UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 124

Docket No. PH-3330-08-0514-I-1

James Brewer,

Appellant,

v.

Department of Veterans Affairs,

Agency.

July 2, 2009

James Brewer, West Hartford, Connecticut, pro se.

Edward Carney, Esquire, Bedford, Massachusetts, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his Veterans Employment Opportunities Act of 1998 (VEOA) appeal for lack of jurisdiction. We DENY the appellant's petition for review (PFR) for failure to meet the review criteria under 5 U.S.C. § 1201.115(d). However, for the reasons set forth below, we REOPEN this appeal on our own motion pursuant to 5 U.S.C. § 1201.118, VACATE the initial decision, and still DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The agency issued vacancy announcement number 7-379-TOG, for the position of Patient Representative, through Delegated Examining Unit (DEU) procedures. Initial Appeal File (IAF), Tab 10 at 31-37. During this same timeframe, the agency also issued vacancy announcement number 07-85-TOGUS, for the position of Transition Patient Advocate, which appears to be the same position as Patient Representative, but this announcement was issued under merit promotion procedures. *Id.* at 24-29. The appellant applied for the DEU vacancy, the agency rated him as ineligible, and his name was thus not placed on the Certificate of Eligibles. *See id.* at 9 (Certificate of Eligibles from the DEU vacancy announcement), 13 (informing the appellant that he was rated ineligible because he "did not describe the type, quantity, and/or responsibility level of experience required for this position") (emphasis omitted), 17-22 (the appellant's application for the Patient Representative position under vacancy announcement number 7-379-TOG). The agency made its selection from the merit promotion certificate. *Id.* at 11.

¶3 The record indicates that on July 11, 2008, the Department of Labor (DOL) sent the appellant a letter, explaining that it was closing his case because of his failure to submit certain requested information, including his DD 214, and his failure to timely file his complaint with DOL. *See* IAF, Tab 21 at 17-18. The appellant then filed this appeal and claimed that the agency violated VEOA. IAF, Tab 1. The administrative judge issued an Order on VEOA Jurisdiction and Notice of Proof Requirements. IAF, Tab 12. The appellant, in his apparent response to this order and the agency's motion to dismiss, argued, among other things, that the agency improperly denied him the right to compete when it determined that he was ineligible for the position and it hired an internal candidate. IAF, Tab 21. The administrative judge issued an initial decision, dismissing the appeal for lack of jurisdiction and denying the appellant's request

for a hearing. IAF, Tab 28. The appellant filed a timely PFR. Petition for Review File (PFRF), Tab 1. The agency did not file a response.

ANALYSIS

¶4 The appellant's PFR fails to meet the review criteria and we deny it herein. *See* 5 C.F.R. § 1201.115(d). We nevertheless reopen this appeal on our own motion to correct an error in the initial decision.

¶5 The administrative judge dismissed the appeal for lack of jurisdiction because she found that the appellant was not a preference eligible under 5 U.S.C. § 2108(3), and since, in her view, VEOA only provided Board appeal rights to "preference eligible veterans," she concluded that he did not have Board appeal rights regarding his nonselection. IAF, Tab 28 at 5-6 (citing *Campion v. Merit Systems Protection Board*, 326 F.3d 1210 (Fed. Cir. 2003)). We discern no error with the administrative judge's conclusion that the appellant was not a preference eligible. Indeed, based on the appellant's DD 214, *see* IAF, Tab 10 at 57, the appellant does not appear to satisfy any of the criteria in 5 U.S.C. § 2108(3), which defines who is preference eligible.

¶6 However, the administrative judge's reliance on *Campion* was misplaced, and her ultimate conclusion was in error. In our decision in *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶¶ 22-24 (2007), we discussed the Veterans' Benefits Improvement Act of 2004, Pub. L. No. 108-454 (Dec. 10, 2004) (VBIA), and we determined that the VBIA amended VEOA by giving Board appeal rights to *non-preference eligible veterans* honorably discharged after 3 or more years of service who were appealing pursuant to 5 U.S.C. § 3304(f)(1). *See* 5 U.S.C. § 3330a(a)(1)(B) ("A veteran described in section 3304(f)(1) who alleges that an agency has violated such section with respect to such veteran may file a complaint with the Secretary of Labor."); 5 U.S.C. § 3330a(d)(1) (if the Secretary of Labor cannot resolve a complaint under

subsection (a) within 60 days, the complainant may elect to appeal the alleged violation to the Board). We note that the statute at 5 U.S.C. § 3304(f)(1) reads:

> Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service 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 under merit promotion procedures.

Based on our analysis of the impact of the VBIA on VEOA, and the implementation of 5 U.S.C. § 3330a(a)(1)(B), we concluded in *Styslinger* that "the administrative judge erred in relying on the appellant's status as a non-preference eligible applicant for the position in question as a basis to dismiss this appeal for lack of jurisdiction." *Styslinger*, 105 M.S.P.R. 223, ¶ 24. Similarly, we conclude that the administrative judge improperly dismissed the appellant's "right to compete" VEOA appeal for lack of jurisdiction based on his status as a non-preference eligible *only* and we therefore vacate the initial decision.

¶7 Because of the administrative judge's determination, she did not address whether the appellant met his "right to compete" jurisdictional burden, below. We note that, in order to establish Board jurisdiction over a "right to compete" VEOA claim under 5 U.S.C. § 3330a(a)(1)(B), the appellant must (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (i) he is a veteran within the meaning of 5 U.S.C. § 3304(f)(1), (ii) the actions at issue took place on or after the December 10, 2004 enactment date of the VBIA, and (iii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of 5 U.S.C. § 3304(f)(1). *Styslinger*, 105 M.S.P.R. 223, ¶ 31.

¶8 Based on the record before us, the appellant cannot meet this burden.[1] We note that an agency may fill a vacancy by any authorized method. *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶ 11 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007). In fact, it is not improper for an agency, as here, to simultaneously solicit applications from the general public and from merit promotion applicants. *Id*. The appellant did not allege that he applied for the merit promotion vacancy, *see* IAF, Tab 21 at 4-5; rather, the record reveals that he only applied for the Patient Representative position pursuant to DEU vacancy announcement number 7-379-TOG. *See* IAF, Tab 10 at 17-22 (the appellant's application for this position). Additionally, the merit promotion vacancy announcement indicated that "Agency Employees Only" may be considered for the position, *id.* at 24, and thus, it would not accept applications from individuals outside its own workforce. The appellant has not even alleged that he should have been on the certificate for the merit promotion vacancy. Therefore, the appellant failed to nonfrivolously allege that the agency denied him the right to compete for a vacant position in violation of 5 U.S.C. § 3304(f)(1), and we dismiss his appeal for lack of jurisdiction.[2]

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[1] We have reviewed the appellant's DD 214, which shows that he served on active duty from July 30, 1981, until June 24, 1984, and thus, he had 2 years, 10 months and 25 days of active service. IAF, Tab 10 at 57. The appellant claimed in his Declaration for Federal Employment that he was on active duty from May 15, 1981, until July 24, 1984, and he alleged below that his DD 214 "showed statutory 3 years or more active duty and an honorable discharge." IAF, Tabs 10 at 19 (the appellant's Declaration for Federal Employment), 21 at 11. We note that the statute at 5 U.S.C. § 3304(f)(5) authorizes OPM to prescribe regulations ensuring that individuals released from active duty shortly before completing 3 years of active service are not excluded from the application of this subsection. However, it does not appear that OPM has promulgated such regulations. For the purposes of our analysis, we assume that the appellant is a veteran to whom 5 U.S.C. § 3304(f)(1) applies.

[2] Because of our disposition, we need not address the apparent untimeliness of the appellant's DOL complaint.

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).

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.