UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 117

Docket No. DC-3330-10-0072-I-1

Gary N. Lynch,

Appellant,

v.

Department of Defense,

Agency.

June 22, 2010

Gary N. Lynch, Goldsboro, North Carolina, pro se.

Cleora S. Anderson, Smyrna, Georgia, 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 timely petition for review of the initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d), VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency employed the appellant as a GS-11 Quality Assurance Specialist. He applied for a GS-12 Quality Assurance Specialist position within the agency under merit promotion procedures. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4c. The agency considered the appellant's application along with 171 other applications for the position. The agency, however, did not refer the appellant's name to the selecting official for the GS-12 position and selected another employee to fill the vacancy. *Id*., Subtabs 4e, 4f. The appellant filed a complaint with the Department of Labor (DOL), alleging that the agency violated his rights as a disabled veteran under VEOA by not referring his name to the selecting official. *Id*., Subtab 4g. After DOL issued a decision on his complaint, the appellant appealed to the Board. *Id*.; IAF, Tab 1. He requested a hearing. *Id*.

¶3 In an initial decision issued on December 11, 2009, the administrative judge denied the appellant's request for corrective action under VEOA. IAF, Tab 13 (Initial Decision (ID)). The administrative judge found that the Board has jurisdiction over the appeal, the appellant was not entitled to a hearing, and the appellant did not show that the agency obstructed his right to compete for the GS-12 position. ID at 3-4. She found further that the agency accepted the appellant's application for the GS-12 position under merit promotion procedures, but did not refer his name to the selecting official because the appellant was not among the group of best qualified applicants. ID at 2. Also on December 11, 2009, the appellant submitted a response to the agency's reply to his discovery request and submitted additional evidence. IAF, Tab 14. In his submission, he alleged, among other things, that the agency's merit promotion procedures violated the Office of Personnel Management's regulations at 5 C.F.R. § 335.103(b)(3) by failing to give due weight to performance appraisals. *Id*. The administrative judge did not consider this submission before issuing the ID.

¶4 The appellant has filed a petition for review. Petition for Review File (PFR File), Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 3.

ANALYSIS

The administrative judge correctly found that the Board has jurisdiction over this VEOA appeal.

¶5 To establish Board jurisdiction over a "right to compete" VEOA claim under 5 U.S.C. § 3330a(a)(1)(B), the appellant must (1) show that he exhausted his remedy with 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 in violation of 5 U.S.C. § 3304(f)(1). *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007). We find that the administrative judge correctly determined that the appellant showed that he exhausted his remedy with DOL and raised nonfrivolous allegations establishing the Board's jurisdiction over his VEOA appeal. ID at 3-4; *see* 5 U.S.C. § 3330a; *Hayes v. Department of the Army*, 111 M.S.P.R. 41, ¶ 9 (2009).

The administrative judge abused her discretion in issuing the initial decision prior to the parties' completion of discovery.

¶6 In his petition, the appellant asserts that the administrative judge erred by issuing the initial decision before he was able to submit the evidence that he received from the agency through discovery and his response to it. PFR File, Tab 1. The appellant asserts that the agency's responses to his discovery requests support his position that there is a genuine issue of material fact regarding the agency's assertion and the administrative judge's finding that the agency did not

obstruct his right to compete for the GS-12 Quality Assurance Specialist position. *Id*.

¶7 An administrative judge's errors regarding discovery matters are subject to an abuse of discretion standard. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). The rules governing discovery in Board proceedings are set out in the Board's regulations at 5 C.F.R. §§ 1201.71-.75. These regulations require that "[d]iscovery must be completed within the time limit the judge designates." 5 C.F.R. § 1201.73(d)(5). Initial discovery requests must be served within 25 days of the administrative judge ordering the agency to produce its file and response. 5 C.F.R. § 1201.73(d)(1). The agency must respond to an appellant's discovery request within 20 days. 5 C.F.R. § 1201.73(d)(2). If the agency serves objections to the appellant's discovery request or if the agency does not timely respond to the appellant's discovery request, the appellant has 10 days to file a motion to compel discovery. 5 C.F.R. § 1201.73(d)(4). If the agency timely responds to the appellant's discovery request, the appellant has 10 days from receipt of the response to file a follow-up discovery request. 5 C.F.R. § 1201.73(f)(2).

¶8 In the acknowledgment order, the administrative judge set the time frame for discovery consistent with the provisions of the Board's regulations, indicating that a party's initial discovery request must be served within 25 days of October 27, 2009, and the opposing party's responses to discovery must be served no later than 20 days after the date of service of the other party's discovery request. IAF, Tab 2. If the parties timely filed discovery requests and responses using the entire period set by the administrative judge for discovery, the discovery period ended on December 21, 2009. The administrative judge issued the initial decision on December 11, 2009, without informing the parties that the discovery period had closed. As the agency's response to any discovery request by the appellant could have been filed on the last day provided for such response,

issuance of the initial decision prior to the close of discovery effectively denied the appellant any opportunity to contest any of the agency's objections, file a motion to compel, or follow up with requests for further discoverable material based upon the agency's initial response.

¶9 Further, the administrative judge was aware that the parties were engaging in discovery in a timely manner. On December 3, 2009, the agency informed the administrative judge that the parties were still engaging in discovery and that the appellant had agreed to allow the agency until December 7, 2009, to respond to the appellant's discovery request. *See* IAF, Tab 12. The administrative judge, therefore, should have known that, pursuant to the Board's regulations, if the agency served objections to the appellant's discovery request or if the agency did not respond to the appellant's discovery request by December 7, 2009, the appellant had 10 days from December 10, 2009, or until December 20, 2009, to file a motion to compel discovery. 5 C.F.R. § 1201.73(d)(4). Additionally, she should have known that, if the agency timely responded to the appellant's discovery request, the appellant had 10 days from receipt of the response, or at least until December 20, 2009, to file a follow-up discovery request. 5 C.F.R. § 1201.73(f)(2).

¶10 The parties' actions regarding discovery were consistent with the guidance provided in the Board's regulations, i.e., that the parties attempt to resolve discovery disputes between themselves "with a minimum of [administrative judge] intervention." 5 C.F.R. § 1201.71. The administrative judge should not have issued the initial decision when she knew or should have known that the time limit for the parties to submit evidence obtained through discovery had not expired.

¶11 The Board will not find reversible error in an administrative judge's failing to inform the parties that the time period set for discovery in the acknowledgment order had expired absent an abuse of discretion that prejudiced a party's substantive rights. *See Davis v. Department of Defense*, 103 M.S.P.R. 516, ¶ 13

(2006). As evidenced by the agency's responses, the appellant's initial discovery request is directed at evidence that could be relevant and admissible concerning the appellant's allegation that the agency obstructed his right to compete. IAF, Tab 14. Further, as the party bearing the burden of proof on the claim, the appellant is entitled to obtain evidence to support his claim. *See Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶ 15 (2006). By issuing the initial decision prior to the completion of discovery, the administrative judge deprived the parties of the opportunity to submit additional relevant evidence that they had obtained during the discovery process. As the acknowledgment order makes clear, submissions by the parties during discovery are to be served on the other party, "**but not the Board**." IAF, Tab 2. Thus, we find it necessary to remand the appeal for further adjudication.

ORDER

¶12 Accordingly, we REMAND this appeal for further adjudication and a new initial decision consistent with this Opinion and Order. In so remanding, we make no finding on whether the appellant's allegation that the agency violated regulations concerning merit promotion actions, if proven, would entitle the appellant to relief. *See Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159, ¶ 5 (2002). Rather, we remand because the appellant has not had a full and fair opportunity to obtain evidence in support of his claim that the agency violated his right to compete. We cannot say on the record as currently developed that the appellant's discovery requests concerning merit promotion regulations would not have led to relevant admissible evidence concerning the appellant's rights under 5 U.S.C. § 3304(f). The administrative judge should

grant the appellant's request for a hearing if, after completion of discovery and an opportunity for the parties to submit argument and evidence, the appellant shows that there is a genuine dispute of material fact. *See Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 12 (2007).

FOR THE BOARD:

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