

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
2009 MSPB 59**

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Docket No. CH-3330-08-0673-I-1

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**Stephen W. Gingery,  
Appellant,  
v.  
Department of the Treasury,  
Agency.  
April 21, 2009**

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Stephen W. Gingery, Macomb, Michigan, pro se.

Eileen R. Jimenez, Esquire, Chicago, Illinois, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his appeal without prejudice to its refiling. We DENY the PFR because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). We REOPEN this appeal on our own motion under [5 C.F.R. § 1201.118](#), however, and AFFIRM the ID as MODIFIED by this Opinion and Order, still DISMISSING the appeal without prejudice to its refiling.

**BACKGROUND**

¶2 In January 2008, the appellant, a preference-eligible veteran with a service-connected disability rated at thirty percent or more, applied for a career-

conditional competitive service position as a GS-5 Contact Representative (CR) with the agency's Internal Revenue Service (IRS) in Detroit, Michigan in response to Vacancy Announcement No. 08CN1-SBE0035-0962-05-MO. Initial Appeal File (IAF), Tab 4, Subtabs 3, 4. The vacancy announcement stated that applicants referred for selection consideration may be scheduled to complete a Telephone Assessment Program (TAP) to evaluate customer service competence and that "passing the TAP is a requirement for selection." *Id.*, Subtab 4 at 9. The appellant was placed at the top of the highest category group on the certificate of eligibles generated for the vacancy announcement. *Id.*, Subtab 1 at 3-4. Accordingly, on March 18, 2008, the appellant took the TAP and completed the paperwork and fingerprinting for employment as a CR. *Id.* at 3, 5.

¶3 On April 9, 2008, the agency sent the appellant an automated e-mail notifying him that he did not pass the TAP and, therefore, would not be considered for employment as a CR. IAF, Tab 18, Subtab 4h at 3. On April 11, 2008, the agency notified the appellant that it would be requesting a passover from the Office of Personnel Management (OPM).<sup>1</sup> *Id.* at 2. On April 15, 2008, the agency prepared a passover request based on the appellant's qualifications due to his failure of the TAP and forwarded that request to IRS Human Capital Officer Robert Buggs for his approval. IAF, Tab 18, Subtabs 4f at 1-3, 4g at 1.

¶4 On July 21, 2008, after exhausting his administrative remedies with the Department of Labor, IAF, Tab 4 at 5-6, Subtab 1, the appellant filed an appeal of

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<sup>1</sup> Generally, in filling a vacancy in the competitive service, an agency must select from among the three top-ranked candidates referred for consideration, and it may not "pass over" a preference eligible to select a candidate not entitled to preference. [5 U.S.C. § 3318\(a\)](#). Under [5 U.S.C. § 3318\(b\)\(1\)](#), however, an agency may select a non-preference eligible rather than a preference eligible if the agency files written reasons with OPM for passing over the preference eligible and obtains OPM's approval. Further, if the preference eligible is a veteran who has a disability of thirty percent or more, he is entitled to notice of the proposed passover and an opportunity to respond to OPM. [5 U.S.C. § 3318\(b\)\(2\)](#). *E.g., Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 10 (2007).

his nonselection with the Board and requested a hearing, claiming that the agency violated his rights under the Veterans' Preference Act. IAF, Tab 1. The appellant contended that the agency improperly disqualified him from consideration for employment based on his performance on the TAP without asking OPM for permission to pass over him and concurrently notifying him of the proposed passover in violation of [5 U.S.C. § 3318\(b\)](#). *Id.* at 10-12.

¶5 On July 25, 2008, while the passover request prepared on April 15, 2008, was awaiting Mr. Buggs's approval for submission to OPM, the agency received the results of the appellant's fingerprint check, which revealed that on July 16, 2008, the appellant had been sentenced by a district court for the State of Michigan to twelve months of non-reporting probation and ordered to undergo an anger management assessment for numerous violations of law. IAF, Tab 18, Subtab 4d at 27-29. The agency then prepared a passover request based on the appellant's suitability. *Id.* at 2-4. Mr. Buggs approved both passover requests and submitted them to OPM on August 28, 2008. IAF, Tab 18, Subtabs 4a, 4b, 4d. The agency notified the appellant of both passover requests in letters dated August 27, 2008, which the agency sent to the appellant concurrent with the submission of the passover requests to OPM.<sup>2</sup> *Id.*, Subtabs 4a, 4b at 7-8, 4d at 5.

¶6 During an October 21, 2008 status conference, the agency's representative reported that OPM had not yet issued a decision on the passover requests. IAF, Tab 46 at 1-2. The administrative judge (AJ) then informed the parties that she intended to dismiss this appeal without prejudice "to allow the agency to follow

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<sup>2</sup> While the record shows that the agency submitted two passover requests to OPM, one based on the appellant's qualifications, IAF, Tab 18, Subtab 4b, and the other based on his suitability, *id.*, Subtab 4d, the ID incorrectly states that, when the agency received the results of the appellant's fingerprint check on July 25, 2008, it withdrew the passover request pending with the IRS Human Capital Office, i.e., the passover request based on the appellant's qualifications, revised it to include a request for passover based on the appellant's suitability, and submitted one passover request to OPM based on both the appellant's suitability and qualifications. IAF, Tab 48, ID at 4.

up with OPM concerning the [p]assover request.” *Id.* at 2. The agency did not object to a dismissal without prejudice. *Id.* However, the appellant objected to a dismissal without prejudice, contending that because the agency did not submit its passover requests to OPM until five months after it had allegedly violated the Veterans’ Preference Act and the remedy for a violation of veterans’ preference rights is a reconstruction of the hiring process status quo ante, the agency’s passover requests are “irrelevant,” at least until the agency reconstructs the hiring process. IAF, Tab 47 at 2.

¶7 On November 3, 2008, the AJ issued an ID that dismissed the appeal without prejudice to refiling. IAF, Tab 48 (ID). The AJ found that dismissing the appeal without prejudice promotes administrative efficiency and noted that “[i]f the agency should not obtain pass-over authority from OPM, the appellant’s case will be ripe for adjudication.” ID at 5-6. The AJ assigned the appellant a refiling date of “no later than thirty (30) calendar days after the earliest of the following events: 1) OPM’s determination on the agency’s [p]assover request on the basis [sic] of qualifications and/or suitability or 2) three months from the date this initial decision becomes a final decision if the [p]assover request remains pending without resolution or determination from OPM.” ID at 6.

¶8 On petition for review (PFR), the appellant again argues the merits of the appeal and alleges that the AJ abused her discretion by dismissing the appeal without prejudice to allow the agency to obtain a response from OPM on its passover requests. Petition for Review File (PFRF), Tab 1. The agency has filed a response in opposition to the PFR. PFRF, Tabs 5, 6.

#### ANALYSIS

¶9 An AJ has wide discretion to control the proceedings before her and the dismissal without prejudice to refiling is a procedural option committed to her sound discretion. *Desmond v. Department of Veterans Affairs*, [90 M.S.P.R. 301](#), ¶ 4 (2001). A dismissal without prejudice is appropriate when it is in the

interests of fairness, due process, and administrative efficiency. *Gidwani v. Department of Veterans Affairs*, [74 M.S.P.R. 509](#), 511 (1997). The Board has held that an AJ may order a dismissal without prejudice at the request on one or both parties, or to avoid a lengthy or indefinite continuance. *See Black v. U.S. Postal Service*, [89 M.S.P.R. 204](#), ¶¶ 6-7 (2001).

¶10 On PFR, the appellant reiterates his argument from below regarding the merits of the appeal and contends that, because the claimed Veterans' Preference Act violations occurred several months before the agency submitted its passover requests to OPM and the remedy for a violation of veterans' preference rights is the reconstruction of the hiring process status quo ante, it is premature for the agency to request a passover until the Board orders the agency to remedy its Veterans' Preference Act violation. PFRF, Tab 1 at 5-8. The appellant claims that such an order "would necessarily eliminate the TAP test, making a qualifications passover request irrelevant." *Id.* at 8.

¶11 The appellant's argument is essentially an attempt to reach the merits of the appeal, which are irrelevant to the issue here of whether the AJ abused her discretion in dismissing the appeal without prejudice to refiling. *See, e.g., Lewis v. Department of the Air Force*, [69 M.S.P.R. 40](#), 44 (1995) (where an appeal has been dismissed without prejudice to refiling in an ID and the appellant then files a PFR of that decision, the Board will not consider arguments raised on review concerning matters that should be considered by the AJ once the appeal has been refiled). Further, the appellant's argument is based on the unwarranted assumption that the Board will find that the agency violated the Veterans' Preference Act and order the agency to reconstruct the hiring process status quo ante. Contrary to the appellant's apparent belief, the Board's decision as to the merits of the appeal is not a foregone conclusion.

¶12 Our review of the record and relevant precedent establishes that the AJ correctly concluded that dismissing the appeal without prejudice promotes administrative efficiency. As noted above, the agency's passover requests are

currently pending before OPM, ID at 5, and we believe that a dismissal without prejudice is appropriate in this case to avoid a lengthy continuance while awaiting OPM's decision on the agency's passover requests. *See Rivera v. Department of the Air Force*, [110 M.S.P.R. 119](#), ¶¶ 7-8 (2008); *Black*, [89 M.S.P.R. 204](#), ¶¶ 6-7. Therefore, we find that the appellant has failed to show that the AJ abused her discretion by dismissing his Veterans Employment Opportunities Act (VEOA) appeal without prejudice to refiling. Accordingly, we deny the PFR.

¶13 We reopen the appeal on our own motion, however, to modify the AJ's instructions regarding refiling. In *Milner v. Department of Justice*, [87 M.S.P.R. 660](#), ¶ 13 (2001), the Board held that a Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) case that has been dismissed without prejudice to refiling will be considered *automatically refiled* by the date set forth in the dismissal order, unless there is evidence that the appellant has abandoned the case. While *Milner* involved a USERRA appeal rather than a VEOA appeal, we find it appropriate to apply the automatic refiling policy announced in *Milner* here. Even though the AJ dismissed this appeal without prejudice sua sponte and the appellant objected to a dismissal without prejudice, the AJ placed the burden of refiling the appeal squarely on the appellant. ID at 6. Given these circumstances, we believe that requiring the appellant to refile the appeal at the risk of waiving his appeal rights under VEOA places an unnecessary burden on the appellant.

¶14 Accordingly, we affirm the dismissal of this appeal without prejudice to refiling, but modify the ID to hold that the appeal will be automatically refiled: (1) when either the appellant or the agency notifies the Board of OPM's determination on the agency's passover requests; or (2) ninety calendar days from the date that the ID becomes final if one or both of the passover requests remain pending without resolution or determination by OPM, whichever occurs first, unless there is evidence that the appellant has abandoned this appeal.

ORDER

¶15 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, [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:

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