UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 130

Docket No. PH-3443-06-0506-I-1

Ronald A. Davis,

Appellant,

v.

Department of Defense,

Agency.

May 7, 2007

Ronald A. Davis, Baltimore, Maryland, pro se.

Robert E. Golinski, Esquire, Denver, Colorado, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal for failure to state a claim upon which relief may be granted. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on our own motion, VACATE the initial decision in part, AFFIRM the initial decision in part, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant, a GS-5 Military Pay Technician with the agency and a preference-eligible veteran, applied for a competitive service GS-6 Military Pay Technician position with the agency. The agency appears to have canceled the

first referral list that it generated, and it later selected an internal candidate who is not preference eligible for the GS-6 Military Pay Technician position. The appellant then brought this appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4311, 4324, claiming that the agency discriminated against him because of his status as a veteran. He also asserted a claim under the Veterans Employment Opportunities Act (VEOA) for an alleged violation of his veterans' preference rights. In addition, the appellant claimed that the agency violated four merit system principles and that it committed two prohibited personnel practices. The appellant requested a hearing. Initial Appeal File (IAF), Tab 1.

¶3 The agency moved to dismiss the appeal for lack of Board jurisdiction, arguing that it did not violate veterans' preference laws. IAF, Tab 4, Subtab 1. Specifically, the agency argued that the area of consideration for the position was restricted, as permitted by the vacancy announcement, to permanent agency employees, and that as a result the appellant's status as a veteran had no bearing on hiring because the position was filled as a merit promotion. *Id.* The agency further argued that it did not violate USERRA or merit systems principles and that it did not commit any prohibited personnel practices. *Id.*

¶4 The appellant responded, arguing that he met the jurisdictional requirements for USERRA and VEOA appeals. IAF, Tab 9. He also argued, inter alia, that the position could not be filled as a merit promotion because the vacancy announcement stated that the position was open to all candidates, the agency limited the area of consideration to circumvent veterans' rights, and the agency violated 5 U.S.C. §§ 3317 and 3318(a), (b). *Id.*

¶5 The administrative judge (AJ) dismissed the appeal for failure to state a claim upon which relief may be granted under USERRA or the VEOA, although

the AJ also suggested that the Board lacks jurisdiction under the VEOA.[1] The AJ dismissed the appeal for lack of jurisdiction insofar as the appellant asserted claims of prohibited personnel practices and violations of the merit system principles. Initial Decision (ID), IAF, Tab 11.

ANALYSIS

USERRA

¶6 This appeal is within the Board's jurisdiction under USERRA because the appellant alleges that he performed uniformed service, that he applied for a promotion and was not selected, and that the agency's action was because of his uniformed service. *See* 38 U.S.C. §§ 4311(a), 4324; *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶¶ 14-15 (2006). As noted above, the appellant requested a hearing in his petition for appeal, but the AJ disposed of the appellant's USERRA claim without a hearing. After the AJ issued his initial decision, the Board's reviewing court held that an individual who brings a USERRA appeal has an unconditional right to a hearing on the merits. *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007). Accordingly, we vacate the AJ's findings and conclusions on the merits of the appellant's USERRA claim and remand that claim for a hearing.

VEOA

¶7 In order to establish Board jurisdiction over a VEOA appeal, the appellant must: (1) Show that he exhausted his remedy with the Department of Labor (DOL); and (2) make nonfrivolous allegations that: (i) He is a preference eligible within the meaning of the VEOA; (ii) the action at issue took place on or after the

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[1] In the ID, the AJ stated, "In sum, I find that the appellant has demonstrated all of the necessary criteria for the Board to assume jurisdiction and consider his appeal under the VEOA." ID at 8. However, the AJ also stated that the appellant failed to make a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference, which is a jurisdictional requirement. *Id*.

October 30, 1998, enactment date of the VEOA; and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377, ¶ 6 (2003). For the appellant to meet the VEOA's requirement that he exhaust the DOL complaint procedure, he must establish that: (1) He filed a complaint with the Secretary of Labor; and (2) the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 8 (2005).

¶8 The appellant asserted in his appeal that he filed a VEOA complaint with DOL on May 15, 2006, and received notification on May 30, 2006, that it was closing its case on the complaint. IAF, Tab 1 at 2. The Board's regulation at 5 C.F.R. § 1208.23(a)(5) requires "evidence" that the appellant exhausted his remedy with DOL, such as a notification letter. The AJ appears to have either found jurisdiction based on the appellant's assertions in his appeal, or implicitly waived the regulation requiring the DOL letter. ID at 7. We note that an unsworn statement by an appellant in an initial appeal file is admissible evidence. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 228 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). The fact that it is unsworn may detract from its probative value, but it should still be considered admissible evidence. *Id.* Moreover, the agency does not dispute the appellant's assertion that he exhausted his remedy with DOL, and in fact incorporates this assertion in its response and motion to dismiss. IAF, Tab 4, Subtab 1. Based on the foregoing, we agree with the AJ that the appellant has exhausted his remedy with DOL.

¶9 It is undisputed that the appellant is a preference eligible and that his nonselection took place after October 30, 1998. The AJ suggested that the appellant did not establish jurisdiction because he did not make a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference. The AJ noted that the only laws cited by the appellant in

support of his VEOA claim were 5 U.S.C. §§ 3317 & 3318.[2] The AJ observed that those laws apply to a selection made after a competitive examination, and found that here the position was filled as a merit promotion without a competitive examination. *See Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶ 8 (2006) (veterans' preference that must ordinarily be given when making a selection for a competitive-service position does not apply when the agency selects an internal candidate under merit promotion procedures). The AJ thus concluded that the agency was not required to follow sections 3317 & 3318.

¶10 The AJ's analysis went to the merits of the appellant's VEOA claim, not to the Board's jurisdiction. We conclude that the appellant has established the final jurisdictional element under the VEOA by alleging that the agency violated specific rules that generally apply to selections for competitive-service positions. A finding that under the circumstances of this case the agency was not required to follow the veterans' preference rules at 5 U.S.C. §§ 3317 & 3318 is a finding that the appellant's VEOA claim fails on the merits, not a finding that the Board lacks the authority to adjudicate the claim. *See Young v. Federal Mediation and Conciliation Service*, 93 M.S.P.R. 99 (2002) (a finding that the agency was not required to follow veterans' preference rules when it filled the particular position that the appellant sought was a denial of relief on the merits, not a dismissal for lack of jurisdiction), *aff'd*, 66 F. App'x 858 (Fed. Cir. 2003).

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[2] After a competitive examination that includes rating and ranking with veterans' preference points added to the passing scores of preference eligibles, an examining authority certifies "enough names from the top of the appropriate register" to permit the appointing authority "to consider at least three names for appointment to each vacancy in the competitive service." 5 U.S.C. § 3317(a). The appointing authority "shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a)." 5 U.S.C. § 3318(a). If an appointing authority "proposes to pass over a preference eligible … in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office [of Personnel Management (OPM)] for passing over the preference eligible" and obtain OPM's approval. 5 U.S.C. § 3318(b)(1).

¶11 The AJ also stated that the appellant failed to state a claim upon which relief may be granted under the VEOA. However, such a disposition is appropriate only if, taking the appellant's allegations as true, he cannot prevail as a matter of law. *Ainslie v. United States*, 355 F.3d 1371, 1373 (Fed. Cir. 2004); *Will v. Department of the Treasury*, 2007 MSPB 79, ¶ 9 (2007); *Kennedy v. Department of the Air Force*, 102 M.S.P.R. 524, ¶ 7 (2006). The appellant alleged before the AJ that the selection of a non-veteran for the GS-6 Military Pay Technician position was not a merit promotion, and that as a result, the agency was required to give him veterans' preference. IAF, Tab 9 at 1-2. The AJ did not take the appellant's allegation as true, but instead found, based on the agency's documentary evidence, that the agency filled the GS-6 Military Pay Technician position by merit promotion of an internal candidate. Accordingly, it was inappropriate for the AJ to have dismissed the appellant's VEOA claim for failure to state a claim upon which relief may be granted.

¶12 The Board's regulations provide for disposition of a VEOA claim on the merits without a hearing. 5 C.F.R. § 1208.23(b). Furthermore, the VEOA does not contain any language relating to a "hearing" comparable to the language in USERRA that the *Kirkendall* plurality relied upon to find an unconditional right to a hearing in a USERRA appeal; indeed, the word "hearing" does not appear anywhere in the VEOA. *Compare* 5 U.S.C. §§ 3330a – 3330c *with* 38 U.S.C. § 4324(c)(1). Accordingly, the Board continues to have the authority to decide a VEOA claim on the merits, without a hearing, when there is no genuine dispute of material fact and one party must prevail as a matter of law. *See Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, ¶ 11 (2001), *modified on other grounds by Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377 (2003).

¶13 Here, the parties dispute whether the agency appointed a non-preference eligible to the GS-6 Military Pay Technician position under merit promotion procedures. This dispute is material, in light of the applicable law on the

relationship between veterans' preference rules and merit promotion procedures. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (the applicable substantive law will determine which disputed facts are material). What is unclear is whether the dispute is genuine. A factual dispute is "genuine" when there is sufficient evidence supporting the contention of the party seeking an evidentiary hearing for the factfinder to resolve the dispute in that party's favor. *Anderson*, 477 U.S. at 249; *MacGlashing v. Dunlop Equipment Co.*, 89 F.3d 932, 938 (1st Cir. 1996). The appellant alleges that the agency's action was not taken under merit promotion procedures, but the agency's documentary evidence appears to show the opposite. IAF, Tab 4, Subtabs 4A, 4F.

¶14 The appellant was not put on notice of the need to show a genuine dispute of material fact in order to receive a hearing on his VEOA claim. Accordingly, on remand the AJ should afford the appellant an opportunity to show that there is a genuine dispute of material fact that requires a hearing to resolve, and then reconsider his denial of a hearing on the appellant's VEOA claim.

Alleged violation of merit system principles and prohibited personnel practices

¶15 The appellant alleged below that the agency's decision not to select him violated the merit system principles found at 5 U.S.C. § 2301(b)(1), (4), (6) & (8). IAF, Tab 1 at 3. The merit system principles are not themselves a source of Board jurisdiction, however, *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 48 (1992), nor is a non-selection an otherwise appealable action with respect to which the appellant could claim that the agency's alleged violation of merit system principles made its decision "not in accordance with law." *See* 5 U.S.C. § 7701(c)(2)(C) (an otherwise appealable action cannot be sustained if the appellant shows that it is "not in accordance with law").

¶16 The appellant also alleged below that the agency's decision not to select him was a prohibited personnel practice under 5 U.S.C. § 2302(b)(11) (prohibiting knowing violations of veteran's preference requirements) and (12)

(prohibiting actions that violate the merits systems principles). IAF, Tab 1 at 2. Absent an otherwise appealable action, however, the appellant's prohibited personnel practice claims cannot be considered. *Fogerty v. Department of the Treasury*, 53 M.S.P.R. 168, 170 (1992); *see also Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 12 (2001) (in a VEOA appeal the Board cannot consider a claim of prohibited discrimination under 5 U.S.C. § 2302(b)(1) because VEOA does not grant the Board the authority to consider claims for violations of laws other than veterans preference rules); *Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, ¶¶ 10-17 (1999) (in a pure USERRA appeal the Board cannot consider a claim of prohibited discrimination under 5 U.S.C. § 2302(b)(1) because USERRA does not grant the Board the authority to consider claims for violations of laws other than USERRA).

¶17 The exception to the rule that a prohibited personnel practice claim may be considered by the Board only if it is raised in connection with an otherwise appealable action under section 7701 is when the appellant claims retaliation for whistleblowing in violation of 5 U.S.C. § 2302(b)(8). In that event, a Board appeal may be based on any "personnel action" listed at 5 U.S.C. § 2302(a)(2)(A), not just those actions that are covered by section 7701. *See* 5 U.S.C. §§ 1214(a)(3), 1221. The AJ found that the appellant asserted a whistleblower retaliation claim, but based on our review of the record we find that the appellant did not raise such a claim in his pleadings. Furthermore, even if he did, he has abandoned such a claim because the AJ dismissed it and the appellant does not protest on review. In this connection, the appellant was informed in the initial decision that a claim of retaliation for whistleblowing could not be considered by the Board unless he first filed a retaliation complaint with the Office of Special Counsel (OSC) and exhausted OSC procedures. The AJ found that the appellant failed to show that he had exhausted OSC procedures, IAF, Tab 11 at 4-5, and the appellant does not argue otherwise on review. *Cf. Pryor v. U.S. Postal Service*, 61 M.S.P.R. 202, 206 (1994) (the AJ's error in

dismissing an appeal for lack of jurisdiction without first issuing an adequate show-cause order was not a prejudicial error requiring a remand; the initial decision put the appellant on notice of the jurisdictional elements and the appellant did not explain persuasively on review how he would have established jurisdiction below if he had been given an adequate show-cause order).[3]

ORDER

¶18 The appellant has established jurisdiction under USERRA and VEOA. He has not shown that his other claims relating to his unsuccessful application for the GS-6 Military Pay Technician position can be considered. The appeal is remanded for a hearing on the merits of the appellant's USERRA claim. On remand, the AJ should also afford the appellant an opportunity to show that there is a genuine dispute of material fact necessitating a hearing on the appellant's VEOA claim. The AJ should issue a new initial decision containing his findings and conclusions under USERRA and VEOA, and incorporating by reference the Board's findings and conclusions on the appellant's remaining claims, so that the appellant has a single appealable decision addressing all of his claims concerning his non-selection for the GS-6 Military Pay Technician position. *See Bagunas v.*

[3] The AJ misstated the test for jurisdiction under 5 U.S.C. § 1221, but he did correctly state the element of exhaustion of OSC procedures. *See* IAF, Tab 11 at 4-5; *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (the Board has jurisdiction over an appeal under 5 U.S.C. § 1221 if the appellant has exhausted his remedies before OSC and nonfrivolously alleges that he made a protected disclosure that contributed to the agency's decision to take or fail to take a personnel action).

U.S. Postal Service, 92 M.S.P.R. 5, ¶ 20 (2002); *Ryan v. Interstate Commerce Commission*, 70 M.S.P.R. 17, 20 (1996).

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.