UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 1

Docket No. SF-3443-08-0129-I-1

Adrian H. Garcia,

Appellant,

v.

Department of Agriculture,

Agency.

January 7, 2009

Adrian H. Garcia, Los Angeles, California, pro se.

Kerri E. Bandics, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision dismissing his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING the appellant's request for corrective action under VEOA.

BACKGROUND

¶2 The appellant filed a November 28, 2007 VEOA appeal with the Board alleging that the agency violated his veterans' preference rights when it did not

select him for the position of Southern California Consortium Director in August 2006. Initial Appeal File (IAF), Tab 1 at 3, 7, 12-13. In particular, the appellant asserted that the agency violated, among other things, 5 U.S.C. § 3318 when it passed him over in favor of a non-veteran without seeking and obtaining approval from the Office of Personnel Management (OPM). IAF, Tab 18 at 7. In an acknowledgment order, the Board's administrative judge (AJ) informed the appellant that, "before the Board can take jurisdiction over your appeal, you must file a complaint with the Secretary of Labor within 60 days after the date of the agency's violation," and ordered him to file a statement that included, among other things, the date the agency's violation occurred and the date he filed a complaint with the Secretary of Labor. IAF, Tab 2 at 2.

¶3 The agency moved to dismiss the appeal for lack of jurisdiction, asserting that the appellant had not exhausted his administrative remedy with the Department of Labor (DOL) because he untimely filed his complaint with DOL on November 27, 2007, more than 15 months after the date of the alleged violation, and DOL dismissed the complaint as untimely filed without reaching its merits. IAF, Tab 15, Subtab 1 at 2-4. The agency also argued that equitable tolling did not apply in this case. *Id*. at 4-7. After the appellant filed a response to the agency's motion to dismiss, asserting that DOL had issued a decision on the merits because it "contacted the agency, which constitutes a form of investigation," IAF, Tab 18 at 6, the AJ issued an order to show cause, informing the appellant that his appeal would be dismissed unless he could show that DOL issued a decision on the merits or that his failure to timely file his complaint with DOL should be equitably tolled. IAF, Tab 20. The AJ set forth the criteria under which equitable tolling may be applied and ordered the appellant to file evidence and argument addressing the Board's jurisdiction, including "a statement explaining his assertion that DOL made a decision on the merits of his VEOA complaint, and a statement explaining why his late filing with DOL should be subject to equitable tolling." *Id*. at 3-5.

¶4 After the appellant filed a response to the order to show cause, IAF, Tab 25, the AJ granted the agency's motion and dismissed this appeal for lack of jurisdiction, IAF, Tab 40, Initial Decision (ID) at 1, 11. Based on the written record, the AJ found that, although the appellant was a preference eligible entitled to the protection of VEOA given evidence showing a service-connected disability rating, he did not show that he exhausted his administrative remedy with DOL. ID at 2, 8. In this regard, the AJ found, based upon a review of e-mail correspondence between the appellant and a DOL Veterans Employment and Training Service Assistant Director, that DOL did not investigate the appellant's claims and instead regarded the appellant's VEOA complaint as untimely filed and closed the complaint on the same day that it was received. ID at 8-9. The AJ found that, "unless the appellant is entitled to equitable tolling of his late filing, he has failed to exhaust his administrative remedy with DOL, and the Board is precluded from exercising jurisdiction over his VEOA complaint." ID at 9-10.

¶5 The AJ then found that the agency did not mislead the appellant or engage in trickery because: (1) the agency's website accurately reported that no selection was made from the external vacancy announcement under which the appellant had applied; instead, the selection was made from an internal vacancy announcement; and (2) the agency was not required to notify the appellant of his right to object to the agency's selection of a non-preference eligible because the agency was not required to seek pass-over authority from OPM when selecting an individual from the merit promotion or internal vacancy announcement. ID at 10. The AJ held that the appellant did not show that his medical conditions justified the delay in filing his VEOA complaint with DOL. ID at 11. Thus, the AJ concluded that, because the appellant did not demonstrate that his late filing with DOL should be excused based on equitable tolling, the Board lacked jurisdiction over the appeal due to his failure to exhaust his administrative remedy. *Id*.

ANALYSIS

¶6 After fully considering the filings in this appeal, we find that there is no new, previously unavailable, evidence and that the AJ made no error in law or regulation that affects the outcome. *See* 5 C.F.R. § 1201.115(d).[1] We further discern no error in the AJ's determination that equitable tolling does not apply in this case. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (federal courts have typically extended equitable relief sparingly, including those situations where the claimant 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; it does not extend to what is at best a "garden variety" claim of excusable neglect). Therefore, we DENY the appellant's petition for review.

¶7 We nevertheless REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, and modify the initial decision to clarify the law surrounding the question of the Board's jurisdiction in this and similar cases.

¶8 As set forth above, the AJ dismissed this appeal for lack of jurisdiction because the appellant failed to *timely* file his complaint with DOL within 60 days of the alleged violation, and thus failed to exhaust his administrative remedy. ID at 11. This determination was consistent with the disposition reached in some Board cases. *See Heckman v. Department of the Interior*, 109 M.S.P.R. 133,

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[1] The appellant submits for the first time on review documents he apparently received as a result of a Freedom of Information Act request. Petition for Review File, Tabs 4, 5. The documents appear to have been created by the agency during its review and selection of an applicant for the Southern California Consortium Director vacancy at issue in this case. *Id.*, Tab 5. Even assuming that this evidence was submitted before the record closed on review and unavailable before the record closed below despite the appellant's due diligence, *see* 5 C.F.R. § 1201.115(d)(1), it is not of sufficient weight to warrant a different outcome in this case, given our determination that the appellant is not entitled to corrective action because of his untimely-filed complaint to DOL. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

¶¶ 18-23 (2008) (where DOL informed the appellant that it would not investigate his VEOA claim because he had not filed his complaint within 60 days after learning of the alleged violation of his veterans' preference rights, and the Board found that the application of equitable tolling was not appropriate, the Board dismissed the VEOA claim for lack of jurisdiction upon finding that the appellant failed to exhaust his DOL remedy); *Mitchell v. Department of Commerce*, 106 M.S.P.R. 648, ¶¶ 2, 11 (2007) (where the appellant did not file a complaint with DOL within 60 days of the date of his nonselection, the Board held that "[b]ecause the appellant has not shown that he exhausted his remedy with DoL . . ., and since the application of equitable tolling would be inappropriate in this case, the appellant has failed to establish that the Board possesses jurisdiction over his VEOA appeal"), *aff'd*, 276 F. App'x 1007 (Fed. Cir. 2008); *cf. Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, ¶ 9 (2002) ("When the appellant concedes that his VEOA complaint to DoL was untimely and DoL disposes of that complaint as untimely without addressing its substance, the Board cannot exercise jurisdiction over that individual's subsequent VEOA appeal concerning the same alleged violation of veterans' preference rights."). Nevertheless, as set forth below, we conclude that those cases must be overruled, and that the Board has jurisdiction over this appeal.[2]

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[2] The AJ correctly found that the appellant is a preference eligible within the meaning of VEOA, *see* IAF, Tab 14, Tab 15, Subtab 4d (designating the appellant as "CP" on the applicable referral list), and Tab 29 at 3, and that the nonselection at issue took place after the October 30, 1998 enactment date of VEOA. Further, the appellant alleged that the agency violated his rights under 5 U.S.C. § 3318(b)(1), IAF, Tab 18 at 7, which provides that if an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, it shall file written reasons for passing over the preference eligible with OPM, which shall determine the sufficiency or insufficiency of those reasons. This provision of section 3318 qualifies as a statute relating to veterans' preference. *See Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 18 (2005) (finding that 5 U.S.C. § 3318 is a "fundamental veterans' preference provision[]" enforceable under VEOA), *aff'd on recons.*, 104 M.S.P.R. 1 (2006)). We explain more fully below why the appellant has exhausted his remedy with DOL.

¶9 Under 5 U.S.C. § 3330a(a)(1)(A), a preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor. Such a complaint "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. § 3330a(a)(2)(A). If the Secretary of Labor is unable to resolve such a complaint within 60 days after the date on which it is filed, the complainant may appeal the alleged violation to the Board. 5 U.S.C. § 3330a(d)(1). The Board has held that in order to establish jurisdiction over a VEOA appeal, an appellant must: (1) show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (i) he 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 his rights under a statute or regulation relating to veterans' preference. *Heckman*, 109 M.S.P.R. 133, ¶ 6. "For the appellant to meet VEOA's requirement that he exhaust his remedy with DOL, he must establish that: (1) he 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." *Id.*; *see Coster v. Department of Agriculture*, 103 M.S.P.R. 191, ¶ 4 (2006); *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 8 (2005). This statement of VEOA's exhaustion requirement does not require that a complaint be filed with the Secretary of Labor within 60 days of the alleged violation; rather, it only requires that a complaint be filed.

¶10 More importantly, the Board's reviewing court, in *Kirkendall v. Department of the Army*, 412 F.3d 1273 (Fed. Cir. 2005), *vacated and petition for reh'g en banc granted*, 159 F. App'x. 193 (Fed. Cir. 2006), *rev'd on other grounds and remanded*, 479 F.3d 830 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007), made certain rulings that, though subsequently vacated by the court, are particularly instructive in this case. In *Kirkendall*, 412 F.3d at 1274-

75, DOL rejected Mr. Kirkendall's complaint because it had not been filed within 60 days of the agency's alleged violation as required by 5 U.S.C. § 3330a(a)(2)(A), the Board's AJ dismissed the VEOA claim as "untimely," and the Board affirmed the AJ's decision that the VEOA claim was precluded for failure to timely file the complaint. The court, in addressing the agency's contention that the Board lacked jurisdiction over the VEOA claim because Mr. Kirkendall had failed to file his complaint with DOL within 60 days of the decision not to list him on the certificate of eligibles, and in finding that the 60-day deadline was subject to equitable tolling, held as follows:

> As an initial matter, we must dispose of the agency's contention that the failure to meet the filing deadline in subsection 3330a(a)(2)(A) irrevocably forecloses a veteran from exhausting his administrative remedies, thus precluding jurisdiction in the board. The agency's theory does not comport with our holding in *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc), that the Supreme Court has "not distinguish[ed] among the various kinds of time limitations that may act as conditions to the waiver of sovereign immunity." Furthermore, the agency's theory directly contradicts *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), a Title VII case, which held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."
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> Other courts have likewise held that filing deadlines contained in statutes requiring exhaustion of administrative remedies are not jurisdictional, but rather are subject to equitable relief. For example, in *Edelman v. Lynchburg College*, 300 F.3d 400, 404 (4th Cir. 2002), another Title VII case, the Fourth Circuit held that the exhaustion requirement, like a statute of limitations, can be tolled. *See also Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) ("The exhaustion requirement is akin to a statute of limitations and is subject to waiver, equitable estoppel, and equitable tolling."). Similarly, *Harms v. Internal Revenue Service*, 321 F.3d 1001, 1009 (10th Cir. 2003), held that "the failure to *timely* exhaust administrative remedies [with the MSPB] is not a jurisdictional deficiency but rather is in the nature of a violation of a statute of limitations." In the context of the Occupational Safety and Health Act, the Tenth Circuit held that the requirement that an employee

> must file a complaint with the Secretary of Labor within 30 days of a violation could be tolled. *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1424 (10th Cir. 1984) . . . . And, the Second Circuit held that the failure to timely exhaust administrative remedies prescribed in the Financial Institution Reform, Recovery, and Enforcement Act can be excused when required by equity. *Carlyle Towers Condo. Ass'n v. Fed. Deposit Ins. Corp.*, 170 F.3d 301, 307 (2d Cir. 1999).

Id. at 1276. The court concluded that, "[w]e therefore hold that the exhaustion requirement contained in subsection 3330a(a)(2)(A) that a veteran file a complaint with DoL within 60 days of the alleged violation is akin to a statute of limitations." *Id*. at 1276-77. As set forth above, the court granted the government's petition for rehearing en banc, and vacated the panel's opinion. *Kirkendall v. Department of the Army*, 159 F. App'x 193 (Fed. Cir. 2006).

¶11 Nevertheless, in *Kirkendall v. Department of the Army*, 479 F.3d 830, 835-36 (Fed Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007), the court again addressed the question of whether the 60-day period for filing a claim with the Secretary of Labor set forth at 5 U.S.C. § 3330a(a)(2)(A) is subject to equitable tolling, and reached the same conclusion as that set forth in the earlier panel decision based on similar reasoning. The court preliminarily found "no merit in the government's suggestion that DoL's rejection of [the appellant's] complaint as untimely under 5 U.S.C. § 3330a(a)(2)(A) constitutes a failure to exhaust administrative remedies depriving both the board and this court of jurisdiction over his VEOA claim." *Id*. at 835. The court held that because the question of whether section 3330a(a)(2)(A) was subject to equitable tolling was at issue, the Board had the authority and obligation to consider whether DOL's action was in error. *Id*. In setting forth this holding, the court cited *Bowen v. City of New York*, 476 U.S. 467, 482 (1986) (excusing claimants' failure to exhaust their administrative remedies for the same reasons the Court found the underlying timeliness requirement subject to equitable tolling), and *Zipes*, 455 U.S. at 393 ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional

prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). *Id.*[3] The court noted that

> [b]efore the merits panel, the government argued that the board was without jurisdiction to consider Kirkendall's VEOA appeal because of his alleged failure to exhaust administrative remedies. We addressed that argument, and rejected it. In its petition for rehearing *en banc*, the government did not renew this argument, and we did not grant rehearing on it. As a general rule, the scope of our *en banc* review is limited to the issues set out in the *en banc* order. It is, therefore, inappropriate for the government now to reargue exhaustion. However, because exhaustion calls into question our jurisdiction over the tolling issues, we address it to clarify that there are no jurisdictional impediments.

Id. at 835 n.2. Thus, upon finding that there was "no merit" to the government's suggestion that DOL's rejection of Mr. Kirkendall's complaint as untimely filed constituted a failure to exhaust administrative remedies depriving the Board of jurisdiction over the VEOA claim, and that there were "no jurisdictional impediments" in the case, the court went on to find that the timing provisions at issue in *Kirkendall* were subject to equitable tolling. *Id*. at 836-44.

¶12 Whether a limitation on claims which may be brought against the government is jurisdictional, i.e., limits the scope of the government's waiver of sovereign immunity, or is merely an affirmative defense that may be raised by the government, depends on the language and context of the statute at issue. *See*

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[3] In support of its determination that the Board had the authority and obligation to consider whether DOL's action was in error, the court in *Kirkendall* also cited to *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1331 (Fed. Cir. 2006) (en banc), for the principle that the Board has jurisdiction to determine its jurisdiction. Given the reasoning in the earlier panel decision, however, as well as the court's clear statements in *Kirkendall* that there was no merit to the idea that the Board lacked jurisdiction over a VEOA claim when DOL rejected the underlying complaint as untimely filed, and there were no jurisdictional impediments in the case, and considering the court's reliance on *Bowen* and *Zipes*, we do not read the court's citation to *Garcia* as requiring the Board to dismiss a VEOA appeal for lack of jurisdiction when there is an insufficient factual showing to invoke equitable tolling.

Blueport Co., LLC v. United States, 533 F.3d 1374, 1379-80 (Fed. Cir. 2008). Both the Supreme Court and the Federal Circuit have examined the language and context of various statutes of limitations on claims against the government to determine whether the time limits they impose are jurisdictional, and not subject to equitable tolling. *Id*. at 1380; *see Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) ("Following the Supreme Court's lead, we have determined that certain statutes of limitations are subject to equitable tolling and that others are not, depending on the language and context of the particular limitation statute at issue."). Here, the court's en banc decision in *Kirkendall* finds that the 60-day time limit for filing a complaint with the Secretary of Labor under 5 U.S.C. § 3330a(a)(2)(A) is not jurisdictional, and is subject to equitable tolling. Decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board. *See, e.g., Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

¶13 Accordingly, while the AJ correctly found that the appellant untimely filed his complaint with DOL and that he has not satisfied the requirements for equitable tolling, in light of the above analysis, we find that this case should not be dismissed for lack of jurisdiction based on the appellant's failure to exhaust his administrative remedy. Instead, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING the appellant's request for corrective action under VEOA because he has failed to meet the time limit for filing a complaint with the Secretary of Labor set forth at 5 U.S.C. § 3330a(a)(2)(A).[4]

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[4] The Board's regulations allow for the disposition of a VEOA claim on the merits without a hearing. 5 C.F.R. § 1208.23(b). In fact, the Board has the authority to decide a VEOA appeal on the merits, without a hearing, when there is no genuine dispute of material fact and one party must prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008). Here, we have decided this case without a hearing because there is no genuine dispute of material fact and the agency must prevail as a matter of law.

ORDER

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

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:

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