No. _____

In the Supreme Court of the United States

RICHARD CORNELIUS JACKSON,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX

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APPENDIX

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Appendix A
[Filed: Nov. 13, 2025]

NOTE: This disposition is nonprecedential

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RICHARD CORNELIUS JACKSON,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2025-1614

Petition for review of the Merit Systems Protection Board in No. CH-3330-23-0216-I-1.

Decided: November 13, 2025

RICHARD CORNELIUS JACKSON, Bellwood, IL, pro se.

AN HOANG, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by

ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before MOORE, *Chief Judge*, TARANTO, *Circuit Judge*, and CHUN, *District Judge*.[1]

PER CURIAM.

Richard Jackson appeals a Merit Systems Protection Board (Board) decision denying his request for corrective action under the Veterans Employment Opportunities Act (VEOA) because his underlying complaint filed with the Department of Labor (DOL) was untimely and not subject to equitable tolling. We *affirm*.

BACKGROUND

Mr. Jackson, a former Immigration Services Officer with the Department of Homeland Security (DHS), alleges DHS violated the VEOA by rejecting him as a preference-eligible veteran for ten jobs he applied over a two-year span. S. Appx. 11.[2] Mr. Jackson claims he first became aware DHS may have violated his veterans' preference rights in July 2022, the same month he filed Freedom of Information Act (FOIA) requests seeking information about DHS' hiring process for jobs he had applied to. *Id.*; *see* S. Appx. 29.

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[1] Honorable John H. Chun, District Judge, United States District Court for the Western District of Washington, sitting by designation.

[2] "S. Appx." Refers to the supplemental appendix attached to Respondent's brief.

On July 25, 2022, three months after submitting his most recent DHS job application, Mr. Jackson filed his first VEOA complaint with DOL. S. Appx. 19, 29. He withdrew it three days later. S. Appx. 19, 30. Then, in February 2023, Mr. Jackson filed a second, substantively identical complaint, which DOL rejected as untimely. *Id.* at 11, 19. Mr. Jackson appealed to the Board, which affirmed DOL's rejection and held Mr. Jackson (1) failed to file his second complaint within the 60-day statutory period after becoming aware of the possible VEOA violation, and (2) did not establish that equitable tolling excused his untimely filing. S. Appx. 10–28 (initial decision); S. Appx. 1–9 (final decision affirming and adopting initial decision). Mr. Jackson appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Equitable tolling is a "rare remedy" reserved for unusual circumstances. *Wallace v. Kato*, 549 U.S. 384, 396 (2007). It applies only if the litigant shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented untimely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990)). We review the Board's fact findings underlying its equitable tolling determination for substantial evidence. *See McIntosh v. Dep't of Def.*, 53 F.4th 630,

638 (Fed. Cir. 2022). Application of the equitable tolling standard to undisputed facts is a legal question we review de novo. *See Former Emps. of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

On appeal, Mr. Jackson challenges the Board's holding that equitable tolling does not apply. Petitioner's Br. 15–16. He argues equitable tolling should apply because DHS deceived him when it removed his veterans' preference forms and disability letters from his job applications. *Id.* at 13–14, 16. Doing so allegedly harmed Mr. Jackson's employment prospects by preventing him from claiming veterans' preference during DHS' hiring process. *Id.* Mr. Jackson submitted FOIA requests seeking information he contends would have proven DHS deceitfully removed his veterans' preference materials from his applications. *Id.* But according to Mr. Jackson, DHS has yet to respond to his FOIA requests, allegedly in order to conceal its deception. *Id.* Mr. Jackson argues the Board erred by failing to address his theory of deception fully; had the Board done so, it would have determined DHS' deceptive alterations triggered equitable tolling, making his February 2023 complaint timely. *Id.* at 16.

The Board found Mr. Jackson timely filed his first complaint, voluntarily withdrew it, then filed a second, substantively identical complaint after the statutory deadline. S. Appx. 19. The Board then found Mr. Jackson's voluntary withdrawal, followed by inactivity until his refiling, showed a lack of reasonable diligence as to his second complaint. S. Appx. 19–20. Mr. Jackson does not dispute the underlying facts. *See* Petitioner's Br. 15–16. Nor does he dispute the Board's articulation of the equitable tolling standard set forth by the Supreme Court in *Pace*. *Id.*; 544 U.S. at 418. There,

the petitioner argued equitable tolling should apply despite his lack of reasonable diligence because extraordinary circumstances stood in his way. 544 U.S. at 418. The Court rejected that argument, even assuming circumstances outside the petitioner's control created a "trap," because reasonable diligence is a necessary condition for equitable tolling. *Id.* Applying the *Pace* standard, the Board determined Mr. Jackson's lack of reasonable diligence likewise acted as an absolute bar to equitable tolling for his second complaint. S. Appx. 19–20. Because we see no error in the Board's application of the equitable tolling standard to the undisputed facts, we conclude Mr. Jackson is not entitled to equitable tolling.

Despite the absolute bar, the Board reached the merits of Mr. Jackson's deception-based theory in the alternative, finding "there [was] no indication that the evidence was previously unavailable because the agency improperly concealed it." S. Appx. 20 (internal quotation marks and citations removed). We need not address that issue because Mr. Jackson's deception-based allegations speak to equitable tolling's second prong; they cannot redeem his lack of reasonable diligence, even if true. 544. U.S. at 418.

Mr. Jackson raises additional arguments, each of which relate to the underlying merits of his VEOA claim, not the timeliness of his filing. Specifically, he argues that: (1) the Board violated its discovery regulations by preventing him from submitting an interlocutory appeal, Petitioner's Br. 16; (2) DHS wrongly denied a preference veteran the right to compete by altering his job applications, *id.* at 17; (3) the Board legally erred by failing to establish jurisdiction, *id.*; (4) DHS violated his rights under the VEOA by

manipulating the selection process, *id.* at 17–18; (5) the Board abused its discretion in ruling on his motions to compel and to sanction in the initial decision, *id.* at 18; and (6) the Board abused its discretion by denying his motion to submit additional pleadings, *id.* at 19–21. Because he did not meet the filing deadline under 5 U.S.C. § 3330a(a)(2)(A) and failed to establish that equitable tolling applies, we do not reach these arguments. *See Pinat v. Off. of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991).

CONCLUSION

For the foregoing reasons, we *affirm*.

AFFIRMED

COSTS

No costs.

Appendix B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD CORNELIUS JACKSON,
Appellant,
v.
DEPARTMENT OF HOMELAND SECURITY
Agency.

DOCKET NUMBER
CH-3330-23-0216-I-1

DATE: February 4, 2025

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Richard Cornelius Jackson, Bellwood, Illinois, pro se.

Lynn N. Donley, Esquire, Chicago, Illinois, for the agency.

BEFORE

Cathy A. Harris, Chairman*
Raymond A. Limon, Vice Chairman
Henry J. Kerner, Member

* The Board members voted on this decision before January 20, 2025

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[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

The appellant has filed a petition for review of the initial decision, which denied his request for corrective action under the Veterans Employment Opportunities Act of 1998. On petition for review, the appellant argues that equitable tolling should apply to this case because the agency engaged in deception when it did not respond to his Freedom of Information Act (FOIA)request for documents related to the positions for which he was not selected and deprived him of his right to compete for those positions by removing documents from his job applications. 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 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 [2] and

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[2] With his petition for review, the appellant provides evidence that he asserts he did not submit to the administrative judge because the administrative judge noted in the order on his motion

AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

NOTICE OF APPEAL RIGHTS[3]

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to strike that there should be "no further briefing on [discovery disputes.]" Petition for Review (PFR) File, Tab 6 at 8-9, 13-45; Initial Appeal File, Tab 27 at 2. The appellant refers to the agency's May 25, 2023 discovery responses. PFR File, Tab 6 at 13-45. However, he has failed to show that the agency's May 25, 2023 discovery responses are new or material. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (stating that, under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (stating that the Board will not grant a petition for review based on "new" evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

The appellant also filed a November 24, 2023 motion to submit an additional pleading. PFR File, Tab 9. He notes that he received new evidence from the agency on November 24, 2023 through a FOIA request, which will show why the administrative judge made erroneous findings and why the agency removed documents from his job applications. *Id.* at 5. Although the evidence that the appellant seeks leave to submit postdates the initial decision, he has failed to sufficiently explain the nature of these documents or how the new evidence changes the outcome of his appeal. *See* 5 C.F.R. § 1201.114(a)(5). Specifically, he has not shown that the new evidence supports a finding that he timely filed his complaint with the Department of Labor or established that equitable tolling should apply. *See Brown v. U.S. Postal Service*, 110 M.S.P.R. 381, ¶ 10 (2009) (explaining that the discovery of new evidence does not constitute the type of extraordinary circumstances that warrants the equitable tolling of a statutory deadline). Accordingly, we deny the appellant's motion.

[3] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in

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

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final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

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 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:

http://www.uscourts.gov/Court_Locator/CourtWebsites.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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. 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), (B), (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.[4] The

[4] 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.

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

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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/CourtWebsites.aspx.

FOR THE BOARD: /s/ Gina K. Grippando
Gina K. Grippando
Clerk of the Board

Washington, D.C.

Appendix C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFECE

RICHARD CORNELIUS JACKSON,
Appellant,
v.
DEPARTMENT OF HOMELAND SECURITY
Agency.

DOCKET NUMBER
CH-3330-23-0216-I-1

DATE: August 3, 2023

Richard Cornelius Jackson, Bellwood, Illinois, pro se.

Lynn Donley, Esquire, Chicago, Illinois, for the agency.

BEFORE

Daniel R. Fine
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant, Richard Cornelius Jackson, alleges in this appeal that the agency violated his preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA). *See* Initial Appeal File (IAF). Tab 1. The appellant has sufficiently proved he exhausted his administrative remedy and has made nonfrivolous allegations that the agency violated his preference rights.

As explained below, however, the appellant untimely filed his U.S. Department of Labor (DOL) complaint. Because the appellant has failed to establish that the statutory deadline should be equitably tolled, his request for corrective action under the VEOA is DENIED.

I. Background

The appellant works in Chicago, Illinois, as an Immigration Services Officer for the United States Citizenship and Immigration Services (USCIS), a component of the agency. IAF, Tab 1, MSPB Form 185-1, Page 1, Boxes 5, 8, 10.

In his appeal form, the appellant alleges that the agency violated the VEOA. He states that he is a preference eligible and that, over the previous two years, he has unsuccessfully applied to 10 specified job postings. IAF, Tab 1, MSPB From 185-2 Continuation Sheet, Box 5.[1] In July 2022, the appellant filed requests with the agency under the Freedom of Information Act (FOIA), asking for information relating to the selected applicants and the hiring process for them—requests to which the agency has allegedly not responded. *Id.* In February 2023, the appellant filed a

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[1] The appellant lists the announcements at issue as: PSC-2022-0035 (Immigration Services Officer), CHI-2022-0008 (Immigration Services Officer), IDP-2022-0002 (Management and Program Analyst), WAS-2022-0003 (Immigration Services Officer), OFM-2022-0002 (Immigration Services Officer), DAL-2021-0013 (Immigration Services Officer), HIA-2021-0003 (Immigration Services Officer), S22-2021-0007 (Immigration Services Officer), FDSNSPS-2021-0003 (Immigration Officer FDNS), and FDNS-2021-0006 (Immigration Officer FDNS). See IAF, Tab 1, MSPB Form 185-2 Continuation Sheet, Box 5.

VEOA complaint with the DOL. *Id.* The DOL rejected the appellant's complaint as untimely. *Id.*

This timely appeal followed in March 2023. After receiving the appeal, I issued a Jurisdiction Order explaining the proof requirements necessary to support a request for corrective action under the VEOA and requiring the appellant to file a statement supporting jurisdiction. IAF, Tab 3. The Jurisdiction Order also stated that, if the appellant's VEOA complaint to the DOL or the Board was late, it could be subject to equitable tolling if the circumstances warranted it. *Id.* at 5-6. The appellant was ordered to file a statement on equitable tolling as well as jurisdiction. *Id.* at 6.

The appellant thereafter filed multiple pleadings within the timeframe called for by the Jurisdiction Order, each of which I have considered in connection with this initial decision. *See* IAF, Tabs 5-8. The agency filed a single submission arguing that the Board lacks jurisdiction and that the appellant's appeal is untimely. IAF, Tab 14. The appellant filed an additional submission responding to the agency's arguments (IAF, Tab 16), which I accept into the record under 5 U.S.C. § 1201.59(c).[2]

The record on jurisdiction has closed; this matter is ripe for decision.

II. Legal Standard

The Board's jurisdiction is limited to "those matters over which it has been given jurisdiction by law, rule,

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[2] Additional pleadings filed by the appellant were not considered by the Board as they did not meet the criteria for consideration under 5 C..F.R. § 1201.59(c). *See also* 5 C.F.R. § 1201.43(c) (Uudge may refuse to consider untimely pleadings).

or regulation." 5 C.F.R. § 1201.3(a); *see also Garcia v. Department of Homeland Security* , 437 F.3d 1322, 1327 (Fed. Cir. 2006) (collecting authority). In most instances, the Board lacks jurisdiction over an individual's claim that he or she was not selected for or promoted to a position with the federal government. The VEOA provides exceptions to that rule.

The Board is empowered to exercise jurisdiction over two types of VEOA claims. The first type is when an individual alleges an agency violated a preference eligible's rights under any statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a(a)(l)(A). To establish jurisdiction for this type of claim, an appellant must exhaust his remedy with the DOL and make nonfrivolous allegations that (l) he is a preference eligible; and (2) the agency violated his rights under a statute or regulation related to veterans' preference. *Davis v. Department of Defense*, 2022 MSPB 20, ¶ 5.

The second type of VEOA claim arises under 5 U.S.C. § 3304(f)(1). *See also* 5 U.S.C. § 3330a(a)(1)(B) (allowing individuals to raise alleged section 3304(f)(1) violations with the DOL). Under section 3304(f)(1), preference eligibles, as well as veterans who have been separated from the armed forces under honorable conditions after three 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 individuâls outside its own workforce under merit promotion procedures. To establish the Board's VEOA jurisdiction over such an appeal, the appellant must exhaust his remedy with the DOL and make nonfrivolous allegations that (1) he is a preference eligible or veteran

described by 5 U.S.C. § 3304(f)(1); and (2) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce. *Oram v. Department of the Navy*, 2022 MSPB 30, ¶ 6 & n.4.

III. Findings and Analysis

The appellant has proved that he exhausted his administrative remedy with the DOL. He has also nonfrivolously alleged one type of claim under the VEOA. His request for corrective action must nonetheless be denied. The complaint that he filed with the DOL in February 2023 was untimely, and he has not cleared the high bar for demonstrating that the statutory deadline should be equitably tolled.

A. The Appellant Exhausted His Remedy with The DOL.

To establish exhaustion, an appellant must show that he provided enough information for DOL to investigate his claims. *Gingery v. Office of Personnel Management*, 119 M.S.P.R. 43, ¶ 14 (2012). As in other areas of administrative law, the exhaustion requirement is meant to provide an agency (here, the DOL) with an opportunity to investigate an individual's claims, potentially resolving them without the involvement of a court or other authority. *Id.* Exhaustion does not require an individual to present "a perfectly packaged case ready for litigation." *Delgado v. Merit Systems Protection Board*, 880 F.3d 913, 924 (7th Cir. 2018).

The appellant did enough here to exhaust his administrative remedy with the DOL. In his February

13, 2023, VEOA complaint to the DOL, the appellant states that he "applied for over 8 jobs with USCIS going back to at least 2021," alleges that in July 2022 he filed a FOIA request "asking for relevant documents for all the jobs I applied for," and asks DOL to investigate the job announcements that he was not selected for. IAF, Tab 1 at 8-10. In subsequent correspondence with the DOL, the appellant identified the 10 announcements that this appeal puts in issue. IAF, Tab 5 at 401; IAF, Tab 1, MSPB Form 185-2 Continuation Sheet Box 5.

The DOL acknowledged the appellant's complaint on February 23, 2023, indicating that the DOL would close his case as untimely unless, on or before March 6, 2023, the appellant explained why his submission was not made within the statutory deadline of 60 days from the date of the alleged violation. IAF, Tab 5 at 403 (citing 5 U.S.C. § 3330a(a)(2)(A)). The DOL formally closed the complaint on March 20, 2023, because the appellant did not establish grounds for waiving the 60-day deadline. IAF, Tab 12 at 13.

The exhaustion analysis is not altered by the agency's intimation that the appellant's exhaustion attempts here may have been for naught based on the formatting and content of the appellant's DOL complaint. IAF, Tab 14 at 6 n.1. The agency's suggestion is not well taken. Exhausting an administrative remedy requires an individual to provide "enough information to put a legally sophisticated reader on notice," and it is thereafter up to the agency to "fill in the gaps." *E.g., Delgado*, 880 F.3d at 925. The appellant's DOL complaint lived up to his part of the bargain.

For these reasons, I find that the appellant exhausted his administrative remedy.

B. The Appellant Nonfrivolously Alleged One Type of VEOA Claim.

The appellant has made nonfrivolous allegations supporting jurisdiction over the claim that his preference rights were violated. He did not make such allegations with respect to a right-to-compete claim.

1. The Appellant Alleged His Preference Rights Were Violated.

I find that the appellant has nonfrivolously alleged that his preference rights were violated. As noted above, an appellant may establish jurisdiction over an exhausted claim that his preference rights were violated by making nonfrivolous allegations that (1) he is a preference eligible, and (2) the agency violated his rights under a statute or regulation related to veterans' preference. *Davis*, 2022 MSPB 20 at ¶ 5.

The appellant has nonfrivolously alleged that he is a preference eligible. He avers that he was honorably discharged from the U.S. Navy and has thereafter had a 10-point preference and been rated at least 30% disabled by the Department of Veterans Affairs. IAF, Tab 6 at 4. The agency's statement of facts does not question the appellant's status and agrees that the appellant is a "10-point service disabled veteran." IAF, Tab 14 at 4. Thus, the appellant is a preference eligible who falls within the VEOA's coverage. *See also* 5 U.S.C. § 2108(2)-(3) (defining terms).

The appellant has also nonfrivolously alleged that the agency violated his rights under a statute or regulation relating to veterans' preference. An appellant's claim that his preference rights were violated should be liberally construed. *Abrahamsen v. Department of Veterans Affairs* , 94 M.S.P.R. 377, ,¶ 9

(2003). An appellant's general allegation that an agency violated his veterans' preference rights is sufficient for jurisdictional purposes; the appellant need not state a claim upon which relief can be granted. *See Jones v. Department of Veterans Affairs*, 113 M.S.P.R. 385, ¶ 9 (2010). Here, the appellant alleges that the agency removed his preference during the hiring process for the job announcements that are at issue in this appeal. IAF, Tab 6 at 4. Under Board law, this allegation suffices for pleading purposes.

2. The Appellant Has Not Alleged a Right-to-Compete Claim.

The nonfrivolousness analysis is less forgiving to the appellant's right-to-compete claim. As noted above, establishing jurisdiction over an exhausted right-to-compete claim requires an appellant to make nonfrivolous allegations that (1) he is a preference eligible or veteran described in 5 U.S.C. § 3304(f)(1); and (2) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce. *Oram*, 2022 MSPB 30 at, ¶ 6 & n.4.

The appellant has established the first part of this test for the reasons set forth above in Section III.B.1. He fails to satisfy the second part. Under the VEOA, an agency may not deny a veteran the opportunity to compete for a vacant position filled under the merit-promotion process when it accepts applications from outside of the agency. 5 U.S.C. § 3304(f); *Joseph v. Federal Trade Commission*, 505 F.3d 1380, 1382 (Fed. Cir. 2007). In other words, an agency using the merit promotion process and accepting applications from

outside its current workforce must give veterans a bona fide opportunity to compete for the position. *Oram*, 2022 MSPB 30 at ¶ 10. But the merit-promotion process, unlike the competitive appointment process, does not afford veterans any point preferences. *Joseph*, 505 F.3d at 1382.

The appellant has not made a non-frivolous allegation that he was denied a bona fide opportunity to compete. "[T]he opportunity to compete [] is satisfied by participation in the selection process on the same grounds as other candidates." *Miller v. Federal Deposit Insurance Corporation*, 818 F.3d 1357, 1360 (Fed. Cir. 2016). An opportunity to compete requires an opportunity to apply, but "VEOA [does] not ensure that [the] application . . . [will] be successful." *Abell v. Department of the Navy*, 343 F.3d 1378, 1383 (Fed. Cir. 2003).

Here, the appellant alleges that the agency violated his right to compete by not affording him a veteran's preference for the positions at issue in this appeal. IAF, Tab 6 at 4. As noted above, however, a right-to-compete claim relates to the merit promotion process—which does not award point preferences to veterans. *Joseph*, 505 F.3d at 1382. Because the appellant does not allege other grounds for a right-to-compete claim, his claim necessarily fails for this reason alone. What is more, the appellant's allegations and the materials that he included with his jurisdictional submissions show that, of the ten positions at issue in this appeal, the appellant was found most qualified and referred for six of the positions. He was found eligible but not referred for three others. As to one position, his application was received; although the status of the application is not specified, the appellant has

not made nonfrivolous allegations that the application for this single position (CHI-2022-0008 (Immigration Services Officer)) has been processed differently than for other applicants. *See* IAF, Tab 5 at 4, 7-11.

For this reason, the appellant has failed to make nonfrivolous allegations supporting jurisdiction over a right-to-compete claim.

C. Corrective Action Must Be Denied For Timeliness Reasons.

Under 5 U.S.C. § 3330a, a preference eligible who alleges an agency has violated his rights with regard to any statute or regulation relating to veterans' preference may file a complaint with the DOL. *See* 5 U.S.C. § 3330a(a)(1)(A). By statute, the DOL complaint must be filed within 60 days of the alleged violation. 5 U.S.C. §3330a(a)(2)(A).

Failing to comply with the 60-day time limit for filing a DOL complaint is generally fatal-but may be subject to equitable tolling in the appropriate case. *Kirkendall v. Department of the Army*, 479 F.3d 830, 835-36 (Fed. Cir. 2007); *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 12 (2009); *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). If an appellant files an untimely DOL complaint and is unable to establish grounds for equitable tolling, the Board should deny the appellant's request for corrective action on the merits rather than dismiss for lack of jurisdiction. *Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 9 (2009). Such a denial may be issued without a hearing where there is no genuine dispute of material fact and one party is entitled to prevail as a matter of law. *Garcia*, 110 M.S.P.R. 371 at ¶ 13 n.4.

1. The Appellant's DOL Complaint Was Untimely.

The appellant's DOL complaint was untimely as to each of the ten vacancies at issue in this appeal. The appellant filed his complaint with the DOL on February 13, 2023. IAF, Tab 1 at 10. To fall within the 60-day deadline, any violation of the appellant's preference rights would have to have occurred no earlier than December 15, 2022. *See* 5 U.S.C. § 3330a(a)(2)(A) (complaint must be filed within 60 days "after the date of the alleged violation"); *Brown* v. *U.S. Postal Service*, 110 M.S.P.R. 381, ¶ 9 (2009). The claims at issue in this appeal arose much earlier.

The appellant states in a jurisdictional submission that, of the positions at issue in this appeal, the one he most recently applied for was PSC-2022-0035 (Immigration Services Officer). IAF, Tab 5 at 4. He applied for this position on April 27, 2022, and he learned that he was not selected in July 2022. *Id.* at 4, 8. Even if one were to treat the appellant's discovery that he was not selected as the trigger for the filing period to begin, the 60 days would have lapsed in September 2022. He waited roughly five additional months to file his VEOA complaint with the DOL.

Based on the foregoing, the appellant's DOL complaint was not timely as to any of the violations of the VEOA that the appellant alleges. His request for corrective action must therefore be denied unless he can establish that he is entitled to equitable tolling.

2. The Appellant Is Not Entitled to Equitable Tolling.

The doctrine of equitable tolling is applied—sparingly—to suspend a statutory filing period for

equitable reasons, "such as when the complainant has been induced or tricked by her adversary's misconduct into allowing the deadline to pass." *Heimberger v. Department of Commerce*, 121 M.S.P.R. 10, ¶ 10 (2014) (calling equitable tolling a "rare remedy").[3] The remedy of equitable tolling "is to be applied in unusual circumstances and generally requires a showing that the litigant has been pursuing [his] rights diligently and some extraordinary circumstances stood in [his] way." *Id.*

The appellant argues that equitable tolling should apply because the agency engaged in what he characterizes as deception: "The agency has refused to release . . . lawfully requested information from my FOIA request because it intended to deprive me of my right under the VEOA." IAF, Tab 5 at 5. This argument does not satisfy the requirements for obtaining equitable tolling.

As an initial matter, the appellant has not shown that he was diligently pursuing his rights before he filed the VEOA complaint at issue in this appeal. The VEOA complaint at issue in this appeal was filed in February 2023. Yet among the appellant's jurisdictional submissions is an earlier VEOA complaint that he chose to withdraw. Specifically, the appellant filed a VEOA complaint on July 25, 2022—after he filed his FOIA request—that referenced his pending FOIA request and makes substantive allegations virtually identical to the February 2023 VEOA complaint that

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[3] The Board enjoys greater flexibility to forgive departures from its own (regulatory) filing deadlines. *See* 5 C.F.R. § 1201.22(c). The VEOA deadlines are statutory and therefore subject to the more demanding equitable tolling analysis.

sparked this appeal. IAF, Tab 5 at 392. On July 28, 2022, the appellant emailed the DOL to advise that he decided to withdraw the July 2022 VEOA complaint. He explained, "I think the best option for me is to just leave the Agency if I'm unable to promote within it, as opposed to being subjected to possible reprisal for filing." *Id.* at 394, 396.

The appellant's concerns about the possibility of experiencing retaliation demonstrate only circumspection on his part—not trickery by the agency. The appellant's claims of trickery fare no better with respect to the agency's alleged failure to respond to the appellant's July 2022 FOIA request as of February 2023. As the July 2022 VEOA complaint itself demonstrates, the appellant had reason to believe as of that time that the agency had violated his rights under the VEOA. And his decision not to pursue his July 2022 VEOA complaint acts as an absolute bar to the doctrine of equitable tolling with respect to his February 2023 VEOA complaint. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (even if the law had set a "trap" for the petitioner, equitable tolling could not apply where the appellant failed to show the requisite diligence).

The appellant's hope of obtaining additional information about his claim through the FOIA process also does not furnish grounds for equitable tolling. The Board has held that delay occasioned by an appellant's effort to seek additional information relating to a potential veterans' preference-rights violation does not merit equitable tolling. *Brown*, 110 M.S.P.R. 381 at ¶ 11 (equitable tolling inapplicable where appellant "requested, but was not provided with, documentation" relating to the successful candidates for positions to which appellant applied).

The result in *Brown* is no outlier: "the discovery of new evidence does not generally constitute the type of extraordinary circumstance that warrants tolling a statutory deadline." *Heimberger*, 121 M.S.P.R. 10 at ¶ 11. This is "especially" the case where, as here, "there is no indication that the evidence was previously unavailable because the agency improperly concealed it." *Id.* That is precisely the case here. The appellant noted as far back as his July 2022 VEOA complaint that the FOIA process might last longer than 60 days. IAF, Tab 5 at 392 (anticipating an up to 90-day time period). To permit equitable tolling here would be to defy the Supreme Court's admonition that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007).

For these reasons, I find that the appellant failed to timely file his VEOA complaint with the DOL and that he has not established that the deadline for filing the complaint should be equitably tolled.

DECISION

The appellant's request for corrective action is DENTED. In light of this disposition, several pending motions are DENTED AS MOOT. The motions include: the appellant's motion for a protective order (IAF, Tab 13), which accuses the agency of violating the Fair Credit Reporting Act, a statute the Board is not tasked with enforcing; the appellant's motion to compel discovery (IAF, Tabs 20-23), which did not comply with the Board's meet-and-confer requirements and seeks discovery that is not relevant to the case-dispositive issues of timeliness and equitable

tolling; and the appellant's motion to sanction the agency (IAF, Tabs 23-24), which largely duplicates the motion to compel and seeks relief that is not related to the case-dispositive issues of timeliness and equitable tolling.

FOR THE BOARD: /s/
Daniel R. Fine
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 6, 2023**, 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. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

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:

(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 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 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 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 C.F.R. Part 1201, Appendix 4) to support your claim. The

date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 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 decision when it becomes final, 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 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 within **60 calendar** days of the date this decision becomes final. 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 this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). 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:

http://www.uscourts.gov/Court_Locator/CourtWebsites.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 this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

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

(3) **Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012**. 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), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 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
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.

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/CourtWebsites.aspx