

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

2009 MSPB 128

Docket No. AT-3330-08-0853-I-1

**Robert Neil Slater,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 9, 2009

Robert Neil Slater, Madison, Mississippi, pro se.

Sandra W. Bowens, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the December 11, 2008 initial decision that dismissed, for lack of jurisdiction, his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), REVERSE the initial decision's finding that the Board lacks jurisdiction over this case, and DENY the appellant's VEOA appeal on the merits.

BACKGROUND

¶2 The appellant, a preference-eligible EAS-18 Field Manager, filed a pro se appeal that challenged another employee's selection for promotion to an EAS-22 Plant Manager position in Gulfport, Mississippi. Initial Appeal File (IAF), Tab 1. The appellant alleged multiple prohibited personnel practices (PPPs), *id.*, and a whistleblower claim, IAF, Tab 12 at 3. The administrative judge (AJ) issued an order setting forth the jurisdictional requirements for a VEOA appeal, IAF, Tab 3, and the appellant responded, IAF, Tabs 4, 5, 8, 12, 13, 15. The agency (USPS) responded with un rebutted evidence that the vacancy was filled using internal noncompetitive merit promotion procedures, and moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 14.

¶3 Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction on her determination that the appellant failed to nonfrivolously allege that the USPS violated his rights under a statute or regulation relating to veterans' preference. IAF, Tab 16, Initial Decision (ID) at 2. In support of her determination, the AJ cited the USPS's "unrefuted evidence that the position for which the appellant applied was not a competitive appointment open to individuals outside its workforce but was an internal merit promotion," under which "the appellant was not entitled to any preference based on his veterans' preference status." *Id.* The AJ further noted that, because the Board lacks jurisdiction over the appellant's nonselection under 5 U.S.C. chapter 75, it does not have jurisdiction over the appellant's allegations of PPPs. To the extent that the appellant claimed protection under the Whistleblower Protection Act (WPA), the AJ found that, because postal service employees are not covered under the WPA, the Board lacks jurisdiction over the appellant's claim as an individual right of action appeal under the WPA. ID at 3.

¶4 The appellant's petition for review states that he agrees with the AJ on the veterans' preference matter. Petition for Review File (PFRF), Tab 1 at 4. Nevertheless, the appellant notes his disagreement "with the complete dismissal

of the case for lack of [j]urisdiction.” *Id.* He identifies his “main claim” as “disparate treatment and disparate impact on [his] promotion outlook” and on his potential income upon retirement and further complains that the job he was not selected for ultimately went to a less-qualified person. *Id.* He claims that once the discovery that he claims was withheld from him is authorized, and the Equal Employment Opportunity Commission file, the Board file, and a pending Inspector General report are complete, the evidence will show that “something is very wrong with this promotion.” *Id.* at 5. The appellant also requests that the Board “combine” this appeal with his other appeal, docketed as *Slater v. U.S. Postal Service*, MSPB Docket No. AT-3443-09-0140-I-1. PFRF, Tab 5 at 5. The USPS responds that the appellant’s petition fails to meet the Board’s criteria for review. PFRF, Tab 3 at 4.

ANALYSIS

The appellant established Board jurisdiction over his VEOA complaint.

¶5 To establish Board jurisdiction over an appeal brought under VEOA, an appellant must: (1) show that he exhausted his remedy with the Department of Labor (DOL); and (2) make nonfrivolous allegations that (a) he is a preference eligible within the meaning of VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. [5 U.S.C. § 3330a](#); *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 6 (2008). An appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. *Id.*

¶6 In this case, the record reflects that the appellant has exhausted his remedy with DOL, that he made nonfrivolous allegations that he is preference eligible, and that the events at issue took place after October 30, 1998. IAF, Tab 1 at 1, 3, Tab 13. He has further alleged that the USPS violated his veterans’ preference rights by denying him the opportunity to be fairly considered when competing for

a promotion. IAF, Tab 1, Continuation Sheet, Question 6. An appellant's allegations of a VEOA violation "should be liberally construed" and an allegation, in general terms, that his veterans' preference rights were violated is sufficient to meet the requirement of a nonfrivolous allegation to establish Board jurisdiction over a VEOA appeal. *See, e.g., Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 8 (2006). Therefore, contrary to the AJ's determination, ID at 2, the appellant nonfrivolously alleged that the USPS violated his rights under a statute or regulation relating to veterans' preference, and established Board jurisdiction over his VEOA claim.

As a matter of law, the USPS did not violate the appellant's veterans' preference rights.

¶7 We are able to decide the appeal on the merits without a hearing because the record on a dispositive issue has been fully developed, the appellant has had a full and fair opportunity to dispute the agency's evidence on that issue, there is no genuine dispute of material fact, and, as a matter of law, the USPS did not violate the appellant's veterans' preference rights. *See Haasz*, [108 M.S.P.R. 349](#), ¶¶ 9-10; *Williamson v. U.S. Postal Service*, [106 M.S.P.R. 502](#), ¶¶ 9-10 (2007). The vacancy announcement stated that only EAS career postal employees were eligible to apply for the position at issue. IAF, Tab 14, Attachment 2. As explained in the agency's submission below and in the initial decision, veterans' preference does not apply when an employee seeks a promotion under an announcement limited to internal candidates. IAF, Tab 14; ID at 2; *see Brown v. Department of Veterans Affairs*, [247 F.3d 1222](#), 1224 (Fed. Cir. 2001); *Williamson*, [106 M.S.P.R. 502](#), ¶ 9; *Joseph v. Federal Trade Commission*, [103 M.S.P.R. 684](#), ¶¶ 8-10 (2006), *aff'd*, [505 F.3d 1380](#) (Fed. Cir. 2007). The appellant, however, has not alleged that he applied under an announcement open to external candidates, and he has not challenged the USPS's evidence or the AJ's finding that the USPS filled the position under an announcement limited to internal candidates. IAF, Tab 15 at 3; PFRF, Tab 1 at 4. Thus, the record is fully

developed, there is no genuine dispute of material fact, and the agency must prevail as a matter of law. *See, e.g., Haasz*, [108 M.S.P.R. 349](#), ¶¶ 9-10; *Williamson*, 106 M.S.P.R. 502, ¶¶ 9-10.

¶8 The AJ correctly determined that the Board lacks jurisdiction under VEOA to consider the appellant's discrimination and other PPP claims, and the appellant has not alleged any otherwise appealable action under which the Board may exercise jurisdiction, ID at 3; *see, e.g., Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶ 16 (2007). Further, the AJ also correctly determined that the Board lacks jurisdiction over the appellant's whistleblowing claim because the appellant, as an employee of the USPS, is not covered by the WPA. ID at 3; *see Matthews v. U.S. Postal Service*, [93 M.S.P.R. 109](#), ¶ 13 (2002).

ORDER

¶9 Accordingly, we REVERSE the AJ's finding that the Board lacks jurisdiction over the appellant's VEOA appeal but DENY the appellant relief under VEOA. We also DENY the appellant's request to join this appeal with *Slater v. U.S. Postal Service*, MSPB Docket No. AT-3443-09-0140-I-1. 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:

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