UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 54

Docket No. CH-3330-09-0168-I-2
CH-4324-09-0154-I-2

David A. Lis,

Appellant,

v.

United States Postal Service,

Agency.

March 18, 2010

Renee M. Lis, Thorp, Wisconsin, for the appellant.

Jennifer C. Rowe, Esquire, Denver, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the July 31, 2009 initial decision that denied his request for remedial action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and dismissed his request for remedial action under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, AFFIRM the portion of the initial decision that denied his USERRA

claim, and REVERSE the portion of the initial decision that dismissed his VEOA claim for lack of jurisdiction. The appellant's request for remedial action under VEOA is DENIED on the merits.

BACKGROUND

¶2 Prior to his removal, the appellant, a 10-point preference eligible veteran, was employed as a Mail Processing Clerk at the Eau Claire Processing and Distribution (P&DF) facility in Eau Claire, Wisconsin. Refiled Appeal File (RAF), MSPB Docket No. CH-3330-09-0168-I-2, Tabs 1, 5, 8. By letter dated October 25, 2006, he notified the agency that he had taken the "custodian test" and wished to be placed on the register for a custodian position at the facility. RAF, Tab 5, Ex. A. The following month, the agency informed the appellant that he was eligible for a Laborer Custodian position[1] and had been placed on the register, with 10 preference points added to his examination score. *Id*.

¶3 However, the agency subsequently filled the custodian positions at the Eau Claire P&DF through internal reassignment, rather than open competitive procedures. RAF, Tab 9. Pursuant to the collective bargaining agreement with the American Postal Workers Union, applicants for vacant custodian positions at Eau Claire are considered in the following order: (1) custodians within the facility; (2) maintenance craft employees throughout the agency; (3) out-of-craft employees within the facility; (4) out-of-craft employees outside the facility; and (5) non-postal employees. RAF, Tab 5, Ex. 1 (Declaration of Bruce Dakins); RAF, Tab 10. Because custodial positions are lowest within the maintenance craft, there is no promotion register. RAF, Tab 10; RAF, Tab 18, Ex. 20. Within

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[1] The notice indicated that the position was at the Stillwater Post Office, and the appellant subsequently informed the agency that he was in fact interested in the Eau Claire and Chippewa Falls, Wisconsin installations. RAF, Tab 5, Ex. A. However, according to a letter to the appellant from agency Human Resources Specialist Ann Gergen, the paperwork was correct because the Eau Claire position was included under the same finance number as Stillwater. *See* RAF, Tab 8, Ex. 6.

each category, letters of interest are considered in the order of receipt, without regard to test scores or veterans' preference. Thus, the appellant, a member of category (3), was given lower priority than maintenance craft employees, in-house or elsewhere in the agency, as well as in-house, out-of-craft employees whose letters of interest were submitted before his. RAF, Tab 5, Ex. 1 (Declaration of Bruce Dakins); RAF, Tab 10. In addition, the agency deemed the appellant's application to have expired after 1 year, although the appellant contends that his application should have remained active for at least 2 years, as indicated on the notice of his placement on the register, and that certain other employees were hired to custodial positions more than 1 year after they applied.[2] RAF, Tab 5, Ex. 1, A; RAF, Tabs 8, 12. In any event, the agency concedes that the appellant was never considered for a custodian position. RAF, Tab 5.

¶4 Effective March 29, 2008, the agency removed the appellant on a charge of absence without leave (AWOL). The appellant filed an appeal, and the administrative judge (AJ) affirmed the action. The full Board denied the appellant's petition for review of that decision, but noted that the appellant had alleged below that he is a disabled veteran and that the agency had discriminated against him and violated his veterans' preference rights by not considering him for custodian positions at the Eau Claire P&DF. Because the AJ had not yet addressed those claims, the Board forwarded them to the Chicago Regional Office for docketing as appeals under USERRA and VEOA. *Lis v. U.S. Postal Service*, MSPB Docket No. CH-0752-08-0479-I-1 (Initial Decision, Aug. 5, 2008; Final Order, Nov. 24, 2008).

¶5 The AJ then provided the appellant thorough notice of the jurisdictional requirements for his USERRA and VEOA appeals, as well as his burden of proof

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[2] The agency further contends that the appellant would not have been considered in any case because of his absence without leave (AWOL) status; however, the appellant asserts that he was not AWOL on the relevant dates.

on the merits of both claims, and ordered him to submit evidence and argument on the jurisdictional issue. In response, the appellant's representative indicated that he was already pursuing a complaint with the Department of Labor (DOL), and wished to refile with the Board after exhausting that remedy. The agency did not object to the appellant's request, and the AJ dismissed both appeals without prejudice. *Lis v. U.S. Postal Service*, MSPB Docket No. CH-4324-09-0154-I-1 (Initial Decision, Dec. 24, 2008); *Lis v. U.S. Postal Service*, MSPB Docket. No. CH-3330-09-0168-I-1 (Initial Decision, Dec. 30, 2008).

¶6 By letter dated March 24, 2009, DOL closed the appellant's complaint, noting that he had not submitted any documentation indicating that there was a certain position for which he applied and was denied consideration. RAF, Tab 1. Shortly thereafter, the appellant refiled his request for remedial action under USERRA and VEOA. In addition, the appellant alleged that the agency discriminated against him on the basis of disability and failed to give him preference based on his union membership. *Id*. He did not request a hearing. *Id*. The AJ then joined the USERRA and VEOA appeals on his own motion. RAF, Tab 3.

¶7 Based on the written record, the AJ determined that the appellant had established jurisdiction over his USERRA claim, but had failed to satisfy his initial burden of showing that his military status was a motivating or substantial factor in the agency's action. RAF, Tab 30 (Initial Decision, July 31, 2009). The AJ dismissed the appellant's VEOA claim for lack of jurisdiction, finding that the appellant had failed to make a non-frivolous allegation that the agency had violated his veterans' preference rights. *Id*. The AJ further found that the Board lacked jurisdiction over the appellant's claim of disability discrimination. *Id*.

ANALYSIS

¶8 We reopen this case for the purpose of correcting the AJ's finding that the Board lacks jurisdiction over the appellant's VEOA claim. To establish Board

jurisdiction over a VEOA appeal based on an alleged violation of veterans' preference rights, an appellant must: (1) show that he exhausted his remedy with DOL; and (2) make non-frivolous allegations that (a) he is a preference eligible within the meaning of VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment of VEOA, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference.[3] 5 U.S.C. § 3330a; *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 6 (2008); *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 7 (2007). Preference eligible employees in the Postal Service are entitled to the same veterans' preference rights under 5 U.S.C. §§ 3309 and 3313 as preference eligible competitive service employees. *Perkins v. U.S. Postal Service*, 100 M.S.P.R. 48, ¶ 8 (2005). An appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. *Haasz*, 108 M.S.P.R. 349, ¶ 6; *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 6 (2005).

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[3] The jurisdictional requirements differ somewhat where an appellant alleges a violation of 5 U.S.C. § 3304(f)(1), which provides that certain categories of veterans may not be denied the right to compete for vacant positions for which the agency accepts applications from individuals outside its work force under merit promotion procedures. In such a case, the appellant must exhaust his remedy with DOL and non-frivolously allege that he is a veteran covered under 5 U.S.C. § 3304(f)(1), that he was denied the right to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its workforce, and that the denial occurred on or after December 10, 2004. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007). The appellant alleges for the first time on review that the agency considered an individual from outside its work force in filling a custodian position. To the extent that the appellant is alleging a violation of 5 U.S.C. § 3304(f)(1), he has not shown that his argument is based on new and material evidence not previously available despite his due diligence, and we have not considered it. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). In any event, the evidence relied upon by the appellant in support of this argument suggests that the agency "transferred" the individual from a postal facility in Cadott, Wisconsin, and thus it did not accept applications from outside the Postal Service workforce. RAF, Tab 27, Ex. B.

¶9 In this case, the appellant has exhausted his remedy with DOL. RAF, Tab 1. The record further reflects that he is a preference eligible and that the events at issue took place after October 30, 1998. In addition, the Board has held that an appellant's allegation, in general terms, that his veterans' preference rights were violated is sufficient to meet the non-frivolous allegation requirement. *Haasz*, 108 M.S.P.R. 349, ¶ 7; *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006). The appellant has made such a general allegation. We therefore find, contrary to the initial decision, that the Board has jurisdiction over the appellant's VEOA claim.[4]

¶10 The record reflects that the appellant was advised below of his burden of proof on the merits of his VEOA claim and was ordered to submit evidence pertaining to both jurisdiction and the merits of his request for corrective action. Furthermore, he did not request a hearing. Because the appellant was provided a full and fair opportunity below to develop the record on his VEOA claim, we resolve it here without remanding the case for further proceedings. *Cf. Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶¶ 8-9 (2001) (remanding for further development of the record where the AJ did not inform the parties that there would be no hearing and did not provide them an opportunity to make written submissions regarding the merits of the appellant's VEOA claim).

¶11 To be entitled to relief under VEOA, an appellant must show by a preponderance of the evidence that the agency violated one or more of his statutory or regulatory veterans' preference rights. *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 10, *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). It is undisputed that all of the custodial positions in question were filled through internal reassignment, rather than through a competitive

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[4] Although we find jurisdiction over the appellant's VEOA claim, the Board nevertheless lacks the authority to adjudicate his claim of disability discrimination. *See Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 12 (2001).

examination process. RAF, Tabs 9, 10. Veterans' preference does not apply to such intra-agency transfers. *Brown v. Department of Veterans Affairs*, 247 F.3d 1222, 1224 (Fed. Cir. 2001); *Glenn v. U.S. Postal Service*, 939 F.2d 1516, 1520-22 (11th Cir. 1991); *but cf. Perkins*, 100 M.S.P.R. 48, ¶ 20 (in an open competitive examination process, internal preference eligible applicants are to be awarded the same veterans' preference afforded to external preference eligible applicants). The appellant's claim that the agency prematurely deemed his application to have expired is not cognizable under VEOA, as the alleged error does not implicate a statute or regulation relating to veterans' preference. *See Haasz*, 108 M.S.P.R. 349, ¶ 10. The same is true of the appellant's allegation that the agency failed to give him preference based on his union membership. We therefore find that the appellant is not entitled to remedial action under VEOA.

ORDER

¶12 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:

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