

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

**2010 MSPB 35**

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Docket No. SF-3443-09-0296-I-1

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**Dennis K. Morris,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

February 19, 2010

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Elbridge W. Smith, Esquire, Honolulu, Hawaii, for the appellant.

Captain Jill B. Rodriguez, Esquire, Fort Shafter, Hawaii, 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 appeal under the Veterans Employment Opportunities Act (VEOA) for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition under [5 C.F.R. § 1201.115](#), REVERSE the initial decision, and REMAND the appeal for further adjudication.

**BACKGROUND**

¶2 The agency filled a Supervisory Operations Officer position by hiring a preference-eligible veteran using the Veterans Recruitment Appointment (VRA)

authority, [38 U.S.C. § 4214](#). Initial Appeal File (IAF), Tab 1 at 1-2, 7; Tab 8, Subtab 4J; Tab 13, Exs. F-I. The selection was made from an “external source” through the agency’s Civilian Personnel Advisory Center, and the “position was not advertised with a vacancy announcement.” IAF, Tab 13, Exs. G, H.

¶3 The appellant, a veteran who according to the record is not preference-eligible, filed this appeal asserting that the agency improperly used the VRA hiring authority to appoint an individual without issuing a vacancy announcement or allowing other qualified veterans such as himself to be considered for the position. IAF, Tab 1 at 1-3; Tab 8, Subtab 4A. The administrative judge’s (AJ) acknowledgment order informed the appellant that the Board may not have jurisdiction over his appeal and ordered him to file evidence and argument showing that the appeal is within the Board’s jurisdiction. IAF, Tab 2 at 2. The agency moved to dismiss the appeal, asserting that it filled the position using the VRA appointment authority and that as a consequence, it was not required to inform anyone of the vacant position. IAF, Tab 8, Subtab 1 at 4-8. The appellant asserted in response that he was qualified for a VRA appointment, that he would have applied for the position if the vacancy had been announced, and that he had a right to compete for the position. IAF, Tab 9 at 2. The appellant argued that the Board has jurisdiction under VEOA. *Id.* at 3.

¶4 In the initial decision based on the written record, the AJ stated that he had informed the appellant in the acknowledgment order that the Board may not have jurisdiction over his appeal. IAF, Tab 15, Initial Decision (ID) at 2-3. The AJ acknowledged the appellant’s assertions that he would have qualified for a VRA appointment if the vacancy had been announced and that the Board has VEOA jurisdiction over his appeal. ID at 4. The AJ found, however, that the appellant had failed to establish VEOA jurisdiction and that he had not alleged facts establishing any other basis for Board jurisdiction over his appeal. ID at 4-7. Thus, the AJ dismissed the appeal for lack of jurisdiction. ID at 1, 7.

¶5 The appellant has filed a petition for review contesting the AJ's determination that the Board lacks jurisdiction under VEOA, and the agency has filed a response in opposition. Petition for Review File (PFRF), Tabs 1, 3.<sup>1</sup>

### ANALYSIS

The AJ erred in dismissing this appeal for failure to establish the Board's VEOA jurisdiction without properly informing the appellant of the jurisdictional issue.

¶6 The appellant argues that the AJ erred in finding that he failed to establish the Board's jurisdiction under VEOA because he was never informed of the jurisdictional criteria below. PFRF, Tab 1 at 1-3. We agree.

¶7 The AJ found that the appellant had been notified of his jurisdictional burden in the acknowledgment order. ID at 2. The record shows, though, that the appellant was not provided with specific notice of the VEOA jurisdictional criteria in either the acknowledgment order or the agency's motion to dismiss for lack of jurisdiction. IAF, Tab 2 at 2; Tab 8, Subtab 1; *see Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue); *see also Tackett v. Department of Agriculture*, [89 M.S.P.R. 348](#), ¶ 7 (2001) (noting that an AJ's failure to inform the appellant of the jurisdictional requirements may not be prejudicial if the appellant is put on notice by the agency's motion to dismiss of what he has to allege to establish jurisdiction). Because the AJ did not provide the appellant with notice and an opportunity to respond to the VEOA jurisdictional issue, the AJ erred in

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<sup>1</sup> After the record closed on review, the appellant filed a reply to the agency's response. PFRF, Tab 4. In reaching our decision in this case, we have not considered this submission because it is not authorized under our regulations and the appellant has not shown that it is based on evidence that was not readily available prior to the close of the record on review. *See Pimentel v. Department of the Treasury*, 107 M.S.P.R. 67, ¶ 3 n.\* (2007), *aff'd*, 287 F. App'x 850 (Fed. Cir. 2008); *White v. Social Security Administration*, 76 M.S.P.R. 447, 459 n.8 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table); 5 C.F.R. § 1201.114(i).

dismissing this appeal on that basis. *See Hudson v. Department of Veterans Affairs*, [104 M.S.P.R. 283](#), ¶¶ 18, 21 (2006).

The Board has jurisdiction over this VEOA appeal.

¶8 We will resolve the jurisdictional issue at this stage because the appellant has responded to the jurisdictional issue in his petition for review and has met his burden of establishing jurisdiction under VEOA. *See Turner v. U.S. Postal Service*, 90 M.S.P.R. 385, ¶ 5 (2001) (“Although the Board will not consider evidence or argument submitted for the first time on review unless the party shows that it was unavailable when the record closed below, *see* [5 C.F.R. § 1201.115\(d\)\(1\)](#), the Board will consider such evidence and argument when an appellant is not adequately notified of what is required to establish jurisdiction.”); *McCray v. Department of the Navy*, 80 M.S.P.R. 154, ¶ 7 (1998) (same).

¶9 In order to establish VEOA jurisdiction over a “right to compete” claim, an appellant must: (1) Show that he exhausted his remedy with Department of Labor (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 Veterans’ Benefits Improvement Act of 2004, 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. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007). An appellant satisfies the exhaustion requirement by (1) filing a VEOA complaint with the Secretary of Labor within 60 days of the alleged VEOA violation, and (2) allowing her at least 60 days from the complaint’s filing date to attempt to resolve the matter. 5 U.S.C. § 3330a(a)(1), (a)(2)(A), (d). If the Secretary is unable to resolve the complaint, she will send the employee written notification of the results of her investigation. 5 U.S.C. § 3330a(c)(2). The appellant must file a Board appeal no earlier than 61 days after filing the complaint with the Secretary of Labor, and no

later than 15 days after receiving written notification from the Secretary concerning the results of her investigation. 5 U.S.C. § 3330a(d). There is no requirement in the VEOA statute or the Board's jurisdictional test that requires an appellant to allege that he filed an application for a vacant position in order to assert the Board's VEOA jurisdiction. *See Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶ 15 (2009).

¶10 The appellant has submitted on review a declaration sworn under the penalty of perjury, a copy of his military DD-214 (Certificate of Release or Discharge from Active Duty), a copy of his February 16, 2009 complaint to DOL (in which he asserts that the agency improperly used its VRA authority to fill a vacant position without announcing the vacancy, such that qualified veterans were not given an opportunity to compete for the position), and a copy of DOL's February 26, 2009 letter notifying him that DOL did not consider his complaint to fall within its jurisdiction and that his complaint had been forwarded to the Office of Personnel Management (OPM). PFRF, Tab 1, Attached Declaration of Appellant, Exs. A, D-F. We find that the appellant's uncontested, sworn assertions and documents in support thereof show that he exhausted his remedy with DOL. The appellant filed a written complaint with DOL asserting that the agency violated his rights by failing to announce a position vacancy and allow veterans to apply and be considered for the position. PFRF, Tab 1, Declaration at 2-3, Ex. D. We find that DOL's February 26, 2009 letter notifying the appellant that his complaint does not fall within DOL's jurisdiction constitutes its notice to the appellant under 5 U.S.C. § 3330a(c)(2). PFRF, Tab 1, Declaration at 2-3, Ex. E. Alternatively, we find that DOL's refusal to address the appellant's complaint allows us to find that the appellant has exhausted his DOL remedy. The Board can find that a pre-appeal complaint process has been exhausted when an appellant has attempted to obtain a necessary determination and the agency responsible for making that determination has refused to do so. *See Thompson v. Department of the Army*, 112 M.S.P.R. 153, ¶ 14 (2009); *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 decision 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)); *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 OPM has refused to issue either a final or an initial decision on an appellant's retirement application). Thus, we find that the appellant has shown that he exhausted his remedy with DOL.<sup>2</sup>

¶11 We also find that the appellant has raised nonfrivolous allegations that he is a veteran within the meaning of 5 U.S.C. § 3304(f)(1), that the action at issue took place on or after December 10, 2004, and that the agency denied the appellant the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce. PFRF, Tab 1, Appellant's Sworn Declaration; IAF, Tab 13, Exs. F-H. In so finding, we are broadly construing the appellant's *claim* that the agency denied him the right to compete; at this stage we make no determination that in fact he had such a right. *Cf. Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006) (allegations in support of VEOA jurisdiction are to be liberally construed). Thus, the appellant has established VEOA jurisdiction over this appeal. 5 U.S.C. § 3330a(a)(1)(B), (d)(1).

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<sup>2</sup> Although the appellant prematurely filed his appeal below prior to what we consider to be DOL's February 26, 2009 close-out letter, the Board's practice is to adjudicate an appeal that was premature when filed but becomes timely while pending before the Board. *See Wooten v. Department of Veterans Affairs*, 96 M.S.P.R. 671, ¶ 9 (2004).

The appeal must be remanded for a finding on the question of whether the agency was required to use merit promotion competitive procedures and issue a vacancy announcement for the Supervisory Operations Officer position.

¶12 Having determined that this appeal is within our VEOA jurisdiction, we proceed to the merits of the appellant's request for corrective action. The appellant reasserts on review that the agency violated his rights under 5 U.S.C. § 3304(f)(1) by appointing an individual from outside its workforce using the VRA appointment authority without announcing the vacancy and permitting preference eligibles and other veterans to apply and be considered for the position. PFRF, Tab 1, Appellant's Declaration at 2-3. The statute upon which the appellant relies provides:

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.

5 U.S.C. § 3304(f)(1).

¶13 The agency states, and the appellant does not dispute, that the agency filled the vacant Supervisory Operations Officer position by instructing its personnel office to appoint a specific individual outside of its workforce to the position using the VRA appointment authority and that the position was not advertised with a vacancy announcement. IAF, Tab 8, Subtab 1 at 3; Tab 13, Exs. G-H. A VRA appointment is an excepted-service appointment to a position normally in the competitive service. *See* 38 U.S.C. § 4214; 5 C.F.R. §§ 307.101, 307.103. VRA appointments were first established on April 9, 1970, by Executive Order 11,521, 35 Fed. Reg. 5311 (1970), and are presently authorized by 38 U.S.C. § 4214. OPM's implementing regulation provides:

VRAs are excepted appointments, made without competition, to positions otherwise in the competitive service. The veterans' preference procedures of part 302 of this chapter apply when there are preference eligible candidates being considered for a VRA. *Qualified covered veterans* who were separated *under honorable conditions* may

be appointed to any position in the competitive service at grade levels up to and including GS-11 or equivalent, provided they meet the qualification standards for the position. To be eligible for a VRA as a *covered veteran* under paragraph (2) or (3) of the definition of that term in § 307.102, the veteran must be in receipt of the appropriate campaign badge, expeditionary medal, or AFSM [Armed Forces Service Medal]. For purposes of a VRA, any military service is qualifying at the GS-3 level or equivalent. Upon satisfactory completion of 2 years of substantially continuous service, the incumbent's VRA must be converted to a career or career conditional appointment. An individual may receive more than one VRA appointment as long as the individual meets the definition of a *covered veteran* at the time of appointment.

5 C.F.R. § 307.103. The agency contends that, because the regulation states that “VRAs are excepted appointments, made without competition,” it is free to noncompetitively fill a position with an individual from outside its workforce using the VRA appointing authority, without first issuing a vacancy announcement. PFRF, Tab 3 at 6-7.<sup>3</sup> In other words, the agency contends that it was not required to allow the appellant or anyone else to compete for the Supervisory Operations Officer position under 5 U.S.C. § 3304(f)(1).

¶14 We begin with the text of section 3304(f)(1). *See Wallace v. Office of Personnel Management*, 88 M.S.P.R. 375, ¶ 8 (2001) (statutory construction begins with the language of the statute). The Board has held that all provisions

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<sup>3</sup> There is some support for the agency's contention in the regulatory history of section 307.103. *See, e.g., Klamm v. Department of Defense*, 97 M.S.P.R. 276, ¶ 8 (2004) (relying on the history of a regulation as an aid to its interpretation). In issuing its final regulations implementing the Jobs for Veterans Act, which was signed into law on November 7, 2002, and which made a “major change” in the eligibility criteria for obtaining a VRA appointment, OPM indicated that no clarification was necessary regarding whether agencies are required to post vacancy announcements before filling jobs under the VRA authority because “[t]he regulation clearly states that VRAs are excepted appointments made without competition,” and that “[a]s a consequence, VRAs do not require public notice as is the case with any appointment in the excepted service,” although agencies may advertise for such positions if they choose to do so. 70 Fed. Reg. 72,065, 72,066 (Dec. 1, 2005).

of a statute must be given meaning, and no part should be rendered superfluous or insignificant. *Brown v. Office of Personnel Management*, 65 M.S.P.R. 380, 386 (1994). The language of section 3304(f)(1) provides that when an agency making an announcement accepts applications from individuals outside its own workforce *under merit promotion procedures*, it must ensure that preference eligibles and certain other veterans be given an opportunity to compete for the position under such procedures. 5 U.S.C. § 3304(f)(1). However, there is nothing in this language on its face that *requires* agencies to use competitive merit promotion procedures when filling a vacancy, and the Board finds no authority for interpreting it as doing so. *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) (where “the language [of the statute] is clear and fits the case, the plain meaning of the statute will be regarded as conclusive”); *cf. Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶¶ 12-16 (2006) (holding that 5 U.S.C. § 3304(f)(1) does not require the use of open competitive examination procedures in considering and selecting veterans).

¶15 Here, the agency contends, and the appellant does not dispute, that it filled the Supervisory Operations Officer position using its excepted appointment authority under the VRA. The issue, therefore, is whether the agency properly relied on the VRA to fill the position noncompetitively. *Cf. Weed*, 112 M.S.P.R. 323, ¶ 14 (the appellant made a viable claim that an agency improperly used a particular hiring authority with a restricted scope of consideration in order to circumvent his right to compete under section 3304(f)(1)). If so, then the agency was not required to use competitive merit promotion procedures and section 3304(f)(1) was never triggered.<sup>4</sup> However, if the agency was otherwise required

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<sup>4</sup> The appellant appears to argue that permitting the agency to hire a veteran under the VRA without issuing a vacancy announcement undercuts the purpose of section 3304(f)(1). As noted above, however, there is no basis for construing section 3304(f)(1) as mandating that agencies use merit promotion procedures, including issuance of a vacancy announcement, when they otherwise would not be required.

to use such merit promotion procedures in filling the Supervisory Operations Officer position, and failed to properly announce the position, then the appellant may be entitled to relief under section 3304(f)(1).

### ORDER

¶16 The parties were not placed on express notice below that the dispositive issue on the merits is whether the agency was required to use competitive merit promotion procedures and issue a vacancy announcement. Accordingly, the appeal must be remanded for the presentation of additional evidence and argument and the issuance of a new initial decision.

¶17 Should the AJ conclude that the agency violated the appellant's right to compete for the Supervisory Operations Officer position because it was required under VRA-specific or other applicable rules to use merit promotion procedures and issue a vacancy announcement, an additional issue will have to be briefed. Ordinarily the remedy in a VEOA case such as this is to reconstruct the selection process consistent with law and regulation. *E.g., Gonzalez v. Department of Homeland Security*, 110 M.S.P.R. 567, ¶ 11 (2009). Here, there appears to be a conflict in potentially applicable OPM rules. Since the appellant is a non-preference-eligible veteran and the selectee for the Supervisory Operations Officer position is a preference-eligible veteran, IAF, Tab 8, Subtabs 4H, 4J, according to OPM's rules implementing the VRA the competition would have been administered under 5 C.F.R. part 302 and the individual who was originally selected would have been granted preference over the appellant. *See* 5 C.F.R. § 307.103; Office of Personnel Management *VetGuide*, "Veterans' Recruitment Appointment (VRA) Authority." On the other hand, according to OPM guidance, the right to compete under section 3304(f)(1) means the right to be considered

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Moreover, there is nothing in the legislative history of section 3304(f)(1) to suggest that Congress intended to alter the authority given to agencies under the VRA, which had been in existence for decades, to recruit and hire certain veterans without competition.

under merit promotion procedures, which do not include veterans' preference. *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶¶ 12-13 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007); *Brandt*, 103 M.S.P.R. 671, ¶ 16. Before ordering reconstruction of the selection process, the AJ should allow the parties to brief the issue of whether any right to compete for a VRA appointment under section 3304(f)(1) arises in the context of 5 C.F.R. part 302 with veterans' preference, or under merit promotion procedures without veterans' preference. We do not resolve this issue at this stage because it has not been briefed by the parties, and because there is no need to resolve the issue if the agency is correct that it was not required to issue a vacancy announcement for the Supervisory Operations Officer position.

¶18 On remand the AJ should address additional issues as appropriate, such as the appellant's argument that the Supervisory Operations Officer position was not subject to the VRA. The evidence appears to show that the position was subject to the VRA, IAF, Tab 13, Ex. I, but the AJ did not make a finding on the issue in the initial decision under review.

FOR THE BOARD:

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