

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
2009 MSPB 30**

---

Docket No. SF-3330-08-0322-I-1

---

**Andy Boctor,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

March 11, 2009

---

John R. Habashy, Esquire, Beverly Hills, California, for the appellant.

Kris Ashman, Esquire, Long Beach, California, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The agency has petitioned for review of an initial decision finding that it had violated the appellant's rights under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons stated below, we DENY the petition, REOPEN the case on our own motion, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The appellant's request for relief under VEOA is GRANTED.

**BACKGROUND**

¶2 The agency in this case issued two separate vacancy announcements for the position of sales specialist. Appeal File, Tab 14, Subtabs 4D, 4E. One of the

announcements indicated that applications would be accepted only from “E.A.S. career Postal employees . . . .” *Id.*, Subtab 4D. The other, an “External Recruitment Announcement,” included no such restriction. *See id.*, Subtab 4E. It indicated, however, that agency employees were to “only apply through the internal merit promotion process.” *Id.*

¶3 The appellant, who was not an employee of the agency, submitted an application under the external announcement. *Id.*, Subtab 4B. The agency did not consider the appellant or any other individual who applied under the external announcement, however. Declaration of S. Streeter at 2, Appeal File, Tab 21. Instead, after considering the internal candidates, and after selecting one of those candidates, it apparently canceled the external announcement. *See* Declaration of JoAnn Baker at 2, Appeal File, Tab 24, Subtab 2 (explaining the circumstances under which an announcement is cancelled).

¶4 The appellant subsequently contacted the agency, was told that the position had been filled, and filed a complaint with the Department of Labor (DoL). DoL Complaint at 1-3, Appeal File, Tab 7. In his complaint, he stated that he had not been considered for the position, and that he felt that his veteran preference rights had been violated. DoL Complaint at 3. DoL issued a letter informing the appellant that it had found no violation of his rights, and the appellant filed a timely appeal with the Board’s Western Regional Office. Appeal File, Tab 1 (appeal); *id.*, Exhibit A (DoL letter). An administrative judge of that office subsequently issued an initial decision finding that the agency had violated the appellant’s right to compete for the sales specialist position under [5 U.S.C. § 3304\(f\)\(1\)](#) by failing to consider him for that position. Initial Decision at 8-12, Appeal File, Tab 25. She ordered the agency to reconstruct the hiring process under the two vacancy announcements. *Id.* at 15.

¶5 The agency has filed a timely petition for review of the initial decision, arguing that it was not required to consider the appellant for the sales specialist position, and that its own procedures required it to consider qualified internal

candidates before considering external candidates such as the appellant. Petition for Review (PFR), PFR File, Tab 1 at 3-6. It also asserts that the administrative judge concluded that, because it had advertised its “vacancy both internally and externally, it was . . . obliged to consider all external applicants under ‘competitive examination principles,’” and it argues that this conclusion is not supported by Board precedent. PFR at 4-6. The appellant has not responded to the petition.

### ANALYSIS

¶6 We have indicated above that the administrative judge found that the agency violated the appellant’s right under [5 U.S.C. § 3304\(f\)\(1\)](#) to compete for the sales specialist position. The title of section 3304, “Competitive service; examinations,” appears to indicate that the section applies only to competitive service positions, and not to excepted service positions such as the position at issue here. *See As’Salaam v. U.S. Postal Service*, [85 M.S.P.R. 76](#), ¶ 16 (2000) (positions in the Postal Service are excepted service positions). Under [39 U.S.C. § 1005\(a\)\(2\)](#), however, the “provisions of title 5 [of the U.S. Code] relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title.” As we have noted below, [5 U.S.C. § 3304\(f\)\(1\)](#) expressly provides preference eligibles with a right to compete for vacant positions under certain circumstances. Clearly, therefore, it is a provision “relating to a preference eligible . . . .” *See Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 16 (2006) (section 3304(f)(1) is “a statute ‘relating to veterans’ preference’ for which VEOA provides a remedy in the event of a violation thereof”).

Accordingly, as a preference eligible veteran,<sup>1</sup> the appellant in this case is covered by 5 U.S.C. § 3304(f)(1).

¶7 Under [5 U.S.C. § 3304](#)(f)(1), “[p]reference eligibles . . . 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 . . . .” In concluding that the agency had violated this provision, the administrative judge found that the agency had accepted applications for the sales specialist position from outside its workforce, and that it had failed to consider the appellant for the position. Initial Decision at 8-9. She also indicated, quoting regulations on which the Board relied in *Brandt v. Department of the Air Force*, [103 M.S.P.R. 671](#), ¶¶ 12 (2006), that individuals covered under the provision were entitled to “compete for vacancies under merit promotion when an agency accept[ed] applications from individuals outside its own workforce.” Initial Decision at 8-9 (quoting [5 C.F.R. § 335.106](#)).

¶8 The agency argues that *Brandt* implicitly makes a “distinction between when external applications are *solicited* and when external applicants are *considered*.” PFR at 5. According to the agency, “once any external applicants are considered, veterans’ preference concepts *may* be applicable.” *Id.* Because it did not consider any of the external applicants, the agency argues, it was permitted to hire an internal candidate without considering the appellant or any other external applicants. *See id.* at 5-6.

---

<sup>1</sup> We have indicated above that [39 U.S.C. § 1005](#)(a)(2) refers to a preference eligible “as that term is defined under section 2108(3) of . . . title” 5. Section 2108(3) generally covers those preference eligibles who meet the definition of a “veteran,” as that term is defined in [5 U.S.C. § 2108](#)(1). The record shows, and the agency does not deny, that the appellant meets that definition. *See* [5 U.S.C. § 2108](#)(1)(D); Appeal File, Tab 7 at 13 (DD form 214, reflecting 4 years of active duty military service ending on Feb. 3, 2002). The appellant accordingly is a “preference eligible” for purposes of 39 U.S.C. § 1005(a)(2).

¶9 We see nothing in *Brandt* that supports the agency’s argument. While the Board did not expressly hold in that case that an agency had an obligation under [5 U.S.C. § 3304\(f\)\(1\)](#) to consider preference eligibles and veterans even when it did not consider the outside candidates whose applications it had accepted, its failure to do so cannot properly be interpreted as an implicit holding that the agency would have no such obligation. Instead, the Board simply had no reason there to address that obligation, since the agency in that case had in fact considered the outside applicants. See *Brandt*, [103 M.S.P.R. 671](#), ¶ 2. Moreover, the plain language of [5 U.S.C. § 3304\(f\)\(1\)](#) shows that a preference eligible’s right to compete for an announced vacancy arises whenever “the agency making the announcement will accept applications from individuals outside its own workforce” (emphasis added), and not just when it considers those applications it indicated a willingness to accept. In addition, we see no merit in the agency’s argument that it was not required to consider the appellant because its own procedures required it to consider qualified internal candidates before considering external candidates. Such procedures cannot override the agency’s statutory obligations. See *Garza v. Office of Personnel Management*, [83 M.S.P.R. 336](#), ¶ 5 (1999) (a regulation cannot override a clearly stated statutory requirement), *aff’d*, 250 F.3d 763 (Fed. Cir. 2000) (Table) .

¶10 Under the circumstances described above, we agree with the administrative judge that the agency violated the appellant’s rights as a preference eligible veteran when it failed to consider him for the sales specialist position.

¶11 Finally, as we have noted above, the agency asserts that the administrative judge erred in concluding that, because it had indicated that it would accept applications from individuals outside its own workforce, it was “obliged to consider all external applicants under ‘competitive examination principles . . . .’” We see nothing in the administrative judge’s analysis of the merits of this appeal that suggests that her finding that the agency violated the appellant’s rights was based on the agency’s failure to consider any external candidates other than the

appellant. Instead, the administrative judge indicated that the basis for her finding of a violation was the agency's failure to consider the appellant. *See* Initial Decision at 9, 15; *see also id.* at 12 (finding that the agency did not violate the appellant's rights by canceling the external vacancy announcement). We also see nothing in her analysis that suggests that she based her finding on the agency's failure to use "competitive examination principles" in making its selection. She indicated instead that the agency's use of merit promotion procedures was proper. *See id.* at 14.

¶12 We note, however, that the administrative judge ordered the agency to reconstruct the hiring process for the sales specialist position under both the internal and the external vacancy announcements. *Id.* at 15. The language used in describing the action to be taken could be regarded as requiring the agency to consider not only the appellant but every other qualified candidate who applied under either announcement. We see no need for the agency to consider all candidates who applied under the external announcement. Only those applicants who are preference eligibles and "veterans," as that term is used in [5 U.S.C. § 3304\(f\)\(1\)](#), must be considered.<sup>2</sup>

#### ORDER

¶13 We ORDER the agency to reconstruct the selection process for the sales specialist position, giving consideration to the appellant and any other qualified preference eligible or veteran consistent with [5 U.S.C. § 3304\(f\)\(1\)](#). *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

---

<sup>2</sup> If the agency determines, through the reconstructed hiring process, that it would have selected another covered veteran or preference eligible instead of the appellant, then the appellant will not have shown that he would have been hired in the absence of the violation found above. The agency will not, under those circumstances, be required to place the appellant in the sales specialist position at issue here.

- ¶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 to describe 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 Regulations, 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. §§ 1201.201](#), 1201.202 and 1201.203. 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 RIGHT TO REQUEST DAMAGES

You may be entitled to be paid by the agency for any loss of wages or benefits you suffered because of the violation of your rights under [5 U.S.C.](#)

[§ 3330a](#). [5 U.S.C. § 3330c\(a\)](#); [5 C.F.R. § 1208.25\(a\)](#). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. [5 U.S.C. § 3330c\(a\)](#); [5 C.F.R. § 1208.25\(a\)](#). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

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, [www.cafc.uscourts.gov](http://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:

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