UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 65

Docket No. PH-3330-12-0425-I-1

Rakhmatulla Asatov,

Appellant,

v.

Agency for International Development,

Agency.

August 16, 2013

Rakhmatulla Asatov, Plainville, Connecticut, pro se.

Raghav Kotval, Washington, D.C., 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 in this case asking us to reconsider the initial decision issued by the administrative judge which denied the appellant's request for corrective action, finding that the agency did not violate his veterans' preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA) when it failed to refer him for consideration for the position of Foreign Service Junior Executive Officer. After fully considering the filings in this appeal, and based on the following points and authorities we DENY the

petition for review.[1] Except as expressly modified by this Opinion and Order, we AFFIRM the initial decision issued by the administrative judge.

BACKGROUND

¶2 The appellant, a preference eligible, filed an appeal alleging that the agency violated his veterans' preference rights when he was not selected for the position of full-time Foreign Service Junior Executive Officer, FS-06/05, under vacancy announcement BS 03 JO 2012/April. Initial Appeal File (IAF), Tab 1. The announcement indicated that there were "many vacancies," which were in the agency's Junior Officer Program, the entry level program into the Foreign Service. IAF, Tab 22 at 59. The qualifications were:

> FS-06: Applicant must have a Bachelor's degree from an accredited institution plus three (3) years of relevant experience; OR a Master's degree in a relevant major plus one (1) year of relevant experience, such as business administration, public administration, human resources management, international relations, or any other business administration. Overseas experience is highly desirable.
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> FS-05: Applicant must have a Bachelor's degree from an accredited institution plus four (4) years of relevant experience with one (1) year of overseas experience; OR a Master's degree in a relevant major plus (2) years of relevant experience, such as business administration, public administration, human resources management, international relations, or any other business administration. Overseas experience is highly desirable.

IAF, Tab 22 at 51. Applicants were required to meet all qualifications by the close of the announcement on May 5, 2012. *Id*. at 49. The announcement also stated: "Veterans' Preference applies. Qualified veterans will be considered consistent with the requirements of the Foreign Service Act." *Id*.

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[1] We DENY the appellant's motion to join this appeal with his appeal in *Asatov v. Agency for International Development*, MSPB Docket No. PH-3330-12-0145-I-1, Nonprecedential Final Order (Jan. 2, 2013), where the Board has already issued a final decision.

¶3 On appeal, the appellant argued, inter alia, that the agency violated 5 U.S.C. § 3308 by imposing minimum educational requirements for the position. IAF, Tab 1. However, the administrative judge found that the position in question is in the excepted service and that 22 U.S.C. § 3941(b) authorizes the Secretary of State to impose whatever requirements he or she deems appropriate to the Foreign Service. Initial Decision (ID) at 9. The administrative judge found further that she need not consider this argument because 5 U.S.C. § 3308 is not a statute relating to veterans' preference. *Id*.

¶4 The appellant also asserted that the agency violated 5 U.S.C. §§ 3311 and 3320, as well as 5 C.F.R. § 302.202, by failing to properly credit his military experience and his 2 years of "experience in developing (sic) country." *See* IAF, Tabs 8, 28, 33. However, the administrative judge found that the appellant failed to raise this allegation in the complaint he had filed with the Department of Labor (DOL). Because the appellant failed to show that he exhausted this argument, the administrative judge dismissed this claim. ID at 11.

¶5 Similarly, the administrative judge dismissed the appellant's claim that the agency violated 22 U.S.C. § 3926 by failing to establish foreign language proficiency requirements for the position, which he claimed deprived him of a hiring preference provided by 22 U.S.C. § 3926. The administrative judge found that, under section 702 of the Foreign Service Act, foreign language proficiency is only required for tenure, as opposed to an initial appointment or an overseas appointment that is expressly classified as a "Language-Designated Position." ID at 11. The administrative judge ultimately denied the appellant's request for corrective action, finding that the agency complied with VEOA by considering the appellant's application and allowing him to compete. ID at 13-14.

ANALYSIS

¶6 On review, the appellant argues that the administrative judge erred in denying his request for corrective action. We disagree. After reviewing the

appellant's various arguments on review, we have found no basis upon which to disturb the administrative judge's determination to deny the appellant's request for corrective action. Petition for Review (PFR) File, Tab 1.

¶7 Under VEOA, a preference eligible who alleges that an agency has violated his rights under "any statute or regulation relating to veterans' preference," and who has exhausted his rights under that section before DOL, may file an appeal with the Board. 5 U.S.C. § 3330a(a)(1), (d); *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 11 (2001). The matter at issue in a VEOA appeal, however, is not whether a particular agency action is proper and should be sustained. *Id.*; *Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159, ¶ 5 (2002). VEOA gives the Board no authority to adjudicate the merits of any agency action. *Id.* Instead, VEOA authorizes the Board to determine only whether an agency, in connection with the action that is the subject of an appeal, has violated a statutory or regulatory provision relating to veterans' preference. *Id.* Here, because this appeal arises under the VEOA, the appellant can establish a VEOA claim if he successfully "alleges that [the] agency has violated [his] rights under any statute or regulation relating to veterans' preference" when it failed to refer him for consideration for the position of Foreign Service Junior Executive Officer. 5 U.S.C. § 3330a(a)(1)(A).

¶8 The Foreign Service Junior Executive Officer position is not in the competitive service; thus, the relevant statute in this case is 22 U.S.C. § 3941, which gives the agency the authority to devise its own system for examination and selection of Foreign Service Officers and requires only that veterans' preference be "an affirmative factor" under such system. 22 U.S.C. § 3941(c). After first being deemed qualified, applicants with scores of 98 or better were referred for further consideration. IAF, Tab 22 at 22. The agency then adjusted the scores for all applicants who were veterans to reflect their veterans' status, i.e., the appellant's score of 91.21 was adjusted to 96.21 after the agency provided him 5 additional points. IAF, Tab 22 at 17, 95-97, and Tab 26. Only

149 applicants, including 67 veterans, made the cut-off and were referred for further consideration. IAF, Tab 22 at 23-30, 95-97, and Tab 26. The appellant's adjusted score of 96.21 was not high enough to make the cut-off, and his application was removed from further consideration. IAF, Tab 22 at 17, 31, 95-97, and Tab 26. Thus, the record shows and the appellant does not contest that the agency afforded all veterans who applied, including the appellant, increased points to their overall scores. Therefore, while the agency was not required under its selection system to add points to the scores in order to consider the applicants' veterans' preference as an "affirmative factor" under 22 U.S.C. § 3941, we find that the agency clearly provided such consideration when it did so.[2]

¶9 The appellant also argues that the administrative judge failed to properly apply 5 C.F.R. Part 302, which governs examination, selection, and application of veterans' preference requirements, which include minimum education requirements. PFR File, Tab 1. The initial decision reflects that the administrative judge considered the appellant's argument in this regard but found that 5 C.F.R. Part 302 does not apply because this matter does not relate to an examination for competitive service. ID at 10; IAF, Tab 1. Contrary to the administrative judge's finding, however, 5 C.F.R. Part 302 covers excepted-service positions that are "subject to" Title 5 of the United States Code or "subject to a statutory requirement to follow the veteran preference provisions of Title 5." *See* 5 C.F.R. § 302.101(a). Nevertheless, because the agency in this case has a separate authority under Title 22 for examining and selecting Foreign Service Officers with its own veterans' preference standard, we find that

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[2] Even assuming solely for the sake of argument that 5 U.S.C. § 3304(f)(1) applies to Foreign Service Officer positions, there is no dispute that the agency allowed the appellant to compete for the Foreign Service Executive Junior Officer position. VEOA does not ensure that an applicant will be successful. *Abell v. Department of the Navy*, 343 F.3d 1378, 1383 (Fed. Cir. 2003).

government-wide Title 5-based veterans' preference rules such as Part 302 do not apply.

¶10 The appellant also argues that the administrative judge erred by failing to find that section 3308 relates to veterans' preference. PFR File, Tab 1. The appellant asserts that the administrative judge's decision is inconsistent with *Isabella v. Department of State*, 102 M.S.P.R. 259 (2006). PFR File, Tab 1 at 6-7. The appellant correctly argues that the administrative judge erred in finding that 5 U.S.C. § 3308, which explains the circumstances under which the Office of Personnel Management, or other examining agency, may prescribe minimum educational requirements for an examination for the competitive service, is not a statute relating to veterans' preference. *See* ID at 9. In *Isabella*, the Board held that Title 5, including VEOA, applies to the appointment process for Foreign Service Diplomatic Security Special Agent positions, but the Board explicitly did not determine whether it has jurisdiction over VEOA appeals filed by Foreign Service Officer candidates. Here, as stated earlier, we find that an appellant can establish a VEOA claim over the appointment process for the Foreign Service Officer position if he successfully "alleges that [the] agency has violated [his] rights under any statute or regulation relating to veterans' preference." 5 U.S.C. § 3330a(a)(1)(A). Nonetheless, because 22 U.S.C. § 3941(b) authorizes the agency to impose whatever requirements it deems appropriate for the Foreign Service Officer positions and because we find that Title 5-based veterans' preference rules do not apply to the appointment process for Foreign Service Officer positions, section 3308 also does not apply in this case.

¶11 Additionally, the appellant asserts that the administrative judge required him to respond to the agency's "totally frivolous motions" but failed to direct him to show evidence of exhaustion with DOL concerning every claim raised in the appeal. PFR File, Tab 1 at 6. To establish exhaustion, the appellant must show that he provided DOL with a summary of the allegations forming the basis of his complaint so that DOL can conduct an investigation. *See Gingery v. Office of*

Personnel Management, 119 M.S.P.R. 43, ¶ 14 (2012); *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 9, *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). This requirement affords 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); *Gingery*, 119 M.S.P.R. 43, ¶ 14; *Burroughs*, 115 M.S.P.R. 656, ¶ 9.

¶12 In this case, the administrative judge provided the appellant with specific notification of what was necessary to show exhaustion. IAF, Tab 2. Furthermore, the appellant (who has filed numerous VEOA appeals with the Board) relies on the Board's holding in *Burroughs* to support various arguments in the instant appeal. *See* IAF, Tab 28 at 12. Because *Burroughs* explicitly states what is necessary for an appellant to establish that he exhausted his VEOA remedy with DOL, we find that the appellant was on notice of what he had to provide to establish exhaustion but failed to do so with regard to this argument. *Cf. Blount v. Department of the Treasury*, 109 M.S.P.R. 174, ¶ 7 (2008) (the Board has found that an administrative judge's defective notice can be cured if the agency's pleadings contain the notice that was lacking in the acknowledgement order). To the extent the appellant has submitted for the first time on review a copy of an email he sent to DOL as evidence that he exhausted this claim before DOL, we have not considered this document because he has failed to show that it was unavailable before the record was closed despite his due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

¶13 Finally, in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An allegation of bias by an administrative judge must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist and must be supported by an affidavit. *Lee v. U.S. Postal Service*, 48 M.S.P.R. 274, 280-82

(1991). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

¶14 Here, the appellant appears to raise an argument of bias by the administrative judge. Specifically the appellant asserts that the administrative judge took 2 months to rule on jurisdictional issues in this case, including a reversal of one of her rulings without providing any "plausible explanation for such a change in her findings." PFR File, Tab 1 at 6. The appellant contends that, because it took the administrative judge only 2 days to rule on the merits in his case, her decisions concerning the merits of his case were made in bad faith. *Id*. However, the appellant has not supported his claims with an affidavit, and there is nothing in the record to support a finding of bias by the administrative judge. Rather, the record reflects that the appellant is dissatisfied with the administrative judge's adjudicatory rulings. This does not establish bias.

ORDER

¶15 Accordingly, we DENY the appellant's petition for review. Except as expressly modified by this Opinion and Order, we AFFIRM the initial decision issued by the administrative judge.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Opinion and Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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.