

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 106

Docket No. CH-3330-09-0127-I-1

**Stephanie G. Graf,
Appellant,**

v.

**Department of Labor,
Agency.**

June 9, 2009

Leroy Ratliff, Calumet City, Illinois, for the appellant.

Dorothy J. Stephens, 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 of an initial decision that dismissed her appeal for lack of Board jurisdiction. We DENY the petition for failure to meet the criteria for review set forth at [5 C.F.R. § 1201.115\(d\)](#). We REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), however, and VACATE the initial decision (ID), but still DISMISS the appellant's Veterans Employment Opportunities Act of 1998 (VEOA) appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed an appeal alleging that her veterans' preference rights were violated under the VEOA when she was not selected for the position of

Manpower Development Specialist, GS-0142-12, under two open competitive vacancy announcements, DE-CKC-ET-06-060 and DE-CKC-ET-07-005. Initial Appeal File (IAF), Tab 1; *see* Tab 8, Subtab 4K at 166-175, Subtab 4U at 38-44. No selection was made from the DE-CKC-ET-06-060 certificate. IAF, Tab 8, Subtab 4A at 8. The agency later issued a second announcement for the position of Manpower Development Specialist, announcement number DE-CKC-ET-07-005. Both positions required 1 year of specialized experience equivalent to at least the GS-11 federal grade level. IAF, Tab 8, Subtab 4K at 167, Subtab 4U at 39.

¶3 The administrative judge (AJ) dismissed the appellant's VEOA appeal for lack of jurisdiction finding that, with regard to vacancy announcement DE-CKC-ET-06-060, although the appellant was on the certificate and was apparently interviewed for the position, *see* IAF, Tab 8, Subtabs 1 at 2, 4N, the parties agreed that the agency made no selection from the certificate. ID at 2; *see* IAF, Tab 9. Thus, the AJ found that the appellant's allegation that she should have been selected did not constitute a nonfrivolous allegation that her veterans' preference rights were violated. ID at 2. With regard to vacancy announcement DE-CKC-ET-07-005, the AJ found that the appellant was promoted to a GS-11 position on April 30, 2006, IAF, Tab 8, Subtab 4Y, and thus, she was not qualified because she had less than 1 year of service in a GS-11 position prior to her application for the position at issue. ID at 2-3. The AJ found further that, a review of the appellant's qualifications by two human resources specialists found that she did not meet the specialized experience qualifications for this position. ID at 3. Thus, the AJ found that, although the appellant was found not qualified, she was allowed to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce. *Id.* Therefore, the AJ found that the appellant failed to make a nonfrivolous allegation of jurisdiction under VEOA with respect to the position under vacancy announcement DE-CKC-ET-07-005. *Id.* In addition, the AJ noted

that the Board does not have jurisdiction over the appellant's claim of disability discrimination. *Id.*

ANALYSIS

¶4 An AJ may dismiss a VEOA claim for lack of jurisdiction only when an appellant fails to meet one or more of VEOA's jurisdictional requirements. *Goldberg v. Department of Homeland Security*, [99 M.S.P.R. 660](#), ¶ 8 (2005). An appellant meets VEOA's jurisdictional requirements if she shows that she has exhausted her Department of Labor (DOL) remedy and makes nonfrivolous allegations that: she is a preference eligible within the meaning of VEOA; an agency has violated her rights under any statute or regulation relating to veterans' preference; and the action(s) at issue took place on or after VEOA's enactment date of October 30, 1998. *Goldberg*, [99 M.S.P.R. 660](#), ¶ 8; *see* [5 U.S.C. § 3330a](#). For an appellant to meet VEOA's requirement that she exhausted the DOL complaint procedure, the appellant must establish that: (1) she 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 the resolution of the complaint. *Goldberg*, [99 M.S.P.R. 660](#), ¶ 8; *see* [5 U.S.C. § 3330a](#). An appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. *See Goldberg*, [99 M.S.P.R. 660](#), ¶ 8.

¶5 Here, it is undisputed that the appellant is a preference eligible who alleged that the agency violated her veterans' preference rights by not selecting her for the position of Manpower Development Specialist, GS-0142-12, under two competitive vacancy announcements, DE-CKC-ET-06-060 and DE-CKC-ET-07-005. *See* IAF, Tab 1; Tab 8, 4A at 22. Additionally, these nonselections occurred after October 30, 1998. The AJ did not rule on whether the appellant had exhausted the DOL complaint procedure. ID at 2. Nonetheless, the AJ dismissed the appeal for lack of jurisdiction based on his finding that the

appellant failed to make a nonfrivolous allegation of VEOA jurisdiction because there were no selections made for vacancy announcement DE-CKC-ET-06-060, and because she was allowed to compete for vacancy announcement DE-CKC-ET-07-005, but she did not meet the specialized experience requirements for the position.¹ ID at 2-3. However, this analysis goes to the merits of the appellant's claim, rather than to the jurisdictional issue. *See Goldberg*, [99 M.S.P.R. 660](#), ¶ 10. Therefore, it was error for the AJ to dismiss the appeal "for lack of jurisdiction" on this basis and we find it necessary to vacate the initial decision. *See Goldberg*, [99 M.S.P.R. 660](#), ¶ 10. Nevertheless, because the appellant failed

¹ We note that the AJ advised the parties that the appellant was required to show, *inter alia*, that the agency denied her the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its workforce. ID at 3; *see* IAF, Tab 4 at 4. However, there are two primary types of selection processes in the competitive service. *See* [5 C.F.R. § 330.101 et seq.](#) One type of selection process is the "merit promotion" process, which is used when an agency announces a position only to those already employed in the agency or in the competitive service. *Perkins v. U.S. Postal Service*, [100 M.S.P.R. 48](#), ¶ 9 (2005); *see Abell v. Department of the Navy*, [343 F.3d 1378](#), 1380 (Fed. Cir. 2003). Preference eligibles and certain other veterans may apply to fill vacancies under merit promotion procedures when an agency accepts applications from individuals outside its own workforce. *See* [5 U.S.C. § 3304\(f\)\(1\)](#). However, an employee is not entitled to veterans' preference in the merit promotion process. *Perkins*, [100 M.S.P.R. 48](#), ¶ 9. The other selection process is the competitive examination process, which is generally required for entry into the competitive service. *Id.* An integral part of the examining process is the assignment of numerical scores, followed by the rating and ranking of candidates according to those scores. *Dean v. Consumer Product Safety Commission*, [108 M.S.P.R. 137](#), ¶ 2 n.* (2008); *see* [5 U.S.C. § 3309](#); [5 C.F.R. § 337.101\(a\)](#). Preference-eligible veterans are entitled to five additional points, and disabled veterans, as well as certain relatives of disabled veterans are entitled to ten additional points, which are added to their passing examination scores. *Dean*, [108 M.S.P.R. 137](#), ¶ 2 n.*; *see* [5 U.S.C. § 3309](#); [5 C.F.R. § 337.101\(b\)](#). In this instance, the vacancy announcements clearly stated that applications would be accepted from "United States citizens and nationals." IAF, Tab 8, Subtabs 4K at 166, 4U at 38. Additionally, the vacancy announcements provided that the candidates would be scored, rated, and ranked, with veterans' preference given when appropriate. IAF, Tab 8, Subtabs 4K at 167-169, 4U at 39-42. Thus, the vacancy announcements were to be filled under the open competitive examination process. Accordingly, the AJ erred in finding that this was a merit promotion selection process, and that the appellant had to show that the agency denied her the opportunity to compete under merit promotion procedures.

to establish that she exhausted the DOL complaint procedure, as explained below, we vacate the initial decision but still dismiss the appellant's VEOA claim for lack of jurisdiction.² *See ID*. On appeal, the appellant indicated that she had filed a *discrimination* complaint with DOL, but she did not attach a copy or provide any other information about the complaint. IAF, Tab 1 at 6. Because the appellant did not provide sufficient information to establish jurisdiction, the AJ issued an order informing the appellant of what she needed to do to establish the Board's jurisdiction over her VEOA claim and ordered her to file a statement "showing . . . the date you filed a complaint with the Secretary of Labor and the date you received written notice, if any, from the Secretary," so that the AJ would receive it within 12 days of the October 21, 2008 date of the order. IAF, Tab 4. Because the appellant did not comply with this order, the AJ again ordered the appellant to provide "specific evidence that she filed a request for remedial action under VEOA with the Secretary of the Department of Labor and that her remedy with the Secretary has been exhausted." IAF, Tab 7 at 3. The appellant filed a response in which she asserted that she had "exhausted her remedy with the Department of Labor and the Office of Special Counsel," but her statement did not contain any of the information the AJ ordered her to provide. IAF, Tab 9 at 4.

² We note that, in addition to also raising a USERRA claim below, the appellant also raised allegations that the agency subjected her to disability discrimination, reprisal for whistleblowing, and various prohibited personnel practices, inter alia, nepotism, preferential treatment for others, and deception or willful obstruction of her right to compete for employment. IAF, Tab 1. However, the AJ docketed the appellant's allegations as three separate appeals, MSPB Docket Nos. CH-1221-09-0020-W-1 (whistleblowing complaint), CH-4324-09-0128-I-1 (USERRA claim), and the instant appeal. With regard to the appellant's allegations of disability discrimination and prohibited personnel practices, the AJ correctly found that the Board has no authority to review such claims in VEOA appeals. *Ruffin v. Department of the Treasury*, [89 M.S.P.R. 396](#), ¶ 12 (2001).

¶7 The agency filed a response to the jurisdictional order which included a copy of a letter from the appellant to the Secretary of Labor, Elaine Chao, in which the appellant raised several questions concerning the DOL hiring process used to fill the GS-12 Manpower Developmental Specialist positions. IAF, Tab 5, attachment 6 at 2-3. Although this letter reflects that the appellant was unhappy with the agency's hiring decision and she discussed veterans' preference in general terms, it is unclear from the appellant's letter that she was attempting to file a VEOA complaint with DOL. *Id.* Rather, as the DOL is the responding agency, her letter reads as if an applicant is questioning an agency's hiring decisions. *Id.* Similarly, DOL's letter in response reads as a hiring agency responding to an applicant. *Id.* at 4. Specifically, the letter addressed the appellant's concerns and advised her that the

proper procedures were followed in the filling of the positions in the Office of Foreign Labor Certification in Chicago. The Chicago HR staff appears to have given your application every consideration to which it was entitled and made every attempt possible to respond to your concerns.

Id. Further, even though the final signed page of the DOL letter was not included in the record, there is no indication from this letter that DOL recognized the appellant's letter to be a VEOA complaint and that it was advising her that it was unable to resolve her complaint. *See* [5 U.S.C. § 3330a](#).

¶8 Moreover, the department within DOL which handles VEOA complaints is the Veterans' Employment and Training Service (DOL VETS). Because this information is publicly available on DOL's official website, www.dol.gov/elaws/vetspref.htm, we take official notice that DOL VETS handles VEOA complaints. *Perkins v. U.S. Postal Service*, [100 M.S.P.R. 48](#), ¶ 12 n.4 (2005); [5 C.F.R. § 1201.64](#). We note that DOL's response did not come from a DOL VETS office, but rather it is addressed from the "Office of the Assistant Secretary for Administration and Management." *Id.* Thus, we conclude that, even though the appellant wrote a letter to DOL to express her concerns with the

hiring process, she has not established that she filed a VEOA complaint with DOL.³ Accordingly, we find that the appellant has failed to meet VEOA's requirement that she exhausted the DOL complaint procedure.

ORDER

¶9 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).

³ In addition, we note that on PFR, the appellant asserts that she filed a VEOA claim with the Office of Special Counsel (OSC), rather than DOL VETS. PFRF, Tab 1 at 4. However, our review of the record finds that the appellant filed a Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) complaint with OSC. IAF, Tab 8, Subtabs 3D, 4A.

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:

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