

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

**2007 MSPB 7**

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Docket No. DA-3443-06-0437-I-1

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**Marc T. Belhumeur,  
Appellant,**

**v.**

**Department of Transportation,  
Agency.**

January 11, 2007

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Marc T. Belhumeur, Fort Worth, Texas, pro se.

Eric E. Anderson, Esquire, Fort Worth, Texas, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has filed a timely petition for review of an initial decision that dismissed his appeal for lack of jurisdiction. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, to address a jurisdictional issue we have not previously decided, and AFFIRM the initial decision, still DISMISSING the appeal for lack of jurisdiction.

### BACKGROUND

¶2 The appellant, an Aerospace Engineer with the Federal Aviation Administration (FAA), applied for promotion to another position with the FAA but was not selected. Initial Appeal File (IAF), Tab 7, Subtabs 4b, 4d. After exhausting his remedy with the Department of Labor, he filed this appeal. IAF, Tab 1. The agency moved to dismiss for lack of jurisdiction, and the administrative judge issued a show-cause order directing the appellant to submit evidence and argument to show that this appeal is within the Board's jurisdiction. IAF, Tabs 5, 6. The appellant responded. IAF, Tab 9. Without affording the appellant the hearing he requested, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, finding that the Veterans Employment Opportunities Act of 1998 (VEOA) does not apply to the FAA, and that the appellant did not allege any other basis for the Board's jurisdiction over this appeal of a non-selection. IAF, Tab 11.

¶3 The appellant has filed a timely petition for review asserting that the Board has jurisdiction by virtue of 5 U.S.C. §§ 2302(b)(11) and 7121(g) over his allegations that the FAA violated his veterans' preference rights and committed prohibited personnel practices. Petition For Review File (PFRF), Tab 1. The agency has responded in opposition to the petition for review. PFRF, Tab 3.

### ANALYSIS

¶4 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. 5 C.F.R. § 1201.115. 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. Therefore, we deny the petition for review. We are reopening the matter for the limited purpose

of addressing the issue of whether the FAA is excluded by statute from 5 U.S.C. § 3330a, which we have not previously addressed.

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Absent an independent basis for jurisdiction, a non-selection is not an adverse action appealable to the Board. *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 5 (2006). Under the VEOA, however, the Board has jurisdiction over claims that, in making a selection for a vacant position, an agency violated an individual's veterans' preference rights. The Board has held that, to establish jurisdiction over an appeal under 5 U.S.C. § 3330a (VEOA), the appellant must: (1) Show that he exhausted his remedy with the Department of Labor; and (2) make nonfrivolous allegations that he is a preference eligible within the meaning of the VEOA, the action at issue took place on or after October 30, 1998, and the agency violated a statute or regulation relating to veterans' preference. *Elliott*, 102 M.S.P.R. 364, ¶ 6. It appears that the appellant meets these jurisdictional requirements. However, we find that the Board lacks jurisdiction over this appeal because the FAA, the agency charged with violating the appellant's veterans' preference rights, is not subject to 5 U.S.C. § 3330a.

¶6 Under 49 U.S.C. § 40122(g)(2), Congress granted the FAA the authority to establish a personnel system that is not subject to the provisions of Title 5, with certain enumerated exceptions. *See Ivery v. Department of Transportation*, 102 M.S.P.R. 356, ¶ 12 (2006). The sections of Title 5 remaining applicable to the FAA that may be relevant to this appeal, or were raised by the appellant, are § 2302(b), relating to whistleblower protection; §§ 3308-3320, relating to veterans' preference; chapter 71, relating to labor-management relations; and §§ 1204, 1211-1218, 1221, and 7701-7703, relating to the Board. None of these sections provides the Board with jurisdiction over this appeal of a non-selection.

¶7 While sections 3308-3320 relating to veterans' preference apply to the FAA, section 3330a, which grants the Board jurisdiction over violations of veterans' preference rights, is not among the sections of Title 5 applicable to the FAA. Under the maxim of statutory interpretation *expressio unius est exclusio alterius*, where, as here, a statute enumerates certain exceptions to a general rule, other unenumerated exceptions are excluded. *Hamlett v. Department of Justice*, 90 M.S.P.R. 674, ¶ 8 (2002); *Lomax v. Department of Defense*, 88 M.S.P.R. 585, ¶ 9 (2001). There is nothing in 49 U.S.C. § 40122(g)(2) indicating that Congress intended to grant FAA employees or applicants VEOA appeal rights.

¶8 As the administrative judge pointed out, Initial Decision at 5, Congress amended 49 U.S.C. § 40122 in 2000 pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (Ford Act). The Ford Act reinstated FAA employees' appeal rights that were in existence in 1996. 49 U.S.C. § 40122(g)(3). Because the VEOA was not enacted until 1998, FAA employees had no right to file appeals to the Board under 5 U.S.C. § 3330a in 1996. Thus, FAA employees were not afforded VEOA appeal rights by operation of the Ford Act. Moreover, neither the Ford Act nor the VEOA added section 3330a to the list of Title 5 sections applicable to the FAA at 49 U.S.C. § 40122(g)(2). We find that the Board therefore has no jurisdiction over a VEOA appeal from an FAA employee or applicant.

¶9 Likewise, none of the other subsections of 49 U.S.C. § 40122(g)(2) provides the Board with jurisdiction over this appeal. Subsection (H) specifically refers to sections of Title 5 that relate to the Board but it does not provide a jurisdictional basis for this appeal. Although the FAA remains subject to 5 U.S.C. §§ 7701-7703, those sections of Title 5 do not grant the Board jurisdiction. Rather, they set forth procedures for adjudicating appeals that are within the Board's jurisdiction. Section 7512 of Title 5 describing actions within the Board's jurisdiction under chapter 75 is not among the sections of Title 5

applicable to the FAA. In any case, a non-selection is not an action appealable under 5 U.S.C. § 7512.

¶10 Sections 1204, 1211-1218, and 1221, relating to the Board's authority under the Whistleblower Protection Act, remain applicable to the FAA, but the appellant has not raised an allegation that he engaged in protected whistleblowing and that such activity was a contributing factor in the FAA's determination not to select him for the vacancy. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (the Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before the Office of Special Counsel and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

¶11 Section 2302(b) is among the enumerated sections of Title 5 still applicable to the FAA under 49 U.S.C. § 40122(g)(2)(A), and the appellant argues that the Board has jurisdiction pursuant to 5 U.S.C. § 2302(b)(11). According to the appellant, the FAA committed a prohibited personnel practice when it failed to provide him with his veterans' preference rights. PFRF, Tab 1; IAF, Tab 9. It is well-established, however, that 5 U.S.C. § 2302 is not an independent source of Board jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

¶12 Under 49 U.S.C. § 40122(g)(2)(C), the FAA remains subject to 5 U.S.C. chapter 71, including 5 U.S.C. § 7121(g), which the appellant cites as a source of Board jurisdiction. PFRF, Tab 1; IAF, Tab 9. That subsection requires employees covered by a collective bargaining agreement to elect a remedy for claims over which the Board and other federal adjudicatory bodies have jurisdiction. It does not provide the Board with jurisdiction over an appeal of an action not otherwise within its statutory authority. The appellant has failed to allege any other basis for Board jurisdiction over this appeal of a non-selection.

¶13 Accordingly, we AFFIRM the initial decision and DISMISS this appeal for lack of jurisdiction.

#### ORDER

¶14 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 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, <http://fedcir.gov/contents.html>. 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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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.