UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 48

Docket No. DE-3330-09-0399-I-1

Orlando Jones,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 9, 2010

Orlando Jones, Aurora, Colorado, pro se.

Michael Gurnee, Esquire, Denver, Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. 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, AFFIRM the administrative judge's finding that the Board lacks jurisdiction over the appellant's claim that the agency violated his veterans' preference rights with respect to a vacancy announcement issued in May 2009,

REVERSE the administrative judge's finding that the Board lacks jurisdiction over the appellant's remaining VEOA claims, DENY those claims on the merits, and FORWARD the appellant's January 12, 2010 submission to the Denver Field Office for docketing and adjudication as claims under the Whistleblower Protection Act and the Uniformed Services Employment and Reemployment Rights Act of 1994.

BACKGROUND

¶2 The appellant, a preference-eligible GS-0201-12 Employment Development Specialist at the agency's Eastern Colorado Health Care System Medical Center, filed an appeal alleging that the agency violated VEOA and discriminated against him on the basis of his age, race, disability, color, and national origin, when it did not select him for three positions at the Center. Appeal File, Tab 1. Following a status conference, the administrative judge issued an order and summary explaining his understanding of the facts at issue, the Board's jurisdictional requirements in a VEOA appeal, and his view of the appellant's apparent shortcomings in meeting these jurisdictional requirements. Appeal File, Tab 4.

¶3 The administrative judge first explained that, to establish Board jurisdiction over a VEOA appeal, an appellant must: (1) show that he exhausted his remedy with the Department of Labor (DOL); and (2) make non-frivolous allegations that (a) he is a preference eligible within the meaning of VEOA, (b) the actions at issue took place on or after October 30, 1998, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. *Id*. at 1. The administrative judge then explained that, although the appellant claimed that the agency did not select him for several vacancies, the agency asserted that it had cancelled all of those announcements. *Id*. at 2. The administrative judge further stated that, while the appellant alleged that the agency did not select him for another vacancy in May 2009, it appeared that the

appellant had not applied for that position and that the agency had, in fact, not yet made a selection. *Id*. at 1-2.

¶4 The administrative judge then found that these facts raised several jurisdictional issues. The administrative judge first noted that it appeared that the appellant had not exhausted his remedies with DOL with respect to the May 2009 vacancy announcement that the agency had not yet filled. *Id*. at 2. With respect to the other vacancy announcements, the administrative judge explained that the agency would not be deemed to have violated veterans' preference laws if it, in fact, cancelled the vacancy announcements. *Id*. The administrative judge next stated that addressing these issues may not be necessary because the appellant had not cited a statute or regulation relating to veterans' preference regarding the agency's alleged actions. *Id*. at 2-3. Finally, the administrative judge noted that the Board lacks jurisdiction over discrimination claims in a VEOA appeal. *Id*. at 3. The administrative judge, therefore, ordered the appellant to submit evidence and argument showing that his VEOA appeal was within the Board's jurisdiction. *Id*.

¶5 Following submissions from both parties, the administrative judge dismissed the appellant's request for corrective action under VEOA, finding that the appellant failed to show a violation of his substantive rights that was within the Board's jurisdiction. Appeal File, Tab 13 at 1, 3, 6. In reaching this conclusion, the administrative judge found the following facts: (1) The appellant applied for a GS-13 Supervisory Human Resources Specialist position that was listed in a December 1, 2008 vacancy announcement; (2) on January 29, 2009, the agency cancelled this announcement and filled the position non-competitively by allowing the employee who had previously held the position to return to it through a voluntary demotion; (3) the appellant was the sole eligible applicant under a February 18, 2009 vacancy announcement for a GS-14 Supervisory Program Specialist position, but the agency did not select him and instead re-announced the position in an attempt to obtain additional applicants; (4) the

appellant applied for the re-announced GS-14 Supervisory Program Specialist position, but the agency again made no selection from the announcement; (5) the appellant applied for a GS-13 Assistant Human Resources Officer position that the agency announced on March 30, 2009, and the agency again made no selection; and (6) on May 21, 2009, the agency informed the appellant that it was re-announcing the GS-13 Assistant Human Resources Officer position with revised rating factors, that he was required to reapply to be considered for the position, and that the appellant did not reapply. *Id*. at 2-3.

¶6 The administrative judge then dismissed the appellant's request for corrective action, finding that canceling a vacancy announcement did not violate the appellant's substantive rights, and that the appellant, therefore, did not present a non-frivolous allegation of a violation with respect to the cancelled announcements at issue. *Id*. at 4. The administrative judge further found that the appellant did not show that the agency violated his substantive rights when it allowed a former incumbent of one position to return to that position through a non-competitive appointment, or that the agency violated his rights with respect to the May 2009 vacancy announcement for which the appellant did not apply. *Id*. at 4-5. With respect to that May 2009 announcement, the administrative judge found that the appellant did not appear to have exhausted his DOL remedies, in any event. *Id*. at 5 n.3. Finally, the administrative judge found that the Board lacks jurisdiction over the appellant's allegations of discrimination and violations of other prohibited personnel practices in the context of this VEOA appeal. *Id*. at 5.

¶7 In his petition for review, the appellant only asserts that the administrative judge abused his discretion in denying his request for certain witnesses, and states that he did not apply for the position in the May 2009 announcement because he was unaware that the agency had reopened that vacancy announcement. Petition for Review File, Tab 1.

ANALYSIS

¶8 We deny the appellant's petition for review because it does not show that the administrative judge committed any procedural or adjudicatory error that affected his substantive rights. Specifically, while the appellant alleges that the administrative judge denied his request for certain witnesses, he has not shown their testimonies would have been relevant, material, and nonrepetitious. Petition for Review File, Tab 1; *see Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). Further, the appellant's assertion, that he was unaware that the agency had reopened the May 2009 vacancy announcement, does not establish that he has new and material evidence that was unavailable before the record closed, despite his due diligence, or that the administrative judge erroneously interpreted a statute or regulation. 5 C.F.R. § 1201.115(d).

¶9 We reopen this appeal, however, because the administrative judge erred in finding that the Board lacks jurisdiction over some of the appellant's VEOA claims. As mentioned above, 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 non-frivolous 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. *See Slater v. U.S. Postal Service*, 112 M.S.P.R. 28, ¶ 5 (2009). An appellant need not state a claim upon which relief can be granted, however, for the Board to have jurisdiction over a VEOA claim, and allegations of a veterans' preference violation are liberally construed. *Id.*, ¶¶ 5-6. Indeed, an allegation, in general terms, that veterans' preference rights were violated is sufficient to meet the requirement of a non-frivolous allegation to establish Board jurisdiction over a VEOA appeal. *Id.*, ¶ 6.

¶10 With the exception of the May 2009 vacancy announcement, the administrative judge found, and there is no dispute, that the appellant exhausted

his remedy with DOL, that the appellant is a preference eligible within the meaning of VEOA, and the actions took place after October 30, 1998. Appeal File, Tab 13 at 4. Contrary to the administrative judge's findings, the appellant's claim, that the agency unfairly failed to select him for the positions for which he applied, constitutes a non-frivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference, and establishes Board jurisdiction over his VEOA claim with respect to those positions. *See Slater*, 112 M.S.P.R. 28, ¶ 6.

¶11 We also find, however, that as a matter of law, the agency did not violate the appellant's rights under VEOA with respect to the positions for which he applied (all but the May 2009 vacancy announcement position). We are able to decide these claims 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 agency did not violate the appellant's veterans' preference rights. *Id.*, ¶ 7; *see also Coats v. U.S. Postal Service*, 111 M.S.P.R. 268, ¶ 13 (2009). The vacancy announcements at issue here stated that current permanent agency employees, federal civil service employees outside the agency, and status applicants (i.e., preference-eligible veterans, reinstatement eligible former employees, and severely disabled handicapped individuals referred by a state employment service) were eligible to apply for the positions. Appeal File, Tab 10, Ex. A at 5, 39, 85, 142. Thus, the appellant, who is a preference-eligible veteran, was entitled to compete for the positions under 5 U.S.C. § 3304(f)(1) because the agency accepted applications from individuals outside its own workforce under merit promotion procedures. *See Abell v. Department of the Navy*, 343 F.3d 1378, 1383-85 (Fed. Cir. 2003).

¶12 However, VEOA only gives the appellant the right to compete for the vacant positions at issue here, but does not ensure that his application would be successful. *Abell,* 343 F.3d at 1383. As explained in the agency's submissions

below and in the initial decision, the agency accepted the appellant's applications and considered him for each of the positions, but it decided to cancel the vacancy announcement, and it provided a lawful reason for the cancellation in each instance. Appeal File, Tab 10, Ex. A at 37, 84, 149, 150; Tab 13 at 2-3. With regard to the GS-13 Supervisory Human Resources Specialist position, the agency initially announced this position on October 28, 2008, and there were four eligible candidates. The appellant was not among the candidates because he did not apply for the position. However, the agency subsequently cancelled the announcement, re-announced the position on December 1, 2008, and received eight eligible applications for the position, including that of the appellant. The agency considered the appellant for the position, but it cancelled the announcement and filled the position, through a non-competitive appointment, when an agency employee accepted a voluntary demotion in grade to fill the position. *Id.*, Tab 10 at 2-3. With regard to the GS-14 Supervisory Program Specialist position, the agency initially announced this position on February 18, 2009. The appellant was the only eligible candidate on the certificate. The selecting official requested that the position be re-announced to obtain additional candidates. The position was announced again on March 5, 2009, but there were only two eligible candidates, including the appellant, who were considered for the position. The agency then revised the position and reposted it as the GS-13 Assistant Human Resources Officer position on March 30, 2009. With this announcement, only three eligible candidates applied. Therefore, the agency cancelled the announcement again. *Id.* at 3-4. Overall, the record shows that the agency's repeated cancellation of the vacancy announcements was to insure that the selecting official would have a sufficient pool of eligible candidates from which to fill the position. Moreover, this justification appears to be consistent with the Office of Personnel Management's regulation requiring that the areas of consideration in merit promotion actions "must be sufficiently broad to ensure the availability of high quality candidates." *See* 5 C.F.R. § 335.103(b)(2). Thus, we

find that the agency's decision to not make selections under the announcements did not deny the appellant his opportunity to compete for the positions, or otherwise violate his rights under a statute or regulation relating to veterans' preference. *See Dean v. Consumer Product Safety Commission*, 108 M.S.P.R. 137, ¶ 11 (2008).

¶13 With respect to the May 2009 vacancy, the administrative judge found that, in addition to failing to show that the agency violated a veterans' preference statute or regulation, the appellant also failed to show that he satisfied the requirement of exhausting his remedies with DOL. Appeal File, Tab 13 at 5 n.3. The appellant does not dispute this finding and we, therefore, find that the administrative judge correctly dismissed this claim for lack of jurisdiction. *See Slater*, 112 M.S.P.R. 28, ¶ 5.

¶14 On January 12, 2010, more than two months after the record closed on review, the appellant filed a submission with the Board in which he alleges that the agency retaliated against him for disclosing "evidence of illegal or improper hiring practice activities" and for being a Vietnam era U.S. Army veteran. Petition for Review File, Tab 3. In light of these apparent allegations of whistleblower reprisal and military status discrimination, we are forwarding the appellant's January 12, 2010 submission to the Denver Field Office for docketing and adjudication as claims under the Whistleblower Protection Act and the Uniformed Services Employment and Reemployment Rights Act of 1994.

ORDER

¶15 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)). We forward the appellant's January 12, 2010 submission to the Denver Field Office for docketing and adjudication as claims under the Whistleblower Protection Act and the Uniformed Services Employment and Reemployment Rights Act of 1994.

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.