



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 22, 2016

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BOARD DECISIONS

The Board has not issued any precedential decisions since the last Case Report.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Robert Michael Miller

Respondent: Federal Deposit Insurance Corporation

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3146](#)

MSPB Docket No.: [SF-3330-12-0711-I-1](#)

Issuance Date: April 8, 2016

Veterans Employment Opportunities Act of 1998 (VEOA)

Credit for experience material to a position

Scope of Board review

The appellant, a preference-eligible veteran, applied for a competitive service position as an Associate Professor with the agency. The vacancy announcement provided that applicants could satisfy an education qualification requirement for the position through either: (1) a degree that included or was supplemented by major study in certain specialized fields; or

(2) a combination of education and experience in courses equivalent to a major in certain specialized fields.

The appellant applied for the position and stated that he met the education qualification requirement through a combination of education and experience, including experience in the military. The agency conducted multiple reviews of the appellant's application, considered supplemental information that the appellant submitted, conducted research, and ultimately concluded that the appellant's education and experience, including his military training and coursework, did not satisfy the education qualification requirement for the position.

After exhausting his administrative remedies with the Department of Labor (DOL), the appellant filed a Board appeal, alleging that the agency violated his veterans' preference rights when it failed to properly credit his experience, in violation of 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d). After holding a hearing, the administrative judge found that the agency properly considered the appellant's education and experience.

On review, the Board found that, under 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d), the Board's role was limited to determining whether the agency improperly omitted, overlooked, or excluded a portion of the appellant's experiences or work history in assessing his qualifications. The Board found that, because the agency considered the totality of the appellant's experiences in determining that he was qualified for the position, the agency did not violate 5 U.S.C. § 3311(2) or 5 C.F.R. § 302.302(d).

Holding: The Court affirmed the Board's decision denying the appellant's request for corrective action, as modified.

1. The Board's review in VEOA appeals alleging violations of 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d) is not limited to determining whether an agency improperly omitted, overlooked, or excluded a portion of an appellant's experiences or work history in assessing his qualifications. Instead, the Board must assess whether an agency adequately considered a veteran's experiences and work history.

2. Although the Board does not reevaluate the weight that an agency accords to a veteran's experience, the Board's jurisdiction extends to determining whether the agency actually evaluated experience material to the position, as required by 5 U.S.C. § 3311(2) and 5 C.F.R. § 302.302(d). However, it is not the Board's role to determine whether an appellant ultimately satisfied the requirements of a position based on

his experience.

3. The court found that the agency evaluated all of the appellant's experience and credited all of his work history in evaluating whether he met the education qualification requirement for the position. Therefore, because the agency adequately considered the appellant's experience and work history, it did not violate 5 U.S.C. § 3311(2) or 5 C.F.R. § 302.302(d).

Petitioner: Robert Michael Miller

Respondent: Federal Deposit Insurance Corporation

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3147](#)

MSPB Docket No.: [DC-3330-13-0504-I-1](#)

Issuance Date: April 8, 2016

VEOA

Bad faith cancellation of vacancy

Discrimination and retaliation unrelated to status as a veteran

The appellant, a preference-eligible veteran and current agency employee, applied for a Financial Analyst position with the agency under both merit promotion and delegated examining vacancy announcements. The agency selected the appellant as 1 of 3 candidates for a structured interview. After the agency completed the structured interviews, the selecting official determined that none of the candidates possessed the requisite qualifications for the position, and the agency cancelled the vacancy.

After exhausting his administrative remedies with DOL, the appellant filed a Board appeal challenging his non-selection, and alleging that the agency had cancelled the vacancy in bad faith. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to raise a nonfrivolous allegation that the agency violated his rights under a statute or regulation related to veterans' preference.

On review, the Board found that it had jurisdiction over the appeal, but that the appellant failed to establish that the agency violated his veterans' preference rights. The Board found that an agency is not required to hire a preference-eligible veteran if it does not believe that the candidate is qualified or possesses the requisite skills, and that the agency had conducted a thorough, structured interview process, and determined none of the interviewees, including the appellant, possessed the requisite skills and

knowledge for the position.

Holding: The Court affirmed the Board's decision finding that the appellant failed to establish that the agency violated VEOA.

1. The agency did not deny the appellant the opportunity to compete for the position, as required by 5 U.S.C. § 3304(f), because the agency considered his application, and he was 1 of 3 candidates interviewed for the position.
2. There was no evidence that the agency's cancellation of the vacancy violated a statute or regulation relating to veterans' preference. Instead, the record contained substantial evidence that the agency cancelled the vacancy due to a lack of qualified candidates.
3. The Board properly found that the appellant could not raise retaliation and discrimination as affirmative defenses or as evidence of bad faith, where the alleged retaliation and discrimination was unrelated to his status as a veteran, but was instead based on prior lawsuits that he had filed, and personal animus on the part of his supervisors.

NONPRECEDENTIAL:

Petitioner: Travis E. Wilkes

Respondent: Department of Veterans Affairs

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2016-1220](#)

MSPB Docket No. [DA-0432-11-0466-C-1](#)

Issuance Date: April 8, 2016

Holding: The court affirmed the Board's decision, which denied the appellant's petition for enforcement of a Board order reinstating his employment. The court found that the appellant, rather than the agency, was obligated to contact the Federal Retirement Thrift Investment Board to seek reinstatement of the appellant's Thrift Savings Plan loan.

Petitioner: Elizabeth A. Emond
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1227](#)
MSPB Docket No. DC-831M-12-0383-B-1
Issuance Date: April 8, 2016

Holding: The court affirmed the administrative judge's decision finding that the appellant was not entitled a former spouse survivor annuity, because a Virginia state court found that the divorce decree that OPM relied on in awarding her the annuity was not a "true and accurate copy."

Petitioner: Calvin J. Mosley
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1240](#)
MSPB Docket No. [CH-0752-10-0469-C-1](#)
Issuance Date: April 8, 2016

Holding: The court affirmed the Board's decision denying the appellant's petition for enforcement of a settlement agreement. The appellant's claims challenging the validity of the settlement agreement were barred by the doctrine of res judicata, because the appellant had litigated these claims and obtained a final decision in a prior Board appeal. The agency did not breach the settlement agreement by failing to pay the appellant a monetary award, because the agreement did not require the agency to do so.

Petitioner: Manuel V. Custodio
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1023](#)
MSPB Docket No. [SF-0831-15-0018-I-1](#)
Issuance Date: April 11, 2016

Holding: The court affirmed the Board's decision dismissing the appellant's Civil Service Retirement System (CSRS) retirement appeal as barred by the doctrine of res judicata, where the appellant had litigated the issue of his entitlement to make a redeposit for his Federal service and obtained a final decision in a prior Board appeal.

Petitioner: David Wayne Carson
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1154](#)
MSPB Docket No. [AT-1221-11-0062-B-2](#)
Issuance Date: April 11, 2016

Holding: The court affirmed the Board's decision denying the appellant's request for corrective action in an Individual Right of Action (IRA) appeal. The appellant failed to establish that his retirement was involuntary, and therefore, failed to prove that he was subject to a personnel action within the meaning of the Whistleblower Protection Act.

Petitioner: Conrado A. Padua
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3174](#)
MSPB Docket No. [SF-0831-15-0399-I-1](#)
Issuance Date: April 12, 2016

Holding: The court affirmed the Board's decision dismissing the appellant's appeal as barred by the doctrine of res judicata, where the appellant had litigated the issue of his eligibility for a CSRS retirement annuity and obtained a final decision in a prior Board appeal.

Petitioner: Ilona A. Ramsey
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3192](#)
MSPB Docket No. [DC-0432-14-0918-I-2](#)
Issuance Date: April 12, 2016

Holding: Per Rule 36, the court affirmed the Board's decision dismissing an appeal as untimely filed without good cause shown.

Petitioner: Richard S. Krugman
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3156](#)
MSPB Docket No. [DA-1221-13-0288-B-1](#)
Issuance Date: April 12, 2016

Holding: Per Rule 36, the court affirmed the Board's decision denying the appellant's request for corrective action in an IRA appeal. The agency proved that it would have terminated the appellant in the absence of his whistleblowing activity.

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