UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 30

Docket No. AT-3330-10-0523-I-1

Milo D. Burroughs,

Appellant,

v.

Department of the Army,

Agency.

February 28, 2011

Milo D. Burroughs, Yelm, Washington, pro se.

Heather A. Pepin, Fort Rucker, Alabama, 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 denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, DISMISS for lack of jurisdiction the claims that the administrative judge adjudicated on the merits, and DENY the appellant's request for corrective action in his remaining claim.

BACKGROUND

¶2 The agency issued one vacancy announcement under internal merit promotion procedures for a single GS-0861-14 Aerospace Engineer position. Initial Appeal File (IAF), Tab 5 at 9. The vacancy announcement indicated that it was open only to current agency employees with competitive status. *Id*. The appellant, a five-point preference eligible veteran who was not a current agency employee, applied for the position and the agency placed him on a referral list. IAF, Tab 5 at 13, Tab 9 at 7, Tab 23 at 5. The agency ultimately selected another individual for the appointment. IAF, Tab 5 at 13, Tab 9 at 10.

¶3 The appellant filed a complaint with the Department of Labor (DOL), identifying the vacancy announcement at issue and arguing that the agency prescribed a minimum educational requirement for the position in violation of his veterans' preference rights. IAF, Tab 1, Subtab 1 at 2, Tab 5 at 9-10. DOL closed the complaint without taking corrective action. IAF, Tab 19 at 8.

¶4 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 1. He alleged that the agency improperly passed him over for selection without approval from the Office of Personnel Management (OPM), that the agency failed to afford him the veterans' preference points to which he was entitled, that the agency denied him his right to compete for the vacancy, and that the minimum educational requirement violated his veterans' preference rights. IAF, Tab 1 at 1, Tab 8 at 2-3, Tab 16 at 1. The appellant also appeared to allege that the minimum educational requirement constituted an unlawful employment practice. IAF, Tab 1 at 1.

¶5 The administrative judge issued an initial decision denying the appellant's request for corrective action under VEOA on the merits without a hearing. IAF, Tab 26, Initial Decision (ID) at 1, 6. He found that the appellant established jurisdiction over his appeal but that veterans' preference points and passover requirements do not apply to merit promotion announcements like the one at issue. ID at 4-5. The administrative judge further found that the appellant had no

right to compete for the position because it was open only to current agency employees and, even if the appellant did have the right to compete, the agency afforded him that right. ID at 5. Having previously instructed the appellant to file a separate appeal if he wished to raise an employment practices claim, the administrative judge did not address that issue in his initial decision. IAF, Tab 7 at 2.

¶6 The appellant has filed a petition for review, arguing the merits of his VEOA claim, Petition for Review File (PFR File), Tab 1 at 1-5, 10-11, Tab 4 at 2-3, Tab 5, Tab 7, and his employment practices claim, PFR File, Tab 1 at 1-3, 9-11. The appellant also argues that the administrative judge failed to afford him proper procedures below. PFR File, Tab 1 at 3, 11. The agency has filed a response, arguing that the petition should be denied for failure to meet the Board's review criteria.[1] PFR File, Tab 3.

ANALYSIS

Proceedings Below

¶7 The appellant argues that the administrative judge violated his right to due process by failing to rule on his request that processing of the appeal be delayed until after he had received certain documents from the agency. PFR File, Tab 1

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[1] Some of the appellant's arguments criticize OPM's regulations for being inconsistent with veterans' preference statutes. PFR File, Tab 1 at 2, 5, 8, Tab 4 at 1, Tab 5 at 1, 3. To the extent that the appellant's petition for review can be construed as a request for review of OPM's regulations under 5 U.S.C. § 1204(f)(1)(B), we DENY it. The appellant has not identified the specific regulations that he is challenging and he has not explained with specificity why he believes that they are invalid. *See Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 21 (2007) (the Board has sole discretion to grant a request for regulation review filed by an interested person) (citing 5 U.S.C. § 1204(f)(1)(B)); *see also Tabradillo v. Office of Personnel Management*, 93 M.S.P.R. 257, ¶ 4 (2003) (in deciding whether to exercise its discretion to review a regulation, the Board will consider a number of factors, including the strength of the arguments against the regulation's validity); 5 C.F.R. § 1203.11(b)(ii) (a request for regulation review must contain a citation to the regulation being challenged).

at 3, 11; IAF, Tab 4 at 1. Even if the administrative judge should have ruled on this request, we find that his failure to do so did not violate the appellant's right to due process. *See Johnson v. United States*, 628 F.2d 187, 194 (D.C. Cir. 1980) (the Fifth Amendment only requires that a person receive his "due" process, not every procedural device that he may claim or desire). We also find that the appellant has not shown how the administrative judge's failure to rule on his request might have affected the outcome of the appeal. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (an administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights).

¶8 The appellant also argues that he was entitled to a hearing on the merits of his appeal. PFR File, Tab 1 at 11. However, the Board has the authority to decide the merits of a VEOA appeal without a hearing if there is no genuine dispute of material fact and one party must prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008); 5 C.F.R. § 1208.23(b). For the reasons explained below, the appellant was not entitled to a hearing in this appeal.

VEOA Claim

¶9 In order to establish Board jurisdiction over a VEOA appeal, an appellant must, among other things, show that he exhausted his administrative remedy with DOL. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 7 (2008). The first step of the exhaustion process is for the appellant to file a complaint with DOL containing "a summary of the allegations that form the basis for the complaint." 5 U.S.C. § 3330a(a)(2)(B); 5 C.F.R. § 1208.23(a)(4). The purpose of this requirement is to afford DOL the opportunity to conduct an investigation that might lead to corrective action before involving the Board in the case. *See* 5 U.S.C. § 3330a(b)-(c); *cf. Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992) (explaining the identical purpose of the analogous requirement that an appellant first exhaust his administrative remedy with the

Office of Special Counsel before filing an individual right of action appeal with the Board).

¶10 In this case, the appellant's complaint to DOL referred to the vacancy announcement at issue but it challenged only the minimum educational requirement prescribed for the Aerospace Engineer position. IAF, Tab 1, Subtab 1 at 2. The complaint did not refer to the allegations of improper passover, failure to apply veterans' preference points, or denial of the right to compete for the position that the appellant raised for the first time in his Board appeal. *Id*. We find that the complaint's reference to the pertinent vacancy announcement was, by itself, insufficient to inform DOL of these particular alleged veterans' preference violations. *See Gingery v. Department of the Treasury*, 2010 WL 3937577 at *5 (Fed. Cir. 2010); *White v. U.S. Postal Service*, 114 M.S.P.R. 574, ¶ 9 (2010). Although the Board uses a liberal pleading standard for allegations of veterans' preference violations in a VEOA appeal, *see Slater v. U.S. Postal Service*, 112 M.S.P.R. 28, ¶ 6 (2009), evidence of the exhaustion requirement is mandatory under the statute and is not subject to the same liberal construction, *see* 5 U.S.C. § 3330a(d). Because the appellant failed to exhaust his administrative remedy with respect to his claims of improper passover, failure to apply veterans' preference points, and denial of his right to compete for the position, the Board lacks jurisdiction over these particular claims.[2] *See Jones v. Department of Veterans Affairs*, 113 M.S.P.R. 385, ¶ 13 (2010). Because the Board lacks jurisdiction over these claims, the administrative judge erred in

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[2] The appellant argues that the Board should take jurisdiction over his veterans' preference claims pursuant to the Veterans' Preference Act of 1944 without regard to VEOA. PFR File, Tab 1 at 1-9, 11, Tab 5 at 3. However, it is well settled that the Board lacks jurisdiction over veterans' preference claims in general in the absence of VEOA. *See Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶¶ 10-12 (2004); *see also Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 315 n.4 (Fed. Cir. 1985 (prior to VEOA, OPM was the agency with general jurisdiction over veterans' preference matters).

adjudicating them on the merits and we therefore vacate the administrative judge's findings in this regard. ID at 5-6; *see Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (the Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal); *Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶ 15 (2004) (the Board must satisfy itself that it has authority to adjudicate the matter before it and may raise the issue of its own jurisdiction sua sponte at any time).

¶11 We also find, however, that the appellant's complaint did inform DOL of the allegedly improper minimum educational requirement and provided DOL with sufficient opportunity to investigate and take corrective action regarding that claim. IAF, Tab 1, Subtab 1 at 2. We further find that the appellant established the second step of the exhaustion process by submitting DOL's written notification of its decision not to take corrective action and that the appellant established the other jurisdictional requirements for a VEOA appeal.[3] IAF, Tab 6 at 1, Tab 8 at 2-3, Tab 19 at 8, Tab 23 at 5; 5 C.F.R. § 1208.23(a)(5)(i). However, the administrative judge did not explicitly address the minimum educational requirements claim. Because the appellant has not identified any dispute of material fact regarding this claim, we find that the record is sufficiently developed for the Board to adjudicate the merits of this claim on review. *See Haasz*, 108 M.S.P.R. 349, ¶¶ 9-10; 5 C.F.R. § 1208.23(b).

¶12 Title 5, section 3308 of the United States Code provides as follows:

> The Office of Personnel Management or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Office

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[3] The other jurisdictional requirements are that the appellant must make nonfrivolous 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. 5 U.S.C. § 3330a; *Jarrard v. Department of Justice*, 113 M.S.P.R. 502, ¶ 9 (2010); 5 C.F.R. § 1208.23(a).

> decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Office shall make the reasons for its decision under this section a part of its public records.

Section 3308 ultimately derives from section 5 of the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387. It is a statute relating to veterans' preference. 49 U.S.C. § 40122(g)(2)(B). Section 3308 generally prohibits the prescription of minimum educational requirements but makes an exception for "scientific, technical, or professional position[s]" whose duties "cannot be performed by an individual who does not have a prescribed minimum education." It reserves for OPM the decision on whether to prescribe a minimum educational requirement and it requires OPM to make the reasons for its decision a part of its public records.

¶13 Applying section 3308 to the facts of this case, it can scarcely be argued that the GS-0861-14 Aerospace Engineer position at issue is not "scientific, technical, or professional" in nature. In addition, the minimum educational requirement of which the appellant complains was not an invention of the agency. IAF, Tab 5 at 9-10. OPM itself established this requirement and published its reasons for doing so, i.e. that professional work in the 0800 series of occupations requires use of an "organized body of knowledge" that is "uniquely acquired through extensive education or training at an accredited college or university." Job Family Position Classification Standard for Professional Work in the Engineering and Architecture Group, 0800, at 7, 39 (2008), *available at* http://www.opm.gov/fedclass/gs0800P.pdf; GS-800 Individual Occupational Requirements for Professional Engineering Positions, *available at* http://www.opm.gov/qualifications/Standards/IORs/gs0800/0800.htm; *see also* Group Coverage Qualification Standards for Professional and Scientific Positions, *available at* http://www.opm.gov/qualifications/standards/group-stds/gs-prof.asp. We therefore find that the challenged minimum educational requirement falls

within the exception to the general rule and that it did not violate 5 U.S.C. § 3308. Accordingly, we deny the appellant's request for corrective action.

Employment Practices

¶14 The appellant appeared to allege below that the agency's minimum educational requirement constituted an unlawful employment practice. IAF, Tab 1 at 1. The administrative judge notified the appellant that the instant appeal pertained only to his VEOA claim and he ordered the appellant to file a separate appeal within 10 days if he wished to pursue an employment practices claim. IAF, Tab 7 at 2. The appellant registered his disagreement with the administrative judge's order and proceeded to argue his employment practices claim in the instant appeal. IAF, Tab 8 at 2-3, Tab 16 at 5, Tab 19 at 3. The appellant renews his employment practices claim on review and argues that the administrative judge erred in not adjudicating it below. PFR File, Tab 1 at 1-3, 9-11.

¶15 An administrative judge has broad discretion to control the proceedings before him, *Key v. General Services Administration*, 60 M.S.P.R. 66, 68 (1993); 5 C.F.R. § 1201.41(b), and we find that the administrative judge's order was not improper. IAF, Tab 7 at 2. Nevertheless, it is clear at this stage of the appeal that the appellant wishes to pursue his employment practices claim. We therefore FORWARD that claim to the Atlanta Regional Office for docketing as a separate appeal.

ORDER

¶16 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:

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