UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 96

Docket No. PH-3330-11-0232-I-2

Mari C. Alegre,
Appellant,
v.
Department of the Navy,
Agency.

August 10, 2012

Patrick Lavery, Newport, Rhode Island, for the appellant.

David B. Mercier, Esquire, Newport, Rhode Island, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed her Veterans Employment Opportunities Act (VEOA) appeal. For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 In 2009, the appellant, a 5-point preference eligible, was in a competitive service position as a GS-0560-09 Budget Analyst with the agency. Initial Appeal

File (IAF) 1, Tab 1 at 2, 16. She applied under two vacancy announcements for the following: (1) A series 501 Administrative/Technical Specialist position (2 vacancies); and (2) A series 343 Administrative/Technical Specialist position (8 vacancies later expanded to 10). IAF 1, Tab 1 at 8; Tab 4 at 4; Tab 7, Subtab 2a at 2, Subtab 2d at 6-8, Subtab 2e at 9-16, Subtab 2f at 17-23; Tab 10 at 4. The appellant asserted that she was provided with no status on her applications for either position, but that, in September 2009, she interviewed for the series 343 position; and, in October 2009, agency personnel told her that she was not selected. IAF 1, Tab 10 at 4.

¶3 The appellant then filed complaints with the Department of Labor (DOL) concerning her nonselection for both the series 343 and series 501 positions, complaint no. RI-2010-001-VPH for the former ("complaint 001") and complaint no. RI-2010-002-VPH for the latter ("complaint 002"). IAF 1, Tabs 4, 5, 6 at 4. She also filed a discrimination complaint. IAF 1, Tab 1 at 6; IAF 2, Tab 2 at 14-15.

¶4 On November 17, 2009, DOL issued the appellant a letter closing complaint 002 concerning the series 501 positions and providing her with Board appeal rights. IAF 1, Tab 5 at 6-7; IAF 2, Tab 2 at 11-12. The next day, the appellant withdrew complaint 001 concerning the series 343 positions after DOL informed her that the agency stated that the selection process for those positions was not final. *Id.* In filling the 343 position, the agency asked the Office of Personnel Management (OPM) on December 8, 2009, for permission to pass over the appellant. OPM denied the request on January 13, 2010, and the agency appointed her to a competitive service series 343 position effective March 28, 2010. IAF 1, Tab 1 at 16, Tab 7, Subtabs 2b and 2c.

¶5 On March 3, 2011, the appellant filed her VEOA appeal, requesting a hearing. IAF 1, Tab 1. She asserted that she had received the agency's investigative file on her discrimination complaint in January 2011 and that it contained new evidence showing that the agency violated her veterans'

preference rights in connection with both the series 343 and 501 position vacancy announcements.[1] *Id.*, Tab 4 at 4-5, Tab 6 at 4-6, Tab 10 at 4-6; IAF 2, Tab 2 at 4-7. Specifically, she asserted that, contrary to DOL's alleged conclusion on complaint 002 that the agency did not violate her veterans' preference rights, the agency improperly "name requested" either one or both of the two selectees for the series 501 positions because their names did not appear on the first certificate. IAF 1, Tab 4 at 4, Tab 6 at 5, Tab 10 at 4. She further asserted that she withdrew complaint 001 concerning the series 343 positions based on misinformation. *Id.*, Tab 10 at 4-6; IAF 2, Tab 2 at 4-7. In that regard, she asserted that, when she withdrew her complaint, the agency had already selected applicants for multiple positions or selected them shortly thereafter. IAF 1, Tab 10 at 5-6; IAF 2, Tab 2 at 7. She also asserted that the agency did not request a pass over from OPM until after it had selected applicants for the series 343 positions, had to create an additional series 343 position for her when OPM denied the request, and did not appoint her to the position until several months after some of the other selectees. IAF 1, Tab 4 at 5, Tab 6 at 6, Tab 10 at 6; IAF 2, Tab 2 at 7. She submitted evidence from the discrimination complaint file to support her assertions. IAF 1, Tab 11.

¶6 After the administrative judge issued a March 7, 2011 VEOA jurisdictional order, IAF 1, Tab 2, the appellant began communicating with DOL, but DOL informed her that it could not act because she had filed a Board appeal, IAF 2, Tab 2 at 4-9, 16-22. The agency moved to dismiss the appeal on the basis that the appellant did not timely file an appeal concerning complaint 002 (the series 501 positions) and withdrew complaint 001 (the series 343 positions). IAF 1, Tab 5. The administrative judge issued an order setting forth the issues she found to

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[1] The record includes the agency's January 19, 2011 cover letter transmitting the investigative file. IAF 2, Tab 2, Exhibit 3. The appellant has apparently submitted only portions of the actual file.

be in dispute, none of which concerned complaint 002 (the series 501 positions). IAF 1, Tab 12. The same day, the administrative judge dismissed the appeal without prejudice, to be automatically refiled. IAF 1, Tab 13.

¶7 After the appeal was refiled, a different administrative judge dismissed it. IAF 2, Tab 6. He did not address the series 501 positions, incorrectly finding that the appellant filed "what appear[ ] to be two VEOA complaints with [DOL] relative to the 0343 positions." Initial Decision (ID) at 3. With regard to complaint 001, he found that the appellant failed to exhaust her remedy before DOL because she withdrew the complaint. *Id.* at 3-4. With regard to complaint 002, he found that her appeal was untimely because she evidently received her Board appeal rights in November 2009 and did not file her appeal until March 3, 2011. *Id.* at 4. To the extent that the appellant was attempting to file a new appeal in March 2011, after having learned through the discrimination investigative file of alleged veterans' preference violations associated with her appointment, the administrative judge found that the appellant did not show that she exhausted her remedies with DOL. *Id.* In that regard, he found that she had not filed a new complaint with DOL; rather, she had simply contacted DOL after receiving the Board's acknowledgment order and referred to the Board appeal that she had already filed. *Id.*

¶8 In her petition for review, the appellant asserts that the administrative judge did not consider that she presented information showing that officials induced her to believe that DOL could not review her complaint and failed to provide her with clear information regarding DOL requirements. Citing, inter alia, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), the appellant asserts that this misconduct allowed the filing deadline to pass. She further asserts that, in finding that she received her Board appeal rights in late November 2009; had 15 days to appeal to the Board; and therefore her March 3, 2011 appeal was untimely; the administrative judge failed to consider her argument that equitable tolling should apply under *Kirkendall v. Department of*

the Army, 479 F.3d 830, 836-44 (Fed. Cir. 2007) (en banc). Petition for Review (PFR) File, Tab 1 at 4-5.

¶9 The appellant also contends that her March 8, 2011 e-mail to DOL was her DOL complaint. PFR File, Tab 1 at 5. She apparently asserts that the administrative judge took part of the e-mail out of context, i.e., the statement that "[p]er MSPB I must notify you with my case," to justify finding that her e-mail was not a request for DOL to investigate, but instead merely referred to a Board appeal that she had already filed. She asserts that she also stated in the e-mail that she needed a letter from DOL that it could not resolve the case. *Id.* She further contends that DOL's response does not show that it considered that her correspondence merely referred to a Board appeal that she had already filed. *Id.* She asserts that DOL's further e-mail and subsequent failure to contact her induced her into believing that DOL could not review her complaint. *Id.* She contends that the administrative judge failed to consider this, again citing *Irwin*. Finally, she asserts that she presented sufficient evidence to warrant holding her requested hearing. *Id*. The agency filed a response in which it argued that the Board should deny the appellant's petition for review. PFR File, Tab 3 at 3-7.

ANALYSIS

¶10 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). We find that it is necessary to remand this case for further proceedings because the initial decision did not satisfy these standards.

¶11 As discussed above, the administrative judge in the initial decision incorrectly stated that both of the appellant's DOL complaints referred to the series 343 positions. ID at 3. Neither the order issued before the dismissal

without prejudice nor the initial decision issued after refiling addressed the appeal as it related to the series 501 positions. IAF 1, Tab 12; IAF 2, Tab 6. Further, neither document stated that the appellant had withdrawn her claim concerning the series 501 positions. *Id.* In that regard, although the order stated that any exception to it must be filed within 10 days, as previously noted, the first administrative judge issued her initial decision dismissing the appeal without prejudice to automatic refiling on the same day that she issued the order. IAF 1, Tabs 12, 13. Moreover, as the appellant asserts, the initial decision issued after refiling did not consider her appeal under the proper standards. For example, it summarily dismissed the appellant's VEOA appeal as it related to the mischaracterized second series "0343 positions" as "untimely" without considering whether the deadline should be equitably tolled. ID at 4; *see, e.g.*, *Gingery v. Department of the Treasury*, 110 M.S.P.R. 83, ¶¶ 25-26 (2008). Therefore, among other things, this appeal must be remanded to assess whether equitable tolling applies to the appellant's complaint 002.

Jurisdiction

¶12 The Board has held that in order to establish jurisdiction over a VEOA appeal, an appellant must: (1) show that she exhausted her remedy with DOL; and (2) make nonfrivolous allegations that (i) she is a preference eligible within the meaning of VEOA; (ii) the action at issue took place on or after the October 30, 1998 enactment date of VEOA; and (iii) the agency violated her rights under a statute or regulation relating to veterans' preference. For an appellant to meet VEOA's requirement that she exhaust her remedy with DOL, she must establish that: (1) she filed a complaint with the Secretary of Labor; and (2) the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 9 (2009). An appellant need not state a claim upon which relief may be granted for the Board to have jurisdiction over a VEOA claim. *Gingery*, 110 M.S.P.R. 83,

¶ 14. Here, as discussed above, the appellant has made nonfrivolous allegations that she is a preference eligible and that the nonselections took place after VEOA's enactment.

Series 343 Positions

¶13 We find that the appellant made a nonfrivolous allegation that the agency violated her rights under a statute or regulation relating to veterans' preference. Specifically, she asserted that the agency violated the pass over requirement of 5 U.S.C. § 3318 by not selecting her for one of the positions. IAF 1, Tab 1 at 8, 13. This provision qualifies as a statute relating to veterans' preference. *See, e.g., Garcia*, 110 M.S.P.R. 371, ¶ 8 n.2.

¶14 With regard to complaint 001 filed in October 2009 concerning the series 343 positions, we find that the appellant did not establish that she exhausted her remedy with DOL because she withdrew that complaint before DOL was able to resolve it or had issued a written notification that the Secretary's efforts had not resulted in resolution of the complaint. IAF 1, Tab 5 at 6-7, Tab 6 at 4. However, the appellant has presented evidence that DOL refused to address her March 2011 complaint relative to the 343 positions because of her pending Board appeal. IAF 2, Tab 2 at 16-20. Because DOL refused to address that VEOA complaint, we find that the appellant has exhausted her DOL remedy with respect to the 343 positions. *See Morris v. Department of the Army*, 113 M.S.P.R. 304, ¶ 10 (2010); *Thompson v. Department of the Army*, 112 M.S.P.R. 153, ¶ 14 (2009). Moreover, because the appellant was pursuing her VEOA appeal concerning the series 343 positions when DOL refused to address her complaint, we find that the appellant's appeal concerning those positions was timely under 5 U.S.C. § 3330a(d)(1)(B).

Series 501 Positions

¶15 We find that the appellant made a nonfrivolous allegation that the agency violated her rights under a statute or regulation relating to veterans' preference.

Specifically, the appellant asserted that the agency violated the "tie-breaking" rules, apparently by name requesting either or both Gonzalo Rios, a 10-point veteran, and Linda Anderson, a 5-point veteran with the same ranking as the appellant, although their names did not appear on the first hiring certificate, which resulted in her not being selected for either of the two positions. IAF 1, Tab 1 at 6, 13, Tab 11 at 258; *see Slater v. U.S. Postal Service*, 112 M.S.P.R. 28, ¶ 6 (2009) (stating that the Board uses a liberal pleading standard for allegations of veterans' preference violations in a VEOA appeal); *see also Gingery*, 110 M.S.P.R. 83, ¶ 15; *cf. Morales v. Department of Homeland Security*, No. 2012-3004, 2012 WL 1385963, at *2 (Fed. Cir. Apr. 9, 2012) (finding no entitlement to relief on the merits of the appellant's VEOA appeal because "[t]here is no restriction on the Agency's ability to choose one preference-eligible candidate over another, so long as the candidate selected is among the 'highest three eligibles on the [hiring] certificate'").[2]

¶16 We find that the appellant has established that she exhausted her remedy with DOL with regard to the complaint she filed in October 2009 concerning the series 501 positions. As previously noted, DOL issued a decision to the appellant closing her complaint and providing her with Board appeal rights on November 17, 2009.[3] IAF 1, Tab 5 at 6, Tab 6 at 4. Although the appellant did not submit the letter from DOL informing her that it was closing her complaint and providing her with Board appeal rights, the agency itself submitted the e-mail evidence showing that DOL closed the complaint. *Id.*, Tab 5 at 6. We find that

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[2] The Board may rely on nonprecedential Federal Circuit decisions if it finds the court's reasoning persuasive, which it does here. *Encarnado v. Office of Personnel Management*, 116 M.S.P.R. 301, ¶ 12 n.6 (2011).

[3] Although this was more than 60 days after the alleged violations occurred, the record indicates that DOL did not dismiss the appellant's complaint as untimely, but adjudicated it on the merits. IAF 1, Tab 5, Enclosure 1; IAF 2, Tab 2, Exhibit 4 at 4. Therefore, DOL apparently waived any timeliness issue. *See, e.g.*, *Letchworth v. Social Security Administration*, 101 M.S.P.R. 269, ¶ 4 n.2 (2006).

this suffices to show that the appellant exhausted her remedy before DOL. *Cf. Burroughs v. Department of the Army*, 116 M.S.P.R. 292, ¶ 10 (2011) (stating that the appellant must show that he received written notification of the results of DOL's investigation of the complaint, or, if DOL was unable to resolve the complaint within 60 days, that he provided written notification to DOL of his intention to bring a Board appeal).

¶17 The 15-day filing deadline set forth in 5 U.S.C. § 3330a(d)(1)(B) for filing a VEOA appeal with the Board is subject to equitable tolling, and an employee's failure to file a Board VEOA appeal within 15 days after receiving written notification from the Secretary of Labor of the results of the Secretary's investigation of the appellant's VEOA complaint does not summarily foreclose the Board from exercising jurisdiction to review the appeal. *Gingery*, 110 M.S.P.R. 83, ¶ 24; *see Kirkendall*, 479 F.3d at 835-44; *Willingham v. Department of the Navy*, 118 M.S.P.R. 21, ¶ 15 n.4 (2012). The Court explained in *Irwin*, 498 U.S. at 96, that Federal courts have "typically extended equitable relief only sparingly," and that the Court had allowed equitable tolling in situations where the complainant "has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or where the complainant has been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Gingery*, 110 M.S.P.R. 83, ¶ 24. Because the administrative judge did not consider whether equitable tolling is applicable to complaint 002, we are remanding for such consideration.

ORDER

¶18 Accordingly, the Board REMANDS this case for further adjudication consistent with this order. Specifically, the administrative judge shall allow the parties to submit further evidence and argument on the merits of the appellant's VEOA appeal concerning the series 343 positions; if necessary, hold the appellant's requested hearing; and issue a decision on the merits. He should also

determine whether the deadline for filing a VEOA appeal of complaint 002 concerning the series 501 positions should be equitably tolled; and, if so, whether the appellant proved the merits of her VEOA appeal.

FOR THE BOARD:

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