

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

**2010 MSPB 78**

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Docket No. NY-0330-10-0027-I-1

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**Richard A. Becker,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

April 27, 2010

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Richard A. Becker, Coram, New York, pro se.

Aaron J. Fields, Esquire, Brooklyn, New York, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the February 8, 2010 initial decision that dismissed his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) 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](#)(d), and we therefore DENY it. We REOPEN the case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED, still DISMISSING the appeal for lack of jurisdiction.

## BACKGROUND

¶2 The appellant holds the position of Nursing Assistant, GS-5. *See* Initial Appeal File (IAF), Tab 6, Subtabs 4E, 4F. On October 31, 2009, he filed a request for corrective action under VEOA based on his non-selection for the position of Assistant Chief of SPD,\* GS-7/8. IAF, Tab 1; *see* IAF, Tab 5 at 3. At that time, the agency had not yet formally notified the appellant of his non-selection for that position. The appellant later amended his claim to include his non-selection for a GS-6 Medical Supply Technician position. IAF, Tab 5 at 1-2. He provided copies of a November 9, 2009 memorandum notifying him of his non-selection for the Medical Supply Technician position and a November 10, 2009 memorandum notifying him that the vacancy announcement for the Assistant Chief of SPD position had been canceled. IAF, Tab 5 at 2-3. In addition, the appellant provided a copy of a letter to the Department of Labor (DOL), dated September 21, 2009, in which he requested relief under VEOA in connection with his non-selection for the two positions. *Id.* at 4.

¶3 Based on the written record, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had not exhausted his remedies before DOL, as required under [5 U.S.C. § 3330a\(d\)](#). IAF, Tab 8 (Initial Decision). On petition for review, the appellant argues that he has attempted to exhaust his remedies with DOL, but that DOL has not responded. Petition for Review (PFR) File, Tab 1. He attaches a copy of a second letter to DOL, dated January 10, 2010, following up on his September 2009 complaint. *Id.* at 3. The agency has filed a response. PFR File, Tab 3.

## ANALYSIS

¶4 We find that the appellant's newly submitted evidence does not provide a basis for granting his petition, as he has not shown that it was unavailable before

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\* The initials "SPD" stand for Supply, Processing, and Distribution. *See* IAF, Tab 6, Subtab 4B.

the record closed despite his due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Moreover, the appellant has not shown that the administrative judge made an erroneous interpretation of statute or regulation that affects the outcome of this case. Accordingly, we deny the appellant's petition. See [5 C.F.R. § 1201.115\(d\)](#). We reopen the appeal on our own motion, however, for the purpose of clarifying the jurisdictional issue.

¶5 To establish Board jurisdiction over a VEOA appeal, an appellant must (1) show that he exhausted his remedy with DOL, and (2) make non-frivolous allegations that he: (i) is a preference eligible within the meaning of VEOA; (ii) the action(s) at issue took place on or after the October 30, 1998 enactment date of VEOA; and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Becker v. Department of Veterans Affairs*, [107 M.S.P.R. 327](#), ¶ 9 (2007); see [5 U.S.C. § 3330a](#). To satisfy the exhaustion requirement, a preference eligible employee may file a Board appeal within 15 days after the date on which he received written notification of the results of DOL's investigation of the complaint or, if DOL was unable to resolve the complaint within 60 days, an appeal may be filed after 60 days from the date on which the complaint was filed with DOL. *Becker*, [107 M.S.P.R. 327](#), ¶ 9; see [5 U.S.C. § 3330a\(d\)\(1\)](#). Where the Secretary of Labor has not resolved the complaint within 60 days, an appeal to the Board under VEOA "may not be brought unless . . . the complainant first provides written notification to the Secretary of such complainant's intention to bring such appeal" and provides the Board with evidence of compliance with this statutory requirement. *Becker*, [107 M.S.P.R. 327](#), ¶ 11 (quoting 5 U.S.C. § 3330a(d)(2)).

¶6 Although the appellant's September 21, 2009 letter to DOL preceded the November 9 and November 10, 2009 agency memoranda concerning the Medical Supply Technician and Assistant Chief of SPD positions, the record suggests that by September 21, 2009, the appellant may have already been aware that he would not be selected for the positions in question. According to an internal e-mail by

Staffing Specialist Karen Martin, the appellant was found qualified for the Medical Supply Technician position and scheduled for an interview during the week of September 14-18, 2009, but knowingly failed to appear. IAF, Tab 6, Subtab 4A. Ms. Martin further related that the agency canceled the vacancy announcement for the Assistant Chief of SPD position in order to upgrade the position description to Supervisory General Supply Specialist, SPD, GS-7/8/9. *Id.* The announcement for the upgraded position, which was open from September 4 to September 15, 2009, indicated that individuals who previously applied for the Assistant Chief of SPD position would need to reapply, but it appears the appellant did not apply under the new announcement. *Id.*, Subtabs 4A, 4G.

¶7 The record does not indicate whether DOL ever responded to the appellant's September 21, 2009 letter. Assuming the appellant sent the letter to DOL on the date indicated, his October 31, 2009 appeal was prematurely filed. However, by the time the administrative judge issued the initial decision, it had been more than 60 days since the appellant allegedly filed his complaint with DOL. *Cf. Becker*, [107 M.S.P.R. 327](#), ¶ 7 (in the context of an individual right of action appeal, the Board noted that its practice is to adjudicate an appeal that was premature when it was filed but becomes ripe while pending before the Board). Hence, it appears that, if the appellant proved he submitted the VEOA complaint to DOL on September 21, 2009, his VEOA appeal would meet the requirements of [5 U.S.C. § 3330a\(d\)\(1\)](#).

¶8 However, the appellant has not submitted evidence, either below or on petition for review, that he provided written notification to the Secretary of his intent to bring a Board appeal. The appellant's January 10, 2010 letter does not express his intent to file a Board appeal, but instead refers to a Board appeal which he had already filed. PFR File, Tab 1 at 3. Because the appellant has not shown that he met the requirements of [5 U.S.C. § 3330a\(d\)\(2\)](#), he has not

established Board jurisdiction over his VEOA appeal. *See Becker*, [107 M.S.P.R. 327](#), ¶ 11.

### ORDER

¶9 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, [www.ca9.uscourts.gov](http://www.ca9.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.