



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 12, 2016

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BOARD DECISIONS

Appellant: Thomas V. Montgomery III
Agency: Department of Health & Human Services
Decision Number: [2016 MSPB 8](#)
Docket Number: DC-3330-14-0993-I-1
Issuance Date: February 5, 2016
Appeal Type: Veterans Employment Opportunities Act of 1998 (VEOA)

Right to Compete
Internal Agency Policy
Close of the Record

The appellant alleged that he was denied the right to compete when the agency transferred an employee from outside its workforce into a GS-1701-15 Supervisory Organizational Development Specialist position in the competitive service without advertising the vacancy. The administrative judge denied his request for corrective action on the merits without a hearing, finding that there was no genuine dispute of material fact, the agency had discretion to fill the vacancy by any authorized method, and the appellant had not shown that he was qualified for the position..

Holding: The Board granted the petition for review, vacated the initial decision, and remanded the appeal to the regional office for further adjudication.

1. Jurisdiction - The appellant established jurisdiction over his appeal by showing that he exhausted his administrative remedies with the Department of Labor and making nonfrivolous allegations that he was a veteran within the meaning of 5 U.S.C. § 3304(f)(1).
2. Announcement Required - Although the selectee for the position was a federal employee, he was an employee of a different agency. Thus, he was "outside [the agency's] own workforce," and under 5 C.F.R. § 330.706(c), the agency was required to announce the vacancy before filling it. It was immaterial that the vacancy was filled using open competitive procedures because 5 U.S.C. § 3304(f)(1) applies to both merit promotion and open competitive examining procedures.
3. Internal Agency Standard Operating Procedure - The agency claimed that it did not announce the position at issue separately because, pursuant to an internal standard operating procedure, it made its selection from a "shared" a selection certificate for another advertised vacancy for an allegedly comparable position. However, an internal agency policy may not override applicable statutes, including 5 U.S.C. § 3304(f)(1). Moreover, it was unclear that the two positions were comparable for purposes of the standard operating procedure, or whether the agency complied with the other relevant provisions of its standard operating procedure. It was also unclear what consideration, if any, was given to the appellant (who applied for the other position on the shared certificate) or any other candidate apart from the selectee.
4. Qualification for the Position - There was a genuine dispute of material fact regarding the appellant's qualification for the position at issue, especially since the agency found the appellant qualified for the other position on the shared certificate.
5. Close of the Record - The administrative judge closed the record without giving the appellant proper notice. Given the genuine disputes of material fact described above, the appeal must be remanded for further adjudication.

COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following cases:

Dixon v. Department of Homeland Security, No. [2015-3157](#) (Feb. 5, 2016) (No. 14-02610-3) (affirming an arbitrator's decision per Rule 36).

Campos v. Office of Personnel Management, No. [2015-3146](#) (Feb. 8, 2016) (MSPB No. DC-831E-14-0903-I-1) (affirming the Board's dismissal of the appellant's basic retirement annuity appeal under the doctrine of res judicata).

McMillon v. Department of Justice, No. [2016-1012](#) (Feb. 10, 2016) (MSPB No. DC-3330-15-0409-I-1) (affirming the Board's decision that denied on the merits the appellant's request for corrective action under VEOA).

Abou-Hussein v. Department of the Navy, No. [2015-3057](#) (Feb. 11, 2016) (MSPB No. AT-0752-13-6851-I-1) (affirming the Board's decision that upheld the appellant's removal for misconduct).

LEGISLATION

[S. 2450](#), **The Administrative Leave Act of 2016**. Introduced January 20, 2016 by Senator Jon Tester (D-MT). The intent of this bill to curb agencies' use of administrative leave.

The Act would apply to executive agencies under 5 U.S.C. § 105, and would limit the use of discipline-related administrative leave to situations in which temporary reassignment, transfer, telework, and other alternative measures to keep the employee working are not feasible. It would also limit such administrative leave to situations in which the employee's continued presence would pose a danger to person, property, the integrity of the pending disciplinary action, or other government interests.

The Act would limit the duration of administrative leave to no more than 5 consecutive days unless otherwise permitted by law. Agencies may place employees under investigation on administrative leave for no more than 10 days, with the ability to make 30-day extensions, but not more than 110 days in total. Employees may also be placed on administrative leave for the duration of the notice period for a proposed personnel action.

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