

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

**2009 MSPB 164**

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Docket No. SF-4324-08-0749-I-1

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**Charles D. Thompson,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

August 27, 2009

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Charles D. Thompson, Pasco, Washington, pro se.

F. Gil Brunson, Esquire, Tooele, Utah, 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 the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition under [5 C.F.R. § 1201.115](#), AFFIRM the initial decision's dismissal of the appellant's claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), codified at [38 U.S.C. §§ 4301-4333](#), VACATE the initial decision to the extent that it addressed the appellant's claim under the Veterans Employment Opportunities Act of 1989 (VEOA), codified at [5 U.S.C. § 3330a](#), and REMAND this appeal to the Western

Regional Office for further adjudication consistent with this Opinion and Order regarding the appellant's VEOA claim.

### BACKGROUND

¶2 In June 2008, the preference eligible appellant submitted applications for three GS-0085-5/6 Security Guard vacancy announcements with the agency's Law Enforcement and Security Directorate (LESD) at its Umatilla Chemical Supply Depot (UCSD) that were open to the public.<sup>1</sup> Initial Appeal File (IAF), Tab 1 at 13, Tab 8 at 4-5. LESD interviewed the appellant regarding the June 2008 vacancies on July 18, 2008. IAF, Tab 1 at 7. Following the interviews, LESD decided to fill the numerous Security Guard vacancies by first using applicants eligible for non-competitive "Veterans Recruitment Appointments" (VRA) under [38 U.S.C. § 4214](#) and it referred ten potential VRA qualified applicants, including the appellant, to its Human Resources Office for a determination of the applicants' VRA eligibility. IAF, Tab 8 at 8, Tab 21 at 1. The agency's Human Resources Specialist concluded that the appellant was not VRA eligible and, for that reason alone, the agency admittedly refused to give the appellant further consideration for the vacant positions. IAF, Tab 8 at 6, 8; Tab 11 at 5; Tab 21 at 1.

¶3 The appellant filed a September 26, 2008 appeal in which he initially asserted that the agency had violated his rights as a veteran under USERRA because he is a preference eligible Vietnam Era veteran, the agency had failed to

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<sup>1</sup> Neither the appellant nor the agency has submitted copies of these vacancy announcements; however, the agency has admitted that they were open to the public. IAF, Tab 21 at 5. The record seems to indicate that the appellant also applied and was considered, but not selected, for a fourth GS-0085-6 Security Guard position. IAF, Tab 21 at 3. However, because this vacancy announcement also was not submitted for the record, it is unclear if this was actually one of the three open to the public vacancy announcements that the appellant applied for or was actually a fourth vacancy. This appeal solely addresses the three June 2008 vacancy announcements the appellant has asserted that he had applied for and was interviewed for in July 2008. *See* IAF, Tab 1 at 13, Tab 23 at 1.

consider him for the June 2008 Security Guard positions he applied for as a result of his prior military service, and the agency had filled some of the positions he had applied for with persons who were not VRA eligible veterans. IAF, Tab 1. The appellant requested a hearing. IAF, Tab 6. The administrative judge (AJ) issued a jurisdictional order that fully explained the Board's USERRA jurisdiction and what the appellant must do to meet his burden to establish the Board's jurisdiction over his appeal under that statute. IAF, Tab 3. Among other things, the order directed the appellant to address whether he had filed a complaint with the Department of Labor (DOL) prior to filing his Board appeal and to address the nonfrivolous allegations that could establish the Board's USERRA jurisdiction. *Id.* at 7.

¶4 The appellant's various jurisdiction-related responses asserted that he had not filed a complaint with DOL, but he repeatedly asserted that he had filed his appeal with the Board because that is what he was instructed to do by DOL when he called DOL to seek DOL's assistance. IAF, Tabs 7, 13. The appellant's responses reasserted that he is a Vietnam Era veteran, that the agency improperly refused to consider him for the June 2008 Security Guard positions based on the military service he had performed, that he is eligible for a VRA appointment, that the agency had provided him with tracking information showing that it has filled seventeen Security Guard positions, and that not all of the appointments were made through VRA appointments.<sup>2</sup> IAF, Tabs 10, 11, 19, 23. The appellant also asserted that the agency had violated his veterans' preference rights under the VEOA by failing to consider him for the Security Guard positions for which he had applied. IAF, Tab 13, Tab 21 at 1, Tab 23 at 2. The agency filed a response to the jurisdictional order in which it asserted that the appellant had applied for

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<sup>2</sup> Although the appellant appears to assert that he filed the agency's "spreadsheet" showing who received the seventeen appointments and the appointees' veterans' preference and VRA eligibility, there is no such document in the record. IAF, Tab 21 at 5, Tab 23 at 2.

Security Guard positions that were recruited under its VRA authority, 5 C.F.R. part 307, and that the appellant was not considered for the positions because he is not qualified as a “covered veteran” under the VRA as defined under [38 U.S.C. § 4212\(a\)\(3\)](#). IAF, Tab 8. The agency asserted that the appeal should be dismissed due to the appellant’s failure to assert nonfrivolous allegations that the agency had discriminated against him based on his military service. *Id.* at 6-7.

¶5 In the initial decision based on the record evidence, the AJ found that a hearing was unnecessary because the appellant had not asserted a nonfrivolous allegation of the Board’s USERRA jurisdiction. IAF, Tab 25, Initial Decision (ID) at 2. The AJ indicated in a footnote that she had advised the appellant that, if he wished to assert that the agency had violated his veterans’ preference rights in regard to the June 2008 vacancy announcements that he submitted applications for, he would have to exhaust his DOL administrative remedy regarding those claims prior to filing a separate appeal asserting a violation of his veterans’ preference rights under the VEOA. ID at 2 n.3.

¶6 The AJ found it undisputed that the appellant had been interviewed for the June 2008 vacancies that the agency decided to fill using its VRA appointment authority, prior to a determination of whether he was actually eligible for a VRA appointment. ID at 2-3. When the agency decided that the appellant was not eligible for a VRA appointment, he was no longer considered for the positions. ID at 3. The AJ found that the appellant’s DD-214 shows that he is a Vietnam Era preference eligible veteran who was honorably discharged after 5 years, 10 months, and 22 days of active duty service in the U.S. Army. ID at 3-4. However, the AJ found that the appellant had not asserted a nonfrivolous allegation that the agency had engaged in military service discrimination as required to raise a USERRA violation. ID at 7-9. Accordingly, the AJ dismissed the appeal for lack of jurisdiction. ID at 1, 9.

¶7 The appellant filed a petition for review. Petition for Review File (PFRF), Tab 1. The agency filed a response in opposition. PFRF, Tab 3.

### ANALYSIS

¶8 Because the appellant has not shown that the AJ committed an error of law or regulation in dismissing his USERRA claim due to his failure to assert facts that, if proven, could show that his military status was a motivating or substantial factor in the agency's refusal to consider him for the positions for which he had applied, we affirm the initial decision's dismissal of that claim. *See Daniels v. U.S. Postal Service*, [88 M.S.P.R. 630](#), ¶¶ 4, 7 (finding that the appellant had not alleged a USERRA violation because his allegations did not indicate that the agency had a general animus against persons who perform military service or that it was motivated to act against him specifically because of his military status), *aff'd*, 25 F. App'x 970 (Fed. Cir. 2001). However, because we find, as discussed below, that the appellant sufficiently raised a VEOA claim, we vacate that portion of the initial decision that references the appellant's possible VEOA claim and remand this appeal so that the AJ can give the appellant notice and an opportunity to respond to the Board's jurisdiction over his VEOA claim.

The AJ should have provided the appellant with notice of and an opportunity to respond to the Board's jurisdiction over his VEOA claim.

¶9 The appellant asserts on review, in effect, that the AJ erred in finding that the Board does not have jurisdiction over his VEOA claim. PFRF, Tab 1 at 3. The appellant had asserted below in his amended statement on jurisdiction that the agency had violated his veterans' preference rights by failing to consider him for any of the Security Guard positions for which he had applied. IAF, Tab 13. The appellant also asserted that he had attempted to file a complaint alleging a violation of his veterans' preference rights with DOL, but that DOL had told him it could not handle his complaint of a violation of his veterans' preference rights and, further, that DOL had told him to go directly to the Board. *Id.* We find that the appellant's allegations were sufficient to entitle him to notice and an opportunity to respond regarding the Board's jurisdiction over that claim. *See Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 8 (2006) (an

appellant's allegations that an agency violated his veterans' preference rights should be liberally construed).

¶10 The AJ did not, however, separately inform the appellant regarding the Board's VEOA jurisdiction and provide him with an opportunity to address that jurisdiction. In order to establish jurisdiction over a VEOA appeal, an 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. *See Hayes v. Department of the Army*, [111 M.S.P.R. 41](#), ¶ 9 (2009).

¶11 The appellant clearly made a nonfrivolous allegation that he is a preference eligible veteran within the meaning of VEOA. It is uncontested that the appellant's Vietnam Era military service qualifies him as a preference eligible veteran for the purposes of title 5 of the United States Code. *See* [5 U.S.C. § 2108](#)(1)(B), (3)(B); IAF, Tab 8 at 9, Tab 11 at 5. Further, there is no dispute that the action at issue took place after the enactment of VEOA.

¶12 The appellant also made a nonfrivolous allegation that the agency had violated his rights under a statute or regulation related to veterans' preference in regard to the June 2008 Security Guard positions for which he had applied. IAF, Tab 13, Tab 21 at 1, Tab 23 at 2. The appellant applied for employment as a Security Guard, GS-0085-5/6, a position that by law may be filled only by appointment of a preference eligible, as long as qualified preference eligible candidates are available. *See* [5 U.S.C. § 3310](#); *Hesse v. Department of the Army*, [104 M.S.P.R. 647](#), ¶¶ 2, 4 (2007). Specifically, 5 U.S.C. § 3310 provides that:

In examinations for positions as guards, elevator operators, messengers, and custodians in the competitive service, competition is restricted to preference eligibles as long as preference eligibles are available.

Section 3310 is a law related to veterans' preference. *See Patterson v. Department of the Interior*, [424 F.3d 1151](#), 1155 (Fed. Cir. 2005) ("Veterans' preference rights are defined by the Veterans' Preference Act of 1944 ('VPA'), Pub. L. No. 78-359, 58 Stat. 387 (codified at [5 U.S.C. §§ 2108](#), 3309-3320), and its attendant regulations, *see* [5 C.F.R. §§ 302.101](#)-302.403 (2005)."). Given that Congress has explicitly provided that, for those positions listed in section 3310, an agency must consider only "preference eligibles" as long as such candidates are available, the appellant has raised a nonfrivolous allegation that the agency violated his veterans' preference rights by failing to consider him for the Security Guard positions for which he had applied. An agency may not attempt to avoid the requirements [5 U.S.C. § 3310](#) by filling positions specified in the statute using excepted service appointments. *See* 5 U.S.C. § 3320 (applying the veterans' preference requirements of 5 U.S.C. §§ 3308-3318 to excepted service appointments).

¶13 To satisfy VEOA's requirement that the appellant 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 a resolution of the complaint. *See Hayes*, [111 M.S.P.R. 41](#), ¶ 9. The appellant reasserts on review that he "did file with DOL/VETS and was told to go to [the] MSPB." PFRF, Tab 1 at 3; IAF, Tab 13. In support of this assertion, the appellant directs our attention to the recording of the "[j]urisdiction hearing," and he asserts that "[a]ll of the conference was taped." PFRF, Tab 1 at 3. The only recording in the record is of the "Close Of Record Conference" that the AJ held on December 10, 2008. IAF, Tab 24, Compact Disc. Unfortunately, as the AJ indicated in the initial decision, only the first 30 minutes of the conference were recorded (apparently due to a recording equipment malfunction) and there is no reference during the first 30 minutes of the conference to the appellant's efforts to "file" a VEOA claim with DOL. ID at 4 n.5; IAF, Tab 24. Further, the record

does not contain a written summary of the conference that an AJ would ordinarily enter into the record, nor does the AJ address as a separate issue in the initial decision the Board's jurisdiction over the appellant's VEOA claim.

¶14 The Board has held that, in order to exhaust the DOL filing requirement under [5 U.S.C. § 3330a\(a\)\(2\)\(B\)](#), an appellant must file a written complaint with DOL and that simply calling DOL to discuss a possible VEOA violation would be insufficient to exhaust the filing requirement. *See Mitchell v. Department of Commerce*, [106 M.S.P.R. 648](#), ¶¶ 8-9 (2007), *aff'd*, 276 F. App'x 1007 (Fed. Cir. 2008), *overruled on other grounds by Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#), ¶ 8 (2009); *Sears v. Department of the Navy*, [86 M.S.P.R. 76](#), 78-79 (2000). However, if, as the appellant has asserted below and on review, he attempted to file a veterans' preference complaint with DOL and he contacted DOL for assistance to that end, but was informed by DOL that it does not handle such complaints and was directed by DOL to file an appeal with Board instead, we may find that the appellant has satisfied the DOL exhaustion requirement as a result of DOL's inherent refusal to address his VEOA complaint by directing him to "go to [the] MSPB." PFRF, Tab 1 at 3; IAF, Tab 13. We note that, in establishing the DOL filing requirement, Congress also provided that DOL "shall, upon request, provide technical assistance to a potential complainant with respect to a complaint under this subsection." [5 U.S.C. § 3330\(a\)\(3\)](#). The Board can find that a jurisdictional requirement has been exhausted when it finds that an appellant has attempted to obtain a necessary decision and the agency responsible for issuing that decision has refused to issue a decision. *See, e.g., Easter v. Office of Personnel Management*, [102 M.S.P.R. 568](#), ¶¶ 5, 8 (2006) (stating that the Board will take jurisdiction over a retirement appeal where it finds that the Office of Personnel Management has refused to issue either a final or an initial decision on an appellant's retirement application); *see also Markanich v. Office of Personnel Management*, [104 M.S.P.R. 323](#), ¶ 12 (2006) (finding a lack of jurisdiction because, in part, there was no evidence that the Defense Information

Service Agency had refused to issue a final report that it was required by [5 C.F.R. § 847.106](#)(b) to provide to the appellant, so as to enable the appellant to file a Board appeal pursuant to [5 C.F.R. § 847.107](#)(a)). Because the AJ did not separately provide the appellant with notice and an opportunity to respond to the VEOA jurisdictional issue, that issue must be remanded for further adjudication. See *Hudson v. Department of Veterans Affairs*, [104 M.S.P.R. 283](#), ¶¶ 18, 21 (2006).

#### ORDER

¶15 Accordingly, we AFFIRM the initial decision's dismissal of the appellant's USERRA claim and REMAND this appeal to the Western Regional Office for further adjudication of the appellant's VEOA claim as set forth in this Opinion and Order and for the issuance of a new initial decision. If the AJ finds that the appellant has satisfied the DOL exhaustion requirement as discussed in this Opinion and Order, the AJ should afford the parties an opportunity to engage in discovery regarding that claim and afford the appellant a hearing on the merits of the claim.

FOR THE BOARD:

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