UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 82

Docket No. SF-3330-09-0007-I-1

James R. Coats,

Appellant,

v.

United States Postal Service,

Agency.

May 14, 2009

James R. Coats, Oak Harbor, Washington, pro se.

David P. Larson, Esquire, Sandy, Utah, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal. For the reasons set forth below, we GRANT the petition for review and VACATE the initial decision. We DENY the appellant's request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA), but we FORWARD the appellant's involuntary resignation claim and his claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) for docketing as separate appeals.

BACKGROUND

¶2 On September 29, 2008, the appellant filed a Board appeal alleging that the agency had improperly denied him reemployment. Initial Appeal File (IAF), Tab 1. He asserted that he has "unlimited reinstatement rights" as a veteran, and that the agency "discriminated against" those rights by failing to reemploy him on the basis of a false allegation that he misused sick leave. *Id.* at 1, 4. The appellant attached to his appeal a letter from the Department of Labor (DOL) dated September 19, 2008, concerning a complaint he had filed. *Id.* at 8. In its letter, DOL informed the appellant that his claim did not meet the requirements for DOL to investigate it. *Id.* Specifically, DOL indicated that the agency's denial of the appellant's reemployment request was not based on the appellant's status as a veteran or the denial of veterans' preference. *Id.* Rather, DOL stated, the agency had denied the appellant's request due to a bad reference from a previous supervisor. *Id.* DOL informed the appellant that he had the right to file a Board appeal within 15 days of his receipt of the letter. *Id.*

¶3 In response to the administrative judge's acknowledgment order, the appellant alleged that he had resigned from the agency under duress in May 1996, and that his request for reinstatement in December 1999 was denied after his former supervisor falsely claimed that the appellant had abused his sick leave and was incompetent in the performance of his duties. IAF, Tab 5 at 4. The appellant cited *Harper v. U.S. Postal Service*, 87 M.S.P.R. 632 (2001), a decision in which the Board remanded for further adjudication a claim of involuntary resignation that was filed several years after that appellant's separation. IAF, Tab 5 at 5. In its response to the appeal, the agency argued that it had no obligation to reemploy the appellant. IAF, Tab 9 at 6-7. The agency also indicated that the appellant had resigned as part of an equal employment opportunity (EEO) settlement. *Id.* at 5, 18.

¶4 On January 9, 2009, the administrative judge issued an initial decision dismissing the appeal. IAF, Tab 12. He noted that the appellant had filed a

Board appeal in April 2002, which was dismissed for lack of jurisdiction in June 2002 based on the appellant's failure to exhaust his administrative remedies at DOL. *Id.* at 2; *see Coats v. U.S. Postal Service*, MSPB Docket No. SE-3443-02-0207-I-1 (Initial Decision, June 26, 2002). The administrative judge further noted that the appellant filed another Board appeal that was dismissed based on the untimeliness of the appellant's complaint to DOL. IAF, Tab 12 at 2; *Coats v. U.S. Postal Service*, MSPB Docket No. SE-3443-02-0397-I-1 (Initial Decision, Dec. 12, 2002); *id.* (Final Order, Sept. 29, 2004). The AJ found that the claims raised in the present appeal involving alleged violations of the appellant's reinstatement rights as a veteran had been adjudicated in the appellant's two prior Board appeals and were therefore barred by res judicata. IAF, Tab 12 at 2-3.

¶5 The appellant has filed a timely petition for review of the initial decision. PFR File, Tab 1. On petition for review, he argues that the agency improperly disciplined him for his use of sick leave and then used that improper discipline as a bargaining chip to force him to resign. *Id.* at 3. He further argues that the agency violated the spirit of the EEO settlement by denying him reemployment on the basis of his alleged abuse of sick leave. *Id.* at 3-4. He argues that the agency's actions "indirectly resulted in the violation of [his] [v]eterans['] preference rights," and that he never would have resigned but for the improper discipline issued against him. *Id.* at 4. He requests back pay from the date of his resignation in May 1996. *Id.*

¶6 The agency has responded in opposition to the petition for review. PFR File, Tab 3. The agency argues that the administrative judge properly dismissed the appeal as barred by res judicata, that it was not required to reinstate the appellant, and that any claim of involuntary resignation by the appellant is untimely. *Id.* at 5.

ANALYSIS

The appellant's VEOA claims are not barred by res judicata or collateral estoppel.

¶7 The administrative judge found that the appellant's VEOA claims were barred by res judicata. IAF, Tab 12 at 2-3. Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.* Both of the appellant's prior appeals were dismissed for lack of jurisdiction.[1] A dismissal for lack of jurisdiction does not preclude a second action on the same claim under the doctrine of res judicata. *Peartree*, 66 M.S.P.R. at 338. We therefore find that the requirements for the application of res judicata were not met in this case.

¶8 A dismissal for lack of jurisdiction would generally preclude a second action in the same forum under the doctrine of collateral estoppel, which would

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[1] We note that the second appeal was dismissed based on the appellant's failure to timely file his complaint with DOL. *Coats*, MSPB Docket No. SE-3443-02-0397-I-1, slip op. at 5 (Initial Decision, Dec. 12, 2002). At the time, the Board considered timely filing of a complaint with DOL to be a jurisdictional requirement. *See Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, ¶ 9 (2002) ("We hold that when the appellant concedes that his VEOA complaint to DoL was untimely and DoL disposes of that complaint as untimely without addressing its substance, the Board cannot exercise jurisdiction over that individual's subsequent VEOA appeal concerning the same alleged violation of veterans' preference rights."). The Board recently overruled its prior case law to find that the failure to timely file a VEOA complaint with DOL is not a jurisdictional defect. *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶¶ 8-13 (2009). However, because the dismissal of the prior appeal for lack of jurisdiction was consistent with decisions of the Board at the time, we will not revisit that finding in this separate appeal.

preclude relitigation of the same jurisdictional issue. *Peartree*, 66 M.S.P.R. at 338. Collateral estoppel, or issue preclusion, is appropriate when: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). The issue that was actually litigated in the appellant's most recent prior appeal was whether his 2002 VEOA complaint was filed with DOL within 60 days of the alleged violation of the appellant's veterans' preference. *See Coats*, MSPB Docket No. SE-3443-02-0397-I-1, slip op. at 4-5 (Initial Decision, Dec. 12, 2002). However, the appellant filed the present appeal after submitting a separate VEOA complaint to DOL in August 2008. *See* IAF, Tab 1 at 8. Therefore, the timeliness of the 2002 VEOA complaint is not at issue in the present appeal. Accordingly, we find that collateral estoppel does not apply in this case.

The appellant's request for corrective action under VEOA is denied.

¶9 In order to establish Board jurisdiction over a VEOA appeal, the appellant must: (1) show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA, (ii) the action 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. *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 7 (2007). An appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 6 (2005).

¶10 For the appellant to meet VEOA's requirement that he exhaust his remedy with DOL, he must establish that: (1) he filed a complaint with the Secretary of

Labor; and (2) the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. *Davis*, 105 M.S.P.R. 604, ¶ 7; *see* 5 U.S.C. § 3330a(d)(1). We find that the September 19, 2008 letter from DOL to the appellant establishes that the appellant met the VEOA exhaustion requirement. *See* IAF, Tab 1 at 8-9.

¶11 A complaint filed with the Secretary of Labor alleging violation of veterans' preference rights must be filed within 60 days after the date of the alleged violation. 5 U.S.C. § 3330a(a)(2)(A). To the extent that the appellant's 2008 VEOA complaint concerns the agency's failure to hire him in 1999 and 2000, *see* IAF, Tab 1 at 20-21, the complaint was filed well beyond the 60-day time limit. However, that 60-day time limit is not jurisdictional; rather it is similar to a statute of limitations that is subject to equitable tolling. *Kirkendall v. Department of the Army*, 479 F.3d 830, 835-44 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007); *Garcia*, 110 M.S.P.R. 371, ¶ 13. The fact that the appellant exhausted his remedy is all that is relevant for purposes of the Board's jurisdiction.

¶12 We further find that the appellant has met the remaining requirements for establishing Board jurisdiction over his VEOA claims. There is no dispute that the appellant is preference eligible. *See* IAF, Tab 9 at 16 (Form PS-50 indicating that the appellant is entitled to a 5-point veterans' preference). There is also no dispute that the actions at issue (i.e., the agency's failure to reinstate the appellant) took place after the enactment date of VEOA. We find that the appellant has nonfrivolously alleged that the agency violated his rights under a statute or regulation relating to veterans' preference. IAF, Tab 1 at 1; *see Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006) (an allegation by an appellant, in general terms, that his veterans' preference rights were violated is sufficient to meet the nonfrivolous allegation requirement). Accordingly, we find that the Board has jurisdiction over the appellant's VEOA claims. However, for

the reasons set forth below, we find that the appellant is not entitled to corrective action under VEOA.

¶13 A VEOA complainant does not have an unconditional right to a hearing before the Board, and the Board may dispose of a VEOA appeal on the merits without a hearing. *See Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008); 5 C.F.R. § 1208.23(b) (a hearing "may be provided" in a VEOA appeal if the appellant requests one or if a hearing is necessary to resolve issues of jurisdiction or timeliness). Disposition of a VEOA appeal without a hearing is appropriate where there is no genuine dispute of material fact and one party must prevail as a matter of law. *Haasz*, 108 M.S.P.R. 349, ¶ 9.

¶14 The appellant claims that the agency's failure to reinstate him violated his veterans' preference rights under agency Handbook EL-311, § 261.33.[2] IAF, Tab 5 at 9, 11. However, that provision merely authorizes the agency to reinstate former employees who are entitled to veterans' preference; it does not mandate that the agency do so. *See* IAF, Tab 5 at 11. Further, the Handbook is not a statute, and the appellant has not shown it to be a regulation. We therefore find that the appellant has not established that the agency violated his rights under a statute or regulation relating to veterans' preference. Accordingly, we deny his request for corrective action under VEOA.[3]

The appellant's involuntary resignation and USERRA claims are forwarded for docketing as separate appeals.

¶15 The appellant has also raised a claim that his 1996 resignation was involuntary. *See* IAF, Tab 5 at 5 (citing *Harper*, 87 M.S.P.R. 632, "as the basis

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[2] The agency cited Handbook EL-312, § 233.32, which contains essentially the same substantive provision. IAF, Tab 9 at 6, 9. Although it is not entirely clear which handbook was in effect at the relevant time, our analysis is the same in either case.

[3] Because we find that the appellant has not shown that the agency violated his rights under a statute or regulation relating to veterans' preference, we need not address whether equitable tolling applies with respect to his complaint to DOL.

for [] stating that I resigned under duress and that [the resignation] was thus not voluntary"). An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). We FORWARD the appellant's involuntary resignation claim to the Western Regional Office for docketing as a separate appeal so that the administrative judge may fully inform the appellant of what he is required to allege to establish the Board's jurisdiction over an involuntary resignation appeal and to fully inform the appellant of his burden to prove that his appeal has been timely filed or that good cause exists for his delayed filing. The administrative judge shall afford the parties a reasonable opportunity to submit evidence and argument regarding those issues. If the administrative judge finds that the appellant has raised a nonfrivolous allegation that his appeal is within the Board's jurisdiction and was timely filed or that good cause exists for a delay in filing his appeal, the administrative judge shall afford him a hearing on the jurisdictional issue. *See Crumpton v. Department of the Treasury*, 98 M.S.P.R. 115, ¶ 11 (2004).

¶16 We also consider whether the appellant has raised a claim of discrimination on the basis of his uniformed service in violation of USERRA. USERRA provides, in relevant part, that a person who has performed service in a uniformed service shall not be denied reemployment on the basis of that performance of service. 38 U.S.C. § 4311(a). Thus, to establish Board jurisdiction over a USERRA appeal, the appellant must at least allege that: (1) He performed duty in a uniformed service of the United States; (2) he was denied reemployment; and (3) the denial of reemployment was due to the performance of duty in the uniformed service. *See Durand v Environmental Protection Agency*, 106 M.S.P.R. 533, ¶ 8 (2007) (setting forth the jurisdictional elements for a USERRA discrimination appeal involving the denial of initial employment). There is no dispute that the appellant, a preference eligible veteran, performed duty in a uniformed service of the United States, and he has alleged that he was denied

reemployment. IAF, Tab 1 at 1. The remaining question, therefore, is whether the appellant has alleged that he was denied reemployment because of his service in a uniformed service.

¶17 Liberally construing the pro se appellant's assertion that the agency "discriminated against" his reemployment rights as a veteran, IAF, Tab 1 at 1, we find that he has established jurisdiction under USERRA. *See Durand*, 106 M.S.P.R. 533, ¶ 9 (finding Board jurisdiction under USERRA where the pro se appellant asserted that the agency was only concerned with denying his veterans' preference, gave no consideration to his Department of Veterans Affairs rated disability, and failed to comply with USERRA). We note that a USERRA claimant who establishes Board jurisdiction is entitled to a hearing on the merits. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 18 (2008); *Kirkendall*, 479 F.3d at 844-46. Therefore, we FORWARD the appellant's USERRA claim for docketing as a separate appeal. After docketing the USERRA appeal, the administrative judge should schedule the appellant's requested hearing. *See* IAF, Tab 1 at 6 (the appellant's hearing request).

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this VEOA 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. 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.