

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

2009 MSPB 109

Docket No. DC-3330-08-0780-I-1

**Rosemary Waters-Lindo,
Appellant,**

v.

**Department of Defense,
Agency.**

June 11, 2009

John J. Rigby, Esquire, Arlington, Virginia, for the appellant.

Nolon J. Benson, Jr., Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued November 26, 2008, that denied her request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, the Board GRANTS the appellant's petition for review, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency violated her rights under VEOA when it did not select her for the position of Diversity Program Manager with the Defense Threat Reduction Agency. Appeal File, Tab 1 &

Tab 6, Exhibit 2. In response, the administrative judge issued an acknowledgment order stating, among other things, that the appellant had a right to a hearing if the case was within the Board's jurisdiction, and providing the appellant with 15 days to submit evidence regarding this issue. Appeal File, Tab 2. The order further stated that the record would close in 20 days, and that the administrative judge would schedule a hearing if the Board had jurisdiction. *Id.*

¶3 After receiving the parties' responses to this order, the administrative judge issued an initial decision denying corrective action without holding a hearing, finding as follows: (1) The appellant timely filed her appeal and otherwise established that it was within the Board's jurisdiction; (2) because there was no genuine dispute of a material fact, it was appropriate to decide the appeal without holding a hearing; (3) the appellant was an internal candidate with a 10-point veterans' preference, was on the certificate of eligibles, but was not selected for an interview; and (4) the appellant did not show that the agency violated her VEOA rights because the agency filled the position under merit promotion procedures and the veterans' preference rules did not apply to such actions. Appeal File, Tab 8.

¶4 In her petition for review, the appellant asserts that the administrative judge erred in adjudicating the appeal without affording her a hearing or allowing her the opportunity to submit evidence regarding whether the agency filled the position by merit promotion. Petition for Review File, Tab 1. The appellant further disputes the agency's claim, and the administrative judge's finding, that the agency filled the position through merit promotion procedures. *Id.*

ANALYSIS

¶5 The Board may 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. *See Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶ 12

(2007). A factual dispute is “material” if, in light of the governing law, its resolution could affect the outcome. *Redd v. U.S. Postal Service*, [101 M.S.P.R. 182](#), ¶ 14 (2006). A factual dispute is “genuine” when there is sufficient evidence favoring the party seeking an evidentiary hearing for the administrative judge to rule in favor of that party should that party’s evidence be credited. *Id.*

¶6 The administrative judge, therefore, erred by informing the appellant that she had a right to a hearing if the Board had jurisdiction over the appeal. Appeal File, Tab 2. The administrative judge further erred by not notifying the appellant of the requirement for showing a genuine dispute of material fact in order to receive her requested hearing, and by not explaining what constitutes a genuine dispute of material fact. *Id.*

¶7 We therefore agree with the appellant’s claim that the administrative judge denied her a full and fair opportunity to dispute the agency’s evidence. Petition for Review File, Tab 1. The appellant also challenges the agency’s claim that it filled the position at issue under merit promotion procedures. *Id.* This constitutes a dispute of a material fact. A question still exists, however, as to whether this dispute is genuine. Because the administrative judge did not put the appellant on notice of the need to show a genuine dispute of material fact in order to receive a hearing, and the requirements for making this showing, remand for further adjudication is warranted. *See Davis*, [105 M.S.P.R. 604](#), ¶ 14.

ORDER

¶8 Accordingly, we REMAND this appeal for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall afford the appellant an opportunity to show that there is a genuine dispute of material

fact that requires a hearing to resolve. The administrative judge shall then reconsider her denial of a hearing on the appellant's VEOA claim.

FOR THE BOARD:

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