

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 235

Docket No. DC-3443-08-0249-I-1

**Julius L. Phillips,
Appellant,
v.
Department of the Navy,
Agency.**

October 28, 2008

Leamon D. Brinson, Dahlgren, Virginia, for the appellant.

Orville Tom Crane, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the following reasons, we GRANT the appellant's PFR, REVERSE the initial decision, and FIND the agency in violation of VEOA regarding the selection process for the GS-7 police officer position in Dahlgren, Virginia, under vacancy announcement DON0083. We also REMAND the appeal for further development of the record and adjudication consistent with this Opinion and Order with respect to the GS-8 police officer position and the

appellant's possible Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) claim.

BACKGROUND

¶2 At the time of his appeal, the appellant was employed as a police officer, GS-0083-06, step 10. Initial Appeal File (IAF), Tab 5, subtab 4a-1. On or around July 30, 2007, the appellant applied for higher grade police officer positions under vacancy announcement number DON0083, which was an open continuous announcement in various locations. *See id.*, subtabs 4b, 4d-2; IAF, Tab 1 at 11-15. The appellant was not selected for any position under this vacancy announcement.

¶3 As a result of his nonselection, he filed a complaint with the Department of Labor (DOL). DOL subsequently informed the appellant that his complaint lacked merit because “[v]eterans [p]reference points only apply to positions advertised as open competitive or Delegated Examining Unit,” and this announcement utilized merit promotion procedures. IAF, Tab 1 at 8. Moreover, DOL concluded that he had only indicated that he was interested in GS-0083-08 positions in Dahlgren, Virginia, the positions that were being filled in that area were GS-0083-07 positions and he “did not indicate an interest in GS-0083-07 positions.” *Id.* The appellant timely filed this appeal. IAF, Tab 1. In it, he also alleged that the agency discriminated against veterans. *See id.* at 3; IAF, Tab 3 at 5.

¶4 On January 30, 2008, the administrative judge issued an acknowledgment order. IAF, Tab 2. In it, she ordered the appellant to file a statement, within 15 days, “indicating the date the agency’s violation occurred, the date [he] filed a complaint with the Secretary of Labor, and the date [he] received written notification, if any, from [DOL].” *Id.* at 2. The appellant filed a timely response to the acknowledgment order, IAF, Tab 3. The agency filed a motion to dismiss, IAF, Tab 5, subtab 1, and the appellant filed a response, IAF, Tab 6. On May 6,

2008, the administrative judge issued an initial decision, concluding that the Board has jurisdiction over this appeal, but denying the appellant's request for corrective action. IAF, Tab 7 at 1, 5. The appellant filed a timely PFR and the agency filed a response. Petition for Review File (PFRF), Tabs 1, 4.

ANALYSIS

¶5 We note that, generally, a nonselection is not an action directly appealable to the Board, but it may be appealable under the VEOA. *Hillman v. Tennessee Valley Authority*, [95 M.S.P.R. 162](#), ¶ 4 (2003). In order to establish Board jurisdiction over a “right to compete” VEOA claim, an appellant must (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (i) he is a preference eligible or veteran within the meaning of [5 U.S.C. § 3304\(f\)\(1\)](#), (ii) the actions at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency denied him the right to compete for a vacant position in violation of [5 U.S.C. § 3304\(f\)\(1\)](#).¹ See *Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 13 (2007); *Abrahamsen v. Department of Veterans Affairs*, [94 M.S.P.R. 377](#), ¶ 6 (2003); see also [5 U.S.C. § 3330a](#). There was no dispute below that the appellant exhausted his remedy with DOL with respect to this vacancy announcement, see IAF, Tab 1 at 8-9, he is a 5-point preference eligible, see IAF, Tab 5, subtab 4a-1, and the nonselection at issue took place after VEOA's enactment date. Moreover, the appellant nonfrivolously alleged that the agency denied him the right to compete by “fail[ing] to allow [him] to interview for [a] position [for which he] was qualified.” IAF, Tab 1 at 2; see *Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 8 (2006) (an allegation by an appellant, in general terms, that his

¹ The Board has held that [5 U.S.C. § 3304\(f\)\(1\)](#) “stands in some relation to, has a bearing on, concerns, and has a connection with veterans’ preference rights and is, therefore, a statute ‘relating to veterans’ preference’ for which VEOA provides a remedy in the event of a violation thereof.” *Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 16 (2006).

veterans' preference rights were violated is sufficient to meet the nonfrivolous allegation requirement). Accordingly, the administrative judge properly concluded that the Board has jurisdiction over this appeal. *See* IAF, Tab 7 at 1.

¶6 On PFR, the appellant argues that the agency did not indicate that the position was being announced under merit promotion procedures and he was denied the "right to compete" for the position. PFRF, Tab 1 at 5; *see* [5 U.S.C. § 3304\(f\)\(1\)](#) (explaining that veterans and preference eligibles "may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures"). We note that an agency has the discretion to fill a vacant position by any authorized method, *see* [5 C.F.R. § 330.101](#), and this vacancy announcement appears to have utilized merit promotion procedures. *See* IAF, Tab 5, subtab 4d-2 ("If you are a current or former permanent Federal employee, are eligible for a Veterans' Employment Opportunities Act (VEOA), or a non-competitive hiring authority as defined on the Common Hiring Program Category Definitions, apply now."). Therefore, the appellant's first PFR argument is without merit.

¶7 As to the appellant's second PFR argument, that he was denied the right to compete for the vacant positions, we note that his July 30, 2007 application was accepted for vacancy announcement number DON0083. IAF, Tab 1 at 11-15; *see also id.*, Tab 5, subtab 4b. His resume indicated that he was applying for a position as a "Supervisory Police Officer GS-0083 Sergeant [sic] GS-7 or Lieutenant GS-8." IAF, Tab 5, subtab 4b-2. However, for reasons that are unclear, another page of his application showed that he was only interested in the GS-8 position, *see id.*, subtab 4b-4 (next to "Series/MPA Accept"). The agency admitted below that it did not consider him for the GS-7 position because he "did not indicate interest in the GS-0083-07 position." *Id.*, subtab 1-2. The agency's position, therefore, is contradicted by the evidence it submitted into the record below.

¶8 With respect to the GS-8 position, the appellant argued that he had “over 25 years experience” as well as “vast work knowledge in the area of Police Work [and] he [did] qualify per [the Office of Personnel Management’s (OPM’s)] regulation.” IAF, Tab 1 at 3; *id.*, Tab 6 at 7; *see id.*, Tab 5, subtab 4b-1-3 (the appellant’s resume describing his work experience). The agency submitted OPM’s Operating Manual for Qualification Standards for General Schedule Positions, which explained that positions that are “GS-6 and above” require specialized experience of “*1 year equivalent* to at least next lower grade level.” *Id.*, subtab 4e-1 (emphasis added). The Manual also provided some examples of such specialized experience:

Experience that provided knowledge of a body of basic laws and regulations, law enforcement operations, practices, and techniques and involved responsibility for maintaining order and protecting life and property. Creditable specialized experience may have been gained in work on a police force; through service as a military police officer; in work providing visitor protection and law enforcement in parks, forests, or other natural resource or recreational environments; in performing criminal investigative duties; or in other work that provided the required knowledge and skills.

Id., subtab 4e-2. There was no evidence in the record that the agency actually considered whether the appellant’s listed experience would satisfy OPM’s requirement. Rather, it appears from the agency’s submission that it relied on the single fact that the appellant was a GS-6 to conclude that he did not have the minimum qualifications for a GS-8 position. *See id.*, subtab 1-2 (“Appellant was not qualified for promotion to the GS-0083-08 position because, as a GS-06, he did not have the required one year experience equivalent to at least the next lower grade level, GS-07.”).

¶9 In the initial decision, the administrative judge did not address the fact that the agency’s argument regarding the GS-7 position was contradicted by its own evidence, nor did she require the agency to provide affidavits or other evidence to clarify its position. The administrative judge also did not address whether factors

other than time in the next lower grade could have qualified the appellant for consideration for the GS-8 position. Rather, she simply concluded that “[w]hile [the appellant’s] complaints may have merit, they do not establish a violation of his right to veteran’s preference and thus do not fall under the Board’s jurisdiction.” IAF, Tab 7 at 5.

¶10 Based on the record evidence, we conclude that the appellant is entitled to corrective action because the agency’s admission that it did not consider his application for the GS-7 position is sufficient to establish that the agency denied him the opportunity to compete for this vacancy, as envisioned under [5 U.S.C. § 3304\(f\)\(1\)](#). An individual whose rights have been violated in this manner is entitled to a selection process consistent with applicable statutes and regulations relating to veterans’ preference. *Deems v. Department of the Treasury*, [100 M.S.P.R. 161](#), ¶¶ 17-19 (2005). Based on the appellant’s geographical preference of Dahlgren, Virginia, IAF, Tab 5, subtab 4b-4, and the fact that there was at least one GS-7 position that was filled at that location, *see* IAF, Tab 1 at 8, the agency must reconstruct the selection process for the GS-7 position(s) at this location under this vacancy announcement to allow the appellant an opportunity to compete.² *Deems*, [100 M.S.P.R. 161](#), ¶ 19.

¶11 In response to the agency’s argument that he did not indicate an interest in the GS-7 position, the appellant stated below that he filed another copy of his resume for the GS-7 position in mid-October 2007. IAF, Tab 3 at 5; *id.*, Tab 6 at 6. The appellant explained that he “was not given an email response even though

² In his initial appeal, the appellant asked the Board to promote him to the GS-7 position. IAF, Tab 1 at 3. “We are aware of no provisions within VEOA stating that an individual whose rights have been violated is automatically entitled to the position sought.” *Deems*, [100 M.S.P.R. 161](#), ¶ 17; *see Joseph v. Federal Trade Commission*, [505 F.3d 1380](#), 1383 (Fed. Cir. 2007) (the statutes governing merit promotion procedures “guarantee[] veterans only a right to apply and an opportunity to compete for such positions. [Congress] said nothing about the basis upon which the agency could make its selection.”).

he applied the same [way] as he did” for the July 30, 2007 application, IAF, Tab 6 at 3, but there was no documentary evidence in the record to support his claim that he filed a second resume. In light of our finding of a VEOA violation with respect to the GS-7 position based on his prior application, we need not address the appellant’s arguments regarding his alleged October 2007 application for the GS-7 position under this vacancy announcement. *See* IAF, Tab 3 at 5; *id.*, Tab 6 at 6.

¶12 With respect to the GS-8 position, we are similarly concerned that the agency’s “consideration” of his July 30, 2007 application may have also improperly denied him the opportunity to compete for that vacant position. Because the evidentiary record is not sufficiently developed on this issue, however, we cannot determine with certainty that the appellant was denied an opportunity to compete for any GS-8 positions advertised under this vacancy announcement, such that his veterans’ preference rights were violated.³ Therefore, we are remanding this appeal to the Washington Regional Office for further development of the record and adjudication of the appellant’s VEOA claim regarding the GS-8 position. On remand, the administrative judge shall direct the agency to provide evidence and argument explaining whether it considered the possibility that, for the GS-8 position, the appellant’s prior work experience qualified as specialized experience of 1 year equivalent to the next lower grade level, and whether the agency should have considered him for any available GS-8 positions.⁴

³ For example, if the agency properly found that the appellant was not qualified for the GS-8 position, its failure to further consider him would not violate VEOA. *See Clarke v. Department of the Navy*, [94 M.S.P.R. 604](#), ¶ 8 (2003).

⁴ Although the appellant retains the ultimate burden of proof, *Dale v. Department of Veterans Affairs*, [102 M.S.P.R. 646](#), ¶ 10, *review dismissed*, 199 F. App’x 948 (Fed. Cir. 2006), the agency has the burden of producing evidence regarding the extent to which it considered the appellant’s application for the GS-8 position, because it is the only party with access to such evidence. *Cf. Lomax v. Department of Defense*, [78](#)

¶13 With respect to the appellant’s claim below that the agency discriminated against veterans, it is unclear whether this allegation was a component of his VEOA claim or, alternatively, was a separate claim that the agency violated USERRA.⁵ “A claim under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous, particularly where the appellant is pro se.” *Baney v. Department of Justice*, [109 M.S.P.R. 242](#), ¶ 14 (2008). Therefore, on remand, the administrative judge shall provide proper jurisdictional notice regarding a USERRA claim to the appellant and adjudicate this claim as appropriate.

ORDER

¶14 On remand, the administrative judge shall direct the agency to provide evidence and argument, explaining whether it considered the possibility that for the GS-8 position, the appellant’s prior work experience qualified as specialized experience of 1 year equivalent to the next lower grade level, and whether the agency should have considered him for any available GS-8 positions. The administrative judge shall also give the appellant proper jurisdictional notice regarding a USERRA claim. The administrative judge shall issue a new initial decision, incorporating our conclusions with respect to the GS-7 position as described herein, ordering the agency to reconstruct the selection process for any GS-7 positions in Dahlgren, Virginia, under this vacancy announcement, determining whether the agency’s treatment of the appellant’s application for the GS-8 position violated his veterans’ preference rights and, if so, ordering the

[M.S.P.R. 553](#), 559-60 (1998) (“An appellant should not be forced to prove that the agency did not make an error in setting his or her pay, since the agency is in a much better position to know why it originally set the appellant's pay as it did and what later led it to conclude that it made an error.”).

⁵ The appellant did not indicate in his initial appeal paperwork that he was filing a USERRA appeal, *see* IAF, Tab 1 at 5-6, nor did he use the term USERRA in any of his submissions.

agency to reconstruct the selection process for any GS-8 positions in Dahlgren, Virginia, under this vacancy announcement. The initial decision should also include an analysis of the appellant's USERRA claim, if appropriate.

FOR THE BOARD:

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