U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 2, 2022

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BOARD DECISIONS

Appellant: Eric Williams
Agency: Department of Defense
Decision Number: 2022 MSPB 29
Docket Number: AT-3330-19-0438-I-1
Issuance Date: August 31, 2022
Appeal Type: Veterans Employment Opportunities Act of 1998

USERRA/VEOA/VETERANS' RIGHTS

The agency announced seven competitive service vacancies for GS-9 Logistics Management Specialist positions. The vacancies were open to the public and the announcement noted, " this position is being filled under the Acquisition Expedited Hiring Authority . . . using [the Office of Personnel Management's] Direct Hire Authority." The appellant, a preference-eligible veteran with a 30% service-connected disability, applied for the position. The agency found the appellant qualified for the position, but after scoring his application, it found that he was not among the best qualified candidates, so he was not selected for an interview. The appellant filed a Veterans Employment Opportunities Act (VEOA) complaint, alleging that the agency failed to afford him veterans' preference during the selection process. After a hearing, the administrative judge issued an initial decision finding that the appellant failed

to prove that the agency violated any law related to veterans' preference because veterans' preference does not apply to appointments made pursuant to direct hire authority. The appellant filed a petition for review.

Holding: The agency had statutory authority to determine for itself any category of positions within its acquisition workforce for which there exists a severe shortage of candidates and for which there is a critical hiring need and use the Direct Hire Authority of 5 U.S.C. § 3304(a)(3) to fill such positions, and the veterans' preference provisions contained in 5 U.S.C. §§ 3309-3318 do not apply in direct hiring.

1. 5 U.S.C. § 3308 is a veterans' preference law that, with certain exceptions, prohibits the prescription of minimum educational requirements for competitive service positions. The Board found that considering education as one factor among many in assessing qualified applicants, as the agency did here, is not the same as prescribing a "minimum educational requirement," and therefore the agency did not violate 5 U.S.C. § 3308.
2. The Board also considered whether the agency violated the veterans' preference requirements set forth in 5 U.S.C. §§ 3309-3318. It noted that the Department of Defense has special statutory authorization to determine for itself any category of positions within its acquisition workforce for which there exists a severe shortage of candidates and for which there is a critical hiring need and to use the Direct Hire Authority of 5 U.S.C. § 3304(a)(3), via the agency's Expedited Hiring Authority of 10 U.S.C. § 1705(f), to fill such positions. It found that the agency properly invoked Expedited Hiring Authority to fill the positions at issue by direct hire, and that the requirements of 5 U.S.C. §§ 3309-3318 do not apply in direct hiring.
3. The Board also held that agency guidance, which stated that "[q]ualified candidates with veterans' preference should be considered for appointments when they are found to best meet mission requirements," does not mandate that the agency follow the specific statutory provisions of 5 U.S.C. §§ 3309-3318. Rather, the guidance is analogous to the right to compete in 5 U.S.C. § 3304(f)(1).

Appellant: Cyril David Daniel Oram, Jr.
Agency: Department of the Navy
Decision Number: 2022 MSPB 30
Docket Number: DC-3330-17-0755-I-1
Issuance Date: August 31, 2022
Appeal Type: Veterans Employment Opportunities Act of 1998

USERRA/VEOA/VETERANS' RIGHTS

The appellant, a preference-eligible disabled veteran, was employed by the agency as a GS-12 Information Technology (IT) Specialist. Approximately 1 month after his appointment to the position, the agency posted a merit promotion announcement for another GS-12 IT Specialist position that was open to current or former competitive service employees, and the agency accepted applications from individuals outside of its own workforce, including Federal employees and veterans. The appellant applied but was not selected. The appellant filed a Veterans Employment Opportunities Act (VEOA) complaint, alleging that the agency's failure to consider his application violated his right to compete as a preference-eligible veteran under 5 U.S.C. § 3304(f). The administrative judge issued an initial decision based on the written record, concluding that, because it was undisputed that the appellant was a Federal employee at the time the agency declined to consider his application for the IT Specialist position for which the agency accepted applications from individuals outside its own workforce, pursuant to *Kerner v. Department of the Interior*, 778 F.3d 1336 (Fed. Cir. 2015), he could not prevail as a matter of law on his claim that he was denied the opportunity to compete for the position. The appellant filed a petition for review.

Holding: Pursuant to 5 U.S.C. § 3401(f)(1), current Federal employee applicants are not entitled to corrective action under VEOA based on a claim that they were denied the opportunity to compete for a vacancy announced under merit promotion procedures and for which the agency accepted applications from individuals outside its own workforce.

1. Under VEOA, preference eligibles and certain veterans who unsuccessfully apply for a position being filled by a Federal agency for which the agency accepted applications from individuals outside of its own workforce under merit promotion procedures and who allege that they have been denied the opportunity to compete afforded by 5 U.S.C. § 3304(f)(1) may seek administrative redress with the Board.
2. The administrative judge found that the vacancy announcement solicited applicants for the position from outside the agency's own workforce, including from veterans. Therefore, whether the appellant was entitled to corrective action under VEOA would normally turn on whether he was granted a bona fide opportunity to compete for the position.
3. However, in *Kerner v. Department of the Interior*, 778 F.3d 1336 (Fed. Cir. 2015), the U.S. Court of Appeals for the Federal Circuit determined that current Federal employees, by virtue of their employment status, are not entitled to corrective action for a claim that they were denied

the opportunity to compete for vacancies announced under merit promotion procedures and for which the agency accepted applications from individuals outside of its own workforce. The Federal Circuit determined that the statutory text and the legislative history of VEOA only evinced an intent to assist veterans in obtaining an *initial* appointment to the Federal service – not subsequent promotions or other intra-agency movement.

4. Because the applicant in this appeal was a current Federal employee at the time he applied for the vacancy at issue, as a matter of law, consistent with *Kerner*, he was not entitled to corrective action based on his claim that he was denied an opportunity to compete for the position at issue.
5. The Board overruled its prior decisions that are inconsistent with the Federal Circuit's decision in *Kerner*, including *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104, ¶ 20 (2007), and *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 32 (2007), and their progenies.
6. The Board found no merit to the appellant's argument that he was harmed by the administrative judge's decision to docket his constructive adverse action claim as a separate appeal because the allegations in that appeal materially differed from those in his VEOA appeal. The Board distinguished cases from the U.S. Court of Claims and the U.S. Supreme Court that were cited by the appellant, finding that those cases did not address the right to compete under 5 U.S.C. § 3304(f).

COURT DECISIONS

NONPRECEDENTIAL:

Oram v. Merit Systems Protection Board, No. 2022-1736 (Fed. Cir. Aug. 29, 2022) (MSPB Docket No. DC-4324-21-0450-I-1). The Court dismissed the petition for review for lack of jurisdiction because the challenged Board decision, which dismissed the appellant's appeal without prejudice subject to refiling, was not an appealable final decision.