UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 24

Docket No. PH-3330-13-0049-I-1

Ross Vassallo,

Appellant,

v.

Department of Defense,

Agency.

April 1, 2014

Ross Vassallo, Easton, Connecticut, pro se.

John K. Moroney, Esquire, Boston, Massachusetts, for the agency.

Lida V. Kianoury, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which denied his request for corrective action under the Veterans Employment Opportunities Act (VEOA). For the reasons discussed below, we GRANT the appellant's petition for review, AFFIRM the initial decision IN PART, REVERSE the initial decision IN PART, and GRANT the appellant's request for corrective action.

BACKGROUND

¶2 The pertinent facts, as set forth in the initial decision, are undisputed. The appellant was employed by the Defense Contract Management Agency (DCMA), a component of the Department of Defense, as a GS-12 Computer Engineer. He applied for the GS-13 position of Lead Interdisciplinary Engineer. The vacancy announcement, issued by DCMA, specified that the following Department of Defense employees could apply for the position: current DCMA employees; and current Department of Defense employees with the Acquisition, Technology, and Logistics Workforce who are outside the Military Components. Initial Appeal File (IAF), Tab 13, Subtab 4i. The job announcement specified, among other things, that an applicant "MUST submit documents verifying your eligibility with your application package. These documents may include, but are not limited to: for current employment verification, a non-award [Standard Form (SF)]-50 or DD3434 . . . ." *Id.* at 8. The appellant's application included a résumé, an SF-52 (Request for Personnel Action), education transcripts, and a Form DD 214. IAF, Tab 13, Subtab 4g. The appellant's application was rejected due to his failure to submit an SF-50 (Notification of Personnel Action). *Id.*, Subtab 4d.

¶3 After first seeking corrective action from the Department of Labor, the appellant filed an appeal with the Board. After being advised by the administrative judge that VEOA claims can be brought under either 5 U.S.C. § 3330a(a)(1)(A) or 5 U.S.C. § 3330a(a)(1)(B), the appellant clarified that he was bringing his claim under the latter provision, i.e., as a veteran described in 5 U.S.C. § 3304(f)(1) who alleges that the agency violated that provision. Section 3304(f)(1) provides that a preference eligible or veteran who meets certain criteria "may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications outside its own workforce under merit promotion procedures." IAF, Tab 3.

¶4 After finding that the appellant established jurisdiction over his VEOA claim, the administrative judge addressed two merits issues. First, she found that

the agency improperly rejected the appellant's application on the basis that he had failed to submit an SF-50 as verification of his current employment, finding that the SF-52 he submitted contained the same employment verification information that would have been contained in an SF-50, and noting that the job announcement at issue specifically states that employment verification documentation "may include, but is not limited to" an SF-50 or DD3434.[1] Initial Decision (ID) at 4-6.

¶5 The administrative judge then considered whether the agency making the announcement accepted applications from individuals outside its own workforce under merit promotion procedures. ID at 6. In resolving that question in the negative, the administrative judge relied on language in the Office of Personnel Management's (OPM's) VetGuide: "('Agency,' in this context means the parent agency, *i.e.*, Treasury, not the Internal Revenue Service and the Department of Defense, not Department of the Army)."[2] ID at 7. Because the vacancy announcement in question was limited to components of the Department of Defense, the administrative judge concluded that the relevant agency did not accept applications from individuals outside its own workforce under merit promotion procedures and denied the appellant's request for corrective action on that basis. ID at 5-7.

ANALYSIS

¶6 The statutory section governing "opportunity to compete" claims under the VEOA provides as follows:

> Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of

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[1] The agency does not challenge this finding on review.

[2] The VetGuide can be found at http://www.opm.gov/policy-data-oversight/veterans-services/vet-guide/.

> 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.

5 U.S.C. § 3304(f)(1). It is undisputed that the appellant met the definition of a "veteran" under section 3304(f)(1) and otherwise satisfied jurisdictional requirements for an appeal under that provision. The dispositive question is whether the agency making the announcement accepted applications from individuals outside its own workforce under merit promotion procedures.

¶7 As the initial decision reflects, OPM's guidance in the VetGuide indicates that the Department of Defense, not its DCMA subcomponent, was the relevant agency in this case. Accordingly, if the VetGuide guidance is applied, the agency did not accept applications from individuals outside its own workforce by accepting applications from "Department of Defense Employee[s] within the Acquisition, Technology, and Logistics (AT&L) Workforce who are outside of the Military Components." *See* IAF, Tab 13, Subtab 4i at 2. Indeed, if the Department of Defense is the relevant "agency," then it did not even accept applications from the entirety of its own workforce.

¶8 OPM's guidance in the VetGuide, while entitled to "some weight" depending on factors such as consistency of the agency's position, its formality, and its persuasiveness, is not entitled to the deference accorded to regulations. *Durand v. Environmental Protection Agency*, 106 M.S.P.R. 533, ¶ 14 (2007); *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 14 (2006). In *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104, ¶¶ 17-20 (2007), the Board rejected guidance in the VetGuide as to an interpretation of 5 U.S.C. § 3304(f)(1) in another context.

¶9 OPM's interpretation of the meaning of the word "agency" has been rejected by the Board in *Washburn v. Department of the Air Force*, 119 M.S.P.R.

265 (2013).[3] In *Washburn*, the Department of the Air Force issued a vacancy announcement to fill a position in the United States Strategic Command, a Department of Defense entity that includes elements of the Air Force, the Army, the Navy, and the Marine Corps, and the vacancy announcement stated that it would accept applications from "Air Force Employee[s]" and "[DOD] Transfer (Army, Navy, [Defense Finance and Accounting Service], etc.—Excluding Air Force)." *Id.*, ¶ 2. The Board held that "the agency making the announcement" within the meaning of 5 U.S.C. § 3304(f)(1) was the Department of the Air Force and concluded that this agency had "accept[ed] applications from individuals outside its own workforce under merit promotion procedures." *Id.*, ¶¶ 5-11.

¶10 While not directly on point, our decision in *Willingham v. Department of the Navy*, 118 M.S.P.R. 21 (2012), is instructive on the question of defining "agency" for purposes of a VEOA claim. The issue in that case was whether the Marine Corps Community Services, a nonappropriated fund instrumentality (NAFI), was an "agency" within the meaning of 5 U.S.C. § 3330a(a)(1)(A).[4] VEOA does not define "agency," and nothing in the Act's legislative history sheds light on the parameters of that term. In light of the resulting ambiguity as to the meaning of "agency" for purposes of VEOA, the Board relied primarily on the Act's remedial purpose to establish rights and benefits for veterans in construing "agency" as encompassing the NAFI at issue there. Thus, while *Willingham* does not stand for the proposition that all subcomponents of the Department of Defense are agencies for purposes of VEOA, it does reflect the

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[3] We note that the administrative judge did not have the benefit of the *Washburn* decision, which was issued after the initial decision in this appeal.

[4] Although the VEOA claim in *Willingham* arose under 5 U.S.C. § 3330a(a)(1)(A) rather than under 5 U.S.C. § 3330a(a)(1)(B), which is the statutory subsection at issue here, we see no basis to construe the term "agency" differently under those subsections.

Board's determination in VEOA appeals to interpret "agency" in a manner that best effectuates the underlying purposes of the Act.

¶11 Based on our previous decisions in *Washburn* and *Willingham*, we conclude that "the agency making the announcement" was DCMA, not the Department of Defense. The VetGuide's contrary interpretation of the law is not persuasive. We note in this regard that the VetGuide provision contains no analysis of this legal issue. Its treatment consists of the single parenthetical sentence quoted above. *Supra* ¶ 5.

¶12 Because DCMA "accept[ed] applications from outside its own workforce under merit promotion procedures," a veteran such as the appellant "may not be denied the opportunity to compete." We conclude that the appellant was wrongfully denied the opportunity to compete for the position at issue because of the agency's erroneous conclusion that he had failed to verify his current employment status. The agency therefore violated the appellant's rights under 5 U.S.C. §§ 3330a(a)(1)(B) and 3304(f)(1). The remedy for a violation in circumstances such as this is to determine whether the appellant was otherwise qualified for the position in question and, if so, require the agency to reconstruct the selection process. *Jolley*, 105 M.S.P.R. 104, ¶ 21.

ORDER

¶13 We ORDER the agency to determine whether the appellant was qualified for the position of Lead Interdisciplinary Engineer, GS-13, under Job Announcement Number SWH812P6914637694884 and, if so, to reconstruct the hiring process for that position. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 60 days after the date of this decision.

¶14 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it

took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶15 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the code of Federal Regulation, section 1201.113(c) 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.203, and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the United States Court of Appeals for the

Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.