

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

2009 MSPB 236

Docket No. CH-3330-09-0303-I-1

**Stephen W. Gingery,
Appellant,**

v.

**Department of the Treasury,
Agency.**

December 28, 2009

Stephen W. Gingery, Macomb, Michigan, pro se.

Eileen R. Jimenez, Esquire, Chicago, Illinois, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision (ID) that denied his request for corrective action filed under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons discussed below, 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, DISMISS certain of the appellant's claims for lack of jurisdiction under VEOA, and AFFIRM the ID as MODIFIED, STILL DENYING the appellant's request for corrective action.

BACKGROUND

¶2 The appellant is a ten-point preference eligible veteran with a compensable service-connected disability of thirty percent or more. Initial Appeal File (IAF), Tab 10, Subtab 4c at 20. On June 2, 2008, the appellant applied to the agency's Internal Revenue Service (IRS) pursuant to Vacancy Announcement No. 08PH3-SBE0189-512-5T11, seeking a career-conditional appointment to a GS-0512-05/11 Internal Revenue Agent position located in Detroit, Pontiac, or Mt. Clemens, Michigan. IAF, Tab 1 at 3, Tab 10, Subtabs 4c, 4d. This vacancy announcement, open to all citizens of the United States, was intended to create a "standing inventory of eligible applicants" for Internal Revenue Agent positions nationwide. IAF, Tab 10, Subtab 4d at 1. On July 8, 2008, the agency notified the appellant that his application had been received and he had "tentatively [met the] eligibility requirements" for the position at the GS-5, 7 and 9 levels. IAF, Tab 1, Ex. 3. As part of the evaluation process set forth in the vacancy announcement, the appellant was required to complete an "online job simulation assessment," IAF, Tab 10, Subtab 4d at 5, and on September 9, 2008, the agency notified him that he had been issued a "Potential Rating" of "Category B Highly Qualified." IAF, Tab 1, Ex. 2 at 5-6.

¶3 On September 30, 2008, the appellant filed a VEOA complaint with the Department of Labor (DOL). IAF, Tab 1, Ex. 1 at 4-6. In his complaint, he contended that, pursuant to his application under Vacancy Announcement No. 08PH3-SBE0189-512-5T11, he was "entitled to be placed at the top of category A with similar preference eligibles, but [he] was notified that [he] was placed in category B." *Id.* at 6. He also contended that an agency representative, Michelle Conway, "implicitly suggests that I will not be considered for [the] January 2009 hire because I only indicated in my original application that my preference was for Mt. Clemens[,] Michigan while I had also indicated Detroit and Pontiac as well." *Id.* The appellant included copies of his email correspondence with the agency regarding the online job simulation assessment. IAF, Tab 1, Ex. 2.

¶4 On January 9, 2009, DOL’s Veterans’ Employment and Training Service (VETS) notified the appellant that it had been unable to resolve his complaint. *Id.*, Ex. 1 at 1. VETS explained that the appellant “applied for a position with the [IRS] as an Internal Revenue Agent, Vacancy Job Announcement No. 08PH3-SBE0189-51 [sic],” and he alleged that he was denied his ten-point preference during the hiring process and further alleged that he was

entitled to be placed at the top of the highest category group, (A), as a qualified veteran claiming preference based on a compensable service-connected disability of 30% or more, and provided absolute preference over non-preference eligibles as stated in the IRS Job Announcement No. 08PH3-SBE0189-51 [sic].

Id. VETS stated that the appellant considered a satisfactory remedy to be that his “veterans preference be correctly applied for this position.” *Id.*

¶5 In his VEOA complaint to the Board, the appellant alleged that the agency had violated his veterans’ preference rights with regard to his application under Vacancy Announcement No. 08PH3-SBE0189-512-5T11 by “failing to place him at the top of Category A with other ‘qualified preference-eligibles who have a comprehensive service-connected disability (ies) of 10 percent or more’” pursuant to [5 U.S.C. § 3319\(b\)](#). IAF, Tab 1 at 2. Section 3319(b) provides that, within an established category rating system for evaluating applicants for positions in the competitive service, preference eligibles shall be listed ahead of individuals who are not preference eligibles, other than in scientific and professional positions at the grade of GS-9 or higher. 5 U.S.C. § 3319(b).

¶6 Pursuant to *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (holding that an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue), the administrative judge (AJ) issued an order on March 30, 2009, that provided the appellant notice of the jurisdictional standard in VEOA appeals. IAF, Tab 13. The AJ found that the appellant had already satisfied the jurisdictional requirements, *id.* at 2, and explained the burdens of production and persuasion for

the merits of the appeal, namely that while the appellant retained the ultimate burden of proving his claim by preponderant evidence, the agency had the burden to produce evidence regarding the extent to which it had considered his application for a vacancy. *Id.* The AJ ordered the agency, which had already averred that the appellant's Category B rating was a tentative one, to produce evidence and argument establishing that no final rating had been made. *Id.*

¶7 The agency responded to the order. IAF, Tab 20. The agency explained that, consistent with the vacancy announcement, the appellant's final rating and placement on a certificate would only take place following an interview, which had not yet been held. *Id.* at 1-2; *see* IAF, Tab 10, Subtab 4d at 5-6. Linda Sott, the agency's Temporary Supervisory Human Resources Specialist, stated in an April 14, 2009 declaration:

Mr. Gingery took the on-line assessment and received a tentative category rating of Category B. Mr. Gingery will receive a final rating after he is interviewed. If he passes the interview he will then be referred to the business unit on a Certificate of Eligibles. At that time, Mr. Gingery will be placed at the top of Category A as a more than 30% disabled veteran for grades 5 and 7 and at the top of Category B for grade 9.

IAF, Tab 20, Ex. A at 2. Sott also stated that the appellant "ha[d] not yet received a final category rating because interviews [were] currently being scheduled" for hiring in Pontiac and Mt. Clemens as of the April 14, 2009 date of the declaration.¹ *Id.* The vacancy announcement supports this contention by stating that "[q]ualified veterans who claim preference based on a compensable service-connected disability of 30% or more . . . move from their assigned category group [after passing the online assessment] to the top of the highest category group (A) and will be provided absolute preference over non-preference eligibles." IAF, Tab 10, Subtab 4d at 5. The appellant did not dispute any of the

¹ Sott explained that there were no vacancies in Detroit to be filled during June 2009. IAF, Tab 20, Ex. A.

agency's evidence. The AJ found that, because no final rating had yet been issued and no certificate of eligibles had yet been referred by the agency, the appellant could not demonstrate that his veterans' preference rights had been infringed with regard to Vacancy Announcement No. 08PH3-SBE0189-512-5T11. ID at 6.

¶8 The record includes a series of email messages in which the agency sought to accommodate the appellant's work schedule in arranging for an interview appointment. IAF, Tab 20, Ex. C. Further, the appellant asserts that he was eventually interviewed on April 24, 2009. IAF, Tab 21 at 5. There is nothing in the record to suggest, however, that the agency has issued a final rating since April 24, 2009.

¶9 In its response to the AJ's March 30, 2009 order, the agency also produced an April 15, 2009 declaration by Barbara Weckerly, Supervisory Human Resources Specialist, which stated that several internal promotion certificates had been issued under a separate merit promotion Vacancy Announcement No. 50-30-SP81825B for Internal Revenue Agent positions in Detroit, but that "no outside applicants were solicited" and no positions were filled because "the announcement was closed without selection." IAF, Tab 20, Ex. B at 1. Weckerly explained that the agency had also issued a separate "external vacancy announcement" for an Internal Revenue Agent in Detroit that was concurrent with the merit promotion vacancy announcement, but that the external announcement closed without a selection having been made. *Id.* The agency submitted copies of the vacancy announcement and internal promotion certificates to support this declaration. *Id.* at 2-6.

¶10 Although the appellant did not specifically address this issue when he replied to the agency's response, IAF, Tab 21 at 2-6, the AJ addressed the issue in the ID, ID at 5-6. The AJ found that, while preference eligibles are entitled to an opportunity to compete for vacancies to be filled under merit promotion procedures, this opportunity only applied where the agency accepted applications

from individuals outside of its workforce, and at any rate, no selection had been made under the merit promotion vacancy announcement. *Id.* The AJ concluded that the appellant's veterans' preference rights had not been violated. *Id.*

¶11 The agency also submitted documentation that showed it had filled an Internal Revenue Agent position in Pontiac through the Federal Career Intern Program (FCIP) on September 15, 2008. IAF, Tab 20, Ex. A at 3-4. In response, the appellant asserted that he was deprived of his right to compete for this position because the agency had not made any factual showing of the need to except this position from the competitive service. IAF, Tab 21 at 4-5; *see* [5 U.S.C. § 3302](#). The AJ found that, in light of the agency's undisputed evidence that the appellant never applied for the position under the FCIP, he did not have to reach the question of whether the selection had otherwise violated the appellant's veterans' preference rights. ID at 6.²

¶12 On PFR, the appellant makes several procedural and legal arguments and seeks to introduce additional evidence. We have considered his arguments and evidence, and we find that none meet the Board's regulatory criteria for review under [5 C.F.R. § 1201.115](#). We thus deny the PFR. We reopen this appeal pursuant to [5 C.F.R. § 1201.118](#) to correct the AJ's jurisdictional determinations regarding the appellant's claims as to the positions at issue under Vacancy Announcement No. 50-30-SP81825B and the position filled through the FCIP.

ANALYSIS

¶13 Nonselections are not normally directly appealable to the Board. *Polen v. Department of Defense*, [72 M.S.P.R. 1](#), 4 (1996); ID at 2. Nevertheless, an appellant may establish Board jurisdiction over the appeal of a nonselection

² After the AJ issued his initial decision, we ruled that depending on the surrounding circumstances, an individual might be able to pursue a VEOA claim challenging the propriety of an agency's use of the FCIP in filling a position for which the individual did not apply. *Weed v. Social Security Administration*, [112 M.S.P.R. 323](#) (2009).

brought pursuant to the VEOA by showing that he exhausted his administrative remedy with DOL, and by making nonfrivolous allegations that (i) he is a preference eligible within the meaning of the VEOA; (ii) the action(s) at issue took place on or after the October 30, 1998 enactment date of the VEOA; and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. See [5 U.S.C. § 3330a](#); *Goldberg v. Department of Homeland Security*, [99 M.S.P.R. 660](#), ¶ 8 (2005); ID at 2. We note here that the statute plainly includes a requirement that, before filing a Board appeal, an appellant must exhaust his DOL remedy. "The need to show exhaustion of that remedy is . . . a jurisdictional element of a VEOA appeal." *Waddell v. U.S. Postal Service*, [94 M.S.P.R. 411](#), ¶ 9 (2003) (citing *Abrahamsen v. Department of Veterans Affairs*, [94 M.S.P.R. 377](#), ¶ 6 (2003)). Where the appellant cannot show exhaustion of his remedy before DOL, the Board must dismiss his VEOA claim. See, e.g., *Goldberg*, [99 M.S.P.R. 660](#), ¶ 10.

¶14 As for the agency's admission regarding Vacancy Announcement No. 50-30-SP81825B and the separate, concurrent "external vacancy announcement" for an Internal Revenue Agent in Detroit that closed without a selection having been made, see IAF, Tab 20, Ex. B, we vacate the AJ's findings, ID at 5-6. The record does not show that the appellant ever filed a complaint with DOL about this vacancy announcement pursuant to [5 U.S.C. § 3330a\(a\)](#). The appellant's DOL complaint addresses only Vacancy Announcement No. 08PH3-SBE0189-512-5T11. IAF, Tab 1, Ex. 1, Tab 10, Subtab 4b. We thus find that the appellant failed to show that he exhausted his remedy with DOL for Vacancy Announcement No. 50-30-SP81825B. Thus, this claim is not properly before the Board and must be dismissed. See *Goldberg*, [99 M.S.P.R. 660](#), ¶ 10.

¶15 For the same reason, we vacate the AJ's findings regarding the agency's admission that it had filled an Internal Revenue Agent position in Pontiac through the FCIP. See ID at 6; IAF, Tab 20, Ex. A at 3-4. Although the appellant mentioned the FCIP issue in his reply to the agency's response to the AJ's March

30, 2009 order, IAF, Tab 21 at 3-4, the record does not show that he ever exhausted his administrative remedy with DOL as to that claim. His DOL complaint addresses only Vacancy Announcement No. 08PH3-SBE0189-512-5T11, and not the agency's use of the FCIP to make the appointment in Pontiac, Michigan. IAF, Tab 1, Ex. 1, Tab 10, Subtab 4b. Thus, the Board presently lacks VEOA jurisdiction over the FCIP appointment issue and must dismiss that claim. *See Goldberg*, [99 M.S.P.R. 660](#), ¶ 10.

¶16 We thus modify the ID, vacating its findings regarding Vacancy Announcement No. 50-30-SP81825B and the agency's use of the FCIP to fill the vacancy in Pontiac, Michigan. Because the appellant has not shown that he exhausted his administrative remedies with DOL, and the Board thus lacks VEOA jurisdiction, we dismiss his claim related to Vacancy Announcement No. 50-30-SP81825B and his FCIP claim.

¶17 Accordingly, we affirm the ID as modified by this Opinion and Order, still denying the appellant's request for corrective action.

ORDER

¶18 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.