UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 32

Docket No. DC-3330-09-0703-I-1

Leroy Alford,

Appellant,

v.

Department of Defense,

Agency.

February 16, 2010

John J. Rigby, Esquire, Arlington, Virginia, for the appellant.

Robert Schapler, Esquire, and William Christopher Horrigan, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeals under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) for lack of jurisdiction and failure to state a claim upon which relief can be granted. For the reasons discussed 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 this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial

decision AS MODIFIED by this Opinion and Order, still DISMISSING the appellant's VEOA appeal for failure to state a claim upon which relief can be granted and still DISMISSING the appellant's USERRA appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a GG-0343-15 Management Analysis Officer with the Defense Intelligence Agency (DIA), filed an appeal with the Board asserting that the agency violated his rights as a preference eligible under VEOA when it did not use his military service to establish his initial civil service annual leave accrual rate. Initial Appeal File (IAF), Tab 1 at 2-5. The appellant asserted that, when he began civil service employment with the agency on June 26, 2006, he was still a member of the United States Air Force on terminal leave, and that, as a result of the agency's inaction, he was not credited with the appropriate number of hours of annual leave for the period of June 26, 2006, through August 31, 2006, when he retired from the United States Air Force. *Id*. at 4; IAF, Tab 12 at 1-2. The appellant asserted that he filed a complaint with the Department of Labor (DOL) on June 27, 2009, and he submitted a letter from DOL stating that it closed its investigation into his complaint on July 7, 2009, because his complaint does not fall within DOL's "purview of veterans' preference statutes and regulations" under VEOA. IAF, Tab 1 at 5, 16. The appellant designated an attorney as his representative and he requested a hearing in his appeal. *Id*. at 3; IAF, Tab 7.

¶3 The administrative judge issued an acknowledgment order informing the appellant that he did not appear to state a claim under VEOA since he had not identified any statute relating to veterans' preference that the agency's action appeared to violate, and ordering him to file evidence and argument to prove that his claim is within the Board's jurisdiction. IAF, Tab 2. The administrative judge also issued an order informing the appellant that the Board may have

USERRA jurisdiction over his appeal and the administrative judge informed the appellant of the elements and his burden to establish USERRA jurisdiction over his appeal. IAF, Tab 6 at 2-3. The parties were instructed to file evidence and argument on the issues of VEOA and USERRA jurisdiction and the appellant and the agency responded to the jurisdictional show cause orders. IAF, Tabs 6, 8, 10-12, 14-15.

¶4 Without holding the appellant's requested hearing, the administrative judge issued an initial decision finding that the appellant's appeal must be dismissed for lack of VEOA and USERRA jurisdiction and for failure to state a claim. IAF, Tab 16, Initial Decision (ID) at 1, 5. The administrative judge found that the appellant failed to establish VEOA jurisdiction over his appeal because his assertion that the agency did not correctly credit his military service for purposes of calculating his rate to accrue annual leave, pursuant to 5 U.S.C. § 6303, is not a nonfrivolous allegation that the agency violated a statute relating to veterans' preference. ID at 3-4. The administrative judge also found that the appellant failed to establish USERRA jurisdiction over his appeal because DIA is not a "Federal executive agency" from which an employee may file a USERRA appeal with the Board. ID at 4-5. The administrative judge further determined that, because the appellant "failed to state a claim" under either VEOA or USERRA, his appeal must be dismissed. ID at 5.

¶5 The appellant has filed a petition for review, to which the agency responds in opposition. Petition for Review File, Tabs 1, 3.

ANALYSIS

¶6 The appellant's petition for review does not provide a basis for Board review because the appellant has not made any argument establishing error by the administrative judge, or presented any new and material evidence affecting the outcome of this case. *See* 5 C.F.R. § 1201.115(d). Therefore, we deny the appellant's petition for review.

¶7 However, we reopen the appeal on our own motion to correct and clarify the administrative judge's findings that the appeal must be dismissed for lack of VEOA and USERRA jurisdiction and for failure to state a claim.

The appellant's VEOA appeal must be dismissed for failure to state a claim upon which relief can be granted.

¶8 To establish Board jurisdiction over an appeal brought under VEOA, 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 the VEOA; (ii) the actions at issue took place on or after the October 30, 1998 enactment date of the VEOA; and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377, ¶¶ 6, 8 (2003); ID at 3; *see* 5 U.S.C. § 3330a.

¶9 Here, the administrative judge found that the appellant failed to establish VEOA jurisdiction over his appeal because he failed to make a nonfrivolous allegation that the agency violated a statute or regulation pertaining to veterans' preference. ID at 3-4. The administrative judge found that 5 U.S.C. § 6303, the statute cited by the appellant in support of his VEOA appeal and that sets forth the provisions governing how federal employees accrue annual leave, is not a statute relating to veterans' preference. ID at 3.

¶10 Because an appellant's assertions that his veterans' preference rights have been violated should be liberally construed, the administrative judge erred in finding that the appellant failed to make a nonfrivolous allegation that the agency violated a statute or regulation pertaining to veterans' preference. *See Abrahamsen*, 94 M.S.P.R. 377, ¶ 9; *Young v. Federal Mediation & Conciliation Service*, 93 M.S.P.R. 99, ¶¶ 6-7 (2002), *aff'd*, 66 F. App'x 858 (Fed. Cir. 2003). The record shows that the appellant exhausted his remedy with DOL and that he made nonfrivolous allegations that: he is a preference eligible; the agency's action took place after the October 30, 1998 enactment date of the VEOA; and the

agency violated his rights under a statute or regulation relating to veterans' preference when it did not credit his military service when calculating his annual leave accrual rate during the period in which he was simultaneously a federal employee and on military leave from the United States Air Force. IAF, Tab 1 at 3-5, 16, Tab 8 at 4-6; *see, e.g.*, *Simpkins v. Department of Labor*, 107 M.S.P.R. 651, ¶¶ 16-17 (2008) (the appellant made a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference where he alleged that the agency prevented him from exercising his right to make a deposit for his post-1956 military service so that he could receive full credit for this service under the Federal Employees' Retirement System (FERS)). Thus, we reverse the administrative judge's finding that the appellant failed to establish VEOA jurisdiction over his appeal.

¶11 The administrative judge's error in dismissing the appeal for lack of VEOA jurisdiction does not affect the outcome of this appeal, however, because ultimately the appellant is not entitled to any relief, as he has failed to state a claim upon which relief can be granted. An appeal that is within the Board's jurisdiction can be dismissed for failure to state a claim upon which relief can be granted if the appellant cannot obtain effective relief before the Board even if his allegations are accepted as true. *Simpkins*, 107 M.S.P.R. 651, ¶ 18; *Will v. Department of the Treasury*, 105 M.S.P.R. 283, ¶ 9 (2007). In appraising the sufficiency of an appeal, the Board follows the accepted rule that an action should not be dismissed for failure to state a claim unless it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief. *Will*, 105 M.S.P.R. 283, ¶ 9. Dismissal for failure to state a claim is appropriate only if, taking the appellant's allegations as true and drawing all reasonable inferences in his favor, he cannot prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 8 (2008).

¶12 We find that the appellant has failed to state a claim upon which relief can be granted because the statutory provision at 5 U.S.C. § 6303, which sets forth

the rate at which a civil service employee accrues annual leave based on his years of service, does not stand in some relation to, have a bearing on, concern, and have a connection with veterans' preference rights. *Cf. Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶¶ 9-16 (2006) (finding that 5 U.S.C. § 3304(f)(1), which affords preference eligible veterans the right to compete for a vacancy open to internal and external candidates, is a statute "relating to veterans' preference"). The fact that 5 U.S.C. § 6303 sets forth the circumstances in which a retired member of the military may, for purposes of accruing annual leave as a civilian federal employee, receive credit for his active duty military service does not render this statutory provision as relating to, bearing on, concerning, or having a connection with veterans' preference rights. *See Simpkins*, 107 M.S.P.R. 651, ¶¶ 18-21 (dismissing the appellant's VEOA appeal for failure to state a claim upon which relief can be granted because the FERS statutory and regulatory provisions regarding the payment of interest for veterans who make deposits for post-1956 military service do not stand in some relation to, have a bearing on, concern, and have a connection to veterans' preference rights). Thus, even if, as the appellant contends, the agency erred in processing his annual leave accrual rate for the period during which he was a federal employee and on terminal leave from the military, he has failed to state a claim upon which relief can be granted under VEOA because he cannot prove that the agency's action violates a statute or regulation relating to, bearing on, concerning, or having a connection to veterans' preference rights. *See id.*, ¶ 20.

¶13 Accordingly, because there is no dispute of material fact, we dismiss the appellant's VEOA appeal, without holding the appellant's requested hearing, for failure to state a claim upon which relief can be granted. *See Williamson v. U.S. Postal Service*, 106 M.S.P.R. 502, ¶ 8 (2007) (the Board has the authority to decide a VEOA appeal on the merits, without a hearing, where there is no genuine dispute of material fact and one party must prevail as a matter of law).

The administrative judge properly found that the appellant failed to establish USERRA jurisdiction over his appeal.

¶14 We also reopen the appeal to clarify the administrative judge's disposition of the appellant's USERRA appeal. Although the administrative judge correctly found that the appellant failed to establish jurisdiction over his USERRA appeal, the administrative judge dismissed the appellant's USERRA appeal for both lack of jurisdiction and failure to state a claim. ID at 1, 5. As set forth above, an appeal that is within the Board's jurisdiction can be dismissed for failure to state a claim upon which relief can be granted if the appellant cannot obtain effective relief before the Board even if his allegations are accepted as true. *Will*, 105 M.S.P.R. 283, ¶ 9. Because a dismissal for failure to state a claim upon which relief can be granted is a decision on the merits, an appeal must be within the Board's jurisdiction for this disposition to be proper. *See Lubert v. U.S. Postal Service*, 110 M.S.P.R. 430, ¶ 12 (2009); *Will*, 105 M.S.P.R. 283, ¶ 9.

¶15 Here, the administrative judge properly found that the appellant failed to establish USERRA jurisdiction over his appeal because the Board's jurisdiction under USERRA is limited to complaints against "Federal executive agencies" and DIA is not a "Federal executive agency" for purposes of 38 U.S.C. chapter 43. ID at 4-5. Pursuant to 38 U.S.C. § 4324, the Board has jurisdiction to adjudicate a USERRA complaint against a "Federal executive agency or the Office of Personnel Management" for violation of rights provided under USERRA. 38 U.S.C. § 4324; *Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 9 (2009); ID at 4. For purposes of chapter 43 of title 38, a "Federal executive agency" is defined as excluding "an agency referred to in section 2302(a)(2)(C)(ii) of title 5" and section 2302(a)(2)(C)(ii) of title 5 explicitly excludes DIA from the definition of executive agency. 5 U.S.C. § 2302(a)(2)(C)(ii); 38 U.S.C. § 4303(5); *see Hereford v. Tennessee Valley Authority*, 88 M.S.P.R. 201, ¶ 10 (2001) ("USERRA defines Federal executive agencies to include executive agencies as defined in 5 U.S.C. § 105, other than

intelligence agencies"); *see also* 5 C.F.R. §§ 353.102(2), 353.211 (employees of intelligence agencies referred to in 5 U.S.C. § 2302(a)(2)(C)(ii) are excluded from appealing a violation of uniformed service reemployment rights to the Board under USERRA); ID at 4. Therefore, the administrative judge correctly found that an employee of DIA may not file a USERRA appeal with the Board. ID at 4-5.

¶16 Thus, because the correct disposition of the appellant's USERRA appeal is dismissal for lack of jurisdiction, we vacate the administrative judge's finding that the appellant's USERRA appeal must be dismissed for failure to state a claim and we affirm the administrative judge's finding that the appellant's USERRA appeal must be dismissed for lack of jurisdiction.

ORDER

¶17 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.