



# VETERANS' EMPLOYMENT REDRESS LAWS IN THE FEDERAL CIVIL SERVICE



A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES  
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

NOVEMBER 2014

THE CHAIRMAN



U.S. MERIT SYSTEMS PROTECTION BOARD  
1615 M Street, NW  
Washington, DC 20419-0001

The President  
President of the Senate  
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *Veterans' Employment Redress Laws in the Federal Civil Service*. This report describes the statutes and pertinent case decisions for two laws designed to protect the employment rights of veterans in the civil service: (1) the Veterans Employment Opportunities Act of 1998 (VEOA); and (2) the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

VEOA is designed to provide a redress procedure for preference eligibles and certain veterans who believe that an agency has not treated them in accord with Federal employment laws and regulations designed to reward particular types of military service. USERRA is designed to address discrimination based on military service and to ensure service members can resume their civilian careers when their military service is completed. USERRA applies to the private sector as well as the public sector. However, this report only discusses the USERRA redress procedures used when the employer in question is the Federal government. VEOA and USERRA share some common elements, but differ in several important respects, including the steps an appellant must take before the Board will have jurisdiction over an appeal and an appellant's right to a hearing.

VEOA is particularly challenging for parties and adjudicators because of the way in which it interacts with so many other civil service laws, rules, and regulations. The manner in which the VEOA statute is structured and the statute's applicability to "any statute or regulation relating to veterans' preference" have resulted in an extensive body of case law that may be confusing for the average veteran or preference eligible. It is for Congress and the President to decide what rights a veteran, preference eligible, or service member should have. However, when enacting amendments to title 5, it may be helpful if Congress would address how it intends those changes to interact with veterans' preference rights and the ability of a veteran to obtain redress for a violation of such rights.

I believe that you will find this report useful as you consider issues affecting the Federal Government's ability to select and maintain a high-quality workforce that includes men and women who have honorably served our Nation in uniform and those who continue in uniformed service today.

Respectfully,

Susan Tsui Grundmann

# U.S. Merit Systems Protection Board

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## EXECUTIVE SUMMARY

This report describes the statutes and pertinent case decisions for two laws designed to protect the employment rights of veterans in the civil service: (1) the Veterans Employment Opportunities Act of 1998 (VEOA) (codified at 5 U.S.C. § 3330a); and (2) the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301-4335).

VEOA provides a redress procedure for preference eligibles and certain veterans who believe that an agency has not treated them in accord with Federal employment laws and regulations designed to reward particular types of military service. USERRA provides procedures to address claims of discrimination based on military service and to ensure that service members can resume their civilian careers when their military service is completed. USERRA applies to the private sector as well as the public sector. However, this report only discusses the USERRA redress procedures used when the employer in question is the Federal government.

USERRA and VEOA share some common elements but differ in several important respects. In particular, VEOA requires that, before filing an appeal with the U.S. Merit Systems Protection Board (“MSPB” or “the Board”), an appellant exhaust his or her administrative remedies with the Department of Labor (DOL) and adhere to strict deadlines in the absence of an exception known as equitable tolling. In contrast, USERRA does not require the exhaustion of administrative remedies and does not have strict deadlines for filing, although there are certain requirements if the appellant seeks the assistance of DOL. VEOA does not guarantee a right to a hearing; however, USERRA does once jurisdiction is established. Under VEOA, an appellant has the burden of proof on the merits. Under USERRA, placement of the burden of proof depends on whether the appellant alleges discrimination or a failure to reemploy. VEOA is particularly challenging for parties and adjudicators because it uses more undefined terms and

intersects with more laws and regulations than USERRA. For that reason, this report contains more discussion of VEOA than it does of USERRA.

While the information in this report should be of use to Congress, the President, appellants, and agencies, the lessons that each may draw from the facts may differ. Our major findings and recommendations are as follows:

**For Congress and the President:** The laws for veterans' redress are complicated, especially VEOA because of the way in which it interacts with so many other parts of the civil service. Vague and undefined terms in 5 U.S.C. § 3330a and the statute's applicability to "any statute or regulation relating to veterans' preference" have resulted in an extensive body of case law that may be confusing for the average veteran or preference eligible. It is for Congress and the President to decide what rights a veteran, preference eligible, or service member should have. But, individuals and the Federal Government as an employer would be well served by clarity in the laws and regulations, particularly in the VEOA statute and in any statute or regulation that intersects with it. Whenever Congress amends a section of title 5 in which veterans' preference can play a role, such as Chapter 33 (which pertains to hiring), we encourage the members to consider how such changes may interact with VEOA and ensure the statutory effect is one that Congress intends.

**For the Office of Personnel Management (OPM):** OPM has been given a complex system of civil service laws under which to operate, extensive responsibilities in that system, and limited resources to accomplish those responsibilities. Competing priorities have made it challenging for OPM to update policies and guidance to comport with changes in the law. We recommend that OPM make a greater effort to ensure that its regulations, policies, and guidance, including the *Delegated Examining Operations Handbook* and the *Vet Guide*, are regularly checked against new Acts of Congress as well as developments in Federal Circuit and Board law and are amended as

needed. To the extent that the complexities of the system permit it, OPM's guidance should be clear, unambiguous, and accurate.

**For Veterans, Preference Eligibles, and Service Members:** Appellants are responsible for meeting the requirements of the statutes, even if the statutes are complex or confusing. Appellants should pay close attention to the requirements of any redress procedures, particularly VEOA's provisions for exhausting administrative remedies and strict deadlines for filing complaints with DOL and appeals with MSPB. An understanding of managerial discretion, and when it applies, also would be helpful to individuals seeking to understand whether their rights have been violated.

**For Agencies:** It is crucial that agencies promptly give veterans, preference eligibles, and service members all of their entitlements. Not only is it the right thing to do, but, if an agency fails to do this, it will be required to reconstruct what would have occurred if the laws had been followed properly. Such reconstructions can be expensive for agencies and harmful to innocent bystanders who may need to be removed from positions through no fault of their own.



## CHAPTER ONE: INTRODUCTION

*“I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.”*

—President Franklin Delano Roosevelt<sup>1</sup>

The Board recently released a report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, which discussed the complexity of the laws and regulations pertaining to the hiring of veterans in the Federal Government.<sup>2</sup> The rules for seeking redress for the violation of such laws and regulations are also complex. This report discusses the two main types of claims an individual may assert before MSPB when seeking such redress. The first is the Veterans Employment Opportunities Act of 1998 (VEOA) (codified at 5 U.S.C. § 3330a), which provides a remedy if a Federal agency has improperly denied a veterans’ right to preference or consideration for a vacancy under a law granting such consideration.<sup>3</sup> The second is the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301-4335), which provides a remedy when an agency has discriminated on the basis of military service or refused to allow an individual to return to his or her position following such service.

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<sup>1</sup> President Franklin D. Roosevelt, Letter to Representative Ramspeck (1944) (cited in *Mitchell v. Cohen*, 333 U.S. 411, 419, n.12 (1948)).

<sup>2</sup> See U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>3</sup> The Veterans’ Benefits Improvement Act of 2004 (VBIA) (Pub.L. No. 108-454) modified 5 U.S.C. §§ 3330a and 3330b, which contain provisions initially codified by VEOA. For a discussion of the effect of the VBIA on VEOA, see *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶¶ 22-30 (2007). For convenience, the statutory provisions established directly by VEOA, or in any amendment to statutes established by VEOA, are typically referred to as VEOA.

## BACKGROUND

The history of veterans' preference in Federal hiring and retention predates the founding of the civil service in the Pendleton Act of 1883.<sup>4</sup> However, there is a difference between a right and an opportunity to seek redress of that right. In the Veterans' Preference Act of 1944 (VPA), Congress recognized that millions of Americans had delayed or put on hold their civilian careers so that they could serve the Nation in uniform. The VPA was intended to help with their readjustment, rehabilitation, and re-employment by providing a preference in Federal hiring and an avenue for redress if that preference was denied.<sup>5</sup> The primary avenues for redress today—VEOA and USERRA—have their roots in the VPA.<sup>6</sup>

The last major reorganization of Federal civil service laws was the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. The CSRA requires that the Federal Government give veterans and preference eligibles certain preferences in hiring as well as other aspects of employment such as retention in a reduction in force (RIF). As explained in our report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, defining veterans and other preference eligibles is complicated. Depending on the law or regulation at issue, whether a particular individual is a “veteran” can vary. A preference eligible can include the spouse, widow, or mother of a person who served in the military, even if the person seeking to use the preference has never served. Appendix A contains the statutory definitions for veteran, disabled veteran, and preference eligible.

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<sup>4</sup> See *Hilton v. Sullivan*, 334 U.S. 323, 336-37 (1948) (explaining the history and scope of the retention provisions for veterans).

<sup>5</sup> *Mitchell v. Cohen*, 333 U.S. 411, 418-20 (1948).

<sup>6</sup> “Veterans’ preference rights are defined by the Veterans’ Preference Act of 1944 (“VPA”), Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. §§ 2108, 3309–3320), and its attendant regulations, see 5 C.F.R. §§ 302.101–302.403 (2005).” *Patterson v. Department of the Interior*, 424 F.3d 1151, 1155 (Fed. Cir. 2005). “The legal basis for veterans’ preference is the Veterans’ Preference Act of 1944, as amended.” U.S. Office of Personnel Management, *Guide to Processing Personnel Actions*, Chapter 7-3.

In 1998, the Senate Committee on Veterans' Affairs held hearings in which it found that veterans were represented in the Federal workforce at twice the rate as the private sector and that a veteran was four times as likely as a non-veteran to be retained in a RIF.<sup>7</sup> However, the committee also determined “that while veterans as a group appear to be faring well in Federal employment, individual cases reveal that there is a pressing need for a uniform redress mechanism for the enforcement of veterans’ preference laws in both hiring and reductions-in-force decisions.”<sup>8</sup> To achieve this purpose, Congress enacted VEOA.

VEOA enables those entitled to preference to seek redress through DOL and if unsatisfied with that result, to file an appeal with MSPB.<sup>9</sup> VEOA also added a new right for veterans—with three years of service—to be considered for positions if the hiring agency accepts applicants from outside its own workforce. A violation of this right can also be redressed through a complaint to DOL and, if the appellant remains unsatisfied, a subsequent appeal to MSPB.<sup>10</sup> Chapters Two through Six will discuss VEOA redress in greater depth.<sup>11</sup>

The other avenue for redress discussed in this report is USERRA, enacted in 1994 to prevent discrimination based on military service. USERRA is different from VEOA in several ways. Most importantly, USERRA is not unique to the Federal Government; it applies to all U.S. employers. It also covers a different but overlapping population—service members—which can include those who meet the VEOA definition of “veteran,” but also covers additional individuals who have served the Nation. Unlike VEOA, USERRA

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<sup>7</sup> Veterans Employment Opportunities Act of 1998, S. Rep. 105-340, at 15 (1998) (citing testimony by the Government Accountability Office (GAO) (then called the General Accounting Office)).

<sup>8</sup> Veterans Employment Opportunities Act of 1998, S. Rep. 105-340, at 15 (1998).

<sup>9</sup> 5 U.S.C. § 3330a.

<sup>10</sup> 5 U.S.C. §§ 3304(f), 3330a.

<sup>11</sup> VEOA also added a new prohibited personnel practice (PPP), codified at 5 U.S.C. § 2302(b)(11), which prohibits an official involved in a personnel action from knowingly acting or knowingly failing to act if such action or lack of action violates a veterans’ preference requirement.

does not require that an individual first seek assistance from DOL.<sup>12</sup>

Appendix B contains a chart showing the major differences and similarities between USERRA and VEOA.

There are two main aspects to USERRA. The first is employment: An employer is prohibited from discriminating against an applicant or employee on the basis of past, current, or future military obligations.<sup>13</sup> The second is reemployment: A person who has temporarily departed employment to serve in the uniformed services has a right to return to the position he or she would have held if not for that service.<sup>14</sup> Chapters Seven and Eight will discuss USERRA in greater depth.

## SUBJECT MATTER JURISDICTION

The Board's power to adjudicate an action is restricted to matters where its jurisdiction is specifically provided by law, rule, or regulation.<sup>15</sup> This means that Congress must have granted to MSPB the authority to adjudicate the subject being placed before MSPB, or authorized an agency to create a regulation or rule that grants MSPB jurisdiction over the subject. This is known as "subject matter jurisdiction."<sup>16</sup> Without subject matter jurisdiction, there cannot be a recognizable decision on the merits of a case.<sup>17</sup> As our reviewing court has noted, "Although often effecting a seemingly harsh result, courts cannot disregard jurisdictional requirements

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<sup>12</sup> A Federal employee who believes his employer has violated USERRA may seek corrective action by filing a complaint with the Secretary of Labor through the Veterans' Employment and Training Services (VETS), or by filing an appeal directly with the Board. *Wible v. Department of the Army*, 120 M.S.P.R. 333, ¶ 12 (2013). As explained in Chapter Eight, *USERRA—Adjudicating Claims*, when a USERRA appellant opts to use the services of DOL, the individual must then exhaust that avenue for redress before filing an appeal with MSPB.

<sup>13</sup> 38 U.S.C. § 4311(a).

<sup>14</sup> 38 U.S.C. § 4313.

<sup>15</sup> *Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000); *King v. Reid*, 59 F.3d 1215, 1217 (Fed. Cir. 1995).

<sup>16</sup> *Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (citing *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686 (Fed. Cir. 1992)).

<sup>17</sup> *Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000).

established by Congress out of sympathy for particular litigants. . . . When jurisdiction is lacking, the only function remaining to the court is that of announcing the fact and dismissing the cause.”<sup>18</sup>

The issue of Board jurisdiction is always before the Board and may be raised by either party or by the Board on its own motion at any time during a Board proceeding.<sup>19</sup>

The Board has authority over a wide variety of subject matters, including but not limited to appeals of adverse actions for cause (i.e. removals, suspensions, demotions), RIFs, and retirement benefit decisions reached by OPM. The Board also has jurisdiction over individual right of action (IRA) appeals alleging retaliation for whistleblowing and appeals brought under VEOA and USERRA. Additionally, the Board has jurisdiction over complaints alleging the commission of prohibited personnel practices (PPPs) when such complaints are filed by the Office of Special Counsel (OSC).<sup>20</sup>

*Each subject matter can have a different set of criteria to establish jurisdiction, including who may file the appeal, the time limits in which to act, and any administrative remedies that must be exhausted before seeking a judgment from MSPB.*

When Congress explicitly establishes a requirement—such as filing a complaint within a certain time period—the Board generally cannot waive it.<sup>21</sup> However, where Congress is silent and the Board has the power to

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<sup>18</sup> *Chertkov v. Office of Personnel Management*, 52 F.3d 961, 966 (Fed. Cir. 1995) (internal punctuation and citations omitted).

<sup>19</sup> See, e.g., *Scott v. Department of the Air Force*, 113 M.S.P.R. 434, ¶ 5 (2010) (reopening an appeal on the Board’s own motion to dismiss the case for lack of jurisdiction). Case law refers to this type of motion as “*sua sponte*”—meaning it was done by an adjudicatory body on its own accord without a request from a party.

<sup>20</sup> For one PPP, 5 U.S.C. § 2302(b)(11), OSC does not have the authority to seek corrective action. See 5 U.S.C. § 2302(e)(2). Section 2302(b)(11) is the PPP relating to knowing violations of veterans’ preference rights. As explained in this report, individuals who believe their preference rights have been violated can seek redress under VEOA, thereby obtaining corrective action if the merits of the case are proven.

<sup>21</sup> See *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 385 (1990) (explaining that a statutory deadline cannot be waived except in rare circumstances).

establish a requirement, that requirement can be waived.<sup>22</sup> For this reason, it is important to recognize that MSPB's rules for filing one type of case (such as a VEOA appeal) can be different than the rules for another type of case (such as an appeal of a removal).<sup>23</sup> Parties must look to the rules established for their specific subject matter or risk having their case be dismissed.

Jurisdiction in VEOA and USERRA cases can be confusing because of the way in which it may be intertwined with the merits of the case. Parties may find it helpful to focus on the legal terms “nonfrivolous” and “preponderance of the evidence.” To establish MSPB's *jurisdiction* over a VEOA or USERRA claim, the appellant's allegations must be nonfrivolous.<sup>24</sup> An allegation is enough to show jurisdiction.<sup>25</sup> However, to prove the *merits* of the case the party must use evidence to prove that it is more likely than not that his or her allegations are true.<sup>26</sup> The party bearing the obligation to prove an element of the case can vary.<sup>27</sup> In a VEOA or USERRA case, the term for “winning” the case is that “relief” is granted to the appellant. Jurisdiction means the Board will be able to look at the merits to decide whether or not to grant relief—but jurisdiction alone is not a guarantee that the merits will be proven and relief granted.

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<sup>22</sup> See 5 C.F.R. § 1201.12 (explaining that the Board may revoke, amend, or waive any of its regulations and a judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation).

<sup>23</sup> Compare 5 U.S.C. § 3330a(d)(1)(B) (15 days), with 5 C.F.R. § 1201.22 (30 days).

<sup>24</sup> The Board has held that a VEOA claim should be liberally construed and an allegation, in general terms, that an appellant's veterans' preference rights were violated is sufficient to meet the requirement of a nonfrivolous allegation establishing Board jurisdiction. *Searcy v. Department of Agriculture*, 115 M.S.P.R. 260, ¶ 11 (2010); *Loggins v. U.S. Postal Service*, 112 M.S.P.R. 471, ¶ 14 (2009).

<sup>25</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012) (VEOA preference rights); *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010) (VEOA veterans' right to compete); *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 10 (2012) (USERRA rights).

<sup>26</sup> *Beyers v. Department of State*, 120 M.S.P.R. 573, ¶ 6 (2014) (VEOA); *Burroughs v. Department of the Army*, 120 M.S.P.R. 392, ¶ 5 (2013) (USERRA). The Board may consider un rebutted sworn statements as competent evidence of the matters asserted in the statement. *Melendez v. Department of Veterans Affairs*, 73 M.S.P.R. 1, 4 (1996).

<sup>27</sup> Compare *Lis v. U.S. Postal Service*, 113 M.S.P.R. 415, ¶ 11 (2010) (the appellant must prove the VEOA case), with *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (the agency has the burden of proof in a USERRA reemployment case, while there is a shifting burden for a USERRA discrimination case).

When the jurisdictional elements of a claim are intertwined with the merits of the claim and the appellant makes the requisite jurisdictional allegations, the preferred approach is for the Board to take jurisdiction and then resolve the merits.<sup>28</sup> Thus, the Board may accept a claim as nonfrivolous for purposes of jurisdiction, but then find that the merits were not proven by a preponderance of the evidence.<sup>29</sup>

A VEOA or USERRA claim may occur in a matter over which the Board has jurisdiction under a different statute. For example, the removal of an employee under 5 U.S.C. chapter 75 may be appealed to the Board. Such an action is known as an “otherwise appealable action.” If an appellant files a timely appeal of an otherwise appealable action and also raises a VEOA or USERRA claim for that appeal, the VEOA or USERRA claim will be adjudicated as an affirmative defense.<sup>30</sup>

However, if an appellant raises VEOA or USERRA as an affirmative defense in an appeal of an adverse action that is either untimely or not within the Board’s jurisdiction, the Board will consider the appellant’s allegations that an adverse action was taken in violation of USERRA or VEOA as separate claims. Thus, if a VEOA or USERRA appeal is timely but an adverse action appeal of the same personnel action is untimely, the VEOA or USERRA appeal can be adjudicated while the untimely action will be dismissed.<sup>31</sup>

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<sup>28</sup> *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 10, n.2 (2005).

<sup>29</sup> See, e.g., *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶¶ 8-9 (2006) (explaining that the Board had jurisdiction because the appellant made the required nonfrivolous allegations, but that relief must be denied because the evidence showed his preference rights were not violated).

<sup>30</sup> *Naboney v. U.S. Postal Service*, 112 M.S.P.R. 93, ¶ 16 (2009); *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006). An affirmative defense is when an employee claims that an action should not be sustained because: (1) there was a harmful error in the agency’s procedures for taking the action; (2) the decision was based on a PPP (such as whistleblower retaliation); or (3) the decision was otherwise not in accordance with the law. 5 U.S.C. § 7701(c)(2).

Affirmative defenses involving veterans’ rights are relatively rare. For example, of the 5 C.F.R. Part 752 cases closed by MSPB between FY 2008 and FY 2013, less than 2 percent involved an affirmative defense under USERRA and less than 2 percent involved an affirmative defense under VEOA.

<sup>31</sup> *Naboney v. U.S. Postal Service*, 112 M.S.P.R. 93, ¶ 16 (2009); *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006).

## PURPOSE

Under its statutory authority to conduct studies of the civil service, MSPB is authorized to conduct research and report upon laws, regulations, and Government actions that affect the health of the merit systems, and in particular upon actions that affect the extent to which the civil service is free from the commission of prohibited personnel practices.<sup>32</sup> Veterans' preference is an important part of the civil service and a knowing violation of veterans' preference is a PPP. Enabling preference eligibles to obtain redress for violations of their rights is an important mechanism to ensure lawful preference is not denied.<sup>33</sup>

We have determined that it would be helpful to Congress, agencies, stakeholders, service members, veterans, and preference eligibles if we provided a report that explained how VEOA and USERRA currently operate. Our purpose is to help those who create and amend laws understand the current state of the law; help those responsible for complying to understand their obligations; and help those who seek its protections to understand their specific rights.

In addition to its studies authority, MSPB has jurisdiction over appeals brought under both VEOA and USERRA. The Board is prohibited from issuing advisory opinions on adjudicatory matters.<sup>34</sup> For this reason, this report differs from many products issued under our studies function. We can inform readers about prior holdings by the Board and its reviewing court, the Federal Circuit. We are also permitted to discuss holdings by other courts of mandatory or persuasive jurisdiction.<sup>35</sup> However, we will not

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<sup>32</sup> 5 U.S.C. § 1204(a)(3).

<sup>33</sup> Between FY 2008 and FY 2013, the Board closed 2,766 cases involving a USERRA claim and 1,625 cases involving a VEOA claim. Of these, only 195 cases involved both a USERRA and a VEOA claim.

<sup>34</sup> 5 U.S.C. § 1204(h).

<sup>35</sup> A mandatory decision is one that is binding on the Board, such as a decision by the Federal Circuit or the Supreme Court. Decisions by other courts may inform deliberations by the Board and those decisions may be followed if the Board finds their logic persuasive. However, such holdings are not



fill in any gaps where the Board or a court has not yet interpreted the law. While we hope this report will be useful in clarifying how veterans' redress laws function, it is not a holding of the Board and we recommend that parties refer directly to the statutes, regulations, and cases applicable to their particular situations.

Unlike VEOA, which is unique to the Federal Government, USERRA applies to employers in the private sector and state governments as well as in the Federal Government.<sup>36</sup> However, the enforcement proceedings are different if the employer in question is a Federal agency.<sup>37</sup> *This report only addresses the Federal process and cases pertinent to adjudication of USERRA claims against the Federal Government as an employer.* Individuals interested in USERRA for the private sector should consult the Department of Labor's Veterans' Employment and Training Service (VETS) website at <http://www.dol.gov/vets/> or contact DOL directly.

## METHODOLOGY

This report relies primarily upon statutes, regulations, and decisions issued by the Board and the courts. Our research for this report included a request for information sent to DOL and questionnaires sent to two veterans groups. Neither DOL nor the veterans groups submitted replies. We also submitted questions to the U.S. Office of Personnel Management (OPM), which did respond. OPM reported that it did not have data indicating the most common misunderstandings that veterans or others with preference eligibility have about their rights and opted not to express an opinion on how the redress procedure laws or regulations could be improved.

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binding and the Board may hold differently if it sees fit. See *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

<sup>36</sup> 38 U.S.C. § 4303(4)-(6).

<sup>37</sup> Compare 38 U.S.C. § 4323 (private and state employers), with 38 U.S.C. § 4324 (Federal executive agencies).

## CHAPTER TWO: ESTABLISHING A VEOA CASE—OVERVIEW

VEOA provides a system of redress for two sets of situations:

1. A preference eligible (veteran or not) alleges that his or her preference under any statute or regulation relating to veterans' preference has been violated.<sup>38</sup>
2. A veteran who has been separated from the armed forces under honorable conditions after 3 years or more of active service alleges that he or she has been 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 (MPP).<sup>39</sup>

The criteria to establish that MSPB has jurisdiction over one of these two types of cases are similar, but slightly different. Parties need to identify the correct jurisdictional rule for their particular set of facts. Once jurisdiction is established, an appellant will need to prove the exact same criteria, but to a different standard. Remember, jurisdiction requires the appellant make a nonfrivolous assertion; obtaining relief (“winning” the case) requires that the appellant use evidence to prove that it is more likely than not that his or her allegations are true.<sup>40</sup>

The term “dismissal for failure to state a claim” refers to a situation in which, if every fact asserted by the appellant were true, and all reasonable

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<sup>38</sup> 5 U.S.C. § 3330a(a)(1)(A). The Board has held that 5 U.S.C. § 3330a does not define the term “relating to veterans’ preference” and that, among other things, veterans’ preference applies to section 3304(b), which requires an examination before an individual may enter the competitive service. *Dean v. Department of Agriculture*, 104 M.S.P.R. 1, ¶¶ 8-10 (2006). *See also Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 8 (2012) (holding that veterans’ preference for purposes of VEOA redress could be found in an agency regulation).

<sup>39</sup> 5 U.S.C. §§ 3330a(a)(1)(B); 3304(f)(1). A copy of a section of the VEOA redress statute is in Appendix D.

<sup>40</sup> *See Searcy v. Department of Agriculture*, 115 M.S.P.R. 260, ¶ 11 (2010) (burden for jurisdiction); *Beyers v. Department of State*, 120 M.S.P.R. 573, ¶ 6 (2014) (preponderant evidence is required to prove the merits of a VEOA claim).

inferences applied in the appellant's favor, the appellant still could not prevail as a matter of law. In other words, if the appellant could prove everything he or she asserts, but those facts could not reasonably be interpreted in a way that would constitute a violation of his or her rights as a veteran or preference eligible, then the MSPB administrative judge (AJ) can dismiss the case for a failure to state a claim for which relief could be granted.<sup>41</sup> Whether an appellant has stated a claim upon which relief may be granted goes to the sufficiency of the pleading and is a separate question from jurisdiction.<sup>42</sup>

A VEOA appellant is not automatically entitled to a hearing regarding either jurisdiction or the merits of a VEOA appeal.<sup>43</sup> The AJ may order a hearing for a VEOA case if he or she determines it is necessary to resolve issues of jurisdiction or timeliness.<sup>44</sup> However, the Board has the authority to decide the merits of a VEOA appeal without a hearing if there is no genuine dispute of material fact and one party must prevail as a matter of law.<sup>45</sup>

The jurisdictional standards for the two types of VEOA cases are as follows:

*A preference rights appeal:* To establish Board jurisdiction over a preference rights appeal brought under VEOA, an appellant must: (1) show that the appellant exhausted his or her remedies with DOL, and (2) make nonfrivolous allegations that: (i) the appellant is a preference eligible within the meaning of the VEOA; (ii) the action(s) at issue took place on or after the October 30, 1998 enactment date of the VEOA; and (iii) the agency

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<sup>41</sup> See *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶¶ 8-11 (2008); *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 6 (2005).

<sup>42</sup> See *Alford v. Department of Defense*, 113 M.S.P.R. 263, ¶¶ 11-12, 14 (2010) (holding that the AJ should not have dismissed the case for lack of jurisdiction but rather should have dismissed it for failure to state a claim for which relief may be granted).

<sup>43</sup> Compare *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to a VEOA hearing), with *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (en banc) (finding that the Board cannot exercise discretion, but rather must grant a USERRA hearing if one is requested).

<sup>44</sup> 5 C.F.R. § 1208.23.

<sup>45</sup> *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011).

violated the appellant's rights under a statute or regulation relating to veterans' preference.<sup>46</sup>

*A right to compete appeal:* To establish Board jurisdiction over a right to compete appeal brought under VEOA, an appellant must: (1) show that he or she exhausted his or her remedy with DOL, and (2) make nonfrivolous allegations that: (i) the appellant is a veteran within the meaning of 5 U.S.C. § 3304(f)(1);<sup>47</sup> (ii) the actions at issue took place on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act of 2004 (VBIA); and (iii) the agency denied him or her the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of 5 U.S.C. § 3304(f)(1).<sup>48</sup>

For both types of VEOA cases, once jurisdiction is established through a nonfrivolous claim, the appellant will be required to prove by preponderant evidence that the agency violated one or more of the appellant's statutory or regulatory veterans' preference rights.<sup>49</sup>

Because the administrative exhaustion requirement is the same for both sets of appeals, we will address it before discussing the other criteria.

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<sup>46</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012); *Campion v. Merit Systems Protection Board*, 326 F.3d 1210, 1213, 1215 (Fed. Cir. 2003). See 5 U.S.C. § 3330a.

<sup>47</sup> 5 U.S.C. § 3304(f)(1) states that if an agency uses merit promotion procedures for a vacancy and accepts applicants from outside its own workforce, the agency must also consider applications from "preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service."

<sup>48</sup> *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007).

<sup>49</sup> *Lis v. U.S. Postal Service*, 113 M.S.P.R. 415, ¶ 11 (2010).

### CHAPTER THREE: FILING VEOA COMPLAINTS AND APPEALS

The discussion in this chapter is limited to actions filed directly under the VEOA redress authority. As noted earlier, if an appellant files a timely appeal with MSPB for an otherwise appealable action (such as the removal of an employee) and also raises a VEOA claim for that appeal, the VEOA claim will be adjudicated as an affirmative defense. Appellants filing under a statutory authority other than VEOA should consult the rules and regulations that pertain to that authority.<sup>50</sup>

When filing a complaint under VEOA, an appellant must exhaust his or her administrative remedies with DOL prior to seeking redress before MSPB. “The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”<sup>51</sup> There are several reasons why the law supports this doctrine:

1. It provides an agency with “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court[.]”<sup>52</sup>
2. It promotes efficiency because “[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court.”<sup>53</sup>

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<sup>50</sup> See, e.g., *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 16 (2008) (explaining in the context of a whistleblowing appeal that exhaustion of remedies before OSC is not required to raise whistleblower retaliation as an affirmative defense in an otherwise appealable action).

<sup>51</sup> *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (internal punctuation and citations omitted).

<sup>52</sup> *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

<sup>53</sup> *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

3. If the claim is brought before MPSB or another adjudicatory body, the record created by the administrative process may be useful in those proceedings.<sup>54</sup>

## **FILING A COMPLAINT TO EXHAUST REMEDIES BEFORE DEPARTMENT OF LABOR**

The first step of the exhaustion process is for the appellant to file a written complaint with DOL containing “a summary of the allegations that form the basis for the complaint.”<sup>55</sup> Unlike some aspects of VEOA, which will be liberally construed in favor of the veteran, exhaustion has very strict rules.<sup>56</sup> A VEOA complaint must be filed with DOL within 60 days after the date of the alleged violation, unless a concept called “equitable tolling” applies.<sup>57</sup>

Equitable tolling may permit a rare exception to this deadline if: (1) the complainant has actively pursued his claim by filing a defective pleading during the statutory period; or (2) the complainant was “induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”<sup>58</sup> The Federal Circuit has held that the principles of equitable tolling apply to the deadline for filing a complaint with DOL and filing an appeal with

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<sup>54</sup> *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). In *Ngo*, the Court noted that the record created when exhausting administrative remedies may be useful for “judicial consideration.” The Board is a quasi-judicial agency operating under administrative law. However, the record established when an appellant exhausts his or her administrative remedies with DOL may be helpful to the Board when adjudicating an appeal as well as assisting its reviewing court when reviewing the Board’s decision.

<sup>55</sup> *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 9 (2011) (quoting 5 U.S.C. § 3330a(a)(2)(B); 5 C.F.R. § 1208.23(a)(4)).

<sup>56</sup> *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 10 (2011) (explaining that although the Board uses a liberal pleading standard for allegations of veterans’ preference violations in a VEOA appeal, evidence of the exhaustion requirement is mandatory under the statute and is not subject to the same liberal construction).

<sup>57</sup> 5 U.S.C. § 3330a(a)(2)(A).

<sup>58</sup> *Hayes v. Department of the Army*, 111 M.S.P.R. 41, ¶ 10 (2009) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 6 (2009). See also *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining that equitable relief is granted “sparingly” and does not apply “where the claimant failed to exercise due diligence in preserving his legal rights.”)

MSPB.<sup>59</sup> For more on equitable tolling, please see Appendix C. Absent equitable tolling, a failure to timely file a complaint with DOL will deprive MSPB of jurisdiction.<sup>60</sup>

Once the complaint is filed, DOL will investigate it.<sup>61</sup> However, the complaint must be adequately specific as to what issues are being raised. For example, in *Burroughs v. Department of the Army*, 115 M.S.P.R. 656 (2011), the appellant informed DOL that he objected to a particular vacancy announcement. However, his complaint did not make allegations that the agency had passed over him, failed to apply veterans' preference points, or denied his right to compete for the position.<sup>62</sup> When the appellant attempted to raise these three issues on appeal to MSPB, the Board held that because the appellant's complaint was not sufficient to inform DOL of his allegations, he had not exhausted the administrative remedies. Therefore, the Board lacked jurisdiction over those allegations.<sup>63</sup>

After investigation, if DOL finds that it is more likely than not that the alleged violation occurred, DOL will make "reasonable efforts" to ensure that the agency involved complies with the statute or regulation that has

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<sup>59</sup> *Kirkendall v. Department of the Army*, 479 F.3d 830, 844 (Fed. Cir. 2007) (holding that 5 U.S.C. §§ 3330a(a)(1)(A) and 3330a(d)(1)(B) are subject to equitable tolling).

<sup>60</sup> *Thompson v. Department of the Army*, 112 M.S.P.R. 153, ¶ 14 (2009) (explaining that "simply calling" DOL does not satisfy the requirement, unless DOL—through a failure to perform its obligations—caused the appellant to miss the opportunity to file in writing); 5 U.S.C. § 3330a(d)(1). See *Sears v. Department of the Navy*, 86 M.S.P.R. 76, ¶ 7 (2000) (holding that the Board cannot have jurisdiction in a VEOA case if the appellant fails to file a complaint with DOL).

<sup>61</sup> 5 U.S.C. § 3330a(b)(1). A knowing violation of veterans' preference is a PPP under 5 U.S.C. § 2302(b)(11), but OSC's authority to seek corrective action is different for (b)(11) than it is for the other PPPs. 5 U.S.C. § 2302(e)(2). Under a memorandum of understanding between OSC and DOL, "[i]f OSC receives an allegation of a violation of veterans' preference under section 2302(b)(11) of title 5, OSC will advise the complainant that it does not have the authority to seek corrective action for alleged violations of § 2302(b)(11) and will refer the individual to VETS to seek redress under VEOA." Memorandum of Understanding Between Veterans' Employment and Training Service, United States Department of Labor and the United States Office Of Special Counsel, at 3, available at [https://osc.gov/resources/osc\\_d11.pdf](https://osc.gov/resources/osc_d11.pdf).

<sup>62</sup> *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 10 (2011). Because Mr. Burroughs has multiple Board cases that are instructive, his cases in this report include the full citation in the text to distinguish between them. For an explanation of pass-over procedures, preference points, and the right to compete, please see our report *Veteran Hiring in the Civil Service: Practices and Perceptions*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>63</sup> *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 10 (2011).

been violated.<sup>64</sup> If the complaint is not resolved, DOL will provide a written notice to the complainant of the results of the investigation.<sup>65</sup>

Cases have arisen in which DOL has issued a notice that it considers the complaint satisfactorily resolved, yet the complainant is not satisfied and wishes to file an appeal with MSPB. For example, in *Gingery v. Department of the Treasury*, during DOL's investigation, the Treasury Department admitted that it had violated the appellant's veterans' preference rights by failing to grant him veterans' preference status when processing his application. The agency had not allowed the appellant to take a test that assessed skills necessary for the position to which he had applied. The Treasury Department offered to allow him to take the test, and promised that he would receive a tentative job offer if he passed. DOL considered this a satisfactory resolution—the appellant did not. The appellant filed a VEOA appeal with MSPB, and the Board held that DOL's resolution of the appellant's VEOA complaint did not divest the Board of jurisdiction over his VEOA appeal. DOL's action in closing the case served as exhaustion of the appellant's administrative remedies, but the nature of the disposition did not alter the appellant's entitlement to appeal to the Board.<sup>66</sup>

Cases have also arisen in which DOL has concluded that a complaint does not fall under its VEOA jurisdiction. The Board has held that it can find that a pre-appeal complaint process has been exhausted when an appellant has attempted to obtain a necessary determination and the agency responsible for making that determination has refused to do so. Therefore, a refusal by DOL to address an appellant's complaint allows the Board to find that the appellant has exhausted his DOL remedy.<sup>67</sup>

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<sup>64</sup> The statute instructs DOL to make its determinations based upon a preponderance of the evidence. See 5 U.S.C. § 3330a(c).

<sup>65</sup> 5 U.S.C. § 3330a(c)(2).

<sup>66</sup> *Gingery v. Department of the Treasury*, 110 M.S.P.R. 83, ¶¶ 4-8, 20 (2008).

<sup>67</sup> *Morris v. Department of the Army*, 113 M.S.P.R. 304, ¶ 10 (2010).



## CLOSING OUT THE DEPARTMENT OF LABOR COMPLAINT

Before filing an appeal with MSPB, the matter must be closed at DOL through one of two means: (1) DOL issues a notice informing the appellant that the matter is closed; or (2) the appellant notifies DOL that he or she has decided to file an appeal with MSPB (after which, DOL “shall not continue to investigate or further attempt to resolve the complaint to which the notification relates”).<sup>68</sup> Until one of these two things has happened, MSPB will not have jurisdiction over the case.<sup>69</sup>

For example, in *Burroughs v. Department of the Army*, 116 M.S.P.R. 292 (2011), the appellant filed a VEOA appeal but did not submit evidence that he had received a letter from DOL or informed DOL of his intent to file an appeal with the Board. The Clerk of the Board issued a show cause order providing the appellant with notice regarding the exhaustion issue and ordering him to file evidence and argument to show that he either received written notification of the results of DOL’s investigation or notified DOL in writing of his intention to file a Board appeal. When the appellant failed to provide this evidence and argument, the Board dismissed the appeal for a lack of jurisdiction because exhaustion of remedies at DOL is a requirement for VEOA jurisdiction to attach.<sup>70</sup>

The VEOA statute includes strict time requirements for both of these options (unless equitable tolling applies).<sup>71</sup> If DOL issues a letter, the appeal cannot be filed more than 15 days after receipt of the letter. If the appellant opts to file without the letter, the appellant cannot file “before the 61st day”

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<sup>68</sup> *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 15 (2007). The appellant must give DOL 60 days in which to attempt to resolve the complaint before the appellant may seek redress by filing an appeal with MSPB. 5 U.S.C. § 3330a(d).

<sup>69</sup> 5 U.S.C. § 3330a(d).

<sup>70</sup> *Burroughs v. Department of the Army*, 116 M.S.P.R. 292, ¶¶ 8, 10 (2011).

<sup>71</sup> *Kirkendall v. Department of the Army*, 479 F.3d 830, 843-44 (2007) (holding that 5 U.S.C. §§ 3330a(a)(1)(A) and 3330a(d)(1)(B) are subject to equitable tolling).

after the complaint was filed.<sup>72</sup> As noted before, it is very important that veterans and preference eligibles pay close attention to these requirements. The Board does not have the authority to waive a statutory deadline for “excusable neglect.”<sup>73</sup>

## FILING A COMPLAINT WITH A DISTRICT COURT

A rarely used provision of the VEOA statute permits an individual to seek redress in a United States district court.<sup>74</sup> The individual still must exhaust the administrative remedies before DOL and must file an initial appeal with MSPB.<sup>75</sup> Once that is done, a VEOA claim may be filed in district court, **provided that all of the following criteria are met:**

1. The claim cannot be filed before the 121st day after the appeal was filed with MSPB.<sup>76</sup>
2. The individual has filed a document with MSPB informing MSPB that the individual has elected to pursue relief in the district court in lieu of continuing the appeal before MSPB.<sup>77</sup>
3. MSPB has not yet issued a “judicially reviewable decision on the merits of the appeal.”<sup>78</sup>

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<sup>72</sup> 5 U.S.C. § 3330a(d).

<sup>73</sup> See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

<sup>74</sup> 5 U.S.C. § 3330b. In FY 2009-2013, only three cases were closed at MSPB as a result of notice that the appellant intended to file an appeal in a district court. We cannot know the reasoning of individual appellants, but one possible explanation why district courts are not used for more VEOA appeals may be that, by law, there is a fee to file a civil action with the district court, whereas there are no fees for filing with the Board. See 28 U.S.C. § 1914.

<sup>75</sup> See *Hill v. Potter*, 48 F. App’x 198, 199 (6th Cir. 2002); *Hunt v. Department of the Army*, 30 F. App’x 567, 568 (6th Cir. 2002); *Daniels v. Department of Veterans Affairs*, 2014 WL 1651967, at \*2 (N. Dist. Ga. 2014); *King v. Tobyhanna Army Depot*, 2013 WL 2896841, 17 (Middle Dist. Pa. 2013).

<sup>76</sup> 5 U.S.C. § 3330b.

<sup>77</sup> 5 U.S.C. § 3330b. See, e.g., *Conyers v. Rossides*, 558 F.3d 137, 149 (2nd Cir. 2009) (noting that filing notice with the Board is a prerequisite to bringing a claim under 5 U.S.C. § 3330b); *Williams v. General Services Administration*, 2011 WL 1344173, at \*6 (Middle Dist. Fl. 2011) (holding that the district court had jurisdiction because the appellant timely filed with the court after notifying the Board of its intent to do so).

A decision by MSPB is not judicially reviewable until it is a “final decision.”<sup>79</sup> A decision by an administrative judge typically becomes a final decision 35 days after it is issued unless a timely petition for review is filed with the Board.<sup>80</sup> If a petition for review is filed and denied or dismissed, the administrative judge’s decision becomes the final decision of the Board. If the petition is granted, the Board’s decision fully disposing of the matter becomes the final decision.<sup>81</sup>

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<sup>78</sup> 5 U.S.C. § 3330b.

<sup>79</sup> See *James v. Federal Energy Regulatory Commission*, 747 F.2d 1581, 1582-83 (Fed. Cir. 1984); 5 C.F.R. § 1201.113.

<sup>80</sup> 5 C.F.R. § 1201.113.

<sup>81</sup> *James v. Federal Energy Regulatory Commission*, 747 F.2d 1581, 1582-83 (Fed. Cir. 1984).

## CHAPTER FOUR: VEOA ALLEGATIONS OF A VIOLATION OF PREFERENCE RIGHTS

As noted before, in addition to the exhaustion of remedies before DOL, if an appellant is claiming a violation of his or her preference rights, the appellant must assert that: (1) the appellant is preference eligible within the meaning of the VEOA; (2) the action(s) at issue took place on or after the October 30, 1998 enactment date of the VEOA; and (3) the agency violated the appellant's rights under a statute or regulation relating to veterans' preference.<sup>82</sup> Because allegations involving actions that took place prior to 1998 are unlikely to be decided in the future due to the statutory deadlines to file, we will not discuss that portion of the jurisdictional requirement in this report. However, Appendix C discusses the rare situations in which an exception to the deadlines to file may apply due to equitable tolling.

### PREFERENCE ELIGIBLE WITHIN THE MEANING OF VEOA

When examining whether a person is a preference eligible, the Board looks at the *person*, not the *position* at issue in the case. The issue is one of “standing”—whether this is a person the law intended should be able to bring the case.<sup>83</sup> In *Wilks v. Department of the Army*, the Board held that the term “preference eligible” is defined based upon 5 U.S.C. § 2108 and that VEOA redress procedures could therefore apply to a person applying for positions in title 10 as well as title 5.<sup>84</sup> In *Willingham v. Department of the Navy*, the Board noted the possibility that an agency's regulations could potentially provide a preference that might meet the requirement that the appellant be a “preference eligible.”<sup>85</sup> The Board raised the issue, but held that it did not

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<sup>82</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012); *Campion v. Merit Systems Protection Board*, 326 F.3d 1210, 1213, 1215 (Fed. Cir. 2003). See 5 U.S.C. § 3330a.

<sup>83</sup> *Wilks v. Department of the Army*, 91 M.S.P.R. 70, ¶ 11 (2002) (describing the issue as one of standing).

<sup>84</sup> *Wilks v. Department of the Army*, 91 M.S.P.R. 70, ¶ 11 (2002). An excerpt from 5 U.S.C. § 2108 is in Appendix A. Title 5 is the section of the law that addresses the civil service and VEOA redress is in title 5. Title 10 is the section of law that addresses the Armed Forces.

<sup>85</sup> *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶¶ 7-8 (2012).

need to resolve the question of regulation-based preference because the appellant met the definition provided in 5 U.S.C. § 2108.<sup>86</sup> A copy of section 2108 is in Appendix A.

## **AGENCY VIOLATION OF RIGHTS UNDER A STATUTE OR REGULATION RELATING TO VETERANS' PREFERENCE**

### **Defining an “agency” for veterans’ preference rights cases**

The VEOA statute does not define “agency” and there is nothing in that Act’s legislative history to illuminate the meaning of that word in the context of 5 U.S.C. § 3330a.<sup>87</sup> Unlike “preference eligible”—which focuses on the person—“agency” focuses on the employer. Therefore, whether a potential employer is an “agency” is a question that must be decided on a case-by-case basis. Below we provide examples of a few such cases.

In *Willingham*, the issue was whether a preference eligible could seek redress under VEOA for non-selection by a Non-Appropriated Fund Instrumentality (NAFI) operating under the authority of the Department of the Navy. A NAFI is an organization “under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces.”<sup>88</sup> For most personnel issues, a NAFI is not managed under civil service rules. For example, NAFIs have their own set of laws for whistleblowing and for compensation for workplace injuries.<sup>89</sup> Most NAFI employees are also

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<sup>86</sup> *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 8 (2012).

<sup>87</sup> *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 10 (2012).

<sup>88</sup> 10 U.S.C. § 1587(a)(1) (describing NAFI employees). GAO has noted that there is no official definition or commonly understood opinion of what constitutes a NAFI. Government Accountability Office, GAO-08-978SP, Appropriations Law—Vol. III, Chapter 15 at 226-27 (Sept. 2008).

<sup>89</sup> Civil service employees, whether in the competitive or excepted service, are protected from reprisal for whistleblowing activities under 5 U.S.C. § 2302(a)(2)(B) and (b)(8). However, protections from whistleblowing reprisal for NAFI employees are codified at 10 U.S.C. § 1587, and the Secretary of Defense has the authority to prescribe regulations to carry out that section. 10 U.S.C. § 1587(e). With respect to workplace injuries, civil service employees are covered by the Federal Employees Compensation Act, while NAFI employees are covered by the Longshoremen’s and Harbor Workers’ Compensation Act. *Lewis v. Department of the Air Force*, 31 M.S.P.R. 328, 331 n1 (1986). Compare 5 U.S.C. § 8101(1), with 5 U.S.C. § 8171(a).

“deemed” not to be employees for the purpose of laws administered by OPM, which comprise a majority of the laws that apply to the civil service.<sup>90</sup>

However, the Board has long and consistently applied the well-established maxim that a remedial statute should be broadly construed in favor of those whom it was meant to protect, and that this principle particularly applies to statutes involving veterans’ rights and benefits. Because of the extent to which the particular NAFI in question in *Willingham* was “integrated” into the civilian personnel system, the Board held that it was an agency for the purposes of VEOA jurisdiction.<sup>91</sup>

In *Sedgwick v. World Bank*, an appellant similarly asserted that he had been denied preference rights when the employer did not apply veterans’ preference to his situation. The Board noted that neither World Bank employees nor recipients of World Bank funding are employed in the Federal civil service system. This case differed from *Willingham* because the Board held that the Bank is not a part of the United States Government, but is instead an international organization in which the United States and many other nations participate. Accordingly, it is not an “agency” under VEOA, and therefore VEOA redress procedures do not apply to its decisions.<sup>92</sup>

It is possible for an employer to be an “agency” and yet have a section of the agency not be an *employer to which VEOA applies*. For example, VEOA redress procedures apply to the Department of Homeland Security (DHS) in general.<sup>93</sup> However, as explained below, they do not apply to every segment of DHS.

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<sup>90</sup> 5 U.S.C. § 2105(c). *See generally* title 5 of the U.S. Code.

<sup>91</sup> *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶¶ 14, 18 (2012).

<sup>92</sup> *Sedgwick v. World Bank*, 106 M.S.P.R. 662, ¶ 9 (2007).

<sup>93</sup> *See, e.g., Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104, ¶¶ 5-7 (2007) (finding that VEOA applies to a DHS Federal Law Enforcement Training Center (FLETC)); *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 7 (2005) (finding jurisdiction in a VEOA appeal involving the Coast Guard).

In *Morse v. Merit Systems Protection Board*, an individual claimed that the Transportation Security Administration (TSA) within DHS violated his veterans' preference rights when it declined to waive an age restriction for an air marshal position. TSA is a unique organization in many ways, including the fact that the rules for appointments to the Federal Aviation Administration (FAA) (a part of the Department of Transportation) apply to TSA hiring.<sup>94</sup>

The court noted that 5 U.S.C. § 3312, which requires a waiver of age restrictions for preference eligibles who are able to perform the duties of a position, applies to FAA employees, and thus to TSA employees. However, it also found that “section 3300a of title 5, which provides preference eligible veterans with rights to appeal to the Board” (VEOA redress) does not apply to the FAA and therefore does not apply to TSA hiring.<sup>95</sup>

The court recognized that its holding creates a situation in which preference eligibles have a right, and yet at the same time are not provided the means to seek redress for violations of that right. The court explained that its “role is merely to interpret the language of the statute enacted by Congress” and not to judge the wisdom of the result.<sup>96</sup> This case highlights the important point that every element of jurisdiction is distinct. A situation can exist where the employer is a Federal agency for purposes of owing a preference right, yet not an agency for purposes of seeking redress of that right.

The word “agency” can be pertinent to a series of different inquiries, including whether the potential employer is one to which: (1) the *rules* for veterans' preference applies; and/or (2) the *redress procedures* for veterans' preference applies. However, for cases involving the right to compete,

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<sup>94</sup> *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1347-48 (Fed. Cir. 2010).

<sup>95</sup> *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1348-51 (Fed. Cir. 2010); *see Belhumeur v. Department of Transportation*, 104 M.S.P.R. 408, ¶ 8 (2007) (holding that the Board lacks jurisdiction over VEOA appeals from FAA employees and applicants).

<sup>96</sup> *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1351 (Fed. Cir. 2010) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002)).

discussed in Chapter Five, the question of what constitutes an “agency” is an even more complicated issue because in addition to the questions of whether VEOA rights and redress procedures apply to the potential employer, how the agency’s “own workforce” is defined can determine whether there is a right to be considered for a specific vacancy. Chapter Five will discuss what it means to be an agency in that context.

### **Violation of rights under a statute or regulation relating to veterans’ preference and hiring**

When examining allegations of a veterans’ preference violation, it is necessary to determine whether preference applies to the particular situation in question and if so, what type of preference is due. It is possible for an employer to be covered by VEOA redress procedures, but for the *position* in question to not carry a veterans’ preference requirement.

Earlier, we explained that the type of appointment authority was not pertinent to the question of whether the individual was a preference eligible.<sup>97</sup> Similarly, whether the *person* has preference is a separate question from whether the *position* is one to which preference applies.<sup>98</sup> Parties must look to the section of the jurisdictional test they are seeking to establish when applying case law.

As we discussed in our recent report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, there can be large sections of Federal agencies or specific positions that are exempt from the rules for veterans’ preference.<sup>99</sup> Below we offer examples of each.

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<sup>97</sup> See *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 8 (2012); *Wilks v. Department of the Army*, 91 M.S.P.R. 70, ¶ 11 (2002).

<sup>98</sup> The position need not be permanent for the right to compete to apply. In *Modeste v. Department of Veterans Affairs*, 121 M.S.P.R. 254, ¶¶ 7-12 (2014), the Board held the statute clearly provides a preference eligible or veteran with the right to compete for vacant positions without qualification as to the duration of those positions.

<sup>99</sup> See U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at [www.mspb.gov/studies](http://www.mspb.gov/studies).



There is no question that the Department of Veterans Affairs (DVA) is an agency for purposes of VEOA redress.<sup>100</sup> However, that does not mean that all veterans' preference statutes and regulations apply to all of DVA. In *Scarnati v. Department of Veterans Affairs*, the position at issue was in the Veterans Health Administration (VHA), an entity within DVA. The court held that VHA has discretionary authority to appoint health care personnel under 38 U.S.C. § 7401(1) without regard to civil service requirements. Because there is no veterans' preference right applicable to 38 U.S.C. § 7401(1) hiring, a VEOA appeal "for an alleged violation of veterans' preference rights is not available to those applying for § 7401(1) positions."<sup>101</sup> In other words, if there is no right to be violated, there can be no appeal of a violation of that right. Therefore, to determine whether VEOA jurisdiction applies to a veterans' preference claim against DVA, it is necessary to determine whether the position's appointment authority is in title 5 or title 38.<sup>102</sup>

Similarly, in *Vores v. Department of the Army*, the Board received a VEOA appeal for an alleged violation of preference rights and the medical position in question was one for which the appointment authority was located in title 38. The Board compared the facts in *Vores* with those in *Scarnati* and noted that the agency in this case was the Department of the Army rather than the Department of Veterans Affairs, and that a different section of title 38 was used in *Vores*. However, because the sections of title 38 used to appoint individuals to the medical positions were "identical in substance"

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<sup>100</sup> See, e.g., *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012) (explaining in a VEOA preference rights appeal that the only issue in dispute was whether DVA's actions violated a statute or regulation related to veterans' preference); *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322, ¶ 9 (2005) (finding in a VEOA appeal "that the agency violated the appellant's rights under a statute relating to veterans' preference").

<sup>101</sup> *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246, 1249 (Fed. Cir. 2003).

<sup>102</sup> Earlier, we explained that the type of appointment authority was not pertinent to whether the individual had preference. See *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 8 (2012); *Wilks v. Department of the Army*, 91 M.S.P.R. 70, ¶ 11 (2002). However, whether the person has preference is a separate question from whether the position is one to which preference applies.

the Board held that preference did not apply to the Army position, and thus the Board lacked VEOA jurisdiction.<sup>103</sup>

Throughout the civil service, certain occupations in title 5 of the U.S Code (such as chaplains or attorneys) are excepted from the rules for competitive examining.<sup>104</sup> When a position in the title 5 excepted service is excepted due to the difficulties inherent in examining for it, agencies must follow the principle of veterans' preference to the extent that it is "administratively feasible."<sup>105</sup> In *Jarrard v. Department of Justice*, the Federal Circuit held that because of the nature of attorney hiring, an agency was not obligated to consult OPM before passing over a veteran for a non-veteran when hiring attorneys, because it was not administratively feasible.<sup>106</sup>

However, most of the other positions in the excepted service will follow different rules for the application of veterans' preference.<sup>107</sup> For example, when numerical scores are assigned in excepted service examining, then 5- or 10-points may be added, as under competitive examining.<sup>108</sup> As explained in our recent report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, OPM's regulations contain instructions for several different ways in which

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<sup>103</sup> *Vores v. Department of the Army*, 109 M.S.P.R. 191, ¶¶ 22–23 (2008).

<sup>104</sup> 5 C.F.R. § 213.3102.

<sup>105</sup> *Jarrard v. Department of Justice*, 669 F.3d 1320, 1323 (Fed. Cir. 2012). See 5 C.F.R. § 302.101(c) (when a position is in the excepted service, "each agency shall follow the principle of veteran preference as far as administratively feasible"); see also 5 U.S.C. § 3320 (selection "for appointment to each vacancy in the excepted service in the executive branch" shall be "from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308–3318 of this title").

<sup>106</sup> *Jarrard v. Department of Justice*, 669 F.3d 1320, 1324–26 (Fed. Cir. 2012). See also *Asatov v. Agency for International Development*, 119 M.S.P.R. 692, ¶¶ 8–9 (2013) (holding that the position of Foreign Service Junior Executive Officer is covered by 22 U.S.C. § 3941, which is outside the title 5 competitive service rules, and therefore only requires that an agency use veterans' preference as "an affirmative factor" in selection).

<sup>107</sup> See, e.g., *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶¶ 8–9 (2004) (explaining veterans' preference ranking order under the Veterans Recruitment Appointment (VRA) authority); 38 U.S.C. § 4214(b)(1)(C) (granting a preference in VRA appointments to veterans entitled to disability compensation); 5 U.S.C. § 3320 ("The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch and in the government of the District of Columbia from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308–3318 of this title.") See also 5 C.F.R. Part 302 (containing rules for veterans' preference in the excepted service).

<sup>108</sup> 5 C.F.R. § 302.201.

the referral list may then be ordered.<sup>109</sup> To determine whether a preference right has been violated, it first will be necessary to determine what preference was owed. Parties interested in excepted service positions should be aware that preference can take a variety of forms in the excepted service.

Because VEOA redress applies to any statute or regulation relating to veterans' preference, and veterans' preference permeates a large section of civil service laws and regulations, VEOA appeals can result in litigation in unexpected matters, such as the validity of hiring authorities where the use of one authority may have implications for the disuse of another authority where preference operates.<sup>110</sup>

In *Dean v. Department of Agriculture*, the appellant filed an appeal under VEOA challenging the agency's decision to hire a non-veteran under the Outstanding Scholar hiring authority (a noncompetitive hiring authority in the competitive service) instead of selecting the veteran from a competitive examining certificate where preference applied. In order to determine whether the appellant's rights were violated, the Board examined the validity of the authority that had been used. The Board held that the Outstanding Scholar hiring authority was not valid because the President had not prescribed a rule authorizing Outstanding Scholar to function as an exception to competitive examining nor had he authorized OPM to create such a rule. As a result, the appellant's preference rights had been violated.<sup>111</sup>

In *Dean v. Office of Personnel Management*, the same preference eligible veteran challenged an excepted service hiring authority, the Federal Career Intern Program (FCIP), on the basis that FCIP violated his preference rights. The

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<sup>109</sup> 5 C.F.R. § 302.304.

<sup>110</sup> An agency may choose from among different valid hiring authorities, even if that choice happens to be less beneficial for veterans. See *Joseph v. Federal Trade Commission*, 505 F.3d 1380, 1384-85 (Fed. Cir. 2007) (explaining that an agency did not violate veterans' preference when it used parallel procedures and opted to select from the merit promotion list rather than appoint a veteran from the competitive examining certificate).

<sup>111</sup> *Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶¶ 2, 8, 22, 31-33, 38 (2005).

Board held that FCIP was not valid because it: (1) was inconsistent with the civil service rules that govern placement of positions in the excepted service; and (2) did not require the justification of placement of positions in the excepted service as mandated by statute.<sup>112</sup> The jurisdiction under which the Board reached these conclusions was Mr. Dean's VEOA right to appeal a violation of his preference rights.<sup>113</sup>

### **Violation of rights under a statute or regulation relating to veterans' preference and reductions in force**

When VEOA was enacted, it was clear that Congress intended for the redress procedure to apply to both recruitment actions and RIFs.<sup>114</sup> The Board has found that it has jurisdiction over RIF-related VEOA claims. For example, in *Buckheit v. U.S. Postal Service*, the appellant was a preference eligible who asserted in a VEOA claim that the agency had violated his rights in a RIF by retaining non-preference eligibles while reassigning him. The appellant exhausted his remedies before DOL and filed a VEOA appeal with the Board.<sup>115</sup>

The Board noted that 5 C.F.R. part 351 contains the procedures for RIFs, and that an employee's rights under this part are based in part on whether the employee is a preference eligible. The Board held that a violation of those regulations may therefore constitute a violation of a regulatory provision relating to veterans' preference. Because the appellant was a preference eligible who exhausted his remedies before DOL and made a nonfrivolous claim that the agency violated his preference rights in a RIF, the Board had jurisdiction over his VEOA appeal. However, on the merits, the Board found that the appellant failed to show that he was denied any

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<sup>112</sup> *Dean v. Office of Personnel Management*, 115 M.S.P.R. 157, ¶ 22 (2010).

<sup>113</sup> *Dean v. Office of Personnel Management*, 115 M.S.P.R. 157, ¶¶ 13, 25 (2010).

<sup>114</sup> See Veterans Employment Opportunities Act of 1998, S. Rep. 105-340, at 15 (1998) (stating that, "while veterans as a group appear to be faring well in Federal employment, individual cases reveal that there is a pressing need for a uniform redress mechanism for the enforcement of veterans' preference laws in both hiring and reductions-in-force decisions").

<sup>115</sup> *Buckheit v. U.S. Postal Service*, 107 M.S.P.R. 52, ¶¶ 5, 10 (2007).

preference-related rights to which he was entitled under part 351 and therefore denied his requested relief.<sup>116</sup>

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<sup>116</sup> *Buckheit v. U.S. Postal Service*, 107 M.S.P.R. 52, ¶¶ 11-13, 15 (2007). *See also Burger v. U.S. Postal Service*, 88 M.S.P.R. 579, ¶ 12 (2001) (noting that an appellant had raised assertions related to a RIF for which the Board could potentially have VEOA jurisdiction and ordering the AJ to determine if a VEOA claim had been asserted).

## CHAPTER FIVE: VEOA ALLEGATIONS OF A VIOLATION OF THE RIGHT TO COMPETE

To establish Board jurisdiction over a right to compete appeal brought under VEOA, an appellant must exhaust his or her administrative remedies before DOL and make nonfrivolous allegations that: (1) the appellant is a veteran within the meaning of 5 U.S.C. § 3304(f)(1);<sup>117</sup> (2) the actions at issue took place on or after the December 10, 2004 enactment date of the VBIA; and (3) the agency denied him or her the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of 5 U.S.C. § 3304(f)(1).<sup>118</sup> Again, to obtain relief, the same elements must be proven by preponderant evidence.

Because allegations involving actions that took place prior to 2004 are unlikely to be decided in the future due to the statutory deadlines to file, we will not discuss that portion of the jurisdictional requirement in this report. However, Appendix C discusses the rare situations in which an exception to the deadlines to file may apply due to equitable tolling.

### A VETERAN WITHIN THE MEANING OF 5 U.S.C. § 3304(f)(1)

A veteran described in section 3304(f)(1) is a person who has been separated from the armed forces under honorable conditions after 3 years or more of active service.<sup>119</sup> Such individuals “may not be denied the opportunity to compete for vacant positions for which the agency making the

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<sup>117</sup> 5 U.S.C. § 3304(f)(1) is a law that states that if an agency uses merit promotion procedures for a vacancy, and accepts applicants from outside its own workforce, then the agency must also consider applications from “preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service.”

<sup>118</sup> *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007).

<sup>119</sup> *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 22 (2007).

announcement will accept applications from individuals outside its own workforce under merit promotion procedures.”<sup>120</sup>

Preference eligibles are also entitled to compete for such positions under section 3304(f)(1).<sup>121</sup> Being a veteran and being preference eligible are two separate things, which can, but need not, overlap for the right to compete to apply.<sup>122</sup> The ability to seek redress for a violation of the right to compete under section 3304(f)(1) also applies to both groups. The Board has held that section 3304(f)(1) “stands in some relation to, has a bearing on, concerns, and has a connection with veterans’ preference rights” and is, therefore, a statute “relating to veterans’ preference” for which VEOA provides a remedy.<sup>123</sup> Therefore, even if a preference eligible does not meet the definition of veteran under section 3304(f) (such as a service member who served less than 3 years but earned preference in that period or a relative with derived preference),<sup>124</sup> relief may be granted under the provisions discussed in Chapter Four, involving allegations of a violation of veterans’ preference rights.

## **AGENCY DENIAL OF THE RIGHT TO COMPETE UNDER 5 U.S.C. § 3304(f)(1)**

Section 3304 provides for the right to compete for veterans and preference eligibles, but the circumstances under which that section gives a right to compete are limited. There must be one or more “vacant positions for

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<sup>120</sup> 5 U.S.C. § 3304(f)(1).

<sup>121</sup> 5 U.S.C. § 3304(f)(1).

<sup>122</sup> See, e.g., *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 5 n.1 (2013) (explaining that although the appellant may not be preference eligible because he retired at the rank of Major, see 5 U.S.C. § 2108(4)(B), he is nevertheless covered as a “veteran” because he separated from the armed forces under honorable conditions after 3 years or more of active service).

<sup>123</sup> *Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 16 (2006).

<sup>124</sup> Preference may be granted “to the widow/widower or mother of a deceased veteran or to the spouse or mother of a disabled veteran. It is called ‘derived preference’ because it is derived from the military service of someone else—a veteran who is not using it for preference. When the disabled veteran does use the service for preference, then the spouse or mother is no longer entitled to preference.” OPM’s *Guide to Processing Personnel Actions*, Glossary, at 35-10.

which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.”<sup>125</sup>

As noted earlier, for most claims of a violation of a veterans’ preference right, the jurisdictional question is whether an agency is an employer covered by the statute. For such cases, it does not matter whether the Department of the Army and the Department of the Navy are part of the same agency—only that the hiring agency is covered by the statute. However, for cases involving the right to compete under section 3304(f)(1), the adjudicator must determine: (1) if the hiring entity is an agency covered by the VEOA statute for redress; and (2) if the agency is accepting applications under merit promotion procedures from outside its own workforce.<sup>126</sup> It is the acceptance of such applications that triggers the right to consideration and thus MPSB jurisdiction over claims that the right was violated.<sup>127</sup> Therefore, the definition of the “agency workforce” is critical to the question of whether the right to be considered for the vacancy applies to the situation at issue.

### **Defining “outside its own workforce” for right to compete cases**

To determine if applications are being accepted from outside the workforce, the adjudicator must determine the borders of the agency; only then can he or she determine if applications are being accepted from individuals outside those borders.

For most agencies it is fairly simple to identify the borders of an agency, which means there has not been an opportunity for the Board to address the specific borders of every agency for purposes of VEOA. However, the issue

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<sup>125</sup> 5 U.S.C. § 3304(f)(1).

<sup>126</sup> *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶¶ 12-13 (2006).

<sup>127</sup> A case may potentially be made that an agency has violated the section 3304(f)(1) right to compete if the agency is required to accept applications under merit promotion procedures but has circumvented that requirement, thereby circumventing the requirement to consider certain veterans and preference eligibles with those merit promotion candidates. *See Morris v. Department of the Army*, 113 M.S.P.R. 304, ¶¶ 15-18 (2010) (remanding a case to determine whether the agency was required to use merit promotion procedures to fill a job for which it used the VRA hiring authority).



of defining agencies within the Department of Defense (DoD) has arisen in several cases and requires special treatment.

In most cases, “agency” means the parent agency. The example that OPM uses in its *Vet Guide* to describe this concept is that the Internal Revenue Service (IRS) is a part of Department of the Treasury, and therefore the agency for purposes of defining the workforce is the Department of the Treasury. Thus, according to OPM, an IRS office could open a vacancy to employees of both IRS and the Bureau of the Public Debt without moving beyond the agency’s workforce.<sup>128</sup>

However, the guidance in the *Vet Guide* becomes a problem when looking at DoD. DoD—and only DoD—has specific case law that states it is not a single agency for purposes of VEOA.<sup>129</sup> (OPM has requested that the Board reconsider its decision in the most recent case on this issue, *Vassallo v. Department of Defense*, 121 M.S.P.R. 70 (2014). The Board has yet to reach a decision in that case. The paragraphs below explain the current state of the law, which may be subject to modifications as case law evolves.)

In *Washburn v. Department of the Air Force*, there was a vacancy in the United States Strategic Command (STRATCOM), a DoD “unified combatant command” that includes elements of the Air Force, Army, and Navy (including the Marine Corps). The agency opened the vacancy to employees of the Air Force and individuals eligible to transfer from other DoD components, such as the Army, Navy, and Defense Finance and Accounting Services (DFAS). The question before the Board was whether this area of

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<sup>128</sup> U.S. Office of Personnel Management, *Vet Guide*, available at <http://www.opm.gov/policy-data-oversight/veterans-services/vet-guide/>.

<sup>129</sup> The Board has held that the different components of DoD constitute separate agencies for other purposes as well, such as the requirement that a probationary period be completed in the same agency. See *Francis v. Department of the Navy*, 53 M.S.P.R. 545, 551 (1992) (holding that civilian service in the Department of the Army cannot be credited towards completing a probationary period in the Department of the Navy). The Federal Circuit explicitly endorsed this finding in *Pervez v. Department of the Navy*, 193 F.3d 1371, 1373-74 (Fed. Cir. 1999), in which it cited *Francis* when holding that the fact that Army and Navy “also are part of the Department of Defense is not inconsistent with their treatment as separate agencies for personnel purposes”).

consideration meant that the employer was accepting applications from outside its workforce.<sup>130</sup>

The Board concluded that the employing agency was the Air Force, based upon: (1) the extensive history of how DoD was formed in 1949 out of separate agencies; (2) prior holdings outside the VEOA context in which the Board and the Federal Circuit held that DoD's components were separate agencies; (3) the extent to which OPM's regulations defining an agency for "general purposes of recruitment, selection, and placement" distinguished between the military departments; and (4) the agency's own references to the employing agency as "the Department of the Air Force." The Board concluded that by including employees from outside Air Force in its announcement, the agency had created the obligation to consider applications from veterans under 5 U.S.C. § 3304(f).<sup>131</sup>

This holding was reinforced in the Board's decision in *Vassallo v. Department of Defense*, which specifically addressed the question of OPM guidance on VEOA. In *Vassallo*, the Defense Contract Management Agency (DCMA) announced that a position was open to "current DCMA employees" and "current Department of Defense employees with the Acquisition, Technology, and Logistics Workforce who are outside the Military Components." The question before the Board was whether the inclusion of the individuals from within DoD but outside of DCMA meant that the recruiting office was accepting applications from outside its own workforce.<sup>132</sup>

The Board noted that OPM, in its *Vet Guide*, asserted that DoD was the parent agency for purposes of VEOA, and that if OPM's guidance was correct, then the recruiting office had not moved beyond the agency's workforce. However, the Board found that OPM's *Vet Guide* was not

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<sup>130</sup> *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 6 (2013).

<sup>131</sup> *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶¶ 7-11 (2013).

<sup>132</sup> *Vassallo v. Department of Defense*, 121 M.S.P.R. 70, ¶¶ 2-6 (2014).

persuasive and reiterated its holding from *Washburn* that the separate components within DOD are different agencies for purposes of the right to compete under VEOA.<sup>133</sup>

### What it means to be allowed to “compete”

Being allowed to compete is not the same thing as being selected. Rather, VEOA entitles a preference eligible to have all of his or her experience considered, including work of a similar nature that was performed in the military as well as any related volunteer work.<sup>134</sup> However, “VEOA does not enable veterans to be considered for positions for which they are not qualified.”<sup>135</sup> The same minimum qualification requirements used for MPP candidates apply to VEOA applicants.<sup>136</sup>

This includes the requirement that an individual meet certain criteria known as a “positive education requirement.” The education requirement is often a certain number of credits in a field or a certain degree.<sup>137</sup> However, OPM guidance specifically recognizes that,

on rare occasions there may be applicants who may not meet exactly the educational requirements for a particular series, but who, in fact, may be demonstrably well qualified to perform the work in that series because of exceptional experience or a combination of education and experience. In such instances, a

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<sup>133</sup> *Vassallo v. Department of Defense*, 121 M.S.P.R. 70, ¶¶ 7-11 (2014).

<sup>134</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1318-19 (Fed. Cir. 2012); 5 U.S.C. § 3311; 5 C.F.R. § 302.302(d). The Board has not yet had occasion to look at the question of consideration of a non-preference eligible’s complete background.

<sup>135</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012).

<sup>136</sup> See *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 13 (2011) (holding that OPM’s minimum educational requirements for “scientific, technical, or professional” positions apply to VEOA applicants); *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98, ¶ 9 (2000) (holding that VEOA did not exempt covered veterans from meeting minimum qualification standards in order to compete for vacant positions under merit promotion procedures).

<sup>137</sup> See U.S. Office of Personnel Management, General Schedule Qualification Standards, available at <http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Group-Standards> (explaining that to qualify for a professional or scientific position, the individual typically must have a 4-year degree or a “core of educational credit” such as 24 semester hours in the field). See also U.S. Office of Personnel Management, Classification Appeal Decision No. C-1910-12-01, Dec. 28, 2000, at 1 (explaining the positive education requirement).

more comprehensive evaluation must be made of the applicant's entire background, with full consideration given to both education and experience.<sup>138</sup>

In *Miller v. Federal Deposit Insurance Corporation*, the appellant, a preference eligible, applied for a position that had a positive education requirement. The appellant possessed a Ph.D. in economics, but did not have the required 24 credit hours in education or another field appropriate to the position.<sup>139</sup>

The appellant asserted that while he “may not meet the exact educational requirement for the particular series,” he felt that his experience compensated for that lack, as permitted by OPM's policy. However, the agency concluded that he was not qualified.<sup>140</sup>

On appeal, the AJ determined that the agency had properly considered the appellant's education and experience, and denied the appellant's request for relief on those grounds. On petition for review, the appellant asserted that as a preference eligible, he was entitled to have the Board review the quality of the agency's assessment of his background.<sup>141</sup>

The Board held that, “although a preference-eligible is entitled to have a broad range of experiences considered by the agency in reviewing his application for a position, how the agency adjudges and weighs those experiences is beyond the purview of the Board's review in a VEOA appeal.” In other words, the Board only reviews whether the agency met its obligation to *consider* the appellant's background, but it has no role in assessing the *conclusions* reached by the agency as a result of that consideration.<sup>142</sup>

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<sup>138</sup> U.S. Office of Personnel Management, General Schedule Qualification Policies, available at <http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=General-Policies>.

<sup>139</sup> *Miller v. Federal Deposit Insurance Corporation*, 121 M.S.P.R. 88, ¶¶ 2-3 (2014).

<sup>140</sup> *Miller v. Federal Deposit Insurance Corporation*, 121 M.S.P.R. 88, ¶¶ 2-3 (2014).

<sup>141</sup> *Miller v. Federal Deposit Insurance Corporation*, 121 M.S.P.R. 88, ¶¶ 4-5 (2014).

<sup>142</sup> *Miller v. Federal Deposit Insurance Corporation*, 121 M.S.P.R. 88, ¶ 9 (2014).

Other requirements may also be placed on all applicants, including VEOA applicants. For example, in *Clarke v. Department of the Navy*, the agency announced a vacancy that included, as a selective factor,<sup>143</sup> that:

[C]andidates must have a minimum of two years of demonstrated professional experience in some combination of selecting, organizing, and providing access to rare books and other special collections materials in an academic or research library. If such experience was gained as part of a set of more diverse responsibilities, the amount of such special collections experience must have cumulated to the equivalent of at least two years of full-time special collections work.<sup>144</sup>

The appellant, a veteran with preference, had more than 20 years of experience working with rare materials, items, and artifacts. However, nothing in his application package indicated that his work cumulated to the equivalent of at least two years of full-time special collections work. The Board determined that the agency had assessed the appellant's background and permitted him to compete, then upheld the agency's decision not to appoint the appellant because he did not have the selective factor.<sup>145</sup>

In *Dale v. Department of Veterans Affairs*, the agency announced a position at both the GS-04 and GS-05 levels. The appellant was referred for the GS-04 position, but not the GS-05. The agency hired a candidate from the GS-05 referral list. On appeal, the appellant did not dispute his lack of qualifications at the GS-05 level, but he asserted that the agency should be required to hire him at the GS-04 level and then train him to become qualified as a GS-05. The Board held that the appellant was only entitled to be considered for the positions for which he qualified, and that the agency

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<sup>143</sup> Selective factors are knowledge, skills, abilities, or special qualifications that are required of candidates, in addition to the minimum requirements in an OPM qualification standard, but are determined to be essential to perform the duties and responsibilities of a particular position. See U.S. Merit Systems Protection Board, *Issues of Merit*, "Selecting with Selective Factors" (Jan. 2008), available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>144</sup> *Clarke v. Department of the Navy*, 94 M.S.P.R. 604, ¶ 8 (2003).

<sup>145</sup> *Clarke v. Department of the Navy*, 94 M.S.P.R. 604, ¶¶ 8-9 (2003). See also *Beyers v. Department of State*, 120 M.S.P.R. 573 ¶ 9 (2014) (explaining in a denial of preference rights case that because the appellant failed a suitability determination, and suitability was a requirement of the position, the agency did not err in withdrawing a tentative job offer.)

met its obligation to give that consideration when it *referred* him at the GS-04 level. The agency was under no obligation to *select* the appellant from the GS-04 list.<sup>146</sup>

As explained in the examples below, in addition to job-related experience, some—but not all—other requirements placed upon MPP candidates can also apply to VEOA applicants.

In *Montee v. Department of the Army*, the area of consideration was all U.S. citizens except those “ordinarily resident” in the United Kingdom (U.K.), where the position in question was located. The agency determined that because the appellant, a preference eligible, was ordinarily resident in the U.K., he could not be considered for the position. The agency explained that the status of forces agreement between the United States and the U.K. prohibited the appointment of such individuals.<sup>147</sup> The Board held that the agency’s determination was supported by the evidence. If the appellant was “ordinarily resident” in the U.K., then he was not qualified for the position and therefore not entitled to VEOA consideration.<sup>148</sup>

In contrast, in *Jolley v. Department of Homeland Security*, the agency opened its area of consideration to individuals working at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, regardless of the employing agency. The appellant was employed in Jacksonville, Florida, but applied for the position. The appellant was not referred because he was not in the geographic area of consideration. After an extensive discussion of OPM’s *Vet Guide* and its guidance on areas of consideration, the Board held that OPM’s guidance could not be interpreted to permit excluding veterans from consideration under 5 U.S.C. § 3304(f) based on an area of consideration’s

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<sup>146</sup> *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶¶ 11-13 (2006).

<sup>147</sup> *Montee v. Department of the Army*, 110 M.S.P.R. 271, ¶¶ 6, 10 (2008). The Board remanded the case to the field office for the AJ to determine if the appellant was in fact “ordinarily resident.”

<sup>148</sup> *Montee v. Department of the Army*, 110 M.S.P.R. 271, ¶ 10 (2008).

physical restrictions because it would render meaningless the statutory guarantee of consideration.<sup>149</sup>

The lesson to draw from a comparison of *Montee* and *Jolley* is that when an agency seeks to limit the area of consideration in a manner that would exclude candidates who apply under section 3304(f), the type of authority used to create that limit will determine whether section 3304(f) can be overridden.

When an agency assesses a candidate who is a veteran or preference eligible, it is appropriate for the agency to evaluate the individual's past conduct and performance, just as it would for any other candidate.<sup>150</sup> In *Harellson v. U.S. Postal Service*, the appellant was a veteran who had worked for the agency previously and sought reinstatement. The appellant submitted an application for a position and management asked a subject matter expert to assess the appellant's qualifications. The expert determined that there were "problems with the appellant's past performance." The agency then opted to select internal candidates.<sup>151</sup>

On appeal, the Board determined that if the evidence was sufficient to establish that the agency had accepted the application of the appellant, an outside candidate, then it would also establish that the appellant, as a preference eligible, was entitled under section 3304(f) to compete for the position in question.<sup>152</sup> However, the Board found that it was not necessary to determine whether the evidence was sufficient to establish that his application had been accepted, because in assessing the appellant and

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<sup>149</sup> *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104, ¶¶ 2, 7-8, 12-16, n.2 (2007).

<sup>150</sup> See, e.g., U.S. Office of Personnel Management, *Delegated Examining Operations Handbook*, at 160 (stating that a "selecting official may object to an eligible on the basis of negligence or misconduct in previous service/employment with the same or another agency/employer.")

<sup>151</sup> *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶¶ 2, 9-10 (2010).

<sup>152</sup> *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶ 11 (2010).

concluding that there was a history of performance problems, the agency had met the full scope of a section 3304(f) obligation to consider the appellant.<sup>153</sup>

The Board noted that when the right to compete under section 3304(f) requires an agency to consider an application, the agency is not precluded from eliminating a veteran or a preference eligible from further consideration for a position based on his or her qualifications for the position. As the appellant was requesting reinstatement in a position he had previously held, the decision appears to imply that the quality of past performance may be considered a measure of qualifications.<sup>154</sup>

Similarly, in *Smyth v. U.S. Postal Service*, an appellant was removed from further consideration for a position based upon a work history that included a 5-day suspension for irregular attendance, two deferments of periodic step increases, and two letters of warning related to attendance. The appellant asserted that he had been denied the consideration owed to him. However, the Board held that:

The appellant has identified no VEOA provision or any other statute or regulation which precluded the agency from finding that he was disqualified from further consideration for the Rural Carrier position because of his prior work history, and we are not aware of any such statute or regulation. Thus, the AJ properly found that the agency's disqualification of the appellant on this basis did not deny him his rights under the VEOA.<sup>155</sup>

The right to compete under 5 U.S.C. § 3304(f) is statutory, and therefore cannot be superseded by Governmentwide or agency regulations. In *Shapley v. Department of Homeland Security*, the agency announced that it would accept applications from all U.S. citizens for a position as a Bridge Program Administrator. The appellant, a preference eligible, applied for the position, and his name was placed on a referral list, but that list was never given to

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<sup>153</sup> *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶ 11 (2010).

<sup>154</sup> *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶¶ 2, 10-11 (2010).

<sup>155</sup> *Smyth v. U.S. Postal Service*, 89 M.S.P.R. 219, ¶¶ 3, 7 (2001).



the selecting official. Instead, the selecting official was given a list containing the names of two priority consideration candidates and was told that he must make a decision on those candidates before he would be given a list of other candidates.<sup>156</sup>

Priority consideration is permissible under a variety of circumstances, which can be authorized by statute, regulation, or case law.<sup>157</sup> In *Shapley*, the priority candidates were given that status because the agency had improperly denied them consideration for a position on a previous occasion. The Board noted that priority consideration for future vacancies may generally be the proper remedy for individuals who were denied consideration for a position for which they were qualified due to an invalid employment practice and that the agency's actions appeared to comport with OPM's guidance for such situations. However, the Board held that OPM's guidance could not take precedence over a statute, such as 5 U.S.C. § 3304(f). Therefore, when the agency determined that the appellant was qualified to be referred (by placing his name on a referral list) and yet did not refer him to the selecting official, it denied him the opportunity to compete guaranteed by section 3304(f).<sup>158</sup> Although it has been six years since the decision in *Shapley*, OPM's *Delegated Examining Operations Handbook* has not yet been updated to comport with *Shapley*.<sup>159</sup>

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<sup>156</sup> *Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶¶ 3, 8, 10-11 (2008).

<sup>157</sup> For example, when an employee fully recovers from an injury after more than one year from the date of commencement of compensation, the employing agency must make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position. See *Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 13 (2006); 5 U.S.C. § 8151(b)(2); 5 C.F.R. § 353.301(b). In another context, an applicant who is improperly rated ineligible for a particular position may be entitled to priority consideration for future vacancies. *Baxter v. Office of Personnel Management*, 44 M.S.P.R. 125, 133 (1990). Priority consideration is also a concept frequently used in settlement agreements which the Board enforces. See, e.g., *Outlaw v. Department of the Army*, 99 M.S.P.R. 302, ¶¶ 2, 12-13 (2005).

<sup>158</sup> *Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶¶ 14-17 (2008).

<sup>159</sup> U.S. Office of Personnel Management, *Delegated Examining Operations Handbook*, at 81-82, 170-71, available at [http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo\\_handbook.pdf](http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf). (According to OPM's website, the Handbook has not been updated since May 2007.)

What it means to be permitted to compete, and the conditions that an agency may place on candidates, can vary greatly by the specific situation at issue. Agencies and veterans could benefit from clearer guidance, particularly from OPM. While we recognize that OPM has been given extensive responsibilities and limited resources to accomplish those responsibilities, we recommend that OPM make a greater effort to ensure that its regulations, policies, and guidance, including the *Delegated Examining Operations Handbook* and the *Vet Guide*, are regularly checked against new Acts of Congress as well as developments in Federal Circuit and Board case law, and amended as needed.<sup>160</sup> OPM's guidance should be clear, unambiguous, and accurate.

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<sup>160</sup> In a 2006 report, the Board noted that the Federal Circuit had declared in 1999 that, “to the extent that OPM’s regulations are contrary to the proposition that an individual is an “employee” if he or she meets the requirements of either 5 U.S.C. § 7511(a)(1)(C)(i) or (ii), they are invalid[.]” and OPM had not yet fixed its regulations to comport with the court’s decision. U.S. Merit Systems Protection Board, *Navigating the Probationary Period After Van Wersch and McCormick*, at 18-19, available at [www.mspb.gov/studies](http://www.mspb.gov/studies); see *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1151, n.7 (Fed. Cir. 1999). OPM amended its regulations shortly after that report was issued. See 72 Fed. Reg. 23772, May 1, 2007.

## CHAPTER SIX: VEOA RELIEF

Under VEOA, if an appellant's rights are violated, the appellant is entitled to a reconstruction of the personnel action consistent with law.<sup>161</sup> This means that when the Board finds that an agency has violated an individual's preference eligibility rights or the right of a veteran to compete under 5 U.S.C. § 3304(f), the Board will order the agency to reconstruct the personnel action in question, while following the laws or regulations that were not followed the first time.<sup>162</sup>

To properly reconstruct a selection action, the agency must conduct an *actual* selection process based on the same circumstances surrounding the original faulty selection.<sup>163</sup> A hypothetical process is not sufficient.<sup>164</sup> This means that the agency must take any original selectee out of the position,<sup>165</sup> conduct and evaluate interviews so that they are meaningfully comparable with the original selectee's interview, and fill the same number of vacancies as before.<sup>166</sup>

While an appellant may be entitled to a reconstruction of the selection action in which the laws and regulations are followed, *an appellant is not entitled to a*

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<sup>161</sup> *Lodge v. Department of the Treasury*, 109 M.S.P.R. 614, ¶ 7 (2008) (veterans' preference); *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 14 (2013) (right to compete). The Board has yet to find a veterans' preference violation in a RIF case brought under VEOA, perhaps because selection actions are far more common than RIF actions, and thus there have not been as many VEOA RIF appeals.

<sup>162</sup> *Lodge v. Department of the Treasury*, 109 M.S.P.R. 614, ¶ 7 (2008) (veterans' preference); *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 14 (2013) (right to compete).

<sup>163</sup> *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 14 (2013); *Phillips v. Department of the Navy*, 114 M.S.P.R. 19, ¶¶ 15–19 (2010).

<sup>164</sup> *Weed v. Social Security Administration*, 110 M.S.P.R. 468, ¶ 14 (2009).

<sup>165</sup> The Board has held that while the selectee must be removed from the position, there is no requirement that the selectee be removed from Federal service as a whole. *See Modeste v. Department of Veterans Affairs*, 121 M.S.P.R. 254, ¶ 14 (2014); *Weed v. Social Security Administration*, 110 M.S.P.R. 468, ¶ 13 (2009).

<sup>166</sup> *Russell v. Department of Health and Human Services*, 120 M.S.P.R. 42, ¶ 13 (2013).

*position with the agency and the Board will not order a retroactive appointment as a remedy for a VEOA violation.*<sup>167</sup>

Although an appellant is not automatically entitled to be appointed, if the reconstructed selection process results in the appellant's selection, he or she may be entitled to an award of compensation under VEOA for any loss of wages or benefits that resulted from the agency's violation of his or her rights.<sup>168</sup>

For example, in *Marshall v. Department of Health and Human Services*, the appellant applied for a GS-13 position with the agency. By the time the case reached the Federal Circuit, it was undisputed that the agency had violated the appellant's preference rights during selection and that the appellant would have been selected if not for the violation. However, in the meantime, the appellant had accepted a lower-graded position with the U.S. Coast Guard. The Federal Circuit held that the appellant was entitled to the difference in wages and benefits between the Federal position he held and the position he should have been offered. This entitlement ran from the date of the appointment that had violated his rights to the date that he was either: (1) placed in the position he should have been put in originally; or (2) the date he declined such a placement.<sup>169</sup>

The VEOA statute provides for an award of lost wages or benefits for an ordinary violation and an additional amount, equal to the award of lost wages or benefits, for a willful violation of the statute.<sup>170</sup> For purposes of

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<sup>167</sup> See *Gonzalez v. Department of Homeland Security*, 110 M.S.P.R. 567, ¶ 6 (2009); *Lodge v. Department of the Treasury*, 109 M.S.P.R. 614, ¶ 7 (2008). However, “[w]hen an agency violates a veteran’s preference rights during selection in the competitive service and when it is undisputed that the agency would have selected the veteran for the position sought but for the violation, [5 U.S.C.] § 3330c requires the agency to offer the same—or, as near as possible, a substantially equivalent—position to the veteran.” *Marshall v. Department of Health and Human Services*, 587 F.3d 1310, 1318 (Fed. Cir. 2009).

<sup>168</sup> See *Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶ 18 (2008); 5 U.S.C. § 3330c(a).

<sup>169</sup> *Marshall v. Department of Health and Human Services*, 587 F.3d 1310, 1312, 1317-18 (Fed. Cir. 2009).

<sup>170</sup> *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 11 (2011). An award for “lost wages” in the context of a VEOA appeal does not have the same meaning as the term of art “back pay” under the

VEOA, the term “willful” means that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited.<sup>171</sup>

Relief is an important component of a VEOA case. As discussed earlier, an appeal may be dismissed for a failure to state a claim for which relief could be granted.<sup>172</sup> A situation can also evolve in which a case becomes “moot” because there is no relief left for the Board to grant. Mootness can arise at any stage of the proceedings.<sup>173</sup> The dismissal of an appeal as moot amounts to a dismissal for lack of jurisdiction.<sup>174</sup> However, for an appeal to be found moot, the appellant must have received *all* of the relief that he or she could have received if he or she had prevailed on the merits.<sup>175</sup> *Unsatisfactory* relief can render a case moot if there is no more relief to be granted. But, *partial* relief does not create mootness if there is more relief that may be available.<sup>176</sup>

The concept of “dismissal as moot,” also called the “mootness doctrine,” arises from the constitutional requirement that an Article III court cannot render a decision unless there is a “case or controversy” in which the parties have a recognizable interest in the outcome. It prevents courts from issuing advisory opinions. Because the Board is prohibited from issuing advisory

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Back Pay Act, because VEOA appeals are not governed by the Back Pay Act. *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 8, n.4 (2011).

<sup>171</sup> *Williams v. Department of the Air Force*, 108 M.S.P.R. 567, ¶ 12 (2008).

<sup>172</sup> See *Haas v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶¶ 8-11 (2008); *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 6 (2005).

<sup>173</sup> *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 12 (2013).

<sup>174</sup> *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 17 (2007).

<sup>175</sup> *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 17 (2007). See, e.g., *Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶ 18 (2010) (dismissing a VEOA appeal as moot because the appellant had already obtained all the relief he could have obtained from the Board if he had prevailed in his appeal).

<sup>176</sup> *Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶ 12 (2010); see *Modeste v. Department of Veterans Affairs*, 121 M.S.P.R. 254, ¶ 13 (2014) (holding that the appeal could not be rendered moot because the appellant had not yet received all of the relief to which he may have been entitled).

opinions, it recognizes the mootness doctrine, even though the Board is not a court operating under Article III of the U.S. Constitution.<sup>177</sup>

Because mootness is considered a jurisdictional issue in Article III courts, the Board has issued VEOA decisions stating that the Board has found a case moot because no further relief may be granted, and is therefore dismissing the case for *lack of jurisdiction*.<sup>178</sup> We recognize this may be confusing, since the Board has also held that stating a claim for which relief may be granted goes to the merits and *not jurisdiction*.<sup>179</sup> Rather than pondering the relationship between relief and merits or jurisdiction, readers should focus on the central point—the ability of the Board to grant relief is a necessary component for a case to proceed.

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<sup>177</sup> *Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶ 11 (2010). An “Article III court” refers to the judiciary as it is established in Article III of the U.S. Constitution. MSPB is an administrative body in the executive branch of the Government, although its decisions are reviewable by an Article III court—the Federal Circuit.

<sup>178</sup> *See, e.g., Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶ 18 (2010) (dismissing a VEOA appeal as moot because the appellant had already obtained all the relief he could have obtained from the Board if his appeal had prevailed).

<sup>179</sup> *Compare Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶ 18 (2010) (dismissing VEOA case for lack of jurisdiction because there was no *further* effectual relief that could be granted and thus the case was moot), *with Alford v. Department of Defense*, 113 M.S.P.R. 263 ¶¶ 11-12 (2010) (holding that the AJ should not have dismissed the VEOA case for lack of jurisdiction but rather should have dismissed it for failure to state a claim for which relief may be granted).

## CHAPTER SEVEN: USERRA—COVERED ACTIONS

USERRA provides broad protections to ensure that those who serve in uniform are not discriminated against in employment matters and to eliminate or minimize any disadvantage to their civilian careers resulting from uniformed service.<sup>180</sup> The statute provides that:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>181</sup>

Because of other Federal laws pertaining to the employment of veterans, many of these situations can overlap with other appeal rights. For example, an employee (regardless of veterans' status) who is removed, demoted, or suspended for more than 14 days can challenge the underlying action by asserting that the charges are untrue, the penalty is unreasonable, or that procedures were not followed.<sup>182</sup> Similarly, as described in the VEOA chapters, a veteran who is not selected may assert that his or her preference rights were denied or that he or she was denied an opportunity to be considered. However, veterans are not usually accorded any preference when seeking promotions, and decisions to grant or deny leave are usually

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<sup>180</sup> 38 U.S.C. § 4301. This report does not contain a copy of the USERRA statute because of its length. A copy of the statute can be found on DOL's website at <http://www.dol.gov/vets/usc/vpl/usc38.htm>.

<sup>181</sup> 38 U.S.C. § 4311(a); *but see Lourens v. Merit Systems Protection Board*, 193 F.3d 1369, 1371 (Fed. Cir. 1999) (holding that the Board did not have USERRA jurisdiction over claims by a widow with derived preference eligibility when the widow had not been a member of—or applicant to—a uniformed service).

<sup>182</sup> USERRA can provide MSPB jurisdiction over suspensions that are too brief to meet the requirements for MSPB's adverse action jurisdiction (14 days or less). *See, e.g., Johnson v. U.S. Postal Service*, 85 M.S.P.R. 1, ¶ 11 (1999), in which the Board found USERRA jurisdiction over a 7-day suspension when the appellant alleged that he was denied leave and instead was charged with absence without leave (AWOL) for periods during which he served on Reserve duty, leading to a suspension for AWOL.

not appealable, so claims related to promotion within the agency or leave use are more likely to stand alone on the alleged USERRA violation.<sup>183</sup>

USERRA cases are typically described as falling under one of two basic categories that will be discussed in this chapter:

*Anti-discrimination:* Prohibiting employers from denying employment, promotion, or “any benefit of employment” to anyone based on their uniformed service. It also protects against reprisal for participating in a USERRA-related activity, such as filing a USERRA claim or testifying on behalf of an individual in a USERRA case.<sup>184</sup>

*Reemployment:* Entitling employees absent from their positions due to uniformed service to prompt reemployment in their former or comparable positions, plus the additional seniority and benefits that they would have had if they had remained continuously employed (called the “escalator principle”).<sup>185</sup>

## ANTI-DISCRIMINATION SITUATIONS

USERRA anti-discrimination cases brought before the Board can run a wide gamut, but many tend to fall into one of the following categories:

- Adverse actions (such as removals, suspensions, or demotions) in which the appellant alleges the agency acted out of animus towards the person for serving in the military (such as a desire to remove a person who is frequently absent from work to perform uniformed duty).<sup>186</sup>

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<sup>183</sup> See *Hamner v. Department of Housing and Urban Development*, 93 M.S.P.R. 84, ¶ 20 (2002) (explaining that veterans are not usually accorded any preference when seeking promotions). *But see Holloway v. Department of Interior*, 82 M.S.P.R. 435, ¶ 15 (1999) (holding that the Board had jurisdiction over a Whistleblower Protection Act claim that the appellant was denied leave in retaliation for perceived whistleblowing activity).

<sup>184</sup> 38 U.S.C. § 4311.

<sup>185</sup> 38 U.S.C. §§ 4312-18.

<sup>186</sup> See, e.g., *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368-69 (Fed. Cir. 2009) (holding that the agency could not remove the appellant for excessive use of military leave).



- Non-selection decisions (including promotions), where it is alleged that the agency did not want to hire a person who might be absent in the future for military duty (such as individuals in the reserves or National Guard).<sup>187</sup>
- Non-selection decisions based on a desire to avoid veterans' preference rules.<sup>188</sup>
- Denial or improper charging of leave to perform uniformed service duties.<sup>189</sup>

An appellant also may assert discrimination based on the specific nature of the service he or she provided to the military. For example, in *Beck v. Department of the Navy*, the appellant had been an enlisted person in the Navy and asserted that he was passed over for a GS-13 position because the deciding official was “dismissive” of the appellant after learning that he had been an enlisted man and not an officer. The Board held that if there had been discrimination on the basis of the appellant’s military rank, then it would qualify as discrimination based on service under USERRA.<sup>190</sup>

However, service-related medical conditions, whether physical or psychological, are unlikely to successfully serve as the basis for a USERRA case. The Board has held that if a medical condition is the result of military service, discrimination on the basis of that medical condition alone does

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<sup>187</sup> See, e.g., *Becwar v. Department of Labor*, 115 M.S.P.R. 689, ¶¶ 6-7 (2011) (finding jurisdiction over the appellant’s assertions that the agency’s decision not to promote her was motivated by the agency’s discontent with her absences from work for military duty); *Isabella v. Department of State*, 106 M.S.P.R. 333, ¶¶ 9-10 (2007) (finding jurisdiction over the appellant’s claim that the agency was willing to process his application when it thought he had separated from the military, but stopped processing when it learned he was still a reservist).

<sup>188</sup> See, e.g., *Williams v. Department of the Navy*, 94 M.S.P.R. 206, ¶ 8 (2003) (finding jurisdiction over the appellant’s assertion that the agency did not want to hire veterans because they have a higher retention standing in a RIF).

<sup>189</sup> While military leave cases have become less common, several years ago there was a misunderstanding that caused some individuals to be charged annual or other leave for periods that should have been covered by military leave. This error by agencies was appealable under USERRA and led to a multitude of cases to seek correction of leave records. These cases are known as *Butterbaugh* cases, after the lead case identifying the error. *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1333–34 (Fed. Cir. 2003); see *Duncan v. Department of the Air Force*, 115 M.S.P.R. 275, ¶ 6 (2010).

<sup>190</sup> *Beck v. Department of the Navy*, 120 M.S.P.R. 504, ¶¶ 5, 9-10 (2014).

not support a USERRA claim. The discrimination must be based on the actual service, not on injuries or disabilities incidental to it.<sup>191</sup>

## REEMPLOYMENT SITUATIONS

USERRA provides that an employee whose “absence is necessitated by reason of service in the uniformed services” will be entitled to reemployment if: (1) he has given advance notice of such service to his employer; (2) the cumulative absence does not exceed 5 years; and (3) he either reports for employment or requests reemployment after completion of the uniformed service.<sup>192</sup>

As shown in the table below, the time period in which the individual must report for employment or reemployment depends on the length of the period of absence due to military service. Additional time is provided for an individual who is unavailable due to an injury or illness related to uniformed service.<sup>193</sup>

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<sup>191</sup> *McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998) (holding that the fact that the appellant incurred a back injury while performing military service was incidental to her claim of disability discrimination). *See also Holmes v. Department of Justice*, 498 F. App’x 993, 995 (Fed. Cir. 2013) (Table) (agreeing with the holding of *McBride*). *But see Davison v. Department of Veterans Affairs*, 115 M.S.P.R. 640, ¶¶ 14-15 (2011) (finding that a case could be brought under USERRA when the appellant asserted the discrimination was based on his use of leave without pay for a medical condition where such leave was only available to service members).

<sup>192</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 12 (2009); *see* 38 U.S.C. § 4312(a), (e). Advanced notice of departure for service is not required if it is impossible, unreasonable, or precluded by military necessity. 38 U.S.C. § 4312(b).

<sup>193</sup> 38 U.S.C. § 4312(e).

Absence	Obligation
Less than 31 days	Return to work no later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service (provided that this allows 8 hours to rest after returning home from duty).
Between 31 and 180 days	Submit an application for reemployment no later than 14 days after the completion of the period of service.
Over 180 days	Submit an application for reemployment with the employer no later than 90 days after the completion of the period of service.

USERRA reemployment cases brought before the Board can also run a wide gamut, but many allegations tend to fall into one of the following categories:

- That a civilian position was not abandoned and that the appellant is therefore entitled to be reemployed.<sup>194</sup>
- That the appellant would have been in a higher-graded position if not for the service and was therefore not returned to the correct position.<sup>195</sup>
- That the new position is not of a “like status” to the position held prior to a departure for military service.<sup>196</sup>

Below we explain each of these concepts.

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<sup>194</sup> See, e.g., *Kiszka v. Office of Personnel Management*, 372 F.3d 1301, 1307-08 (Fed. Cir. 2004) (finding that a resignation is not required for the adjudicator to find that an appellant abandoned his civilian career in favor of a military career and therefore was not entitled to reemployment).

<sup>195</sup> See, e.g., *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶¶ 2-4 (2008) (alleging that the appellant would have been promoted in her civilian position during the period in which she was away in military service).

<sup>196</sup> See, e.g., *Crawford v. Department of the Army*, 117 M.S.P.R. 38, ¶¶ 2, 8, 22-23, 26 (2011).

## Abandonment

Abandonment cases often arise in the context of retirement annuities because of the way in which certain military service may be treated when determining eligibility for a civilian service annuity.<sup>197</sup> However, the issue can arise in any reemployment case, because if an individual has abandoned his or her civilian career, the agency is under no obligation to reemploy the person.<sup>198</sup>

A resignation is but one way to determine if the position has been abandoned.<sup>199</sup> An appellant's actions can lead an employer—and the adjudicator—to infer that the individual has abandoned his civilian job in favor of a career in the military.<sup>200</sup> While not dispositive, a strong indicator can be whether the appellant asked for leave without pay or a separation to perform uniformed service.<sup>201</sup> Similarly, an appellant's expressed intent, such as statements that he is still employed by the agency, can be an important factor in determining abandonment.<sup>202</sup> While USERRA does not have a deadline to file a complaint, the passage of an extensive period of time after the appellant's removal with no challenge by the appellant can also indicate

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<sup>197</sup> See, e.g., *Lindsley v. Office of Personnel Management*, 96 M.S.P.R. 259, ¶¶ 8, 19 (2004) (holding that the appellant was not entitled to have his military time credited towards a civil service annuity because he had abandoned his civilian career).

<sup>198</sup> *Corkery v. Office of Personnel Management*, 94 M.S.P.R. 118, ¶ 15 (2003).

<sup>199</sup> See *Woodman v. Office of Personnel Management*, 258 F.3d 1372, 1378-79 (Fed. Cir. 2001) (holding that the lack of a resignation by the appellant is not determinative of whether he abandoned his civilian career for one in the military).

<sup>200</sup> See *Erickson v. U.S. Postal Service*, 636 F.3d 1353, 1356-57 (Fed. Cir. 2011) (discussing *Woodman v. Office of Personnel Management*, 258 F.3d 1372 (Fed. Cir. 2001)).

<sup>201</sup> See *Erickson v. U.S. Postal Service*, 636 F.3d 1353, 1356-57 (Fed. Cir. 2011) (discussing *Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. 2004) and *Dowling v. Office of Personnel Management*, 393 F.3d 1260 (Fed. Cir. 2004)).

<sup>202</sup> See *Erickson v. U.S. Postal Service*, 636 F.3d 1353, 1359 (Fed. Cir. 2011) (finding pertinent the appellant's un rebutted testimony that he had not resigned because he believed he was still employed by the agency).

abandonment.<sup>203</sup> The adjudicator must evaluate the totality of the evidence and weigh it in order to determine if abandonment occurred.<sup>204</sup>

### The escalator principle

Upon return to civilian duty, the individual is entitled to return to the place the person would have been if not for the military service.<sup>205</sup> This is called the “escalator principle” because the individual “does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously[.]”<sup>206</sup>

In the report accompanying the bill, Congress described the escalator principle’s applicability to USERRA as follows:

[W]hatever position the returning serviceperson would have attained, with reasonable certainty, but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status depending on what has happened to the employment situation in the servicemember’s absence.<sup>207</sup>

While the escalator principle is a crucial component of USERRA, it can be difficult to predict what would have occurred if an individual had not left his or her civilian job to perform uniformed service, particularly to the degree of being “reasonably certain.” In cases before 2014, the Board repeatedly held that advancement is not reasonably certain if it is dependent on the exercise of “a discriminating managerial choice” and the fitness and ability of the

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<sup>203</sup> See *Erickson v. U.S. Postal Service*, 636 F.3d 1353, 1358-59 (Fed. Cir. 2011) (finding that the appellant’s failure to contest his removal for a period of six years was an indication of abandonment, although it was not dispositive).

<sup>204</sup> See *Erickson v. U.S. Postal Service*, 636 F.3d 1353, 1356-59 (Fed. Cir. 2011) (weighing several factors before concluding that there was not sufficient evidence of abandonment).

<sup>205</sup> *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶ 10 (2008).

<sup>206</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>207</sup> H. Rep. 103-65, at 30-31 (1994 U.S.C.C.A.N. 2463-64) (internal citations omitted).

employee.<sup>208</sup> However, in a 2014 decision, *Rassenfoss v. Department of the Treasury*, the Board overruled this line of cases and began using a different test to determine whether the individual was entitled to the escalation that he or she sought.<sup>209</sup> The next few paragraphs discuss an older case, *Leite v. Department of the Army*, followed by a discussion of *Rassenfoss* to highlight the differences in the Board's approach to the question of reasonable certainty.

In *Leite*, the appellant was away on military duty when the agency abolished her GS-13 position and established a GS-14 position for which she competed but was not selected. When she returned from duty, the agency informed the appellant she was entitled to a GS-13 position similar to the position that she had left. The appellant asserted she was entitled to a GS-14 position. Ultimately, the agency placed her in a position in a different pay system that was equivalent to the GS-13 position.<sup>210</sup>

In her USERRA claim, the appellant asserted that other individuals in the organization had been given temporary duties above their pay levels and then promoted into those higher-level positions. She posited that in light of her past exemplary performance it was likely that if not for her military service, she also would have been given greater responsibilities on a temporary basis and then been permanently selected for a temporarily held position. The Board held that while it could not “rule out the possibility” that the appellant might have been promoted if not for her military service, it was not “reasonably certain” that this chain of events would have occurred, and therefore the appellant was not entitled to the promotion under USERRA.<sup>211</sup>

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<sup>208</sup> See *West v. Department of the Air Force*, 117 M.S.P.R. 24, ¶ 8 (2011); *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶ 10 (2008).

<sup>209</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 13 (2014).

<sup>210</sup> *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶¶ 2-4 (2008).

<sup>211</sup> *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶¶ 12-14 (2008). See also *West v. Department of the Air Force*, 117 M.S.P.R. 24 ¶ 9 (2011) (holding that there is no basis for requiring an agency to consider an absent employee for promotion as though she had the experience and skills she might have obtained if she had continued her civilian employment).

However, in *Rassenfoss v. Department of the Treasury*, the Board expressly overruled the approach used in *Leite*.<sup>212</sup> In *Rassenfoss*, the question was whether the appellant would have received a Quality Step Increase (QSI) for outstanding performance if he had not been away from his civilian work to serve in the military.<sup>213</sup> As stated in Member Robbins' dissenting opinion in *Rassenfoss*, under OPM's regulations, a QSI "shall not be required" but rather may be given "consistent with performance-related criteria in a performance appraisal program."<sup>214</sup> Thus, the awarding of a QSI has traditionally been dependent on management discretion.

In the *Rassenfoss* majority opinion, the Board noted that it had historically distinguished between benefits that are dependent on fitness, ability, or the exercise of managerial discretion and those that are based on seniority, rewards for length of service, or that would have accrued through the mere passage of time. The former category typically did not benefit from the escalator principle because it was too difficult to be reasonably certain whether a discretionary authority would have been exercised.<sup>215</sup>

However, in *Rassenfoss*, the Board also noted that DOL, which has the authority to promulgate pertinent regulations for non-Federal employment, had rejected the discretionary/nondiscretionary management decision distinction undergirding the Board's approach in earlier cases. Rather, DOL directed employers to adopt a case-by-case approach to determine whether a benefit was reasonably certain to have accrued absent military service.<sup>216</sup> The Board concluded that Congress would not have wanted an outcome in which Federal employees are afforded less protection than state or private sector employees. The Board therefore overruled its earlier holdings that had

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<sup>212</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 13 (2014).

<sup>213</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 3 (2014).

<sup>214</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, 523 (2014) (Member Robbins, dissenting).

<sup>215</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 12 (2014).

<sup>216</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶¶ 12-13 (2014).

assumed that discretionary personnel actions inherently fail the reasonable certainty test and instructed that DOL's approach be used instead.<sup>217</sup>

Applying DOL's regulations, the Board explained that relevant factors to consider when assessing whether it is reasonably certain that an employee would have received a discretionary action such as a QSI or promotion can include: (1) the returning employee's work history; (2) his or her history of merit increases; and (3) the work and pay history of employees in the same or similar positions.<sup>218</sup> The Board remanded *Rassenfoss* to the regional office to further develop the record, particularly the history of others in the same or similar positions as the appellant.<sup>219</sup>

### Positions of "like status"

When an individual returns from uniformed service, an agency is obligated to reemploy the appellant in a position of *like status*; however, the new position is not required to have the same duties as the old position.<sup>220</sup> Status means particular attributes of a specific position, including the "rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority."<sup>221</sup> In comparing two positions, the Board looks beyond the title and grade of the positions involved and compares the scope of actual duties and responsibilities of the new position with those of the former position.<sup>222</sup>

For example, in *Crawford v. Department of the Army*, the Board noted that the appellant's position had been abolished while he was away performing uniformed service, and therefore it was plausible that a position with the exact same duties no longer existed. For the old and new positions, the

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<sup>217</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 13 (2014). The Board noted that OPM has the authority to promulgate USERRA regulations for Federal employment and stated that such regulations should be read in a manner "consistent with" those issued by DOL.

<sup>218</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 13 (2014).

<sup>219</sup> *Rassenfoss v. Department of the Treasury*, 121 M.S.P.R. 512, ¶ 17 (2014).

<sup>220</sup> *Crawford v. Department of the Army*, 117 M.S.P.R. 38, ¶¶ 10, 22 (2011); 38 U.S.C. § 4313(a)(2).

<sup>221</sup> *Crawford v. Department of the Army*, 117 M.S.P.R. 38, ¶ 10 (2011) (quoting 5 C.F.R. § 353.102).

<sup>222</sup> *Crawford v. Department of the Army*, 117 M.S.P.R. 38, ¶ 19 (2011).



Board weighed the factors of the duties, pay, tenure, seniority, working conditions, and level of rank and responsibility. The Board found that nearly all of these factors were the same in both positions; only the duties differed. The Board held that despite the difference in duties, under the circumstances the agency had met its obligation to place the appellant in a position of like status to his prior position.<sup>223</sup>

In contrast, in *Nichols v. Department of Veterans Affairs*, when the appellant returned from military service, the agency asserted that, while the appellant's old position had been filled, it had created a "like" position for him. The Federal Circuit held that while the agency's decision to fill the job in the appellant's absence did not alter the appellant's entitlement to his old job, the agency had some discretion to find an equivalent position. However, to be equivalent, the position must be of equal status. The court held that "[i]t goes without saying that when one starts out as the boss, but is placed in a position subordinate to the replacement boss, and other new bosses, there is incontestably a loss of authority, and accordingly a diminished status." Because the new job had less status, it could not be considered equivalent. The agency was ordered to return the appellant to his old job, even though it meant displacing the new incumbent.<sup>224</sup>

In *Heidel v. U.S. Postal Service*, a returning service member was given a position with the same title and grade as his pre-service position. However, in the old position, the appellant performed several tasks, interacted with his coworkers and supervisors, trained new employees, and was exposed to the workplace decision-making process so as to better prepare him to compete to be a supervisor one day. In the new position, the appellant sat alone all day doing one thing, namely, handling and repairing damaged pieces of mail. The Board held that although the two positions were in the same job family

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<sup>223</sup> *Cranford v. Department of the Army*, 117 M.S.P.R. 38, ¶¶ 2, 8, 22-23, 26 (2011).

<sup>224</sup> *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163-64 (Fed. Cir. 1993). *Nichols* was adjudicated prior to the enactment of USERRA. However, because the concept of "like status" was a part of the law prior to USERRA, the Federal Circuit has continued to apply *Nichols* to more recent cases, such as *Cranford v. Department of the Army*, 718 F.3d 1361, 1366 (Fed. Cir. 2013).

and shared the same grade, their duties and responsibilities were not of “like status.”<sup>225</sup>

An agency cannot withhold a “like” position based on an assertion that the individual is not initially qualified to perform in the new position. The agency must make “reasonable efforts” to help the person become qualified.<sup>226</sup>

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<sup>225</sup> *Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 513, 518 (1996).

<sup>226</sup> *Crawford v. Department of the Army*, 117 M.S.P.R. 38, ¶ 11 (2011).

## CHAPTER EIGHT: USERRA—ADJUDICATING CLAIMS

As explained in this chapter, USERRA differs from VEOA in many respects, including: the roles of DOL and OSC; how to prove a claim; which party has the burden of proof (which differs based on the type of USERRA claim); the right to a hearing; deadlines (or lack thereof); and who may be a covered employer. Appendix B contains a table highlighting some of the significant differences between USERRA and VEOA.

### ESTABLISHING USERRA JURISDICTION

To establish Board jurisdiction over a USERRA discrimination appeal, an appellant must nonfrivolously allege that: (1) he performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service.<sup>227</sup>

For USERRA cases in which discrimination is not alleged, the Board typically describes its jurisdiction without phrasing it as a jurisdictional test. For example, in *Welshans v. U.S. Postal Service*, the Board simply stated that, “[u]nder USERRA, the Board has jurisdiction over an appellant’s claim that he was denied ‘any benefit of employment’ on the basis of his membership in the uniformed services.”<sup>228</sup> In *O’Bleness v. Department of the Air Force*, a case involving military leave, the Board described the claims being made and then

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<sup>227</sup> *Mims v. Social Security Administration*, 120 M.S.P.R. 213, ¶ 22 (2013); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 10 (2004). While the jurisdictional standard does not mention the nature of an appellant’s discharge, the Board has held that to have standing, the individual cannot be a person who has left uniformed service under other than honorable conditions. “[S]tanding is a jurisdictional requirement that must be met before the jurisdictional test [ ] is ever applied.” Thus, the Board will not find USERRA jurisdiction for an individual who was discharged under other than honorable conditions. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 16 (2008).

<sup>228</sup> *Welshans v. U.S. Postal Service*, 107 M.S.P.R. 110, ¶ 4 (2007).

stated that, “[t]he Board’s jurisdiction extends to claims such as those raised here[.]”<sup>229</sup>

As with a VEOA claim, a claim under USERRA will be broadly and liberally construed in determining whether it is nonfrivolous.<sup>230</sup> Also in common with a VEOA claim, the weakness of the assertions in support of a USERRA claim is not a basis to dismiss the USERRA appeal for lack of jurisdiction; rather, if the appellant fails to develop his contentions, his USERRA claim will be denied on the merits.<sup>231</sup>

## ESTABLISHING MERITS OF A USERRA CASE AND BURDENS OF PROOF

Under USERRA, there are two crucial differences between proving the merits of a discrimination claim and the merits of a reemployment claim:

1. **Burden of Proof:** In a *discrimination* case the appellant must prove the merits of the case by preponderant evidence. If that burden is met, the agency may avoid relief by showing by preponderant evidence that it would have taken the same action even in the absence of the improper motivation.<sup>232</sup> In a *reemployment* case the agency bears the burden of proving, by preponderant evidence, that it met its statutory obligations to reemploy the individual with the appropriate level of career advancement and benefits.<sup>233</sup>
2. **Motive:** In a *discrimination* case, the appellant must prove the agency’s motivation; in a *reemployment* rights claim, the individual does not have to

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<sup>229</sup> *O’Bleness v. Department of the Air Force*, 106 M.S.P.R. 457, ¶ 9 (2007).

<sup>230</sup> *Mims v. Social Security Administration*, 120 M.S.P.R. 213, ¶ 22 (2013).

<sup>231</sup> *Swidecki v. Department of Commerce*, 113 M.S.P.R. 168, ¶ 6 (2010); *Randall v. Department of Justice*, 105 M.S.P.R. 524, ¶ 5 (2007). As explained earlier, preponderance of the evidence means that the evidence shows that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

<sup>232</sup> *Burroughs v. Department of the Army*, 120 M.S.P.R. 392, ¶ 5 (2013); *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566, ¶ 11 (2012); see 38 U.S.C. § 4311(c).

<sup>233</sup> *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (explaining that the standard for reemployment cases is derived from 5 U.S.C. § 7701(c)(2)(B)). See 5 U.S.C. § 7701(c)(2)(B) (stating that an agency must prove its case by preponderant evidence).

establish the motivation for the agency's action or inaction because motive is irrelevant in USERRA reemployment cases.<sup>234</sup>

### **Establishing a discrimination case**

A USERRA discrimination case is different from a discrimination case brought under Equal Employment Opportunity Commission procedures. In equal employment opportunity (EEO) discrimination cases, “disparate treatment” and “disparate impact” are two distinct analytical frameworks for establishing discrimination. A disparate treatment claim may succeed only if there is a finding of *intent* to discriminate by the acting party, while a disparate impact claim may succeed if a facially-neutral policy or practice has a disproportionate *effect* on a protected class of people and is not justified by business necessity.<sup>235</sup>

In a USERRA discrimination case, the question is not the effect, but *only the intent*. Therefore, USERRA does not provide a cause of action under the disparate impact theory. While use of an agency policy or practice known to create a disparate impact may be used as evidence of discriminatory intent, the impact alone, in the absence of any discriminatory intent, is not pertinent to a USERRA discrimination case.<sup>236</sup>

Discriminatory motivation in a USERRA case may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. In determining whether the employee has

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<sup>234</sup> *Wyatt v. U.S. Postal Service*, 101 M.S.P.R. 28, ¶ 12 (2006); *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶¶ 5-6 (2005).

<sup>235</sup> *Harellson v. U.S. Postal Service*, 115 M.S.P.R. 378, ¶ 12 (2011).

<sup>236</sup> *Harellson v. U.S. Postal Service*, 115 M.S.P.R. 378, ¶¶ 20-21 (2011).

proven that his protected status or activity was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken.<sup>237</sup>

USERRA discrimination cases may refer to hostility towards an individual based on his or her service as "animus," and find that the animus is a motive to discriminate. Discrimination can be found even when animus is not the only motivating factor. The test is often referred to as the "but for" test. Once animus is proven, the adjudicator must ask, if not for the animus, what would have happened?<sup>238</sup>

In USERRA discrimination cases, the question is not whether the official who decided to take the action had animus; rather, it is whether the agency's actions were a *result* of animus, even if that animus was held by someone else or took place at a different point in the process.<sup>239</sup>

In *Staub v. Proctor Hospital*, an individual asserted that two supervisors within the hospital influenced a manager to fire him because the supervisors objected to his absences to perform uniformed service. He did not claim that the deciding manager bore him any animus, but asserted that a corrective action notice was issued by his supervisors out of animus, and that without the notice, the deciding manager would not have later removed him for violating the notice.<sup>240</sup>

The case reached the Supreme Court, where the question was whether an employer could be held liable for employment discrimination under USERRA if an action was based on the discriminatory animus of an

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<sup>237</sup> *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶ 20 (2013) (quoting extensively from *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)).

<sup>238</sup> *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

<sup>239</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1193-94 (2011).

<sup>240</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1189-90 (2011). Although *Staub* involved a private sector employer, as noted earlier, decisions of the Supreme Court and Federal Circuit are binding on the Board. Decisions of other courts interpreting USERRA provisions may be followed at the Board's discretion, if the Board finds them persuasive.

employee who influenced, but did not make, the challenged employment decision. (This is known as a “cat’s paw” case, a term that comes from a fable in which a monkey convinces a cat to reach into a fire to take roasted chestnuts for them to eat. While the cat is busy repeatedly singeing his paw with each prize, the monkey eats all of the rewards. In the end, the monkey is fed but the cat has nothing to show for his efforts except a burned paw.)<sup>241</sup>

The Court determined that, “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”<sup>242</sup>

Proximate cause in this context means that there is a direct relationship between the alleged animus by an official and the alleged employment action. There is no proximate cause if the link is indirect, remote, or completely contingent on other factors.<sup>243</sup>

In *Staub*, the court held that there was evidence that antimilitary animus caused the issuance of a corrective action notice and that non-compliance with that notice caused the removal. It held that a reasonable jury could infer that those with the animus intended the removal and that therefore the hospital could be held liable for a USERRA violation.<sup>244</sup>

This case demonstrates one of many reasons why it is so important for agencies to ensure that all of their employees avoid discriminatory and retaliatory conduct, including but not limited to discrimination based on military service. It is not enough to have deciding officials who respect military service if the system permits antimilitary animus at lower levels that influence the decision-makers. Agencies have a responsibility to keep

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<sup>241</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1190, n.1 (2011). A copy of the fable, “The Monkey and the Cat” is available at [http://www.gutenberg.org/files/25357/25357-h/25357-h.htm#Page\\_140](http://www.gutenberg.org/files/25357/25357-h/25357-h.htm#Page_140).

<sup>242</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2011) (emphasis in original).

<sup>243</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1192 (2011).

<sup>244</sup> *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2011).

personnel actions clean of animus at all stages. Otherwise, the “cat’s paw” will still get burned, and the agency will still be liable.<sup>245</sup>

Because the intent to discriminate can be challenging to prove, cases often come down to what a witness claims someone else said or did.<sup>246</sup> In such cases, the adjudicator must make a credibility determination. When assessing credibility, an important factor is whether the testimony is supported or contradicted by other evidence.<sup>247</sup>

Witness testimony can be sufficient evidence; however, a witness is more likely to be found credible if there is additional evidence to support that witness’s assertions.<sup>248</sup> For this reason, parties may find it useful to keep copies of important documents to produce later, should it become necessary. For agencies, this may include documentation of poor performance or conduct issues unrelated to military service. For appellants, it may include documentation to show that the conduct or performance was approved, to help establish that allegations of performance or conduct issues are a mere pretext for discrimination.

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<sup>245</sup> See also *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 23 (2014) (applying the cat’s paw approach to whistleblower cases in which the decision-maker may lack a retaliatory animus but the official is influenced by someone seeking to retaliate for whistleblower activity).

<sup>246</sup> See, e.g., *Williams v. Department of the Navy*, 94 M.S.P.R. 206, ¶ 2 (2003) (in which the appellant alleged that he was told that the hiring agency did not want to hire veterans); *Pruitt v. Department of Veterans Affairs*, 97 M.S.P.R. 495, 497-98 (2004) (Separate Op., Chairman McPhie) (explaining that the appellant alleged that an agency personnel officer told her that the selecting official did not want to hire a veteran).

<sup>247</sup> To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness’s opportunity and capacity to observe the event or act in question; (2) the witness’s character; (3) any prior inconsistent statement by the witness; (4) a witness’s bias, or lack of bias; (5) the contradiction of the witness’s version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness’s version of events; and (7) the witness’s demeanor. These are known as the “Hillen factors.” See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

<sup>248</sup> Compare *Duncan v. Department of the Air Force*, 674 F.3d 1359, 1364 (Fed. Cir. 2012) (finding that the Board could find that the appellant’s testimony was insufficient to establish that the agency improperly charged him military leave when the appellant failed to produce pay records to support his claims), with *Tierney v. Department of Justice*, 717 F.3d 1374, 1377-79 (Fed. Cir. 2013) (finding that the Board could not overrule the AJ’s determination that a witness was credible when the witness’s statements were supported by pay records).



### Agency allegations of conduct or performance issues

Nothing in USERRA requires an agency to disregard misconduct or performance issues.<sup>249</sup> For example, in *Strausbaugh v. Government Printing Office*, the appellant was a probationary employee on a pass during his active military duty status with the U.S. Air Force Reserves. During a hurricane, he requested permission to bring his small child to the agency's facility. The appellant asserted that he had permission, while the supervisor asserted that he expressly and repeatedly denied the appellant's request and that the appellant disobeyed an order to not bring the child. The Board found the agency's witnesses more credible and held that despite the fact that the conduct at issue occurred while the appellant was in an active military status, the reason for the action was his conduct and not antimilitary animus. The appellant's request for relief was therefore denied.<sup>250</sup>

In *McMillan v. Department of Justice*, the appellant was an Army reserve officer as well as a special agent with the Drug Enforcement Administration (DEA) on a tour of duty in Peru, South America. There was allegedly some conflict between the agency and the appellant arising from the appellant attempting to represent DEA while with the Army and to use Army information in his DEA work. The question was whether the agency's decision to deny the appellant's request for an extension of his civilian tour of duty in Peru was motivated by an antimilitary animus or whether it was a result of the appellant's failure to meet the office's desired goals in terms of seizures, arrests, and informant recruitment.<sup>251</sup>

The AJ determined that the appellant had not shown that the denial of the tour extension was the result of discrimination. On petition for review, the

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<sup>249</sup> See, e.g., *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566 (conduct-based action); *McMillan v. Department of Justice*, 120 M.S.P.R. 1 (2013) (performance-based action).

<sup>250</sup> *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566, ¶¶ 3-7, 12, 15 (2012). See also *Swidecki v. Department of Commerce*, 113 M.S.P.R. 168, ¶¶ 8-10 (2010) (remanding the case for a decision on the merits as to whether the agency removed the appellant from consideration for a position due to antimilitary discrimination or if it was because he failed a background check due to criminal conduct).

<sup>251</sup> *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶¶ 2-9 (2013).

Board held that USERRA should be read to prohibit adverse employment actions based on the content and performance of *any* military assignment, general or specific. Thus, *if the appellant was acting on orders from his military supervisors* when he conflated the two jobs, he could not be punished for it by his civilian supervisors.<sup>252</sup>

However, the Board also noted that USERRA protections are dependent upon an employee's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance expected from all civilian employees. The Board emphasized that its holding should not be read to imply that USERRA prohibits an employer from considering events which occur during a period of service but do not constitute performance of military duty. Nor does USERRA prohibit an employer from taking action against an employee for gratuitous misconduct in the course of performing military duties.<sup>253</sup>

Thus, if the appellant's military orders did not require his actions and his civilian supervisors were opposed to it, his actions could not be protected under USERRA. The Board remanded the case to the AJ to make the necessary credibility determinations regarding precisely what occurred and why.<sup>254</sup>

## DEPARTMENT OF LABOR ROLE IN USERRA CLAIMS

As stated previously, VEOA requires that a complaint be filed with DOL before an appeal may be filed with the Board. However, in a USERRA case, the appellant may file a complaint with DOL or file directly with the Board without seeking assistance from DOL.<sup>255</sup> But, if the appellant opts to file

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<sup>252</sup> *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶¶ 11, 16-18 (2013).

<sup>253</sup> *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶ 17 (2013).

<sup>254</sup> *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶¶ 2-9, 11, 16-18 (2013).

<sup>255</sup> DOL and OSC have "interrelated statutory obligations" under USERRA. In the past, they have addressed this situation through the use of a memorandum of understanding. Individuals interested in using either agency to pursue a USERRA claim may benefit from checking to see which agency they should contact as such agreements can change. *See, e.g.,* Memorandum of Understanding Between Veterans'

with DOL for a USERRA claim, the appellant must exhaust that remedy before filing a USERRA claim with MSPB.<sup>256</sup>

USERRA also differs from VEOA in that USERRA does not provide for exhaustion of the complaint before DOL as a matter of time; rather, it requires notification from DOL that the Secretary of Labor's efforts did not resolve the appellant's complaint. Thus, if the appellant opts to seek help from DOL, the Board does not acquire jurisdiction over the USERRA claim until the appellant receives the required notification from DOL.<sup>257</sup>

### **NO DEADLINES TO FILE USERRA CLAIMS WITH MSPB, BUT LACHES MAY APPLY**

Unlike VEOA, USERRA does not contain a specific time limit to file an appeal. However, the Board has acknowledged that the “doctrine of laches” may apply as a defense to a USERRA claim.<sup>258</sup> Under laches, an unreasonable delay in pursuing a right or a claim can result in the dismissal of the claim by the adjudicating body, even if there is no statutory deadline to file the claim. The idea behind laches is that the passage of time tends to result in the destruction of evidence or loss of witness testimony, putting the defense in an unfair position.<sup>259</sup> The party asserting laches must prove both: (1) an unreasonable delay by the opposing party; and (2) prejudice (meaning that the ability to mount a defense was somehow harmed by the delay).<sup>260</sup>

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Employment and Training Service, United States Department of Labor and the United States Office of Special Counsel, at 6, available at [https://osc.gov/resources/osc\\_d11.pdf](https://osc.gov/resources/osc_d11.pdf) (explaining that “[t]he provisions [of the agreement] may be reviewed and modified or terminated when it is determined, by either agency that such review and modification or termination is in [the] interest of efficient enforcement of the law or laws involved”).

<sup>256</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

<sup>257</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

<sup>258</sup> *See Garcia v. Department of State*, 101 M.S.P.R. 172, ¶¶ 14-17 (2006).

<sup>259</sup> *Jones v. Perkins*, 76 F. 82, 85 (Mich., E. Dist., 1896).

<sup>260</sup> *Pueschel v. Department of Transportation*, 113 M.S.P.R. 422, ¶ 6 (2010).

For example, in *Johnson v. U.S. Postal Service*, the appellant was on a temporary promotion in 2003 when he was called for active duty. While on active duty, he applied to be permanently promoted to the position he temporarily held, but he was not selected. When he returned from military service later in 2003, he was returned to his permanent position, and voluntarily retired within a year. In 2011, the appellant filed a USERRA appeal of his non-selection, asserting that he was not promoted in 2003 because of discrimination regarding his military service. He also asserted that he had just learned of his right to appeal the events of 2003.<sup>261</sup>

The agency moved to dismiss the appeal on the grounds that the officials involved in the 2003 decision had since retired and it could not find its records regarding the action, likely because its policy was to retain such records for only 5 years.<sup>262</sup>

The Board held that if the appellant believed for 8 years that he had been discriminated against, it was unreasonable for him to wait that long without trying to determine what his appeal rights might be. Furthermore, as the appellant had not informed the agency that he felt discriminated against, the agency was not obligated to tell him of his USERRA rights. Thus, the Board found that the delay was unreasonable.<sup>263</sup>

The Board also held that, although the retirement of officials does not alone establish prejudice (particularly if the witness(es) can be located), the combination of the retirements, the deleterious effect of 8 years on memories, and the likelihood that the records had been destroyed in the normal course of business was sufficient to establish prejudice. Accordingly, the appeal was dismissed as barred by the doctrine of laches.<sup>264</sup>

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<sup>261</sup> *Johnson v. U.S. Postal Service*, 121 M.S.P.R. 101, ¶¶ 2-3 (2014).

<sup>262</sup> *Johnson v. U.S. Postal Service*, 121 M.S.P.R. 101, ¶ 4 (2014).

<sup>263</sup> *Johnson v. U.S. Postal Service*, 121 M.S.P.R. 101, ¶¶ 5-7 (2014).

<sup>264</sup> *Johnson v. U.S. Postal Service*, 121 M.S.P.R. 101, ¶¶ 8-9 (2014).

Because USERRA does not have a specific filing deadline, it is possible to file a timely USERRA claim after the deadline to file other claims has passed. As mentioned in the introduction, if an individual has an otherwise appealable action (such as a removal) and asserts that it occurred because of discrimination based on military service, it will be processed as an affirmative defense for the adverse action case. However, if the appellant's adverse action appeal is untimely or not within the Board's adverse action jurisdiction, the Board may still consider his USERRA claim as a separate appeal.<sup>265</sup>

For example, in *Brown v. U.S. Postal Service*, the appellant asserted that his removal was the result of agency actions that were designed to “get rid of him” before he could be called to serve in the Navy. The appellant's adverse action appeal to MSPB was untimely filed without good cause shown for the delay. Nevertheless, the Board noted that the appellant's assertions could constitute a USERRA appeal and that such an appeal would be timely filed.<sup>266</sup>

USERRA's substantive provisions do not apply retroactively, meaning that if a person did not have a particular right prior to USERRA, then the individual cannot assert a violation of the right through USERRA redress proceedings. But, where a governmental action violated a veterans' protection statute *in effect at the time the conduct occurred*, the Board has jurisdiction under USERRA to adjudicate claims arising from that past violation, regardless of whether it occurred before or after USERRA's enactment. This, combined with the lack of a deadline to file, can result in

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<sup>265</sup> See *Brown v. U.S. Postal Service*, 106 M.S.P.R. 12, ¶ 19 (2007); *Holmes v. Department of Justice*, 92 M.S.P.R. 377, ¶¶ 11-12 (2007).

<sup>266</sup> *Brown v. U.S. Postal Service*, 106 M.S.P.R. 12, ¶¶ 9, 18-19 (2007).

MSPB jurisdiction over events that are several years old,<sup>267</sup> although laches may result in a dismissal of the claim.<sup>268</sup>

## STANDING TO FILE A USERRA CLAIM

As explained earlier, to pursue a claim before MSPB, the party must have “standing”—meaning that the law intended that the party should be able to bring the case.<sup>269</sup> Typically, when appearing before MSPB, the party filing the appeal is a person negatively affected by the decision of an employer or potential employer. The person may appear *pro se* (representing himself or herself) or use another person as a representative, such as a union representative or private-sector attorney.<sup>270</sup> However, USERRA provides that OSC may appear on behalf of, and act as attorney for, the person complaining of a violation of his rights under USERRA and explicitly states that OSC may “initiate an action regarding such complaint before the Merit Systems Protection Board.”<sup>271</sup>

The ability of OSC to pursue a claim on behalf of an individual under USERRA is an important distinction, because OSC is expressly not permitted to file a complaint for corrective action under VEOA. OSC has the authority to seek corrective action for most PPPs. The VEOA statute created a new PPP, numbered (b)(11), prohibiting a knowing violation of preference rights. Yet, the statute also stated that “[n]otwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in

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<sup>267</sup> See, e.g., *Machulas v. Department of the Air Force*, 109 M.S.P.R. 165, ¶ 7 (2008) (finding that the Board could have jurisdiction over military leave issues from 15 years earlier).

<sup>268</sup> See, e.g., *Johnson v. U.S. Postal Service*, 121 M.S.P.R. 101, ¶¶ 8-9 (2014) (dismissing the appellant’s claim as barred by the doctrine of laches).

<sup>269</sup> *Wilks v. Department of the Army*, 91 M.S.P.R. 70, ¶ 11 (2002) (describing the issue as one of standing).

<sup>270</sup> A party may choose any representative as long as that person is willing and available to serve. 5 C.F.R. § 1201.31(b).

<sup>271</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 7 (2009) (quoting 38 U.S.C. § 4324(a)(2)(A)).

subsection (b)(11).” VEOA is in title 5, as is OSC’s authority to seek corrective actions, while USERRA is in title 38.<sup>272</sup> Thus, the ability of OSC to intercede on an individual’s behalf is dependent upon which statute (VEOA or USERRA) is being used to pursue the claim.

## AN “EMPLOYER” FOR PURPOSES OF USERRA JURISDICTION

As with VEOA, while USERRA is read broadly, the Board will not have jurisdiction over an employer when the law specifically excludes the employer from the Board’s jurisdiction.

The USERRA statute specifically excludes the Board from having jurisdiction over “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office[.]”<sup>273</sup>

Other agencies may also be excluded from the Board’s USERRA jurisdiction. In *Conyers v. Department of Transportation*, an individual who sought employment as a Supervisory Transportation Security Screener with the TSA filed an appeal with MSPB asserting jurisdiction under several different statutes, including USERRA. The Board held that under the law that created the TSA, Congress specifically excluded TSA screener positions from MSPB’s USERRA jurisdiction. The appellant appealed this finding to the Federal Circuit, which reached the same conclusion, that MPSB’s jurisdiction

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<sup>272</sup> See 5 U.S.C. §§ 2302(b)(11), 2302(e)(2), 1214; 38 U.S.C. § 4301 *et seq.*

<sup>273</sup> 38 U.S.C. § 4303(5); 5 U.S.C. § 2302(a)(2)(C)(ii). See *Erlendson v. Justice*, 121 M.S.P.R. 441, ¶ 6 (2014); (finding that the Board lacked jurisdiction over the appellant’s USERRA complaint against the Federal Bureau of Investigation); *Alford v. Department of Defense*, 113 M.S.P.R. 263, ¶ 15 (2010) (finding that an employee of the Defense Intelligence Agency cannot file a USERRA appeal with the Board).

is limited to that granted to it by law, and the law specifically excluded the screeners from MSPB's jurisdiction for purposes of USERRA.<sup>274</sup>

USERRA differs from VEOA regarding how the entity being sued is defined. VEOA focuses on the actions of an "agency," which the law does not define, while USERRA is about an "employer," which the law defines in great detail.<sup>275</sup> As explained below, the language used to define employer in the USERRA statute has created a situation where the Board can have USERRA jurisdiction for cases involving individuals who are not paid directly by the Government, even though it lacks jurisdiction over the private sector employer.<sup>276</sup>

Agencies often use contract employees to accomplish work for which the agency is responsible.<sup>277</sup> In *Silva v. Department of Homeland Security*, the appellant was employed by a contractor, performed work for Customs and Border Patrol (CBP) within DHS under the contract, left for military service, was replaced by someone else, returned from military service, and requested a return to his former position serving DHS under the contract between

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<sup>274</sup> *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380, 1381-83 (Fed. Cir. 2004) (explaining why the undersecretary has "greater flexibility regarding screener positions than he or she may have with respect to other classes of employees"); see *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529, ¶¶ 8-9 (2005) (applying *Conyers* to find that the Board lacked USERRA jurisdiction over termination and failure to reemploy claims). But see *Quinlan v. Department of Homeland Security*, 118 M.S.P.R. 362, ¶ 8 (2012) (finding that MSPB has jurisdiction over TSA reductions in grade under the language of 49 U.S.C. § 40122(g)(3)); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 12 (2014) (explaining that MSPB has jurisdiction over TSA whistleblower claims under the Whistleblower Protection Enhancement Act of 2012). TSA began as a part of the Department of Transportation and later became a part of the Department of Homeland Security. Thus, TSA cases may be found under either name, depending on when the suit occurred.

<sup>275</sup> Compare 5 U.S.C. § 3330(a)(1) (not defining "agency"), with 38 U.S.C. § 4303(4) (explaining that an "employer" includes an entity that has control over employment opportunities).

<sup>276</sup> The Board has not yet been presented with a case where an individual asserts a VEOA claim against a private sector contractor, and therefore cannot state what might occur under such a case.

<sup>277</sup> In 2011, it was estimated that the Government spent approximately \$320 billion on contracts for services. Ron Nixon, "Government Pays More in Contracts, Study Finds," *New York Times*, Sep. 12, 2011, available at <http://www.nytimes.com/2011/09/13/us/13contractor.html>.



DHS and the private sector company. The contractor did not return the appellant to the position, allegedly at DHS's request.<sup>278</sup>

The Board noted that in the private sector, under USERRA, an employer includes not only the entity that pays an employee's salary or wages, but also anyone to whom an employer has delegated employment-related responsibilities. When the authority over the individual is shared in this manner, both employers share responsibility for compliance with USERRA. The Board recognized the principle that USERRA should be broadly construed and any "interpretive doubt" should be "resolved in the veteran's favor."<sup>279</sup> The Board therefore held that a Federal agency could be considered the employer over a contractor's employee under the right conditions. Because the appellant had made a nonfrivolous allegation that DHS exercised control over his reemployment to such an extent that it should be considered his "employer" under USERRA, and the Board had USERRA jurisdiction over CBP within DHS, the Board held that it had jurisdiction over the appellant's USERRA claim against DHS, even though the appellant's position was not in the civil service. However, the Board lacked jurisdiction over the appellant's claim against the contractor.<sup>280</sup>

## THE RIGHT TO A USERRA HEARING

As explained earlier, a VEOA appellant is not automatically entitled to a hearing regarding either jurisdiction or the merits of a VEOA appeal.<sup>281</sup> In contrast, under USERRA, once an appellant has established Board

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<sup>278</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 2 (2009).

<sup>279</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶¶ 10, 13-14 (2009) (quoting *Kirkendall v. Department of the Army*, 479 F.3d 830, 846 (Fed. Cir. 2007)).

<sup>280</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶¶ 15, 19 (2009).

<sup>281</sup> Compare *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to VEOA hearing), with *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (finding that the Board cannot exercise discretion but rather must grant a USERRA hearing if one is requested).

jurisdiction, he has an unconditional right to a hearing on the merits of his USERRA claim.<sup>282</sup>

However, that right to a hearing attaches only after jurisdiction has been found. For example, in *Downs v. Department of Veterans Affairs*, the appellant was discharged from military service under other than honorable conditions. This deprived the Board of USERRA jurisdiction, even though the appellant made a nonfrivolous allegation under USERRA and therefore met the *general* USERRA jurisdictional test. The Board held that the unconditional right to a hearing does not attach until after jurisdiction has been established, and that since jurisdiction was lacking, a hearing would not be held.<sup>283</sup> This is consistent with the point made by our reviewing court mentioned in the introduction: “When jurisdiction is lacking, the only function remaining to the court is that of announcing the fact and dismissing the cause.”<sup>284</sup>

## USERRA RELIEF

USERRA and VEOA have similar provisions instructing the Board on the relief to grant if a violation has been found. Under 5 U.S.C. § 3330c (VEOA), if the Board finds a violation occurred, it will “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.” Under 38 U.S.C. § 4324 (USERRA), if the Board finds a violation occurred, it will “enter an order requiring the agency or Office [of Personnel Management] to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.”

As explained earlier, under VEOA, if a candidate’s rights were violated with respect to a recruitment action, the proper remedy will usually be to

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<sup>282</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 10 (2012).

<sup>283</sup> *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶¶ 17–18 (2008).

<sup>284</sup> *Chertkov v. Office of Personnel Management*, 52 F.3d 961, 966 (Fed. Cir. 1995) (internal punctuation and citations omitted).

reconstruct the action. The appellant is not entitled to be selected—only to have the process reconstructed with the laws and regulations followed properly.<sup>285</sup> Similarly, in a USERRA case involving non-selection, the fact that a USERRA violation occurred does not automatically require an agency to give the appellant the position. As with VEOA, the action must be reconstructed, and selection and an award for “lost wages”<sup>286</sup> become issues only if the appellant would have gotten the position in a properly constructed process.<sup>287</sup>

The specific relief granted for a particular USERRA violation will depend on what needs to be remedied (for example, restoration of leave that was denied, reemployment in the position that was previously held, or promotion due to the escalator principle). However, the core principle is the same—to put the appellant where he or she would have been if not for the violation.<sup>288</sup>

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<sup>285</sup> See *Gonzalez v. Department of Homeland Security*, 110 M.S.P.R. 567, ¶ 6 (2009); *Lodge v. Department of the Treasury*, 109 M.S.P.R. 614, ¶ 7 (2008).

<sup>286</sup> Lost wages under USERRA are different from back pay under the Back Pay Act (which applies to many other Board decisions). Under USERRA, a service member is expected to exercise reasonable diligence to mitigate economic damages suffered as a result of an employer’s violation of USERRA. Therefore, an award of lost wages and benefits must be offset by the amount the appellant should have reasonably earned during the relevant period. In contrast, the Back Pay Act does not require that a back pay award be offset by what an employee should have reasonably earned during the relevant period; rather, 5 U.S.C. § 5596 requires only that an award of back pay be offset by amounts actually earned by the employee through other employment during the period at issue. *Erickson v. U.S. Postal Service*, 120 M.S.P.R. 468, ¶ 17, n.6 (2013).

<sup>287</sup> See *Grandberry v. Department of Homeland Security*, 406 F. App’x 472, 475 (Fed. Cir. 2010).

<sup>288</sup> See, e.g., *Tully v. Department of Justice*, 481 F.3d 1367, 1369 (Fed. Cir. 2007) (explaining that a basic principle of USERRA is that service member employees receive benefits equal to, but not more favorable than, those generally available to all employees of the employer).

## CHAPTER NINE: CONCLUSION

The laws for veterans' redress are complicated, especially VEOA because of the way in which it interacts with so many other parts of the civil service. Vague and undefined terms in 5 U.S.C. § 3330a and the statute's applicability to "any statute or regulation relating to veterans' preference" have resulted in an extensive body of case law that may be confusing for the average veteran or preference eligible. It also has resulted in a system with so many rules that OPM has, at times, not kept up with necessary changes. The USERRA statute, while far more extensive, may be easier to use because its terms and provisions are more tightly defined and it has fewer moving parts.

USERRA and VEOA share some common elements, but differ in several important respects. In particular, VEOA requires that an appellant exhaust his or her administrative remedies and adhere to strict deadlines in the absence of an exception known as equitable tolling. In contrast, USERRA does not require an exhaustion of administrative remedies and does not have strict deadlines for filing. VEOA does not have a guaranteed right to a hearing. USERRA has a right to a hearing upon request once jurisdiction is established. Under VEOA, an appellant has the burden of proof on the merits. Under USERRA, the party with the burden of proof depends on whether the claim alleges discrimination or a failure to reemploy.

The complexity of the systems of rights and of redresses for veterans, preference eligibles, and service members creates a burden on the individuals that the laws were meant to help, particularly those who seek to navigate the process without the assistance of a legal expert. While we hope this report will be useful to veterans, preference eligibles, and service members, these individuals could all benefit from a system that requires less explanation and is easier for agencies and individuals to understand.

A violation of a veteran's rights—whether adjudicated under USERRA or VEOA—can have serious consequences for a veteran who must wait for the

redress procedures in order to get what he or she was entitled to receive—especially if it means a lengthy period of no pay where a salary should have occurred. A violation can also have serious consequences for an innocent bystander who may need to be removed from a position while the personnel action in question is reconstructed. Everyone benefits when employers adhere to the laws and regulations pertaining to veterans and promptly take corrective action in response to any violation of those requirements.

**APPENDIX A: DEFINITION OF VETERAN AND RELATED TERMS (5 U.S.C.  
§ 2108)**

For the purpose of this title—

(1) “veteran” means an individual who—

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955;

(B) served on active duty as defined by section 101 (21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, and before October 15, 1976, not including service under section 12103 (d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

(C) served on active duty as defined by section 101 (21) of title 38 in the armed forces during the period beginning on August 2, 1990, and ending on January 2, 1992; or

(D) served on active duty as defined by section 101 (21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom;

and, except as provided under section 2108a, who has been discharged or released from active duty in the armed forces under honorable conditions;

(2) “disabled veteran” means an individual who has served on active duty in the armed forces, (except as provided under section 2108a) has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because

of a public statute administered by the Department of Veterans Affairs or a military department;

(3) “preference eligible” means, except as provided in paragraph (4) of this section or section 2108a (c)—

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B), (C), or (D) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed;

(G) the mother of a service-connected permanently and totally disabled veteran, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and

(H) a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge (as that term is defined in section 1174 (i) of title 10);

but does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(4) except for the purposes of chapters 43 and 75 of this title, “preference eligible” does not include a retired member of the armed forces unless—

(A) the individual is a disabled veteran; or

(B) the individual retired below the rank of major or its equivalent; and

(5) “retired member of the armed forces” means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.



## APPENDIX B: COMPARING VEOA AND USERRA

The table below is offered as a quick reference guide to illustrate some similarities and differences between VEOA and USERRA but is not a substitute for consulting pertinent cases, statutes, or regulations. Similarities have a white background; differences have a light colored background.

	VEOA	USERRA
Level of Statutory Detail	The statutory language is relatively brief and occasionally vague, resulting in both the Board and the Federal Circuit defining many of its terms in case law.	The statutory language is extensive, detailed, and often self-explanatory.
Applicability	VEOA applies only to the Federal Government. There is no private sector equivalent.	USERRA rights apply to the private and public sectors, including the Federal Government, but the systems for redress are different.
Defining the Individuals	The individual must be a veteran as described in 5 U.S.C. § 3304(f)(1) or be a preference eligible. <sup>289</sup>	The individual must be a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service. <sup>290</sup>
Defining the Employer	The employing entity is “an agency,” which is not defined in statute.	The employer is a broad category defined in statute.
Scope of MSPB Jurisdiction	MSPB can lack jurisdiction over certain Federal employers. <sup>291</sup>	MSPB can lack jurisdiction over certain Federal employers. <sup>292</sup>

<sup>289</sup> 5 U.S.C. § 3330a(a)(1).

<sup>290</sup> 38 U.S.C. § 4311(a). *See Lourens v. Merit Systems Protection Board*, 193 F.3d 1369, 1371 (Fed. Cir. 1999) (holding that the Board did not have USERRA jurisdiction over claims by a widow with derived preference eligibility when the widow had not been a member of—or applicant to—a uniformed service).

<sup>291</sup> *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1348-51 (Fed. Cir. 2010) (holding that the Board lacks jurisdiction over VEOA appeals from TSA applicants); *see Belhumeur v. Department of Transportation*, 104 M.S.P.R. 408, ¶ 8 (2007) (holding that the Board lacks jurisdiction over VEOA appeals from FAA employees and applicants).

	VEOA	USERRA
Establishing MSPB Jurisdiction	Jurisdiction can be established through a non-frivolous assertion. <sup>293</sup>	Jurisdiction can be established through a non-frivolous assertion. <sup>294</sup>
Affirmative Defense in an Otherwise Appealable Action	VEOA rights can be raised as an affirmative defense in an action that is otherwise appealable to MSPB. <sup>295</sup>	USERRA rights can be raised as an affirmative defense in an action that is otherwise appealable to MSPB. <sup>296</sup>
Filing with DOL	An individual must (in the absence of equitable tolling) file a complaint with DOL within 60 days after the date of the alleged violation. <sup>297</sup>	An individual has the option to file a complaint with DOL but can seek redress from the Board without first filing a complaint with DOL. <sup>298</sup>
Exhaustion of Remedies at DOL	If DOL has not resolved the complaint after 60 days, an individual may file an appeal with MSPB after notifying DOL of the intent to file with MSPB. <sup>299</sup>	If the individual opted to file a complaint with DOL, the individual must wait for the complaint to be resolved. The passage of time does not enable the individual to file with MPSB. <sup>300</sup>

<sup>292</sup> *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380, 1381-83 (Fed. Cir. 2004); see *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529, ¶¶ 8-9 (2005) (applying *Conyers* to find that the Board lacked USERRA jurisdiction over termination and failure to reemploy claims). But see *Quinlan v. Department of Homeland Security*, 118 M.S.P.R. 362, ¶ 8 (2012) (finding that MSPB has jurisdiction over TSA reductions in grade under the language of 49 U.S.C. § 40122(g)(3)); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 12 (2014) (explaining that MSPB has jurisdiction over TSA whistleblower claims under the Whistleblower Protection Enhancement Act of 2012).

<sup>293</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012); *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010).

<sup>294</sup> *Mims v. Social Security Administration*, 120 M.S.P.R. 213, ¶ 22 (2013); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 10 (2004).

<sup>295</sup> *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006).

<sup>296</sup> *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006).

<sup>297</sup> See *Kirkendall v. Department of the Army*, 479 F.3d 830, 844 (Fed. Cir. 2007) (holding that 5 U.S.C. §§ 3330a(a)(1)(A) and 3330a(d)(1)(B) are subject to equitable tolling); 5 U.S.C. § 3330a(a)(2)(A).

<sup>298</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

<sup>299</sup> *Burroughs v. Department of the Army*, 116 M.S.P.R. 292, ¶¶ 8, 10 (2011); 5 U.S.C. § 3330a(d).

<sup>300</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

VEOA		USERRA
Deadlines to File	In the absence of equitable tolling, the appellant cannot file: (1) before the 61st day after the date on which the complaint is filed; or (2) later than 15 days after the date on which the individual receives written notification from the Secretary that the matter is closed. <sup>301</sup>	USERRA does not contain a deadline to file, but laches may apply. <sup>302</sup>
Burden of Proof	The appellant must prove the merits of the case by preponderant evidence. <sup>303</sup>	In a <i>discrimination</i> case, the appellant must prove the merits of the case by preponderant evidence. If that burden is met, the agency may avoid relief by showing by preponderant evidence that it would have taken the same action even in the absence of the improper motivation. <sup>304</sup>  In a <i>reemployment</i> case, the agency bears the burden of proving, by preponderant evidence, that it met its statutory obligations to reemploy the individual with the appropriate level of career advancement and benefits. <sup>305</sup>
OSC Role	OSC cannot pursue corrective action on the individual's behalf. <sup>306</sup>	OSC may appear on the appellant's behalf. <sup>307</sup>

<sup>301</sup> 5 U.S.C. § 3330a(d)(1).

<sup>302</sup> See *Garcia v. Department of State*, 101 M.S.P.R. 172, ¶¶ 14-17 (2006).

<sup>303</sup> *Lis v. U.S. Postal Service*, 113 M.S.P.R. 415, ¶ 11 (2010).

<sup>304</sup> *Burroughs v. Department of the Army*, 120 M.S.P.R. 392, ¶ 5 (2013); *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566, ¶ 11 (2012).

<sup>305</sup> *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (explaining that the standard for reemployment cases is derived from 5 U.S.C. § 7701(c)(2)(B)). See 5 U.S.C. § 7701(c)(2)(B) (stating that an agency must prove its case by preponderant evidence).

<sup>306</sup> See 5 U.S.C. §§ 2302(b)(11), 2302(e)(2), 1214.

VEOA		USERRA
Right to a Hearing	No right to a hearing. <sup>308</sup>	Right to a hearing. <sup>309</sup>
Available Remedies	If a violation is found, the agency will be required to comply with the violated provisions and award compensation for any loss of wages or benefits suffered as a result of the violation. <sup>310</sup>	If a violation is found, the agency will be required to comply with the violated provisions and award compensation for any loss of wages or benefits suffered as a result of the violation. <sup>311</sup>

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<sup>307</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶¶ 15, 19 (2009) (quoting 38 U.S.C. § 4324(a)(2)(A)).

<sup>308</sup> Compare *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to VEOA hearing), with *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (finding that the Board cannot exercise discretion but rather must grant a USERRA hearing if one is requested).

<sup>309</sup> Compare *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to VEOA hearing), with *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (finding that the Board cannot exercise discretion but rather must grant a USERRA hearing if one is requested).

<sup>310</sup> 5 U.S.C. § 3330c.

<sup>311</sup> 38 U.S.C. § 4324.

## APPENDIX C: EQUITABLE TOLLING

The concept behind equitable tolling is that a party should not be deprived of the ability to pursue a claim because of a statute of limitations if the party, despite diligent efforts, was unaware of the injury.<sup>312</sup> The Supreme Court has extended this concept to suits against the Government, provided that there is not “good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.”<sup>313</sup> This is known as the *Irwin* presumption, named for the case in which the Supreme Court established the concept.<sup>314</sup>

In *United States v. Brockamp*, a case involving tax refunds, the Court noted that the language in the statute at issue “sets forth its time limitations in unusually emphatic form.” Accordingly, the Court found that the timing requirements in the statute were not subject to equitable tolling—meaning they could not be waived.<sup>315</sup>

The VEOA statute also contains timing requirements for which strong language is used, such as stating that “in no event” may an appeal be brought to MPSB if it is filed too soon or too late.<sup>316</sup> There is also a requirement that a complaint with DOL “must be filed within 60 days.”<sup>317</sup> However, as explained below, equitable tolling does apply to VEOA.

In *Kirkendall v. Department of the Army*, the Federal Circuit was presented with a case in which an appellant missed the deadline to file his VEOA complaint with DOL. The question was whether the language in the statute, stating the

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<sup>312</sup> *Black’s Law Dictionary*, 9th ed. (2009).

<sup>313</sup> *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original, punctuation modified).

<sup>314</sup> See *Kirkendall v. Department of the Army*, 479 F.3d 830, 836 (Fed. Cir. 2007) (explaining that the court must be guided by the presumption established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)).

<sup>315</sup> *United States v. Brockamp*, 519 U.S. 347, 350, 354 (1997).

<sup>316</sup> 5 U.S.C. § 3330a(d); see *Kirkendall v. Department of the Army*, 479 F.3d 830, 838 (Fed. Cir. 2007) (describing this language as “certainly strong”).

<sup>317</sup> 5 U.S.C. § 3330a(a)(2)(a).

complaint “must be filed” by a deadline, was intended by Congress to mean “must be filed unless we would usually allow the deadline to be missed for this particular reason;” and whether “in no event” could the appeal deadline be missed was intended to mean “in no event other than events we usually allow when the Government is being sued.”<sup>318</sup>

The Federal Circuit held that VEOA was the type of statute for which equitable tolling is appropriate. It particularly noted the canon that veterans’ benefits statutes should be construed in the veteran’s favor.<sup>319</sup> Therefore, the VEOA deadlines for filing with DOL or with the Board can be waived if the Board finds that the appellant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where he has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.<sup>320</sup>

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<sup>318</sup> *Kirkendall v. Department of the Army*, 479 F.3d 830, 838-41 (Fed. Cir. 2007).

<sup>319</sup> *Kirkendall v. Department of the Army*, 479 F.3d 830, 843-44 (Fed. Cir. 2007).

<sup>320</sup> *Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 8 (2009).

**APPENDIX D: VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998**  
**REDRESS STATUTE (5 U.S.C. § 3330a-c)**

**5 U.S.C. § 3330a**

(a)

(1)

(A) 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.

(B) A veteran described in section 3304 (f)(1) who alleges that an agency has violated such section with respect to such veteran may file a complaint with the Secretary of Labor.

(2)

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

(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 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 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 subsection (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.

#### **5 U.S.C. § 3330b**

(a) In lieu of continuing the administrative redress procedure provided under section 3330a (d), a preference eligible, or a veteran described by section 3330a (a)(1)(B) with respect to a violation described by such section, 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.

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

#### **5 U.S.C. § 3330c**

(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.

**APPENDIX E: VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998**  
**OPPORTUNITY TO COMPETE STATUTE (5 U.S.C. § 3304(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) If selected, a preference eligible or veteran described in paragraph (1) shall receive a career or career-conditional appointment, as appropriate.

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

(4) 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.

(5) The Office of Personnel Management shall prescribe regulations necessary for the administration of this subsection. The regulations shall ensure that an individual who has completed an initial tour of active duty is not excluded from the application of this subsection because of having been released from such tour of duty shortly before completing 3 years of active service, having been honorably released from such duty.

## COMPARING VEOA AND USERRA

The table below is offered as a quick reference guide to illustrate some similarities and differences between VEOA and USERRA but is not a substitute for consulting pertinent cases, statutes, or regulations. Similarities have a white background; differences have a light colored background.

	VEOA	USERRA
Level of Statutory Detail	The statutory language is relatively brief and occasionally vague, resulting in both the Board and the Federal Circuit defining many of its terms in case law.	The statutory language is extensive, detailed, and often self-explanatory.
Applicability	VEOA applies only to the Federal Government. There is no private sector equivalent.	USERRA rights apply to the private and public sectors, including the Federal Government, but the systems for redress are different.
Defining the Individuals	The individual must be a veteran as described in 5 U.S.C. § 3304(f)(1) or be a preference eligible. <sup>1</sup>	The individual must be a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service. <sup>2</sup>
Defining the Employer	The employing entity is “an agency,” which is not defined in statute.	The employer is a broad category defined in statute.
Scope of MSPB Jurisdiction	MSPB can lack jurisdiction over certain Federal employers. <sup>3</sup>	MSPB can lack jurisdiction over certain Federal employers. <sup>4</sup>
Establishing MSPB Jurisdiction	Jurisdiction can be established through a non-frivolous assertion. <sup>5</sup>	Jurisdiction can be established through a non-frivolous assertion. <sup>6</sup>
Affirmative Defense in an Otherwise Appealable Action	VEOA rights can be raised as an affirmative defense in an action that is otherwise appealable to MSPB. <sup>7</sup>	USERRA rights can be raised as an affirmative defense in an action that is otherwise appealable to MSPB. <sup>8</sup>
Filing with DOL	An individual must (in the absence of equitable tolling) file a complaint with DOL within 60 days after the date of the alleged violation. <sup>9</sup>	An individual has the option to file a complaint with DOL but can seek redress from the Board without first filing a complaint with DOL. <sup>10</sup>
Exhaustion of Remedies at DOL	If DOL has not resolved the complaint after 60 days, an individual may file an appeal with MSPB after notifying DOL of the intent to file with MSPB. <sup>11</sup>	If the individual opted to file a complaint with DOL, the individual must wait for the complaint to be resolved. The passage of time does not enable the individual to file with MSPB. <sup>12</sup>
Deadlines to File	In the absence of equitable tolling, the appellant cannot file: (1) before the 61st day after the date on which the complaint is filed; or (2) later than 15 days after the date on which the individual receives written notification from the Secretary that the matter is closed. <sup>13</sup>	USERRA does not contain a deadline to file, but laches may apply. <sup>14</sup>
Burden of Proof	The appellant must prove the merits of the case by preponderant evidence. <sup>15</sup>	In a <i>discrimination</i> case, the appellant must prove the merits of the case by preponderant evidence. If that burden is met, the agency may avoid relief by showing by preponderant evidence that it would have taken the same action even in the absence of the improper motivation. <sup>16</sup>  In a <i>reemployment</i> case, the agency bears the burden of proving, by preponderant evidence, that it met its statutory obligations to reemploy the individual with the appropriate level of career advancement and benefits. <sup>17</sup>
OSC Role	OSC cannot pursue corrective action on the individual’s behalf. <sup>18</sup>	OSC may appear on the appellant’s behalf. <sup>19</sup>
Right to a Hearing	No right to a hearing. <sup>20</sup>	Right to a hearing. <sup>21</sup>
Available Remedies	If a violation is found, the agency will be required to comply with the violated provisions and award compensation for any loss of wages or benefits suffered as a result of the violation. <sup>22</sup>	If a violation is found, the agency will be required to comply with the violated provisions and award compensation for any loss of wages or benefits suffered as a result of the violation. <sup>23</sup>

## ENDNOTES FOR COMPARING VEOA AND USERRA

<sup>1</sup> 5 U.S.C. § 3330a(a)(1).

<sup>2</sup> 38 U.S.C. § 4311(a). *See Lourens v. Merit Systems Protection Board*, 193 F.3d 1369, 1371 (Fed. Cir. 1999) (holding that the Board did not have USERRA jurisdiction over claims by a widow with derived preference eligibility when the widow had not been a member of—or applicant to—a uniformed service).

<sup>3</sup> *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1348-51 (Fed. Cir. 2010) (holding that the Board lacks jurisdiction over VEOA appeals from TSA applicants); *see Belhumeur v. Department of Transportation*, 104 M.S.P.R. 408, ¶ 8 (2007) (holding that the Board lacks jurisdiction over VEOA appeals from FAA employees and applicants).

<sup>4</sup> *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380, 1381-83 (Fed. Cir. 2004); *see Spain v. Department of Homeland Security*, 99 M.S.P.R. 529, ¶¶ 8-9 (2005) (applying *Conyers* to find that the Board lacked USERRA jurisdiction over termination and failure to reemploy claims). *But see Quinlan v. Department of Homeland Security*, 118 M.S.P.R. 362, ¶ 8 (2012) (finding that MSPB has jurisdiction over TSA reductions in grade under the language of 49 U.S.C. § 40122(g)(3)); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 12 (2014) (explaining that MSPB has jurisdiction over TSA whistleblower claims under the Whistleblower Protection Enhancement Act of 2012).

<sup>5</sup> *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1319 (Fed. Cir. 2012); *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010).

<sup>6</sup> *Mims v. Social Security Administration*, 120 M.S.P.R. 213, ¶ 22 (2013); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 10 (2004).

<sup>7</sup> *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006).

<sup>8</sup> *Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006).

<sup>9</sup> *See Kirkendall v. Department of the Army*, 479 F.3d 830, 844 (Fed. Cir. 2007) (holding that 5 U.S.C. §§ 3330a(a)(1)(A) and 3330a(d)(1)(B) are subject to equitable tolling); 5 U.S.C. § 3330a(a)(2)(A).

<sup>10</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

<sup>11</sup> *Burroughs v. Department of the Army*, 116 M.S.P.R. 292, ¶¶ 8, 10 (2011); 5 U.S.C. § 3330a(d).

<sup>12</sup> *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 8 (2012); *Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007).

<sup>13</sup> 5 U.S.C. § 3330a(d)(1).

<sup>14</sup> *See Garcia v. Department of State*, 101 M.S.P.R. 172, ¶¶ 14-17 (2006).

<sup>15</sup> *Lis v. U.S. Postal Service*, 113 M.S.P.R. 415, ¶ 11 (2010).

<sup>16</sup> *Burroughs v. Department of the Army*, 120 M.S.P.R. 392, ¶ 5 (2013); *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566, ¶ 11 (2012).

<sup>17</sup> *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (explaining that the standard for reemployment cases is derived from 5 U.S.C. § 7701(c)(2)(B)). *See* 5 U.S.C. § 7701(c)(2)(B) (stating that an agency must prove its case by preponderant evidence).

<sup>18</sup> *See* 5 U.S.C. §§ 2302(b)(11), 2302(e)(2), 1214.

<sup>19</sup> *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶¶ 15, 19 (2009) (quoting 38 U.S.C. § 4324(a)(2)(A)).

<sup>20</sup> *Compare Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to VEOA hearing), *with Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (finding that the Board cannot exercise discretion but rather must grant a USERRA hearing if one is requested).

<sup>21</sup> *Compare Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 8 (2011) (finding no entitlement to VEOA hearing), *with Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007) (finding that the Board cannot exercise discretion but rather must grant a USERRA hearing if one is requested).

<sup>22</sup> 5 U.S.C. § 3330c.

<sup>23</sup> 38 U.S.C. § 4324.



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