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APPENDIX A

NOTE: This disposition is nonprecedential.¹

**United States Court of Appeals
for the Federal Circuit**

ERICE MAURICE KENCY,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2024-1068

Petition for review of the Merit Systems
Protection Board in No. AT-3330-18-0193-I-1.

Decided: April 2, 2024

ERICE MAURICE KENCY, Grovetown, GA,
pro se.

CALVIN M. MORROW, Office of General
Counsel, United States Merit Systems Protection
Board, Washington, DC, for respondent. Also repre-
sented by ALLISON JANE BOYLE, KATHERINE
MICHELLE SMITH.

¹S.A. refers to the supplemental appendix attached to
the respondent's informal brief, ECF No. 15.

KENCY v. MSPB

Appellant Erice M. Kency appeals a decision of the Merit Systems Protection Board (Board) affirming the dismissal of Mr. Kency's appeal as untimely. Mr. Kency argues that the Board erred in deeming his appeal untimely and, alternatively, erred in failing to apply equitable tolling. Because Mr. Kency failed to properly raise these arguments before the Board, we *affirm*.

I

Mr. Kency filed a complaint with the Secretary of Labor (Secretary), alleging that the Department of the Army violated the Veterans Employment Opportunities Act of 1998 (VEOA) by failing to appropriately credit his service and consider his veterans' preference points in hiring.

S.A. 23–24; *see also Dow v. Gen. Servs. Admin.*, 590 F.3d 1338, 1339 (Fed. Cir. 2010) (describing veterans' preference points). The VEOA requires giving qualifying veterans preference in employment for certain government positions. *Dow*, 590 F.3d at 1339 (citing 5 U.S.C. § 3330a). Such veterans have points added to their score on the civil service examination and are listed ahead of other applicants. *Id.* (citing 5 U.S.C. § 3309; 5 C.F.R. § 332.401).

After receiving Mr. Kency's complaint, the Secretary investigated the complaint through the Department of Labor's Veterans' Employment and

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Training Service (VETS), found no violation of the VEOA, and sent Mr. Kency a notice letter to that effect on December 6, 2017. S.A. 23-24.² The Secretary's letter stated that any appeal to the Board must be made by Mr. Kency within 15 calendar days from the date Mr. Kency received the letter and included information on how Mr. Kency could file an appeal with the Board. S.A. 23-24. Mr. Kency acknowledges receiving the Secretary's letter on December 6, 2017.

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APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ERICE MAURICE KENCY,
Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

DOCKET NUMBER AT-3330-18-0193-I-1

DATE: September 1, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Eric Maurice Kency, Grovetown, Georgia, pro
se.

Michael E. Hokenson, Esquire, Fort Belvoir,
Virginia, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his Veterans Employment Opportunities Act of 1998 (VEOA) appeal as untimely. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation

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or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

¶2 On November 21, 2017, the appellant filed a VEOA complaint with the Department of Labor (DOL). Initial Appeal File (IAF), Tab 1 at 4. On December 6, 2017, DOL sent the appellant an email containing notice that it had closed his complaint file

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without taking corrective action. *Id.* at 16-17. The notice informed the appellant that he had “ 15 calendar days from the date of receipt of this letter” to file an appeal with the Board. *Id.* at 16.

¶3 The appellant filed his Board appeal on December 26, 2017. IAF, Tab 1. The administrative judge issued an order on timeliness, informing the appellant that his appeal appeared to have been filed 5 days late, notifying him of the standard for showing that either his appeal was timely or that the filing period should be equitably tolled, and directing him to file evidence and argument on the issue. IAF, Tab 4. The appellant did not respond to the order. After the close of the record, the administrative judge issued an initial decision dismissing the appeal as untimely. IAF, Tab 7, Initial Decision.

¶4 The appellant has filed a petition for review, arguing that his appeal was timely because the 15-day deadline did not begin to run until December 11, 2017.

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Petition for Review (PFR) File, Tab 1 at 2. He admits to receiving DOL’s original closeout notice on December 6, 2017, but asserts that DOL sent him a new closeout notice on December 11, 2017, to correct the case number. PFR File, Tab 1 at 2, Tab 5 at 6. The agency has responded to the petition for review, and the appellant has filed a reply to the agency’s response. PFR File, Tabs 3 , 5.

ANALYSIS

¶5 A VEOA appeal must be filed within 15 days after the complainant receives written notification from DOL that the complaint could not

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be resolved. 5 U.S.C. § 3330a(d)(1)(B). The 15-day deadline is statutory and mandatory, with no provision to waive the deadline for good cause shown. However, the deadline is subject to equitable tolling. *Alegre v. Department of the Navy*, 118 M.S.P.R. 424, ¶ 17 (2012). Accordingly, failure to meet this deadline will result in a dismissal on timeliness grounds unless the appellant can establish a basis to equitably toll the filing period. *See Gingery v. Department of the Treasury*, 110 M.S.P.R. 83, ¶¶ 22-25 (2008).

¶6 In this case, it is undisputed that the appellant originally received DOL's closeout notice on December 6, 2017. IAF, Tab 1 at 16; PFR File, Tab 1 at 2. Measured from that date, the appellant's December 26, 2017 VEOA appeal was untimely by 5 days. The appellant, however, argues that the filing period should be measured from December 11, 2017, when he received a new copy of the closeout notice, corrected to show the proper case number. PFR File, Tab 1 at 2, Tab 5 at 6.

¶7 The appellant is raising this argument for the first time on petition for review even though it is based on evidence that was in his possession before the close of the record below. The Board has long held that it will not consider an argument raised for the first time on review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Washington v. Department of Veterans Affairs*, 69 M.S.P.R. 86, 88

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(1995); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980); *see* 5 C.F.R. § 1201.115(d). The appellant in this case has not explained why he

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failed to make this or any other argument in response to the administrative judge's timeliness order below. Thus, the appellant's late-raised argument is precluded by the Board's regulations. Therefore, we affirm the initial decision.

NOTICE OF APPEAL RIGHTS²

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions

² Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

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about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

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Within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the

Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) **Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (not the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file

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with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

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http://www.uscourts.gov/Court_Locator/Court_Websites.aspx .

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

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(3) **Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.**

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This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), §, (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.³ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals

³ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115 -195, 132 Stat. 1510.

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for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

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If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/Court_Websites.aspx .

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

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APPENDIX C

**UNITED STATES OF AMERICA MERIT
SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

ERICE MAURICE KENCY,
Appellant,

V.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER AT-3330-18-0193-I-1

DATE: January 23, 2018

Erice Maurice Kency, Grovetown, Georgia, pro
se.

Michael E. Hokenson, Fort Belvoir, Virginia,
for the agency.

BEFORE

Christopher G. Sprague Administrative Judge

INITIAL DECISION

On December 26, 2017, the appellant filed this appeal asserting the Department of Army (agency) failed to properly apply his veterans' preference points to an employment vacancy in violation of the Veterans Employment Opportunities Act of 1998 (VEOA). Appeal File (AF) Tab 1. Because there is no factual dispute bearing on the timeliness issue, the

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appellant's request for a hearing was not granted. See *Mannfng v. Merft Systems Protection Board*, 742 F.2d 1424, 1428 (Fed. Cir. 1984). For the reasons detailed below, the appeal is DISMISSED as untimely.

BACKGROUND

By letter dated December 6, 2017 sent to the appellant via email, the Department of Labor, Veterans' Employment and Training Service (DOL VETS), informed the appellant that it was closing his complaint against the agency, effective December 6, 2017, and that the appellant must file a Board appeal

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to pass. *Id.* at 96. The Supreme Court has stated, and the Board has followed, that the doctrine will be applied only "sparingly" and that the doctrine does not extend to mere "excusable neglect." *Id.*, *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, 6 (2009). Likewise, the Board also held that a garden variety failure to act with due diligence is not enough to justify tolling the limitations period. *Hayes v. Department of Army*, 111 M.S.P.R. 41, 11 (2009).

Here, there is no evidence that equitable tolling should apply since the appellant did not respond to my timeliness order. Consequently, I conclude the appellant has not established that the doctrine of equitable tolling should be applied in this case.

Decision

The appeal is DISMISSED as untimely.

FOR THE BOARD: _____/S/

Christopher G. Sprague
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on February 27, 2018, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30- day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the “Notice of Appeal Rights” section, below

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or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled “Notice of Appeal Rights,” which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

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(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the

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documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response

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to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its

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issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury see 5

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APPENDIX D

PUBLIC LAW 105-339—OCT. 31, 1998

**VETERANS EMPLOYMENT OPPORTUNITIES
ACT OF 1998**

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112 STAT. 3182 PUBLIC LAW 105-339—OCT.
31, 1998

Public Law 105-339
105th Congress

An Act

Oct. 31, 1998 To amend title 5, United States
[S. 1021] Code, to provide that consideration
may not be denied to preference eligibles applying for
certain positions in the competitive service, and for
other purposes

Veterans *Be it enacted by the Senate and*
Employment *House of Representatives of the*
Opportunities *United States of America in Congress*
Act of 1998. *assembled,*

5 USC 2101 **SECTION 1. SHORT TITLE.**
note. This Act may be cited as the
“Veterans Employment Opportunities Act of 1998”

SEC. 2. ACCESS FOR VETERANS.

Section 3304 of title 5, United States Code, is amended by adding at the end the following:

“(f)(1) Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the

announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

“(2) This subsection shall not be construed to confer an entitlement to veterans’ preference that is not otherwise required by law.

“(3) The area of consideration for all merit promotion announcements which include consideration of individuals of the Federal workforce shall indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service are eligible to apply. The announcements shall be publicized in accordance with section 3327.

“(4) The Office of Personnel Management shall establish an appointing authority to appoint such preference eligibles and veterans.”.

SEC. 3. IMPROVED REDRESS FOR PREFERENCE ELIGIBLES.

(a) IN GENERAL.—Subchapter I of chapter 33 of title 5, United States Code, is amended by adding at the end the following:

“§ 3330a. Preference eligibles; administrative redress

“(a)(1) A preference eligible who alleges that an agency has violated such individual’s rights under any statute or regulation relating to veterans’ preference may file a complaint with the Secretary of Labor.

Deadline “(2)(A) A complaint under this subsection must be filed within 60 days after the date of the alleged violation

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“(B) Such complaint shall be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

“(3) The Secretary shall, upon request, provide technical assistance to a potential complainant with respect to a complaint under this subsection.

“(b)(1) The Secretary of Labor shall investigate each complaint under subsection (a).

“(2) In carrying out any investigation under this subsection, the Secretary’s duly authorized representatives shall, at all reasonable times, have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or agency that the Secretary considers relevant to the investigation.

“(3) In carrying out any investigation under this subsection, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

“(4) Upon application, the district courts of the United States Courts shall have jurisdiction to issue writs commanding any person or agency to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this subsection and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a

contempt of court.

“(c)(1)(A) If the Secretary of Labor determines as a result of an investigation under subsection (b) that the action alleged in a complaint under subsection (a) occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the agency specified in the complaint complies with applicable provisions of statute or regulation relating to veterans’ preference.

“(B) The Secretary of Labor shall make determinations referred to in subparagraph (A) based on a preponderance of the evidence.

“(2) If the efforts of the Secretary under subsection (b) with Notification. respect to a complaint under subsection (a) do not result in the resolution of the complaint, the Secretary shall notify the person who submitted the complaint, in writing, of the results of the Secretary’s investigation under subsection (b).

“(d)(1) If the Secretary of Labor is unable to resolve a complaint under sub-section (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought—

“(A) before the 61st day after the date on which the complaint is filed; or

“(B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

“(2) An appeal under this subsection may not be brought unless

“(A) the complainant first provides written notification to the Secretary of such complainant’s intention to bring such appeal; and

“(B) appropriate evidence of compliance with subparagraph

(A) is included (in such form and manner as the Merit Systems Protection Board may prescribe) with the notice of appeal under this subsection.

“(3) Upon receiving notification under paragraph (2)(A), the Secretary shall not continue to investigate or further attempt to resolve the complaint to which the notification relates.

“(e)(1) This section shall not be construed to prohibit a preference eligible from appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation, in lieu of administrative redress under this section.

“(2) A preference eligible may not pursue redress for an alleged violation described in subsection (a) under this section at the same time the preference eligible pursues redress for such violation under any other law, rule, or regulation.

“§ 3330b. Preference eligibles; judicial redress Deadline.

“(a) In lieu of continuing the administrative re-dress procedure provided under section 3330a(d), a preference eligible may elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.

“(b) An election under this section may not be

made—

“(1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or

“(2) after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.

Regulations. “(c) An election under this section shall be made, in writing, in such form and manner as the Merit Systems Protection Board shall by regulation prescribe. The election shall be effective as of the date on

Effective date

which is received, and the administrative proceeding to which it relates shall terminate immediately upon the receipt of such election.

“§ 3330c. Preference eligibles; remedy

“(a) If the Merit Systems Protection Board (in a proceeding under section 3330a) or a court (in a proceeding under section 3330b) determines that an agency has violated a right described in section 3330a, the Board or court (as the case may be) shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board or court determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages.

“(b) A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 33 of title 5,

United States Code, is amended by adding after the item relating to section 3330 the following:

“3330a. Preference eligibles; administrative redress.

“3330b. Preference eligibles; judicial redress.

“3330c. Preference eligibles; remedy.

P

PUBLIC LAW 105-339—OCT. 31, 1998 112
STAT. 3185

SEC. 4. EXTENSION OF VETERANS' PREFERENCE

(a) AMENDMENT TO TITLE 5, UNITED STATES CODE.—Paragraph (3) of section 2108 of title 5, United States Code, is amended by striking “the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, or the General Accounting Office;” and inserting “or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;”.

(b) AMENDMENTS TO TITLE 3, UNITED STATES CODE.—

(1) IN GENERAL.—Chapter 2 of title 3, United States Code, is amended by adding at the end the following:

“§ 115. Veterans' preference

“(a) Subject to subsection (b), appointments under sections 105, 106, and 107 shall be made in accordance with section 2108, and sections 3309 through 3312, of title 5.

“(b) Subsection (a) shall not apply to any appointment to a position the rate of basic pay for which is at least equal to the minimum rate established for positions in the Senior Executive Service

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under section 5382 of title 5 and the duties of which are comparable to those described in section 3132(a)(2) of such title or to any other position if, with respect to such position, the President makes certification—

“(1) that such position is—

“(A) a confidential or policy-making position; or

“(B) a position for which political affiliation or political philosophy is otherwise an important qualification; and

“(2) that any individual selected for such position is expected to vacate the position at or before the end of the President’s term (or terms) of office

Each individual appointed to a position described in the preceding applies shall be notified as to such expectation, in writing, at the time of appointment to such position.”

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 2 of title 3, United States Code, is amended by adding at the end the following:

“115. Veterans’ preference.”

c) LEGISLATIVE BRANCH APPOINTMENTS.—
2 USC 1316a.

(1) DEFINITIONS.—For the purposes of this subsection, the terms “covered employee” and “Board” shall each have the meaning given such term by section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301).

(2) RIGHTS AND PROTECTIONS.—The rights and protections established under section 2108, sections 3309 through 3312, and subchapter I of chapter 35, of title 5, United States Code, shall apply to covered employees.

(3) REMEDIES.—

(A) IN GENERAL.—The remedy for a violation of paragraph

(2) shall be such remedy as would be appropriate if awarded under applicable provisions of title 5, United States Code, in the case of a violation of the relevant corresponding provision (referred to in paragraph (2)) of such title.

(B) PROCEDURE.—The procedure for consideration of alleged violations of paragraph (2) shall be the same as

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apply under section 401 of the Congressional Accountability Act of 1995 (and the provisions of law referred to therein) in the case of an alleged violation of part A of title II of such Act.

(4) REGULATIONS TO IMPLEMENT
SUBSECTION.—

(A) IN GENERAL.—The Board shall, pursuant to section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), issue regulations to implement this subsection.

(B) AGENCY REGULATIONS.—The regulations issued under subparagraph (A) shall be the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions referred to in paragraph (2) except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this subsection.

(C) COORDINATION.—The regulations issued under subparagraph (A) shall be consistent with section 225 of the Congressional Accountability Act of 1995 (2 U.S.C. 1361).

(5) APPLICABILITY.—Notwithstanding any other provision of this subsection, the term “covered employee” shall not, for purposes of this subsection, include an employee—

(A) whose appointment is made by the President with the advice and consent of the Senate;

(B) whose appointment is made by a Member of Congress or by a committee or subcommittee of either House of Congress; or (C) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

(6) EFFECTIVE DATE.—Paragraphs (2) and (3) shall be effective as of the effective date of the regulations under paragraph (4)

28 USC 601 d) JUDICIAL BRANCH APPOINTMENTS.—

note. PROCEDURES. (1) IN GENERAL.—Subject to paragraphs (2) and (3), the Judicial Conference of the United States shall prescribe procedures to provide for—

(A) veterans’ preference in the consideration of applicants for employment, and in the conduct of any reductions in force, within the judicial branch; and

(B) redress for alleged violations of any rights provided for under subparagraph (A).

(2) PROCEDURES.—Under the procedures, a preference eligible (as defined by section 2108 of title 5, United States Code) shall be afforded preferences in

a manner and to the extent consistent with preferences afforded to preference eligible in the executive branch.

(3) EXCLUSIONS.—Nothing in the procedures shall apply with respect to an applicant or employee—

(A) whose appointment is made by the President with the advice and consent of the Senate;

(B) whose appointment is as a judicial officer;

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(C) whose appointment is required by statute to be made by or with the approval of a court or judicial officer; or

(D) whose appointment is to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

(4) DEFINITIONS.—For purposes of this subsection, the term “judicial officer” means a justice, judge, or magistrate judge listed in subparagraph (A), (B), (F), or (G) of section 376(a)(1) of title 28, United States Code.

(5) SUBMISSION TO CONGRESS; EFFECTIVE DATE.—

(A) SUBMISSION TO CONGRESS.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States shall submit a copy of the procedures prescribed under this subsection to the Committee on Government Reform and Oversight and the Committee on the Judiciary of the House of Representatives and the Committee on Governmental Affairs and the Committee on the Judiciary of the Senate.

(B) EFFECTIVE DATE.—The procedures pre-

scribed under this subsection shall take effect 13 months after the date of enactment of this Act.

**SEC. 5. VETERANS' PREFERENCE 49 USC
REQUIRED FOR REDUCTIONS IN 106 note
FORCE IN THE FEDERAL AVIATION
ADMINISTRATION.**

Section 347(b) of the Department of Transportation and Related Agencies Appropriations Act, 1996 (109 Stat. 460) is amended—

- (1) by striking “and” at the end of paragraph (6);
- (2) by striking the period at the end of paragraph (7) and inserting “; and”; and
- (3) by adding at the end the following:
“(8) sections 3501–3504, as such sections relate to veterans’ preference.”.

**SEC. 6. FAILURE TO COMPLY WITH VET-
ERANS' PREFERENCE REQUIREMENTS TO BE
TREATED AS A PROHIBITED PERSON-NEL
PRACTICE FOR CERTAIN PURPOSES.**

(a) IN GENERAL.—Subsection (b) of section 2302 of title 5, United States Code, is amended—

- (1) by striking “or” at the end of paragraph (10);
- (2) by redesignating paragraph (11) as paragraph (12); and
- (3) by inserting after paragraph (10) the following:
“(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans’ preference requirement; or
“(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans’ preference requirement; or”.

(b) DEFINITION; LIMITATION.—Section 2302 of

title 5, United States Code, is amended by adding at the end the following:

“(e)(1) For the purpose of this section, the term ‘veterans’ preference requirement’ means any of the following provisions of law:

‘ (A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference

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eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

“(B) Sections 943(c)(2) and 1784(c) of title 10.

“(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

“(D) Section 301(c) of the Foreign Service Act of 1980.

“(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

“(F) Section 1005(a) of title 39.

“(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans’ preference requirement for the purposes of this subsection.

“(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

“(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any

authority under section 1215 (relating to disciplinary action).”.

(c) REPEALS.—

(1) SECTION 1599c OF TITLE 10, UNITED STATES CODE.—

(A) REPEAL.—Section 1599c of title 10, United States Code, is repealed.

(B) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 81 of such title is amended by striking out the item relating to section 1599c.

(2) SECTION 2302(a)(1) OF TITLE 5, UNITED STATES CODE.—

Subsection (a)(1) of section 2302 of title 5, United States Code, is amended to read as follows:

“(a)(1) For the purpose of this title, ‘prohibited personnel practice’ means any action described in subsection (b).”

5 USC 2302 (d) SAVINGS PROVISION.—This note.

section shall be treated as if it had never been enacted for purposes of any personnel action (within the meaning of section 2302 of title 5, United States Code) preceding the date of enactment of this Act.

SEC. 7. EXPANSION AND IMPROVEMENT OF VETERANS’ EMPLOYMENT EMPHASIS UNDER FEDERAL CONTRACTS.

(a) COVERED VETERANS.—Section 4212 of title 38, United States Code, is amended—

(1) in subsection (a)—

(A) by striking out “\$10,000” and inserting in lieu thereof “\$25,000”; and

(B) by striking out “special disabled veterans and veterans of the Vietnam era” and inserting in lieu

thereof “special disabled veterans, veterans of the Vietnam era, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized”;

(2) in subsection (b), by striking out “special disabled veteran or veteran of the Vietnam era” and inserting in lieu thereof “veteran covered by the first sentence of subsection (a)”; and

(3) in subsection (d)(1), by striking out “veterans of the Vietnam era or special disabled veterans” both places it appears

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and inserting in lieu thereof “special disabled veterans, veterans of the Vietnam era, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized”.

(b) PROHIBITION ON CONTRACTING WITH ENTITIES NOT MEETING REPORTING REQUIREMENTS.—(1) Subchapter III of chapter 13 of title 31, United States Code, is amended by adding at the end the following:

“§ 1354. Limitation on use of appropriated funds for contracts with entities not meeting veterans’ employment reporting requirements

“(a)(1) Subject to paragraph (2), no agency may obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract described in section 4212(a) of title 38 with a contractor from which a report was required under section 4212(d) of that title with respect to the preceding fiscal year if such contractor did not submit such report.

“(2) Paragraph (1) shall cease to apply with respect

to a contractor otherwise covered by that paragraph on the date on which the contractor sub-mits the report required by such section 4212(d) for the fiscal year concerned.

“(b) The Secretary of Labor shall make Records available in a database a list of the contractors that have complied with the provisions of such section 4212(d).”.

(2) The table of sections at the beginning of chapter 13 of such title is amended by adding at the end the following:

“1354. Limitation on use of appropriated funds for contracts with entities not meeting veterans’ employment reporting requirements.”.

SEC. 8. REQUIREMENT FOR ADDITIONAL INFORMATION IN ANNUAL REPORTS FROM FEDERAL CONTRACTORS ON VETERANS EMPLOYMENT.

Section 4212(d)(1) of title 38, United States Code, as amended by section 7(a)(3) of this Act, is further amended—

(1) by striking out “and” at the end of subparagraph (A);

(2) by striking out the period at the end of subparagraph (B) and inserting in lieu thereof “; and”; and

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(3) by adding at the end the following:

“(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.”.

Approved October 31, 1998.

LEGISLATIVE HISTORY—S. 1021 (H.R. 240):
HOUSE REPORTS: No. 105-40, Pt. 1 accompanying
H.R. 240 (Comm. on Government Reform and
Oversight).
SENATE REPORTS: No. 105-340 (Comm. on
Veterans' Affairs).
CONGRESSIONAL RECORD, Vol. 144 (1998):
Oct. 5, considered and passed Senate.
Oct. 8, considered and passed House.
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