UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 225

Docket No. PH-3443-05-0464-I-1

Michael K. Dale,
Appellant,

v.

Department of Veterans Affairs,
Agency.

July 31, 2006

Michael K. Dale, Margate, New Jersey, pro se.

Kate Gorney, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has timely filed a petition for review of the October 12, 2005 initial decision that dismissed the appellant's appeal for failure to state a claim for which relief can be granted. We DENY the petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED, DENYING the appellant relief under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services

Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA).

BACKGROUND

¶2 In February 2005, the appellant, a veteran with a service-connected disability, applied for the GS-4/5 Program Support Clerk position with the agency under a vacancy announcement. Initial Appeal File (IAF), Tab 1 at 11-13; IAF, Tab 8, Subtabs 4b-4e. After he was not selected for the position, IAF, Tab 1 at 15, Tab 8, Subtab 4a, the appellant filed an appeal with the Board alleging that his nonselection violated his veterans' preference rights, and that it was the result of discrimination based on his disability, age, and gender, IAF, Tab 1 at 2-3, Tabs 2, 4, 9, 11, 13, 15. He also appeared to be alleging that three nonveteran candidates, including the candidate selected for the position, should have been ranked lower than he was during the selection process. IAF, Tab 11. He requested a hearing. IAF, Tab 1 at 4.

¶3 After holding a hearing, the administrative judge (AJ) issued an initial decision, dismissing the appeal for failure to state a claim for relief under VEOA or USERRA. Initial Decision (ID) at 1, 4-7, 11. The AJ also found that the Board lacks jurisdiction over his claims that the agency violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4214, or the Disabled Veterans Affirmative Action Program, 5 C.F.R. part 720, subpart C,[1] and that the appellant did not prove his discrimination claims based on disability, gender, or age, or his harmful error claim. ID at 7-11.

¶4 The appellant has filed a petition for review and additional submissions. Petition for Review File (PFRF), Tabs 1, 3-6. The agency has not responded to the petition for review.

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[1] It is not clear whether the appellant ever raised such claims below; in any event, he has not raised them on review. Therefore, we will not consider them further.

ANALYSIS

¶5 Upon reviewing the appellant's petition for review, we find that it does not meet the criteria for review under 5 C.F.R. § 1201.115, and we therefore deny it. Nevertheless, we reopen this case on our own motion for the following reasons.

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). An AJ must make a jurisdictional determination before resolving the case on the merits. *See Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 10 n.2 (2005) (the Board was precluded from deciding whether the appellant's VEOA claim failed on the merits where it lacked jurisdiction over the appeal); *cf. Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (the Board cannot assume for purposes of analysis that all jurisdictional requirements have been met and resolve the case on the merits). To the extent that the AJ did not make a jurisdictional determination before resolving the case on the merits, ID at 2-7, we will do so now.

¶7 A nonselection is not an action directly appealable to the Board. *See Hillman v. Tennessee Valley Authority*, 95 M.S.P.R. 162, ¶ 4 (2003). However, as the AJ recognized, IAF, Tab 17; ID at 2-3, the Board might have jurisdiction over a nonselection under either USERRA or VEOA. These separate statutory schemes protect different rights, impose different jurisdictional requirements for an appeal to the Board, and include different elements to establish a claim.

¶8 Contrary to the test set forth by the AJ, IAF, Tab 17 at 2; ID at 3, to establish Board jurisdiction over an appeal brought under VEOA, an appellant must (1) show that he exhausted his remedy with the Department of Labor (DOL) and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA, (ii) the action(s) at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his

rights under a statute or regulation relating to veterans' preference. *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 6 (2004).

¶9 Here, the record shows that the appellant exhausted his remedy with DOL, that he is a preference eligible, and that the nonselection took place after October 30, 1998. IAF, Tab 1 at 5-6, 11-12, 15; *see* 5 U.S.C. § 2108(2), (3). The only remaining inquiry is whether the appellant made a nonfrivolous allegation that his statutory or regulatory veterans' preference rights were violated. In this inquiry, the appellant's claims of violation of his veterans' preference should be liberally construed. *See Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 7 (2005); *Young v. Federal Mediation & Conciliation Service*, 93 M.S.P.R. 99, ¶¶ 6-7 (2002), *aff'd*, 66 F. App'x 858 (Fed. Cir. 2003). The vacancy announcement for the Program Support Clerk position stated that veterans' preference would be considered in the selection. IAF, Tab 8, Subtab 4g. This pro se appellant has asserted that the agency violated his veterans' preference rights when it did not select him for the GS-5 Program Support Clerk position. IAF, Tabs 1, 11, 18. Therefore, we find that the appellant made a nonfrivolous allegation that his veterans' preference rights were violated. *See Cruz*, 98 M.S.P.R. 492, ¶ 7; *Young*, 93 M.S.P.R. 99, ¶¶ 6-7. Accordingly, the Board has jurisdiction over his VEOA claim.

¶10 Nevertheless, we further find that the appellant did not show that the agency violated his veterans' preference rights when it did not select him for the Program Support Clerk position. To be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency's selection violated one or more of his statutory or regulatory veterans' preference rights. *See Hillman*, 95 M.S.P.R. 162, ¶ 16; ID at 6.

¶11 The vacancy announcement for the Program Support Clerk position advertised the position at the GS-4 and GS-5 levels. IAF, Tab 8, Subtab 4g. During the recruitment process, the appellant applied directly through the agency's Human Resources Office, noting that he was a 30% disabled veteran.

Id., Subtab 4e. The appellant's name and application were referred through the Delegated Examining Unit on the GS-4 certificate of eligibles only, not on the GS-5 certificate, because he was found not qualified at the GS-5 level. *Id.*, Subtab 4d; Hearing Tape (HT) 2, Side A (Human Resource Specialist Janice Rybicki). The GS-5 level required one year of specialized experience at the GS-4 level directly related to the position being filled, specific education, or equivalent combinations of education and experience. IAF, Tab 8, Subtab 4g. The appellant was given veterans' preference points and ranked at the top of the GS-4 certificate. *Id.*, Subtab 4d.

¶12 After fully considering the record, the AJ found that the appellant was not qualified at the GS-5 level because he lacked one year of specialized experience directly related to the position being filled. ID at 4-5. The appellant does not dispute this finding on petition for review. Nor does the appellant allege that he had the necessary education or combination of education and experience to qualify at the GS-5 level. The appellant merely alleges that he could have received a veterans recruitment appointment (VRA),[2] and that, if he had received such an appointment, the agency would have been required to train him so that he could satisfy the GS-5 specialized experience requirement. PFRF, Tab 3. However, the vacancy announcement for the Program Support Clerk position stated that applicants applying under this announcement would not be considered under the VRA. IAF, Tab 8, Subtab 4g at 4. Thus, the appellant has not provided a basis for disturbing the AJ's findings that he was not qualified at the GS-5 level, and that the agency properly referred him on the GS-4 certificate, and not the GS-5 certificate. *See* ID at 4-5; IAF, Tab 8, Subtabs 4c, 4d, 4g.

¶13 The agency filled the Program Support Clerk position at the GS-5 level. HT 2, Side A (selecting official Margaret Holmes). Holmes testified that she

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[2] "The VRA is a special authority by which agencies can, if they wish, appoint eligible veterans without competition … ." PFRF, Tab 3, Att. (Vetguide); *see* 5 C.F.R. part 307.

decided to fill the position at the GS-5 level because the position was located in a remote outpatient clinic setting and she felt that only someone with the requisite specialized experience at the GS-5 level could work with the minimal supervision available there. *Id.* She testified that she therefore only interviewed and considered candidates on the GS-5 certificate and did not even look at the GS-4 certificate. *Id.* The appellant argues that the agency violated his veterans' preference rights when it placed him on the GS-4 certificate and then selected a candidate from the GS-5 certificate because he is a veteran and an alleged VRA candidate. PFRF, Tabs 1, 3. The appellant has misconstrued VEOA. VEOA only prohibits an agency from denying a preference eligible the opportunity to compete; it does not provide that veterans will be considered for positions for which they are not qualified. *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98, ¶ 9 (2000). Here, the appellant was allowed to compete for the position he sought and his status as a preference eligible was fairly considered in the selection process. This is all that VEOA requires. *See Smyth v. U.S. Postal Service*, 89 M.S.P.R. 219, ¶ 7 (2001), *aff'd*, 41 F. App'x 475 (Fed. Cir. 2002). The appellant has identified no veterans' preference statute or regulation which precluded the agency from filling the position at the higher of the two advertised grades, and we are unaware of any such statute or regulation. Therefore, we find that he has not shown that his nonselection for the Program Support Clerk position violated one or more of his statutory or regulatory veterans' preference rights. *See Easter v. Department of the Army*, 99 M.S.P.R. 288, ¶ 8 (2005) (VEOA does not provide that veterans will be considered eligible for positions for which they are not qualified); *Smyth*, 89 M.S.P.R. 219, ¶ 7; *Ramsey*, 87 M.S.P.R. 98, ¶ 9. Accordingly, we DENY the appellant's request for relief under VEOA.[3]

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[3] The appellant argues that the agency violated various statutes and regulations when it removed him from consideration or passed over him. PFRF, Tabs 1, 3, 6; IAF, Tab 18. The agency did not remove him from consideration or pass over him, however. Rather,

¶14 Even though the appellant was not correctly placed on notice of what he needed to allege to establish jurisdiction over his USERRA claim, we nonetheless find that he made the allegations necessary to satisfy such jurisdictional requirements. USERRA provides, in relevant part, that a person who has performed service in a uniformed service shall not be denied initial employment on the basis of that performance of service. 38 U.S.C. § 4311(a). Thus, in order to establish Board jurisdiction over a claim for violation of section 4311(a), under the circumstances of this case, the appellant must at least allege that: (1) He performed uniformed service; (2) he was denied initial employment; and (3) the denial of initial employment was due to his performance of uniformed service. *See Goldberg*, 99 M.S.P.R. 660, ¶ 6; *Lazard v. U.S. Postal Service*, 93 M.S.P.R. 337, ¶ 5 (2003).

¶15 Here, the record shows, and the agency does not dispute, that the appellant performed duty in the uniformed service. IAF, Tab 1 at 11-12. The appellant has alleged that the agency denied him initial employment when it did not select him for the Program Support Clerk position. *Id.* at 2-3. Thus, the appellant has satisfied the first two jurisdictional requirements. With regard to the third jurisdictional requirement, the appellant appears to have alleged that the agency offered the appointment to the Program Support Clerk position to a nonveteran who should have been ranked lower than him during the selection process. IAF, Tab 11. Liberally and broadly construing this pro se appellant's USERRA claim, we find that he has raised a nonfrivolous claim of jurisdiction under USERRA. *See Gaston v. Peace Corps*, 100 M.S.P.R. 411, ¶ 8 (2005) (the appellant raised a nonfrivolous claim of jurisdiction under USERRA where he claimed that his veterans' preference should have placed him ahead of the other candidates, and that a nonveteran was selected over him); *Williams v. Department of the Air*

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the agency decided to hire at the GS-5 level, and the appellant was not qualified at that level. Thus, the appellant's reliance on such statutes and regulations is misplaced.

Force, 99 M.S.P.R. 269, ¶ 10 (2005) (pleadings will be interpreted liberally, especially where an appellant is proceeding pro se); *Hammond v. Department of Veterans Affairs*, 98 M.S.P.R. 359, ¶ 7 (2005) (a claim under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous); *Martir v. Department of the Navy*, 81 M.S.P.R. 421, ¶ 9 (1999) (the appellant raised a nonfrivolous claim of jurisdiction under USERRA where he alleged that he was a veteran, the agency denied him permanent appointment to any of four vacant positions, and the agency offered permanent appointments to these positions to similarly situated nonveterans). Therefore, we find that the Board has jurisdiction over the appellant's USERRA claim.

¶16 Nevertheless, we further find that the appellant did not show that the agency discriminated against him based on his military status when it did not select him for the Program Support Clerk position. In discrimination appeals brought under USERRA, the appellant must prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency action. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). The appellant may prove that his military status was a motivating or substantial factor by direct or circumstantial evidence. *Id.* at 1014. Once an appellant has met that burden of proof, the burden shifts to the employer to show, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced the employer to take the same action. *Id.* We find that the appellant was placed on notice of the required burden of proof and the methods of proof even though the AJ incorrectly labeled them as jurisdictional requirements. IAF, Tab 17 at 2-3; ID at 3. In addition, the AJ informed the appellant of the availability of discovery and the procedure for initiating discovery. IAF, Tab 3. Nothing in the record indicates that the appellant attempted to engage in discovery. Further, the AJ held the appellant's requested hearing. Therefore, the record is sufficiently developed to decide the appellant's USERRA claim on the merits. *See Williams*, 97 M.S.P.R. 252, ¶ 12.

¶17 The appellant failed to present any evidence to show that he was not selected for the Program Support Clerk position due to his performance of uniformed service. In fact, selecting official Holmes testified that she did not even look at the GS-4 certificate, and that she, thus, was unaware of the appellant's military status. HT 2, Side A. Moreover, the agency showed by preponderant evidence that it did not select the appellant for legitimate reasons. That is, the agency decided to fill the position at the GS-5 level due to the remote location of the position and the consequent need for someone with specialized experience, and the appellant did not qualify at the GS-5 level. *Id.*; IAF, Tab 8, Subtab 4d. Accordingly, we DENY the appellant's USERRA claim on the merits.

¶18 Finally, the appellant claimed that the agency discriminated against him based on his disability, sex, and age when it failed to select him. IAF, Tab 1 at 3, Tabs 2, 4, 9, 11, 13, 15. The AJ found that the appellant did not prove those claims. ID at 8-11. However, the Board lacks jurisdiction to decide such claims in a pure VEOA or USERRA case. *Hillman*, 95 M.S.P.R. 162, ¶ 4 n.2; *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 12 (2001); *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, ¶ 15 (2001). Therefore, the AJ erred in deciding those claims in this pure VEOA and USERRA case. *See id.* Similarly, to the extent that the AJ decided a harmful error claim that was unrelated to the appellant's veterans' preference or military status claims, ID at 11, she erred, *see Ruffin*, 89 M.S.P.R. 396, ¶¶ 11-12; *Metzenbaum*, 89 M.S.P.R. 285, ¶ 15.

¶19 Accordingly, we DENY the appellant's request for relief under both VEOA and USERRA.

ORDER

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. 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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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.