, the agency determined that the appellant was not qualified for the position, *id.*, Subtab 2i. According to the agency's vacancy announcement, to satisfy the qualifications for the position, an applicant had to have either: (1) "[a] degree that included or was supplemented by a major study in education or in a subject-matter field appropriate to the position such as leadership, management or organizational behavior"; or (2) a "[c]ombination of education and experience [in] courses equivalent to a major in education, or in a subject-matter field appropriate to the position as described above, plus appropriate experience or additional course work that provided knowledge comparable to that normally acquired through the successful completion of the 4-year course of study described above." *Id.*, Subtab 2s.

¶3 After receiving notice that he did not meet the minimum qualifications for the position, the appellant requested the agency's human resources department to "send [him] the complete and specific rationale for [the hiring committee's] decision[,] including their review of [his] relevant military experience." *Id.*, Subtab 4h. In response, the agency explained that the Associate Professor

position was classified in job series 1701, which required a major study in education or other appropriate field, *id.*, and, after re-reviewing his application materials, the agency determined that the appellant's Ph.D. in economics, along with his prior teaching and military experiences, did not satisfy the position's minimum education requirements, *see id.*, Subtab 2g. The agency then conducted another review of the appellant's educational history and again concluded that he did not meet the educational requirements of the position, including the 24 hours of study in education or another appropriate field as required by the Office of Personnel Management's (OPM) guidance. *See id.*, Subtabs 2f and 2y. In response, the appellant suggested that "this is one of those rare occasions where I may not meet the exact educational requirement for the particular series, but I am demonstrably well qualified to perform the work in the series because of exceptional experience." *Id.*, Subtab 2f. The agency, however, found that upon "review[ing] all [of his] documents . . . [he did] not meet [the] education requirement." *Id.*

¶4 The appellant filed a VEOA complaint with the Secretary of Labor alleging a violation of his veterans' preference rights, *see id.*, Subtabs 2a and 2c, and he subsequently filed the instant Board appeal arguing that the agency failed to properly credit his experience when it determined that he did not meet the minimum qualifications for the Associate Professor position, *see* IAF, Tab 1. The administrative judge found that the appellant established Board jurisdiction over his VEOA appeal and that there were material facts in dispute which necessitated a hearing. Following a hearing, he denied the appellant's request for corrective action. ID at 14. In his initial decision, the administrative judge found that, pursuant to 5 U.S.C. § 3308, OPM prescribed a minimum education requirement for the 1701 job series, which included the Associate Professor position for which the appellant applied, and that the agency properly considered the entirety of the appellant's experiences and educational training in concluding that he did not meet the minimum education requirements for the position. *See* ID at 3, 9-14. In

reaching his conclusions, the administrative judge credited the testimony of several of the agency's witnesses who explained the process the agency followed in assessing the appellant's experience, and the administrative judge found that the appellant possessed neither the "OPM-mandated minimum educational requirement," nor the requisite experience or eminence in the position's specific fields of study to overcome this deficit. *Id.* at 9, 11; *see* IAF, Tab 5, Subtab 2y at 28-29 (OPM guidance explaining that "on rare occasions there may be applicants who may not meet exactly the educational requirements for a particular series, but who, in fact, may be demonstrably well qualified . . . because of exceptional experience or a combination of education and experience"). The administrative judge found that the agency considered the appellant's teaching experience (including undergraduate Reserve Officers' Training Corps instruction and economics), his positive evaluations, and his military background, but nevertheless concluded that these experiences "did not relate directly to the position to be filled" concerning educational instruction in management, leadership, and the development of coursework in these fields of study. *See* ID at 11-13. Upon finding that the agency properly considered the entirety of the appellant's background and experiences as a preference-eligible veteran, *see* 5 U.S.C. § 3311(2); 5 C.F.R. § 302.302(d), the administrative judge denied the appellant's request for corrective action under VEOA. *See* ID at 13-14.

¶5 The appellant has filed a petition for review challenging both the merits of the administrative judge's initial decision and several of his prehearing rulings. PFR File, Tab 1. On review, the appellant argues, inter alia, that the administrative judge incorrectly found that the agency considered the entirety of his experiences in determining that he did not meet the minimum education requirements for the position. *Id.* at 5-12. Specifically, the appellant argues that the administrative judge should have undertaken a qualitative assessment of whether the agency properly weighed and considered his prior experiences under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) in reaching its conclusion that he

was not qualified for the Associate Professor position. *Id.* at 7-11. The agency has filed an opposition to the appellant's petition for review arguing that the administrative judge conducted the proper analysis and that the merits of the appellant's VEOA appeal do not include a substantive review by the Board of the weight the agency accorded the appellant's prior work experiences in finding him not qualified. *See* PFR File, Tab 3.

ANALYSIS

The administrative judge properly denied the appellant's request for corrective action because 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) do not provide an appellant with a right to a qualitative review of an agency's assessment of a preference-eligible's qualifications for a position of employment.

¶6 Generally, in order to establish Board jurisdiction over a VEOA appeal under 5 U.S.C. § 3330a, an appellant must: (1) show that he exhausted his remedy with the Department of Labor (DOL); and (2) make nonfrivolous allegations that (a) he is a preference-eligible within the meaning of VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (c) the agency violated his rights under a statute or regulation related to veterans' preference. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 6 (2008). In establishing the Board's jurisdiction over a VEOA appeal, an appellant need not state a claim upon which relief can be granted, *id.*, ¶ 6, and an appellant's allegation, in general terms, that his veterans' preference rights were violated is sufficient to meet the nonfrivolous allegation requirement, *id.*, ¶ 7.

¶7 For purposes of establishing the Board's jurisdiction over his VEOA appeal, the appellant's nonfrivolous allegations that the agency did not comply with 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) by failing to consider the full extent of his military and civilian experiences when reviewing his application for the Associate Professor position were sufficient. *See Haasz*, 108 M.S.P.R. 349,

¶ 6; ID at 5.[1] Among the several preferences extended to preference-eligible veterans in federal employment is the right "to credit for all experience material to the position for which examined, including experience gained in religious, civic welfare, service, and organizational activities, regardless of whether [the preference-eligible applicant] received pay therefor." 5 U.S.C. § 3311(2); *see* 5 C.F.R. § 302.302(d). The Board has recently explained that section 3311 "require[s] . . . a more generous assessment of the qualifications of preference-eligibles who apply for positions," including "credit[ing] those candidates with all experience material to the position, even if such experience is unpaid." *Beyers v. Department of State*, 120 M.S.P.R. 573, ¶ 11 (2014); *see Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1321 (Fed. Cir. 2012) (finding that the agency failed to consider the employee's "other valuable experience"). Section 3311 and 5 C.F.R. § 302.302(d), therefore, are a statute and a regulation, respectively, "relating to veterans' preference" which may form the basis of a VEOA appeal before the Board. *See Slater v. U.S. Postal Service*, 112 M.S.P.R. 28, ¶ 5 (2009) (describing the test to establish Board jurisdiction over a VEOA appeal under 5 U.S.C. § 3330a).

¶8 Although the appellant does not have a right to a hearing in a VEOA appeal, we agree with the administrative judge that there existed material facts in dispute which necessitated a hearing in this case. *See Haasz*, 108 M.S.P.R. 349, ¶¶ 8-9; ID at 5. Upon proceeding to a hearing on his VEOA appeal, however, the appellant had to establish by a preponderance of the evidence that the agency violated 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) by failing to credit him with all valuable experience material to the Associate Professor position. *See Lis v. U.S. Postal Service*, 113 M.S.P.R. 415, ¶ 11 (2010) (to be entitled to relief

---

[1] There is no dispute that the appellant properly exhausted his VEOA appeal by filing a complaint with DOL, that he is a preference-eligible veteran, and that the actions at issue in this appeal took place after October 30, 1998. ID at 5.

under VEOA, an appellant must show by preponderant evidence that the agency violated one or more of his statutory or regulatory veterans' preference rights). The administrative judge found that the appellant did not meet this burden, *see* ID at 6-13, and, on petition for review, the appellant argues that the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 573 F.3d 1318 (Fed. Cir. 2009), requires the Board to assess whether the agency properly weighed and evaluated his prior experiences in determining that he was not qualified for the Associate Professor position, *see* PFR File, Tab 1 at 11-12; *see also Lazaro*, 666 F.3d at 1318-19. In opposition, the agency argues that the administrative judge applied *Kirkendall* correctly when he found no violation of 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) based upon the agency's witnesses' testimony that they reviewed and considered the entirety of the appellant's application materials in assessing his qualifications for the position. *See* PFR File, Tab 3 at 20-21.

¶9 We agree with the agency's argument and find that the administrative judge properly applied *Kirkendall*, 573 F.3d at 1324-25, and *Lazaro*, 666 F.3d at 1318-19, in denying the appellant's request for corrective action. The appellant urges that *Kirkendall* and *Lazaro* be read broadly to provide a preference-eligible job applicant with a substantive right to have the Board undertake a qualitative review of an agency's assessment of his experiences and qualifications. We find the more accurate reading of these cases establishes that, although a preference-eligible is entitled to have a broad range of experiences considered by the agency in reviewing his application for a position, how the agency adjudges and weighs those experiences is beyond the purview of the Board's review in a VEOA appeal. *See, e.g.*, *Asatov v. Agency for International Development*, 119 M.S.P.R. 692, ¶ 7 (2013) (the matter at issue in a VEOA appeal is not whether a particular agency action is proper and should be sustained); *Scharein v. Department of the Army*, 91 M.S.P.R. 329, ¶¶ 9-10 (2002) (VEOA does not guarantee a preference-eligible a position of employment), *aff'd*, No. 02-3270, 2008 WL 5753074 (Fed. Cir. Jan. 10, 2008) (NP). Accordingly, we find that,

pursuant to 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d), the Board is limited to assessing whether an agency considered all of an appellant's "valuable experience" which is material to the position for which the appellant has applied, and we conclude that this assessment does not include a review of the weight the agency gave to a preference-eligible's prior experiences in determining that he was not qualified for a position of employment.

¶10 In reaching this conclusion, we find that the facts of *Kirkendall* and *Lazaro* do not support the reading of 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) that the appellant urges us to adopt on review. *See* PFR File, Tab 1 at 11-12. In both cases, the issues presented concerned the hiring-agencies' failures to consider certain portions or segments of the applicants' work histories. Specifically, in *Kirkendall*, the appellant asserted that the agency failed to consider his military experience in connection with his application for employment because that experience was not included on his formal application but rather was included in documentation appended to his application. *See* 574 F.3d at 1323. Similarly, in *Lazaro*, the appellant argued that computer-related work he had performed with the agency at the GS-7 level constituted qualifying experience for a GS-9 level position, but that the agency never considered that experience. *See* 666 F.3d at 1317, 1319 & n.2. In *Kirkendall*, the Federal Circuit found that the appellant had established a violation of VEOA and remanded the appeal to the Board for a determination of the proper remedial relief, *see* 574 F.3d at 1325, and in *Lazaro*, it found that the appellant's allegations of a VEOA violation established jurisdiction over his appeal, *see* 666 F.3d at 1321. In neither case, however, did the appellants argue that their prior experiences were judged, weighed, or assessed improperly or inadequately by the hiring agencies. We therefore disagree with the appellant's argument that a preference-eligible has a substantive right to the Board's review of how a hiring agency assessed his prior experiences and qualifications under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) in a VEOA appeal.

¶11 In reaching this conclusion, we note that the Board does not undertake a substantive review of whether an agency should have hired a preference-eligible in other VEOA appeals, and we find that undertaking such a substantive review of how the agency judged the appellant's prior qualifications and experiences in this case would be inconsistent with the Board's role under VEOA. For example, in a VEOA appeal where a preference-eligible argues that he was not credited with his 10-point preference in applying for a federal position, the Board does not reach the substantive question of whether the preference-eligible should have been hired, but instead focuses on the more limited question of whether he was fully credited with his veterans' preference during the selection process. *See Russell v. Department of Health & Human Services*, 117 M.S.P.R. 341, ¶¶ 12-14 (2012). If the Board finds such a violation occurred, it generally will order the hiring agency to reconstruct its hiring process rather than appoint the preference-eligible to the position in question. *See id.*; *see also Gingery v. Department of Veterans Affairs*, 117 M.S.P.R. 354, ¶ 14 (the agency's violation of the appellant's VEOA rights by failing to consider his application entitles him to a lawful selection process, not to an appointment), *aff'd*, 480 F. App'x 588 (Fed. Cir. 2012) ; *cf. Marshall v. Department of Health & Human Services*, 587 F.3d 1310, 1316 (Fed. Cir. 2009) (appointment is the appropriate remedy where it is clear that the preference-eligible would have been appointed absent the veterans' preference violation). Similarly, in a right to compete VEOA appeal under 5 U.S.C. § 3304(f)(1), the Board does not determine whether a preference-eligible is qualified for a particular position of federal employment or whether he should have been selected for the position in question, but rather only assesses whether the preference-eligible was permitted to compete for the position on the same basis as other candidates. *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶ 11 (2010); *see Abell v. Department of the Navy*, 343 F.3d 1378, 1384 (Fed. Cir. 2003) (an agency "is not required to hire a preference-eligible veteran if . . . it does not believe that the candidate is qualified or possesses the necessary

experience"); *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 13 (2006) (VEOA does not provide that a veteran will be considered for a position for which he is not qualified). In such an appeal, moreover, a preference-eligible's right to compete does not preclude an agency from eliminating a veteran or preference-eligible from further consideration for a position based on his qualifications for the position, and nothing requires that the veteran or preference-eligible be considered at every stage of the selection process, up to that process's final stage. *Harellson*, 113 M.S.P.R. 534, ¶ 11.

¶12 Here, we find that it would be inconsistent with the Board's role under VEOA to engage in a fact-based review of how an agency weighed and assessed a preference-eligible's experiences in making its hiring decisions and determinations about the preference-eligible's qualifications for a position of employment. Rather, under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d), we conclude the Board's role is limited to determining whether the hiring agency improperly omitted, overlooked, or excluded a portion of the appellant's experiences or work history in assessing his qualifications for the vacancy, and the Board will not reevaluate the weight the agency accorded those experiences in reaching its decision that the appellant was not qualified for a given position of employment. *See Kirkendall*, 573 F.3d at 1324 ("Section 3311(2) guarantees that any experience of a veteran that is material to the position for which the veteran is examined will be credited. At the very least, 'credited' means 'considered.'") (citation omitted). VEOA does not empower the Board to reevaluate the merits of an agency's ultimate determination that a preference-eligible veteran is not qualified for a position with the agency. *See Abell*, 343 F.3d at 1384-85; *see also Brown v. Department of Veterans Affairs*, 247 F.3d 1222, 1225 (Fed. Cir. 2001) ("[U]nder the Veterans' Preference Act of 1944 . . . veterans may be accorded special point and service credit preferences[;] veterans are not accorded limitless rights and benefits.").

¶13 We have carefully reviewed the administrative judge's initial decision; we agree that the agency credited the appellant with all of his valuable experience material to the Associate Professor position; and we find that the appellant cannot demonstrate that the agency failed to consider or omitted any of his prior experiences under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d). The record reflects that the agency dutifully and thoroughly considered the appellant's work history, *see* ID at 9-13 (summarizing hearing testimony); IAF, Tab 5 , Subtabs 2f, 2g and 2j, and there is no evidence in the record that the agency omitted, overlooked, or refused to consider any of the appellant's teaching or military experiences in reaching its conclusion that he was not qualified for the Associate Professor position, *cf. Kirkendall*, 573 F.3d at 1324 (finding a veterans' preference violation when information "was simply ignored . . . because it had not been printed in the two-page, self-made application that [the appellant] submitted"); *Russell*, 117 M.S.P.R. 341, ¶¶ 11-14 (finding that the agency violated the appellant's veterans' preference rights when it failed to credit him with his veterans' preference as reflected on his SF-50). This finding is reinforced by the fact that the agency solicited additional information from the appellant, which it considered in making its hiring decision. *See* IAF, Tab 5, Subtab 2m. The appellant, moreover, does not dispute that he does not have the educational background in education, leadership, management, or organizational behavior as specified in the job announcement, *see* PFR File, Tab 1 at 7 ("The Petitioner has never disputed that he does not possess a degree or major course of study in Education, Leadership, Management, or Organizational Development or a related field."); IAF, Tab 5, Subtabs 2s and 2t, and he has failed to identify any of his experiences (military or civilian) which the agency overlooked or failed to consider in finding him not qualified for the position, *see, e.g.*, PFR File, Tab 1 at 10.

¶14 The appellant, as a preference-eligible veteran, was entitled to be credited with "all valuable experience" by the agency in its assessment of his experience

for the Associate Professor position. *See* 5 U.S.C. § 3311(2); 5 C.F.R. § 302.302(d). We find that the agency followed this process and considered the totality of the appellant's experiences in determining that he was not qualified for the Associate Professor position. *See* ID at 9-13. The administrative judge's initial decision denying the appellant's request for corrective action under VEOA is AFFIRMED.

Section 4214 of Title 38 is not a generally applicable veterans' preference statute which exempts all preference-eligibles from satisfying a minimum education requirement imposed by OPM.

¶15 Although not cited by the administrative judge in his initial decision, in conducting our review of the issues presented by the appellant, we have considered the Federal Circuit's statement in *Lazaro* that "in determining whether a preference-eligible veteran is qualified, the number of years of education completed by the veteran is not relevant." 666 F.3d at 1318 & n.1 (citing 38 U.S.C. § 4212(b)). Citing *Lazaro* for this proposition of veterans' preference law, the Board recently stated that 38 U.S.C. § 4214(b) requires agencies to consider preference-eligible candidates who have not attained the minimum level of education required for some positions. *Beyers*, 120 M.S.P.R. 573, ¶ 11. Upon our review of these decisions, however, we wish to clarify that 38 U.S.C. § 4214 is not a generally applicable veterans' preference statute and that the statute's waiver of the minimum education requirement under certain circumstances has no impact on the outcome of this appeal.

¶16 Section 4214 of Title 38 is part of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which codified and expanded the protections first extended to veterans in Executive Order 11,521. *See* 5 C.F.R. § 307.101; *see also Brown*, 247 F.3d at 1224-25 (discussing the history of 38 U.S.C. § 4214). The text of section 4214 provides in relevant part that "[t]he United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life," and that "veterans constitute a uniquely qualified recruiting source" for federal

employment. 38 U.S.C. § 4214(a). "To further the policy stated in [38 U.S.C. § 4214(a)], veterans referred to in paragraph (2) of this subsection shall be eligible, in accordance with regulations which [OPM] shall prescribe, for veterans recruitment appointments, and for subsequent career-conditional appointments" subject to certain limitations. 38 U.S.C. § 4214(b)(1). These limitations are, inter alia, that veterans recruitment appointments "may be made up to and including the level GS-11 or its equivalent," and that "a veteran shall be eligible for such a [veterans recruitment] appointment without regard to the number of years of education completed by such veteran." 38 U.S.C. § 4214(b)(1)(A), (B).[2] OPM's regulations addressing veterans recruitment appointments are located at 5 C.F.R. part 307, and specify that a veterans recruitment appointment under 38 U.S.C. § 4214(b) is an excepted appointment in the competitive service which may only be made to a GS-11 or lower level position. *See* 5 C.F.R. §§ 307.101-.103.

¶17 Section 4214(b)'s proscription on considering the number of years of a veteran's education in assessing his qualifications for a position of employment, therefore, is limited to veterans recruitment appointments and is not a generally applicable statute limiting an agency's assessment of all preference-eligible job applicants. *See* 5 C.F.R. § 307.103. Although 38 U.S.C. § 4214 and OPM's implementing regulations are a statute and regulations relating to veterans' preference, *see* 5 U.S.C. § 3330a, the appellant has not argued that he was, or should have been, appointed to the Associate Professor position with the agency under this specialized appointment authority. *See generally* PFR File, Tab 1. We find, moreover, that, because the Associate Professor position at issue in this

[2] There are other limitations listed in the statute which are not relevant to our discussion of this issue under the facts of this case. *See* 38 U.S.C. § 4214(b)(1)(C)-(E).

appeal was a GS-14 level position, 38 U.S.C. § 4214(b) is not applicable to the appellant's instant VEOA appeal. *See* IAF, Tab 5, Subtabs 2s, 2t and 2v.

¶18 Based upon the foregoing, we find the Board's recent statement in *Beyers* that 38 U.S.C. § 4214(b) "require[s] agencies to consider preference-eligible candidates who have not attained the minimum level of education required for some positions," 120 M.S.P.R. 573, ¶ 11, is limited to veterans recruitment appointments. *See Lazaro*, 666 F.3d at 1318 & n.1. We thus clarify *Beyers*, 120 M.S.P.R. 573, ¶ 11, to reflect that 38 U.S.C. § 4214(b) does not exempt all preference-eligibles from satisfying the minimum education requirements for a position which OPM has established pursuant to 5 U.S.C. § 3308, and we emphasize that section 4214(b)(1)(B)'s exemption from a minimum education requirement only applies to veterans recruitment appointments under 5 C.F.R. part 307.

The appellant's challenges to the administrative judge's prehearing rulings do not establish an abuse of discretion warranting reversal of the initial decision.

¶19 On review, the appellant also disputes several of the administrative judge's prehearing rulings denying motions to compel and motions for sanctions, and he argues that the administrative judge should have precluded and struck portions of the agency's defense due to its discovery deficiencies. *See* PFR File, Tab 1 at 14-26. In each instance, the appellant has moved for the initial appeal to be remanded to the administrative judge with further instructions on how to adjudicate his VEOA appeal. *Id.*

¶20 Each of the decisions the appellant challenges falls within the administrative judge's broad scope of authority and discretion to control the proceedings before him, and each of the appellant's challenges fails to warrant the reversal of the initial decision. *See, e.g.*, PFR File, Tab 1 at 14 (seeking to strike the testimony of an agency witness not included in the initial disclosures, but named in the agency file), at 16, 21 (challenging both the inclusion and the exclusion of documents in the agency file); *see also Vaughn v. Department of the*

Treasury, 119 M.S.P.R. 605, ¶ 12 (2013). The record reflects that the appellant was provided with all of the documentation supporting the agency's case prior to the close of record order (and thus prior to the hearing), and we are unable to conclude that the appellant suffered any prejudicial surprise as the result of the timing of the agency's disclosure of documentation or other evidence. We find the appellant's arguments of harmful error stemming from the administrative judge's prehearing rulings to be unsubstantiated, and we decline to remand the initial appeal with the specific instructions sought by the appellant.

ORDER

¶21 The administrative judge's initial decision denying the appellant's request for corrective action under VEOA is AFFIRMED, and the appellant's petition for review is DENIED. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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.