UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 29

Docket Nos. SF-3330-10-0654-I-1
SF-300A-10-0660-I-1

Michael B. Graves,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 7, 2012

Michael B. Graves, Los Angeles, California, pro se.

Evan Stein, Esquire, Los Angeles, California, 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 and the agency cross petitions for review of an initial decision that granted in part and denied in part the appellant's request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA), and dismissed for lack of jurisdiction the appellant's employment practices appeal filed under 5 C.F.R. part 300. For the following reasons, we VACATE the initial decision's findings regarding the appellant's VEOA appeal and DISMISS that appeal for lack of jurisdiction. We further AFFIRM the initial decision's dismissal of the employment practices appeal for

lack of jurisdiction. In light of the above disposition, we need not consider the agency's cross petition for review, which challenges the merits of the administrative judge's findings in the VEOA appeal.

BACKGROUND

¶2 The appellant filed an appeal alleging that he applied for a title 38 "hybrid" Medical Records Technician (MRT)/Release of Information Technician (ROIT) position and that the agency discriminated against him, engaged in prohibited personnel practices, violated 5 C.F.R. part 300,[1] and "pre-selected lesser qualified non-veterans over disabled veteran Graves without notifying Graves or OPM." Initial Appeal File (IAF), Tab 1 at 1-2, 11. The appellant submitted with his appeal a May 4, 2010 complaint he filed with the Department of Labor (DOL) in which he alleged a violation of veterans' preference provisions with respect to MRT/ROIT announcement T38 10-05 (DC), which he alleged opened on April 13, 2010, and closed on May 3, 2010. *Id*. at 7, 11. The appellant also submitted a May 5, 2010 letter from DOL acknowledging his May 4, 2010 complaint but closing that complaint because the vacancy announcement "only closed on May 3, 2010, [and] you cannot have been notified that your application was not accepted for consideration or that you were not selected." *Id*. at 19. DOL informed the appellant that he was not eligible for redress under VEOA at that time and encouraged him to resubmit his complaint at a later date. *Id*. DOL nevertheless notified the appellant of his right to file a Board appeal. *Id*.

¶3 The administrative judge joined the appellant's VEOA and unlawful employment practices appeals. IAF, Tab 3 at 1. In its response to the appeals, the agency indicated that it had no record of the appellant having applied for the MRT/ROIT position under vacancy announcement T38 10-05 (DC) and that a

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[1] Under 5 C.F.R. § 300.104(a), a candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management (OPM) violates a basic requirement in 5 C.F.R. § 300.103 is entitled to appeal to the Board.

selection to fill the vacant position had not been made. IAF, Tab 6, Subtab 1 at 1. The agency argued that the Board lacked jurisdiction over the appeals. *Id*. at 2-3.

¶4 The administrative judge ordered the appellant to establish that the Board had jurisdiction over his VEOA and employment practices appeals. IAF, Tab 12 at 7-13; *see* IAF, Tab 38 at 3-5. The administrative judge notified the appellant that he had not identified any specific hiring action or selection by the agency in which the agency violated his rights under a statute or regulation relating to veterans' preference, that it was therefore unclear whether the Board had jurisdiction over the appeal given the agency's statement that it had not made a selection for vacancy announcement T38 10-05 (DC), that the Board's regulations did not provide for the filing of an appeal before the effective date of the action being appealed, that "the triggering event requiring the appellant to file an appeal with DOL had not occurred and there was no basis to file a complaint," and that "[s]hould the parties present evidence that a selection was now . . . made under vacancy announcement no. T38-10-05 (DC), a dismissal without prejudice may be warranted to allow for exhaustion of remedies before DOL." IAF, Tab 12 at 11-12. Thus, the administrative judge ordered the appellant to file evidence and argument showing why any claim he might be raising under VEOA should not be dismissed for lack of jurisdiction. *Id*. at 12.

¶5 After the appellant filed several responses and the agency filed a declaration indicating that no selection had been made for the vacancy in question, *see* IAF, Tab 18 at 5, the administrative judge issued another order indicating that "there is a possibility that this appeal could be adjudicated prior to a selection being made under vacancy announcement T38-10-05 (DC)," and that "[a]s such, a dismissal without prejudice may be appropriate under the circumstances presented," IAF, Tab 19 at 2. The administrative judge ordered the agency to indicate the time period in which it anticipated either deciding to make a selection from vacancy announcement T38 10-05 (DC) or canceling the announcement without making a selection. *Id*. at 3. The administrative judge

also ordered the parties to state whether they were requesting to have the appeals dismissed without prejudice to allow the agency time to complete the selection process. *Id*. The appellant filed an objection to dismissing the appeal without prejudice, IAF, Tab 21, and the agency submitted a signed statement from a human resources assistant chief indicating that the applicants for the vacancy were referred for consideration but the selecting official was still in the process of considering the qualified applicants and no selection had been made, IAF, Tab 24 at 3. The human resources assistant chief noted that a selection was anticipated within 10 calendar days. *Id*. Accordingly, the administrative judge ordered the agency to notify him immediately after it made a selection under vacancy announcement T38 10-05 (DC). IAF, Tab 31 at 1. The agency subsequently submitted a declaration notifying the administrative judge that the agency had selected a non-veteran for the vacancy in question on August 26, 2010, who had qualifications superior to those of the appellant. IAF, Tab 37.

¶6 After the parties filed responses to the administrative judge's order, and based on the written record given the appellant's statement that he would not attend a hearing, *see* IAF, Tab 39 at 2-3, and Tab 42, the administrative judge found that the Board had jurisdiction over the VEOA appeal but lacked jurisdiction over the employment practices appeal because the vacancy in question was for a position in the excepted, rather than the competitive, service, IAF, Tab 48, Initial Decision (ID) at 1, 5-8. Based on the Board's decisions in *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245 (2010), and *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 209 (2010), the administrative judge found that the agency violated the appellant's veterans' preference rights with respect to the MRT/ROIT position because the agency did not comply with the competitive service veterans' preference requirements set forth in title 5 of the United States Code, such as 5 U.S.C. §§ 3317 and 3318, when it selected a non-veteran for the T38 10-05 (DC) position under 38 U.S.C. § 7401(3). ID at 8-15. The administrative judge denied corrective action with respect to the

appellant's claim that the agency did not select him for other MRT positions because the agency did not fill any such positions during the period in question, and found that the appellant's allegations of discrimination, preselection, prohibited personnel practices, and harmful error were not within the Board's jurisdiction. ID at 16-17. The administrative judge ordered the agency to reconstruct the selection process under vacancy announcement number T38 10-05 (DC) in accordance with title 5 veterans' preference requirements. ID at 17-18.

ANALYSIS

¶7 The Board's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). In addition, the issue of Board jurisdiction may be raised at any time during a proceeding. *Morgan v. Department of the Navy*, 28 M.S.P.R. 477, 478 (1985).

¶8 To establish Board jurisdiction over a VEOA appeal an appellant must, among other things, show that he exhausted his administrative remedy with DOL. *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 9 (2011), *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). 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); *see Burroughs*, 115 M.S.P.R. 656, ¶ 9. 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); *Burroughs*, 115 M.S.P.R. 656, ¶ 9; *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).

¶9 In this case, the appellant's complaint to DOL referred specifically to the vacancy announcement at issue and quoted from what appears to be a provision in OPM's VetGuide, which provides that for 10-point preference eligibles, "[i]f there is no immediate opening, the agency must retain the application in a special file for referral on certificates for future vacancies for up to three years." IAF, Tab 1 at 7; *see* U.S. Office of Personnel Management, *VetGuide*, http://opm.gov/staffingportal/vetguide.asp. In this regard, the appellant asserted in his complaint that, after he submitted an application for an MRT position in January 2009, the agency did not consider him for future vacancies, including vacancy announcement "T38 10-05." *Id*. at 8. To the extent that the appellant continues to allege before the Board that the agency violated OPM's VetGuide, he has not established a nonfrivolous allegation of a violation of a statute or regulation. 5 U.S.C. § 3330a(a)(1)(A); *see Coats v. U.S. Postal Service*, 111 M.S.P.R. 268, ¶ 14 (2009) (a Postal Service handbook is not a statute or regulation relating to veterans' preference under VEOA); *Durand v. Environmental Protection Agency*, 106 M.S.P.R. 533, ¶ 14 (2007) (positions taken by OPM in the VetGuide are not entitled to the deference accorded to regulations). In fact, OPM's VetGuide indicates in its introduction that "[f]or additional information, including a complete text of the laws and regulations on Veterans' rights, consult the references cited." U.S. Office of Personnel Management, *VetGuide*, http://opm.gov/staffingportal/vetguide.asp.

¶10 Although the appellant referred in his DOL complaint to 5 U.S.C. § 3110(e), that section provides that the statutory restrictions in section 3110 relating to the employment of relatives "shall not be construed to prohibit the appointment of an individual who is a preference eligible in any case in which the passing over of that individual on a certificate of eligibles furnished under section 3317(a) of this title will result in the selection for appointment of an individual who is not a preference eligible." The appellant also referred in his DOL complaint to 5 C.F.R. part 310, which addresses legal restrictions on public

officials in the employment of relatives and exceptions to those restrictions. To the extent that the appellant may be alleging before the Board that the agency violated these provisions, he has not alleged or shown that the agency construed 5 U.S.C. § 3110 to prohibit the appointment of a preference eligible.

¶11 Finally, the appellant did not identify in his DOL complaint any statute or regulation relating to veterans' preference that the agency allegedly violated in making its selection for vacancy announcement T38 10-05 (DC). IAF, Tab 1 at 7-9. In fact, as previously noted, the record reflects that the agency did not make its selection for the vacancy until August 26, 2010, IAF, Tab 37, more than 3 months after the appellant filed his May 4, 2010 complaint with DOL. We find that the complaint's reference to the pertinent vacancy announcement was, by itself, insufficient to inform DOL of any particular alleged veterans' preference violations. *See Burroughs*, 115 M.S.P.R. 656, ¶ 10. 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); *Burroughs*, 115 M.S.P.R. 656, ¶ 10. Because the appellant failed to exhaust his administrative remedy with respect to his claim, the Board lacks jurisdiction over his VEOA appeal. *See Burroughs*, 115 M.S.P.R. 656, ¶ 10. Because the Board lacks jurisdiction over the VEOA appeal, the administrative judge should not have adjudicated it on the merits and we therefore vacate the administrative judge's findings in that regard. *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).

¶12 The administrative judge found that the appellant exhausted his DOL remedy because "the Board typically determines whether an appellant has exhausted his remedy with DOL based on whether the appellant submitted a complaint to DOL asserting that the agency violated his rights in connection with a specific position or vacancy announcement." ID at 6. The administrative judge found that the appellant in this case did identify a specific vacancy announcement in his DOL complaint. *Id*. As set forth above, however, the Board in *Burroughs*, which was decided after the issuance of the initial decision in these cases, clarified that a DOL complaint's reference to a vacancy announcement is, by itself, insufficient to inform DOL of particular alleged veterans' preference violations. *Burroughs*, 115 M.S.P.R. 656, ¶ 10.[2]

¶13 Moreover, the administrative judge held that although no selection had been made when the appellant filed his DOL complaint, the Board's practice is to adjudicate an appeal that was premature when filed but becomes timely while pending before the Board. ID at 6. The cases the administrative judge relied upon to find that the Board will adjudicate a prematurely filed Board appeal are, however, distinguishable from this appeal. In *Heckman v. Department of the Interior*, 109 M.S.P.R. 133, ¶ 8 (2008), *overruled on other grounds by Garcia v. Department of Agriculture*, 110 M.S.P.R. 371 (2009), for example, the Board held that although the appellant's Board appeal was premature because he filed it on March 29, 2005, and DOL sent the appellant a closing letter on May 10, 2005, it would still adjudicate the appeal because it became timely while pending before

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[2] In *Becker v. Department of Veterans Affairs*, 114 M.S.P.R. 29, ¶ 6 (2010), the Board held that, although the appellant's DOL complaint preceded agency memoranda notifying him of his nonselection for one vacancy and the cancellation of another vacancy, the appellant "may have already been aware" that he would not have been selected for the positions because he knowingly failed to appear for a scheduled interview. *Becker* is thus distinguishable from this case because the appellant did not allege, and there is no indication in the record, that he was aware when he filed his DOL complaint, 1 day after the vacancy announcement closed, that he would not be selected for the MRT/ROIT position.

the Board. Similarly, in *Wooten v. Department of Veterans Affairs*, 96 M.S.P.R. 671, ¶ 9 (2004), the Board held that because the appellant submitted on review new and material evidence of his receipt of written notification of the results of DOL's investigation into his complaint, his premature appeal had become timely and the appellant established exhaustion of his DOL remedy. Here, the question is not whether the appellant presented evidence showing that DOL's notification letter was issued after the appellant had filed a Board appeal. Rather, we find that the appellant did not exhaust his DOL remedy because he filed his DOL complaint before any nonselection or other alleged violation had occurred, and DOL did not therefore have an opportunity to conduct an investigation that might have led to corrective action before involving the Board in the case. *See Burroughs*, 115 M.S.P.R. 656, ¶ 9.

¶14 Accordingly, we dismiss the appellant's VEOA appeal for lack of jurisdiction and affirm the initial decision's dismissal of the employment practices appeal for lack of jurisdiction.[3]

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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[3] The appellant has requested that the Board dismiss the agency's cross petition for review for failure to provide interim relief. Petition for Review (PFR) File, Tab 6. We deny the request because the administrative judge did not order the agency to provide interim relief. ID at 17-18. In any event, we have not considered the agency's cross petition for review.

The appellant has also filed a motion to join these appeals with several other appeals pending before the Board. PFR File, Tab 7. Joinder occurs when one person has filed two or more appeals and they are united for consideration. 5 C.F.R. § 1201.36(a)(2). A judge may join cases if doing so would expedite processing of the cases and not adversely affect the interests of the parties. 5 C.F.R. § 1201.36(b). We deny the appellant's motion, as doing so would not expedite processing of the cases.

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.