UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 13

Docket No. DC-3330-11-0405-I-1

Herbert Russell,

Appellant,

v.

Department of Health and Human Services,

Agency.

February 2, 2012

Herbert Russell, Charlotte, North Carolina, pro se.

Emily Lerner, Washington, D.C., 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 an initial decision that denied him relief under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons explained below, we GRANT the petition, REVERSE the initial decision, FIND a violation of the appellant's right to a veterans' preference, and ORDER corrective action.

BACKGROUND

¶2 The appellant is an army veteran who is receiving compensation for service-connected disabilities rated at 30 percent. Initial Appeal File (IAF), Tab

10, Subtab 2 at 13. Because of his military service and disabilities, he is entitled to a 10-point veterans' preference when applying for most federal positions. 5 U.S.C. §§ 2108(3)(C), 3309(1).

¶3 In October 2010, the appellant applied for a job vacancy the agency had posted. IAF, Tab 5, Subtabs 2k, 2m. The application had to be submitted online through the agency's QuickHire system, and applicants then had to fax any supporting documents to the agency. *Id.*, Subtab 2m at 6-7; Hearing Transcript (HT) at 9-10. QuickHire would create a separate fax coversheet for each supporting document that was supposed to be submitted. IAF, Tab 5, Subtab 2m at 7. Each coversheet had a unique barcode that identified the applicant, vacancy announcement, and document type. *Id.*; HT at 10. The QuickHire system would receive faxes electronically and file them by barcode. HT at 11. If it received a second fax with the same barcode as an earlier fax, it would automatically erase the first fax and replace it with the second one. HT at 18. Although applicants were told to use only QuickHire-generated coversheets, IAF, Tab 5, Subtab 2m at 7; HT at 18-21, they were not warned that reusing a coversheet would cause the first fax to be erased.

¶4 In his online application, the appellant correctly claimed to be a veteran with a 30-percent compensable disability. IAF, Tab 5, Subtab 2k at 1. He also faxed the supporting documentation that the agency asked for, including an application for a 10-point veterans' preference and a letter from the Department of Veterans Affairs (VA) confirming that he had a 30-percent compensable disability. IAF, Tab 10, Subtab 2 at 11-16. He received an automatically generated response that the agency had received (among other things) the VA letter. *Id.* at 11.

¶5 Although the vacancy announcement did not ask for it, the appellant also wanted to submit a copy of a federal Standard Form (SF) 50-B showing that he had previously worked for the federal government and was a 30-percent disabled veteran. *Id.* at 17-18; HT at 84, 114. Because QuickHire did not give him the

option to create a fax coversheet for this form, the appellant reused the coversheet for his VA letter, crossing out the computer-generated subject line and handwriting in a new one. IAF, Tab 10, Subtab 2 at 17; HT at 112. The appellant did not, however, cross out the barcode. IAF, Tab 10, Subtab 2 at 17; HT at 15. As a result, when he faxed this document to the agency, QuickHire automatically erased his earlier fax of the VA letter and replaced it with the SF 50-B. HT at 18. The appellant was not informed that the VA letter had been erased and had no way of checking on QuickHire to determine whether the agency had the document in his file. HT at 21-22, 85.

¶6 Because the appellant's QuickHire file did not contain a VA letter, the agency human resource specialist who scored his application awarded him only the basic 5-point veterans' preference rather than the 10-point preference to which he was entitled as a disabled veteran. HT at 66-70. She ignored his application for a 10-point preference and the SF 50-B stating that he was a disabled veteran because the agency accepts only VA letters to establish eligibility for the 10-point preference. HT at 74-75, 78-79. She did not contact the appellant to inform him that his application was missing the VA letter. HT at 68.

¶7 The top three ranked applicants, whose names were forwarded to the selecting official, were not preference eligible and received scores of 99.49, 99.49, and 99.18. IAF, Tab 5, Subtab 2i. The appellant received a score of 94.69, which apparently included a 5-point preference. *Id.*, Subtab 2l. Had he received a 10-point preference, therefore, it appears that he would have been the top-ranked applicant. The agency selected one of the other applicants to fill the position. HT at 54-55.

¶8 The appellant filed a veterans' preference complaint with the Department of Labor (DOL). IAF, Tab 1, Enclosure 1. After DOL informed him that it had closed its investigation, he timely filed this appeal with the Board. IAF, Tab 1 & Enclosure 2. The administrative judge held a hearing and then issued an initial

decision denying the appellant's request for corrective action. IAF, Tab 26. She concluded that the appellant, not the agency, was responsible for his not receiving the 10-point preference. *Id.* at 6-7. She found that the appellant had caused his VA letter to be erased by tampering with the electronically-generated fax coversheet, and therefore that it was his fault that his application was incomplete. *Id.* at 7.

¶9 The appellant timely filed a petition for review with the Board, and the agency timely responded. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶10 The VEOA gives the Board jurisdiction to decide whether the agency violated the appellant's rights under any statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a(a)(1)(A), (d). There is no dispute here that the agency failed to give the appellant the full veterans' preference to which he was entitled by statute. 5 U.S.C. § 3309(1). As the administrative judge correctly recognized, the only question is whether the appellant, rather than the agency, should be held responsible for this violation. IAF, Tab 20 at 2. We conclude that the administrative judge erred in assigning the responsibility to the appellant.

¶11 An applicant who seeks a veterans' preference must provide the agency with sufficient proof of his entitlement to the preference. *See Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245, ¶ 27 n.3 (2010); *Badana v. Department of the Air Force*, 104 M.S.P.R. 182, ¶ 14 (2006). But the agency may not deprive the applicant of his rights merely because he makes a minor technical mistake in submitting his application, at least when the agency has enough information to afford him his rights anyway. In *Phillips v. Department of the Navy*, 110 M.S.P.R. 184, ¶¶ 7, 9-10 (2008), for example, we held that the agency violated a preference eligible applicant's right to compete by refusing to consider him for a GS-7 position when his resume indicated his interest in that position, even though the application form itself stated that he was interested only in a

GS-8 position. Similarly, in *Kirkendall v. Department of the Army*, 573 F.3d 1318, 1324-25 (Fed. Cir. 2009), the court held that the agency violated a preference eligible applicant's right to credit for all relevant experience when it ignored experience listed in military documents that was not repeated on a two-page application form.

¶12 Here, we find that the agency deprived the appellant of his full 10-point preference because of what is at most a minor technical mistake, even though the information the agency had should have alerted it that he might be eligible for the preference. The appellant took all the steps he reasonably believed were needed to establish his entitlement to a 10-point preference. As discussed above, it is undisputed that he followed the agency's instructions by faxing it the VA letter with the special QuickHire-generated coversheet. IAF, Tab 10, Subtab 2 at 12-13. He received electronic confirmation that the agency had received this fax. *Id.* at 11. Even assuming that the appellant erred by reusing the coversheet, he was never warned - and had no reason to suspect - that doing so would erase his earlier fax, HT at 85, and the QuickHire system did not allow him to check whether the agency in fact had the VA letter, HT at 21-23.

¶13 Moreover, the agency knew, or at least should have known, that the appellant might be entitled to a 10-point preference. Even though it was missing the VA letter, the agency's file contained the appellant's application for a 10-point preference as well has his SF 50-B stating that he was entitled to that preference. IAF, Tab 5, Subtab 2j; Tab 10, Subtab 2 at 18; HT at 12-14. Because the appellant used a QuickHire-generated fax coversheet with a barcode for a VA letter, the system should have reflected that he had at least tried to submit this document. HT at 10, 17-18. The agency could have tentatively granted the appellant a 10-point preference and sought documentation in the event the preference mattered to the selection process, or it could have followed up with him immediately to determine if he had submitted the VA letter. Yet the agency made no effort to notify the appellant that is was missing the key document or to

determine from the rest of the file whether he was entitled to a 10-point preference. HT at 68, 78.

¶14 In these circumstances, we conclude that the agency, not the appellant, should be held responsible for the failure to give him a full 10-point preference. Because the agency therefore violated the appellant's right to a 10-point preference in competing for the vacancy at issue, the agency must reconstruct the selection process after adding 5 more points to the appellant's score. *See, e.g.*, *Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 18 (2006). The agency will have to go through the pass-over procedures - including giving the appellant notice and an opportunity to respond to the Office of Personnel Management - before selecting a lower-ranked non-preference-eligible applicant through the reconstructed process. *See* 5 U.S.C. § 3318(b)(2); *Endres v. Department of Veterans Affairs*, 107 M.S.P.R. 455, ¶ 10 (2007); 5 C.F.R. § 332.406(a)(1).

¶15 We emphasize that we are not deciding here that an agency must follow up with every applicant who claims a preference but has not submitted the necessary documentation. The appellant was deprived of his preference here because of a flaw in the agency's QuickHire system that the agency apparently knew existed but did not warn applicants about. We note that the agency has replaced the QuickHire system with one that does not erase faxed supporting materials, so we expect that this problem will not recur. HT at 26. We reserve for a later case the question of whether an agency must follow up in other circumstances.

¶16 Because we find a violation of the appellant's right to a veterans' preference based on the record developed at the hearing, we need not address any of the other arguments the appellant raised in his petition for review. In particular, we have not relied on any of the new evidence that the appellant attached to his petition.

ORDER

¶17 We ORDER the agency to reconstruct the hiring process for vacancy announcement HHS-FDA-04-2011-0005, giving the appellant a full 10-point veterans' preference. The agency must complete this action no later than 30 days after the date of this decision.

¶18 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶20 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees, expert witness fees, and other litigation expenses. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.203, and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST DAMAGES

You may be entitled to be compensated by the agency for any loss of wages or benefits you suffered because of the violation of your veterans' preference rights. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

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.