UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 50

Docket No. PH-300A-09-0431-I-1

John B. Sauser,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 12, 2010

William T. Wilson, Esquire, West Chester, Pennsylvania, for the appellant.

Francis A. Irons, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his employment practices appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a GS-0802-11 Engineering Technician for the agency. Initial Appeal File (IAF), Tab 5, Subtab 4c. In February 2009, the agency announced two vacancies for the position of GS-0801-11 General Engineer. IAF, Tab 3, Subtabs H, I. The appellant applied for both of the vacancies, but the agency determined that he lacked "the basic requirement of education or combination of education and experience" to qualify him for the position. *Id.*, Subtabs A, E. The appellant requested reconsideration in both cases, *id.*, Subtab B at 6, Subtabs C, G, but the agency maintained that the appellant did not meet the qualification standards, *id.*, Subtab B at 1-5, Subtabs D, F, G.

¶3 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 2. He argued that the agency's determination that he was not qualified for the GS-0801-11 General Engineer position was based on "an employment practice that violates a basic requirement in 5 C.F.R. § 300.103," i.e., a misinterpretation and misapplication of the Office of Personnel Management's (OPM) Qualification Standards for the position. *Id.* at 2, 10-11. The administrative judge issued an acknowledgment order stating that the Board may not have jurisdiction over the appellant's claim and ordering the appellant to file evidence and argument on the jurisdictional issue. IAF, Tab 2 at 2. Both parties filed evidence and argument on the jurisdictional issue, and the agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tabs 3-6, 8.

¶4 The administrative judge issued an initial decision, dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 9, Initial Decision (ID) at 1, 4. He found that the appellant failed to make a nonfrivolous allegation of Board jurisdiction because he was challenging the agency's rating and handling of his individual application rather than an employment practice per se. ID at 3-4.

¶5 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that he was not challenging an employment practice. Petition for Review File (PFRF), Tab 1 at 5-14. The agency has filed a

response, arguing that the initial decision was correctly decided and that the petition for review should be denied for failure to meet the Board's review criteria. PFRF, Tab 3 at 4-7.

ANALYSIS

¶6 An applicant for employment who believes that an employment practice applied to him by OPM violates a basic requirement in 5 C.F.R. § 300.103 is entitled to appeal to the Board. 5 C.F.R. § 300.104(a). The Board has jurisdiction under 5 C.F.R. § 300.104(a) when two conditions are met: First, the appeal must concern an employment practice that OPM is involved in administering; and second, the appellant must make a nonfrivolous allegation that the employment practice violated one of the "basic requirements" for employment practices set forth in 5 C.F.R. § 300.103. *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1373 (Fed. Cir. 2003); *Mapstone v. Department of the Interior*, 110 M.S.P.R. 122, ¶ 7 (2008).

¶7 The term "employment practices," which includes the development and use of examinations, qualification standards, tests, and other measurement instruments, is to be construed broadly. *Dowd v. United States*, 713 F.2d 720, 723-24 (Fed. Cir. 1983); 5 C.F.R. § 300.101. Although an individual agency action or decision that is not a rule or practice of some kind does not qualify as an employment practice, an agency's misapplication of a valid OPM requirement may constitute an employment practice. *Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 887 (Fed. Cir. 1998); *Holse v. Department of Agriculture*, 97 M.S.P.R. 624, ¶ 6 (2004). OPM need not be immediately involved in the practice in question. *Prewitt*, 133 F.3d at 888; *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 10 (2007).

¶8 In this case, the agency has conceded that its determination that the appellant was unqualified for the GS-0801-11 General Engineer position was based on its application of OPM's Qualification Standards for such positions.

IAF, Tab 4 at 4-5, Tab 5, Subtab 1, Tab 8 at 5. In addition, the agency's internal communications and communications with the appellant show that its decision was based on its application of OPM's standards. IAF, Tab 5, Subtabs 4d-4e, 4i-4j, 4l-4o. The agency has filed copies of the OPM Qualification Standards upon which it relied. IAF, Tab 5, Subtabs 4a, 4p. We therefore find that the appellant has satisfied the first prong of the jurisdictional test, i.e., that the appeal concerns an employment practice that OPM is involved in administering. *See Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 315 (Fed. Cir. 1985); *Mapstone v. Department of the Interior*, 106 M.S.P.R. 691, ¶ 14 (2007); *Scott*, 105 M.S.P.R. 482, ¶ 12.

¶9 As stated previously, the second jurisdictional prong is a nonfrivolous allegation that the employment practice violated a basic requirement for employment practices set forth in 5 C.F.R. § 300.103. That regulation requires that employment practices be based on a "job analysis to identify: (1) The basic duties and responsibilities; (2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and (3) The factors that are important in evaluating candidates." 5 C.F.R. § 300.103(a). There must also be a "rational relationship between performance in the position to be filled . . . and the employment practice used. 5 C.F.R. § 300.103(b)(1). The appellant alleged that the agency's job analysis led to the "identification of erroneous factors that the Agency deemed important in evaluating candidates," and that the agency's misapplication of OPM's Qualification Standards lead to the elimination of "any rational relationship between performance in the position to be filled and the employment practice used to establish educational requirements." IAF, Tab 1 at 10, Tab 3 at 4-5. We find that the appellant's allegations satisfy the second prong of the jurisdictional test, i.e., that he has made a nonfrivolous allegation that the agency's application of OPM's Qualification Standards violated basic requirements for employment practices set forth in 5 C.F.R. § 300.103. *See Mapstone*, 110 M.S.P.R. 122, ¶ 8; 5 C.F.R. § 300.103(a)(3), (b)(1).

¶10 This appeal is unlike *Banks v. Department of Agriculture*, 59 M.S.P.R. 157, 160 (1993), *aff'd*, 26 F.3d 140 (Fed. Cir. 1994) (Table), in which the appellant failed to make a nonfrivolous allegation of Board jurisdiction because he merely alleged that the agency failed to fully consider his education and experience in making its selection; Banks did not allege that the agency misapplied to him any measurement of employment developed by OPM or that the agency applied to him any invalid measurement. Rather, the appellant here has made a nonfrivolous allegation of Board jurisdiction like the appellant in *Mapstone*, 110 M.S.P.R. 122, ¶ 8, and *Mapstone*, 106 M.S.P.R. 691, ¶¶ 13-14, who claimed that the agency misapplied OPM's Qualification Standards by imposing minimum education requirements that lacked a rational relationship to the position to be filled. *See* 5 C.F.R. § 300.103(b)(1).

ORDER

¶11 Accordingly, we remand the appeal to the Northeastern Regional Office for adjudication on the merits.

FOR THE BOARD:

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