

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

**2010 MSPB 192**

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Docket No. DA-3330-09-0583-I-1

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**Milo D. Burroughs,  
Appellant,**

**v.**

**Department of Defense,  
Agency.**

September 21, 2010

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Milo D. Burroughs, Yelm, Washington, pro se.

Rachael K. House, Esquire, Carson, California, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of the initial decision that denied on the merits his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we DENY the petition, REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

## BACKGROUND

¶2 The appellant is a five-point preference eligible veteran who was honorably discharged after more than 3 years of active service. Initial Appeal File (IAF), Tab 1 at 3, Tab 4, Subtab E, Tab 6, Subtab 2h at 2, 4. The appellant filed this Board appeal under VEOA, alleging that the agency violated his veterans' preference rights with respect to its selection process for an Aerospace Engineer position for which he applied. IAF, Tab 1 at 3-7.

¶3 The administrative judge issued an acknowledgment order addressing the jurisdictional standard for a VEOA appeal. IAF, Tab 2 at 2. Among other things, the administrative judge ordered the appellant to establish that he exhausted his administrative remedy with the Department of Labor (DOL). *Id.* The appellant filed a copy of his April 25, 2009 complaint to DOL, IAF, Tab 8, Subtab 5, but he did not indicate whether DOL ever responded to his complaint.

¶4 The administrative judge issued an initial decision, in which she found that the appellant exhausted his remedy with DOL and otherwise established Board jurisdiction over his appeal. IAF, Tab 24, Initial Decision (ID) at 2. However, she found that the appellant failed to establish that the agency violated his veterans' preference rights, and she therefore denied corrective action on the merits. ID at 1, 4-10.

¶5 The appellant filed a petition for review, and both parties submitted evidence and argument relating to the merits of the appeal. Petition for Review File (PFR File), Tabs 3, 5-6. The Clerk of the Board, however, issued a show cause order stating that the record on jurisdiction was incomplete, and ordering the appellant to file evidence and argument on the issue. PFR File, Tab 8. The appellant responded within the time limit set by the Board. PFR File, Tab 9.

### ANALYSIS

¶6 The Board’s appellate jurisdiction is limited to that conferred upon it by Congress. *Cruz v. Department of the Navy*, [934 F.2d 1240](#), 1243 (Fed. Cir. 1991) (en banc); *Phillips v. Department of the Navy*, [40 M.S.P.R. 620](#), 622 (1989). “The Board has the authority, indeed the obligation, to determine its own jurisdiction over a particular appeal.” *Parrish v. Merit Systems Protection Board*, [485 F.3d 1359](#), 1362 (Fed. Cir. 2007). “[T]he Board must satisfy itself that it has authority to adjudicate the matter before it and may raise the issue of its own jurisdiction *sua sponte* at any time.” *Metzenbaum v. General Services Administration*, [96 M.S.P.R. 104](#), ¶ 15 (2004).

¶7 The Board’s authority to adjudicate a VEOA appeal derives from [5 U.S.C. § 3330a\(d\)](#). Congress conditioned the Board’s jurisdiction to adjudicate a VEOA appeal under that section upon the appellant having first exhausted his administrative remedy with DOL. The exhaustion requirement is satisfied where the appellant filed a complaint with DOL and either (1) DOL sent the appellant written notification of the results of its investigation of the complaint, or (2) DOL did not resolve the complaint within 60 days and the appellant notified the Secretary of Labor of his intention to appeal to the Board. *Becker v. Department of Veterans Affairs*, [107 M.S.P.R. 327](#), ¶¶ 9, 11 (2007); *Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶¶ 14-19 (2007); see [5 U.S.C. § 3330a\(d\)\(1\)](#), (2); [5 C.F.R. § 1208.23\(a\)\(5\)](#). 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. 5 U.S.C. § 3330a(d)(2); *Becker*, [107 M.S.P.R. 327](#), ¶ 11; see 5 C.F.R. § 1208.23(a)(5)(ii).

¶8 In this case, the administrative judge erred in finding that the appellant exhausted his administrative remedy with DOL merely on the basis that he filed a complaint with DOL. ID at 2. As explained above, the appellant must also

establish either that DOL notified him in writing of the results of its investigation, or that 60 days elapsed since the filing of the complaint and he notified the Secretary of Labor in writing of his intention to file the Board appeal. *See Becker*, [107 M.S.P.R. 327](#), ¶¶ 9, 11. The record below did not contain evidence that DOL provided the appellant written notification of the results of its investigation, *see* [5 C.F.R. § 1208.23\(a\)\(5\)\(i\)](#), and although it appears that more than 60 days had elapsed between the time the appellant filed his DOL complaint and the time he filed his Board appeal, IAF, Tab 1, Tab 8, Subtab 5, the record did not contain evidence that the appellant notified the Secretary of Labor in writing of his intention to file the instant appeal, *see* 5 C.F.R. § 1208.23(a)(5)(ii).

¶9 Therefore, after the appellant filed his petition for review, the Clerk of the Board issued a show cause order notifying the appellant that the jurisdictional issue remained unresolved, informing him of the additional steps that he must take to prove that he exhausted his administrative remedy with DOL, and directing him to file evidence and argument on the issue. PFR File, Tab 8. The appellant responded, again asserting that he filed a complaint with DOL, and that he appealed to the Board only after DOL did not resolve the complaint within 60 days.<sup>1</sup> PFR File, Tab 9 at 1. However, as explained above, and as explained to the appellant in the show cause order, more is required to establish that he exhausted his administrative remedy. Because the appellant has not established that DOL sent him written notification of the results of its investigation or that he notified the Secretary of Labor of his intention to appeal to the Board, the appellant has not shown that he exhausted his administrative remedy with DOL.

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<sup>1</sup> The appellant also argued that the Board has jurisdiction over the instant appeal because the Civil Service Commission, the Board's predecessor agency, had jurisdiction over a prior appeal that the appellant brought under the Veterans Preference Act of 1944. PFR File, Tab 9 at 1. The outcome of that case, however, has no bearing on whether the appellant exhausted his administrative remedy in this case.

See [5 U.S.C. § 3330a\(d\)](#); *Becker*, [107 M.S.P.R. 327](#), ¶¶ 10-11; [5 C.F.R. § 1208.23\(a\)\(5\)](#). Accordingly, we dismiss the appeal for lack of jurisdiction.<sup>2</sup>

### ORDER

¶10 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).

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<sup>2</sup> We have denied the appellant's petition for review because it does not contain any evidence or argument that would change the outcome of our jurisdictional determination. Because we find that the Board lacks the authority to review the merits of this appeal due to the absence of evidence showing that the appellant exhausted his remedies with DOL, we have made no decision regarding the appellant's arguments on review that do not pertain to the issue of the Board's jurisdiction.

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.