U.S. Merit Systems Protection Board

CASE REPORT DATE: September 19, 2008

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BOARD DECISIONS

► **Appellant: Gregory E. Shapley**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 212
Docket Number: AT-3443-07-0829-I-1
Issuance Date: September 17, 2008

Miscellaneous Agency Actions
USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his request for corrective action under VEOA for failure to state a claim upon which relief can be granted. The appellant applied, but was not selected, for the position of Bridge Program Administrator, GS-14/15. Previous to this vacancy announcement and selection, the agency advertised and filled the position of Bridge Management Specialist, GS-13/15. Because the agency improperly selected a person for the earlier vacancy before the closing date of the vacancy announcement, and therefore did not consider the applications of two other persons who applied before the deadline, the agency gave them priority consideration for the Bridge Program Administrator position. The selecting official for the latter position was told that he had to make a yes or no decision on hiring one of the two priority candidates, that he had to justify a decision not to hire one of priority candidates, and that as a result, he did not consider the appellant for the position.

In his VEOA appeal, the appellant alleged that the agency violated 5 U.S.C. § 3304(f)(1) by filling the Bridge Program Administrator position through priority consideration without allowing him to compete for the position. The AJ found that the agency had discretion to fill the vacancy by any authorized method, that the agency properly granted priority consideration to the two candidates other than the appellant, and dismissed the appeal for failure to state a claim upon which relief can be granted.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered the agency to reconstruct the selection process for the position for which he had applied:

1. The appellant satisfied the jurisdictional elements for a VEOA claim: he exhausted his remedy with the Department of Labor; he is a preference eligible and the events took place after enactment of VEOA; and he alleged that the agency violated 5 U.S.C. § 3304(f)(1), a law relating to veterans' preference.

2. Under the plain language of § 3304(f)(1), all covered individuals must be permitted to compete where, as here, applications will be accepted from persons outside the hiring agency's work force.

3. At issue is whether the appellant was provided a bona fide opportunity to compete for the position. Under the circumstances of this case, the Board answered that question in the negative. The mere fact that the appellant's name was on the certificate of eligibles does not suffice. The selecting official conceded that the appellant's application was not actually considered.

4. The proper remedy for a VEOA violation is reconstruction of the selection process in compliance with applicable statutes and regulations relating to veterans' preference.

► **Appellant: Tracy L. Beverly**
Agency: Department of Justice
Decision Number: 2008 MSPB 211
Docket Number: DA-3443-07-0572-I-1
Issuance Date: September 15, 2008

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. The AJ informed the appellant that the initial decision would become final on January 25, 2008, unless a petition for review was filed by that date. The appellant's PFR was not filed until April 14.

Holding: The Board dismissed the PFR as untimely filed with no showing of good cause for the delay.