

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

**2013 MSPB 18**

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Docket No. DE-3330-12-0100-I-1

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**Steven J. Launer,  
Appellant,  
v.  
Department of the Air Force,  
Agency.  
March 1, 2013**

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Steven J. Launer, Cheyenne, Wyoming, pro se.

Robert B. Stirk, Esquire, Joint Base Andrews, Maryland, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA), [5 U.S.C. §§ 3330a - 3330c](#). For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision, AS MODIFIED by this Opinion and Order.<sup>1</sup>

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<sup>1</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

## BACKGROUND

¶2 The appellant, who alleges that he is a 10-point preference-eligible veteran, applied for a competitive-service Engineering Equipment Operator position with the agency in 2011 under vacancy announcement no. 552153. The agency had multiple slots to fill, and it accepted applications through an automated system administered by the Office of Personnel Management (OPM). *See* Initial Appeal File (IAF), Tab 1; Tab 13 at 36. OPM, which used category rating authorized by [5 U.S.C. § 3319](#) in lieu of a traditional examination, gave the appellant a score of 89 and placed him in the Well Qualified category of applicants, which included individuals with scores of 80-89. IAF, Tab 13 at 7, 22.<sup>2</sup> Applicants with scores of 90-100 were placed in the Best Qualified category and applicants with scores of 70-79 were placed in the Qualified category. *Id.* at 22. OPM then referred 11 candidates deemed Best Qualified to the selecting official. *Id.* at 7, 22. The agency selected several candidates, one of whom was not a veteran. *Id.* at 14. When one of the candidates deemed Best Qualified declined the position, the agency requested another certificate. The appellant's name was the only one on the second certificate, reflecting his position at the top of the Well Qualified cohort. The agency selected him. *Id.* at 7-8, 14, 17, 19.

¶3 The appellant filed a complaint with the Department of Labor (DoL) alleging a violation of his veterans' preference rights. DoL conducted an investigation and concluded that there was no violation. *Id.* at 24. The appellant then filed this appeal. He alleged, among other things, that he was given a score of 110 when he applied for an Engineering Equipment Operator position in July 2010, so his score of 89 on the 2011 application must have been mistaken.

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

<sup>2</sup> Category ranking may be used when OPM conducts an examination for a competitive-service position or when an agency conducts such an examination under a delegation of authority from OPM. *See* [5 U.S.C. §§ 1104](#)(a)(2), 3304, 3319(a).

IAF, Tab 1 at 1. In a later submission, made in response to the administrative judge's request that he explain how he was injured by the agency's alleged violation of his veterans' preference rights, the appellant claimed that if he "had been properly scored and categorized" his "expected start date" would have been earlier than it turned out to be. IAF, Tab 15.

¶4 The administrative judge issued an initial decision denying corrective action. He found that OPM properly credited the appellant's experience when it assessed his qualifications for the Engineering Equipment Operator position, and appears to have also found that the appellant's score of 89 was arrived at after "the addition of his 10-point veterans' preference." IAF, Tab 16.

¶5 The appellant has filed a timely petition for review in which he asserts that OPM did not add 10 points to his examination score, and that OPM thus violated [5 U.S.C. § 3309](#). He contends that if OPM had added 10 points to his score he would have made the Best Qualified category (with a score of 99), and as a result he would have been selected earlier and started work sooner. Petition for Review File, Tab 1. The agency opposes the petition for review. *Id.*, Tab 3.

### ANALYSIS

¶6 In a traditional competitive examination, preference-eligible veterans have additional points added to their passing scores. [5 U.S.C. § 3309](#); [5 C.F.R. § 337.101\(b\)](#). The names of applicants are entered onto registers, or "lists of eligibles," in rank order, with preference eligibles ranked ahead of others with the same rating. *See* [5 U.S.C. § 3313](#); [5 C.F.R. § 332.401](#). The appointing authority must make a selection from the highest three eligibles on the list, [5 U.S.C. § 3318\(a\)](#), and must justify a decision to pass over a preference eligible in order to select a non-preference eligible, [5 U.S.C. § 3318\(b\)](#).<sup>3</sup>

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<sup>3</sup> Our description of the traditional competitive examination system set forth above is simplified, and focuses on the main features of that system in order to contrast it with the category rating system.

¶7 The Homeland Security Act of 2002 authorized “alternative ranking and selection procedures,” which have come to be known as “category rating.” [5 U.S.C. § 3319](#). For many years category rating was merely an optional tool that an agency could use when filling a vacancy, but by a directive of the President, effective November 1, 2010, it became the primary method by which all agencies fill competitive-service vacancies. *See Dean v. Office of Personnel Management*, [115 M.S.P.R. 157](#), ¶ 19 n.7 (2010). 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; a preference eligible with a compensable service-connected disability of 10% or more must be listed in the highest quality category; within a category, preference eligible veterans are listed ahead of non-preference eligibles; and an agency may not select a non-preference eligible ahead of a preference eligible in the same category unless it seeks and receives approval for a pass over. [5 U.S.C. § 3319](#). An agency may assign numerical scores for purposes of placing applicants in categories, but veterans’ preference points are not added to such scores. *See 5 C.F.R. § 337.304(b); Category Rating Fact Sheet* (Office of Personnel Management; issued March 14, 2006).<sup>4</sup>

¶8 The appellant received a score of 110 when he applied for an Engineering Equipment Operator position in July 2010 because the agency used a traditional competitive examination and added 10 points to his passing score. IAF, Tab 9 at 2. When the appellant applied for the same position in 2011 – the application that is the subject of this appeal – OPM used category rating, as it was then required to do. *Id.*; *see also* IAF, Tab 13 at 22. Contrary to the initial decision, OPM did not add preference points to the appellant’s score in 2011. We are not persuaded by the appellant’s argument on review that OPM should have done so because, as

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<sup>4</sup> OPM has express authority to issue regulations implementing the category rating statute. [5 U.S.C. § 3319\(e\)](#). The *Category Rating Fact Sheet* is available on OPM’s website, <http://www.opm.gov>.

noted above, such a procedure is not permitted under the regulations governing category rating. [5 C.F.R. § 337.404\(b\)](#).

¶9 We further find that the agency afforded the appellant the appropriate veterans' preference under [5 U.S.C. § 3319](#). When the appellant applied for the Engineering Equipment Operator position in 2011, he stated as follows in the "Veterans Preference Claim" area of the application: "10 Points Preference Claimed (award of a Purple Heart or compensable service-connected disability of less than 10%)." IAF, Tab 1 at 8. If the appellant had claimed that he had a compensable service-connected disability of 10% or more and submitted supporting documentation to establish his status, he would have been entitled to be placed in the Best Qualified category ahead of all non-preference eligibles; further, under those circumstances the agency could not have selected the non-preference eligible without obtaining permission to pass him over. [5 U.S.C. § 3319\(b\), \(c\)\(2\)](#). The appellant did not claim in his 2011 application that he had a compensable service-connected disability of 10% or more, however, so the agency cannot now be found to have violated his rights for failing to treat him as if he had that status. *Cf. 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 an International Relations Specialist position, he was not entitled to relief under the VEOA because he did not submit, with his job application, evidence to establish his status as a disabled veteran).

¶10 We note that the appellant apparently claimed to have a compensable service-connected disability of 30% or more when he applied for the Engineering Equipment Operator position in 2010 under vacancy announcement no. 366144, although in that same application he claimed, inconsistently, that he was entitled to 10-point preference based on "award of a Purple Heart or compensable service-connected disability of less than 10%." IAF, Tab 1 at 4. Still, the fact remains that he did not claim to have a compensable service-connected disability of 10%

or more when he applied for the Engineering Equipment Operator position in 2011 under vacancy announcement no. 552153, and that application is the subject of this appeal. *Id.* at 8. It is also noteworthy that the instructions in the 2010 application clearly stated that an applicant claiming to be a “30% Disabled Veteran” must submit supporting documentation to establish that status. *Id.* at 4. The appellant does not allege, and there is nothing in the record to indicate, that when he applied for the 2011 vacancy that is the subject of this appeal he submitted documentation that established he had a service-connected disability of 10% or more. This, coupled with the fact that the appellant did not even claim a service-connected disability of 10% or more in his 2011 application, leads us to conclude that the agency did not violate his rights in failing to accord him the type of preference that a veteran with a service-connected disability of 10% or more receives under category rating.

#### **ORDER**

¶11 The appellant’s request for corrective action 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 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 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](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.