UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 66

Docket No. SF-3330-09-0446-I-1

Thomas G. Jarrard,

Appellant,

v.

Department of Justice,

Agency.

April 19, 2010

Don Richter, Esquire, and Markus W. Louvier, Esquire, Spokane, Washington, for the appellant.

Andrew W. Duncan, Esquire, and Jill A. Weissman, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a timely petition for review of the initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision, and REMAND for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant submitted two November 18, 2008 applications for two Assistant U.S. Attorney (AUSA) vacancy announcements to the agency's U.S. Attorney's Office for the Eastern District of the State of Washington that closed effective December 8, 2008. Initial Appeal File (IAF), Tab 7, Subtabs 2L-2M, 2O-2P. The appellant also submitted a January 12, 2009 application for a third AUSA vacancy that closed effective January 23, 2009. *Id.*, Subtabs 2K-2N. The appellant submitted evidence with each of his applications showing that he is a veteran with a military service connected disability. *Id.*, Subtabs 2K-2M. All three of the AUSA vacancy announcements noted that they were for excepted service positions, and they required, among other things, that the applicant "have at least 2 years post-J.D. experience." *Id.*, Subtabs 2N-2P. The appellant's resumes indicated that he received his law degree in May 2007. *Id.*, Subtabs 2K at 3, 2L at 4, 2M at 4.

¶3 The agency notified the appellant in a February 12, 2009 letter that he had not been selected for either of the first two vacancies and it notified him in a February 24, 2009 letter that he had not been selected for the third vacancy. IAF, Tab 7, Subtabs 2H-2I. The appellant filed a complaint with the Department of Labor in which he asserted that the agency had violated his rights as a disabled veteran when it failed to offer him a position without complying with the veterans' preference pass-over requirements of 5 U.S.C. § 3318, which he claimed applied to hiring decisions for excepted service attorney positions pursuant to 5 U.S.C. § 3320. *Id.*, Subtab 2G. The agency filed a response, asserting that the appellant did not graduate from law school until May 2007, and that he was not selected for the positions because he did not possess the qualifications; it attached copies of the vacancy announcements and the appellant's applications for those positions in support of its assertions. *Id.*, Subtab 2C. The Department of Labor issued a decision finding the appellant's complaint to be without merit because, as of the application deadlines, he did not

satisfy the advertised position requirement of having at least 2 years of post-J.D. experience. *Id.*, Subtab 2B.

¶4 The appellant filed a Board appeal under VEOA in which he argued that the agency had violated his rights as a preference eligible disabled veteran when it failed to offer him a position without complying with veterans' preference pass-over requirements he claimed applied to these hiring decisions under 5 U.S.C. §§ 3318 and 3320. IAF, Tab 1 at 6. The appellant further argued that the agency knowingly violated what he characterized generally as veterans' preference requirements at 5 U.S.C. §§ 2302(b)(11), 3304(f)(1), and 3311. IAF, Tab 6 at 2. He requested a hearing. IAF, Tab 1 at 4.

¶5 The Chief Administrative Judge ordered the appellant to submit evidence and argument regarding the Board's jurisdiction over his VEOA appeal. IAF, Tab 3 at 2. The Chief Administrative Judge informed the parties that, if she determined that the Board has jurisdiction, she would adjudicate the appeal and schedule a hearing if one had been requested. *Id*. at 1-2. The appellant submitted evidence and argument on the issue of jurisdiction. IAF, Tab 6 at 2-3, 6-29.

¶6 The agency argued that the Chief Administrative Judge should deny the appeal without a hearing because there was no dispute of material fact, attorney positions are exempt from the pass-over requirements of 5 U.S.C. § 3318, and the appellant did not meet the requirements for the AUSA positions because he did not have at least 2 years of post-J.D. experience at the time he applied for the positions. IAF, Tab 7, Subtab 1. The appellant filed a reply, contesting the agency's legal arguments and asserting that there were genuine disputes of material fact. IAF, Tab 8. The appellant also moved to strike portions of the agency's narrative response. *Id*. at 6, 24.

¶7 Without allowing for further development of the record, the Chief Administrative Judge issued an initial decision denying the appellant's request for corrective action on the merits. IAF, Tab 9, Initial Decision (ID) at 2, 7. She found that the appellant had established the Board's VEOA jurisdiction and that a

decision could be made on the merits of the appeal without holding a hearing because there were no genuine issues of material fact and the agency must prevail as a matter of law. ID at 2-3 & n.1. Specifically, she found that the appellant failed to demonstrate that there was a genuine dispute regarding whether he was minimally qualified for the AUSA positions, and determined that VEOA does not provide that veterans like the appellant will be considered eligible for positions for which they are unqualified. ID at 6-7. Finding that the appellant failed to meet the minimum qualifications for the AUSA positions, the Chief Administrative Judge concluded that she did not need to decide whether the pass-over provisions of 5 U.S.C. § 3318 applied when making selections for attorney positions. ID at 6. The initial decision did not explicitly address the appellant's claims under 5 U.S.C. §§ 2302(b)(11), 3304(f)(1), or 3311.

¶8 The appellant has filed a petition for review, arguing that the Chief Administrative Judge erred in deciding the appeal without holding a hearing, issuing a close of the record order, or ruling on his motion to strike. Petition for Review File (PFR File), Tab 1 at 2-6, 12. He has submitted, for the first time on review, further documentary evidence in support of his claim that he was qualified for the AUSA positions for which he applied, alleging that he did not submit the evidence below because the record closed without warning. *Id*. at 6-8, 22-38. The appellant further argues that, under 5 U.S.C. § 3320, the pass-over provisions of 5 U.S.C. § 3318 apply to selections for the AUSA positions, and that the Chief Administrative Judge erred by not ruling on that claim, or his claims under 5 U.S.C. §§ 3304(f)(1) and 3311. *Id*. at 8-16. He asks the Board to order corrective action because the existing record demonstrates that the agency willfully violated his veterans' preference rights. *Id*. at 16-19. The agency has filed a response, addressing the appellant's arguments and arguing that the petition for review should be denied. PFR File, Tab 3 at 3-7.

ANALYSIS

The Chief Administrative Judge erred in failing to issue a close of the record order.

¶9 To establish Board jurisdiction over a VEOA claim brought under 5 U.S.C. § 3330(a)(1)(A), an appellant must (1) show that he exhausted his remedy with the Department of Labor and (2) make nonfrivolous 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 date of VEOA, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a; *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 6 (2006). For the reasons explained in the initial decision, the appellant established Board jurisdiction over the instant appeal. ID at 3; IAF, Tab 6 at 3, 26-27.

¶10 Once an appellant establishes Board jurisdiction under VEOA, the Board may address the merits of the appeal. *Elliott*, 102 M.S.P.R. 364, ¶ 6. The Board may decide the merits without a hearing where there is no genuine dispute of material fact and one party must prevail as a matter of law. *Waters-Lindo v. Department of Defense*, 112 M.S.P.R. 1, ¶ 5 (2009); *see* 5 C.F.R. § 1208.23(b). However, the Board has found it proper to conduct a hearing where the parties' submissions contain genuine disputes of material fact that cannot be resolved on the written record. *E.g.*, *Hillman v. Tennessee Valley Authority*, 95 M.S.P.R. 162, ¶ 16 (2003); *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 9 (2001).

¶11 Because the Chief Administrative Judge found that the appellant established Board jurisdiction under VEOA, ID at 3, and because the Chief Administrative Judge declined to hold a hearing as she indicated she would in the acknowledgment order, IAF, Tab 3 at 1-2, she was responsible for advising the parties that there would be no hearing, for setting a date on which the record would close, and for affording the parties an opportunity to make submissions regarding the merits of the appeal before the date the record would close, *see*

Ruffin, 89 M.S.P.R. 396, ¶ 8 (remanding a VEOA appeal where the administrative judge found jurisdiction and then ruled on the merits of the appeal without issuing a close of the record order or affording the parties the opportunity to make submissions regarding the merits of the appeal); *see also Benson v. Office of Personnel Management*, 83 M.S.P.R. 549, ¶¶ 4-5 (1999); 5 C.F.R. § 1201.58(b). She failed to do so, however, and prior to the issuance of the initial decision, it was not clear to the parties that they would have no further opportunity to develop the record on the merits. The Chief Administrative Judge's failure to notify the parties of when the record would close was especially problematic in light of the appellant's assertion in his last filing that there were discovery matters still outstanding. IAF, Tab 8 at 10. For the following reasons, we find that this procedural error prejudiced the appellant's substantive rights because there remain issues of material fact regarding the appellant's qualifications for the AUSA positions that cannot be resolved on the current record.[1]

¶12 VEOA does not exempt preference eligible veterans from meeting the minimum qualification standards for the positions to which they apply. *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98, ¶ 9 (2000). An agency does not violate an applicant's veterans' preference rights when it declines to select him because of his failure to meet a minimum qualification requirement of the position. *See Clarke v. Department of the Navy*, 94 M.S.P.R. 604, ¶ 8 (2003).

¶13 Although the appellant was facially unqualified for the AUSA positions under the terms of the vacancy announcements, he argues on review that the

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[1] We also find that the Chief Administrative Judge erred in failing to rule on the appellant's motion to strike. IAF, Tab 8 at 6, 24; *see Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418-19 (1991). However, we find that this error did not prejudice the appellant's substantive rights. Furthermore, we deny the motion on review. The appellant's mere disagreement with the agency's legal argument provides no basis to strike portions of that argument from the record.

agency did not actually exclude him as unqualified at the time it made its decision not to hire him. PFR File, Tab 1 at 5-6. The appellant's argument is supported by the agency's initial correspondence with him, which states merely that the AUSA positions for which he applied had been filled, making no reference to his alleged lack of qualification for the positions. IAF, Tab 7, Subtabs 4H, 4I. Furthermore, the record reflects that the agency first asserted that the appellant was unqualified for the AUSA positions only after the appellant filed his claim with the Department of Labor. *Id*., Subtab C.

¶14 Because the record has not been fully developed, it is unclear, for instance, whether under any applicable agency or Office of Personnel Management policy or regulation, the appellant needed to be qualified at the time of the application, at the time of the agency's selection, or at the time the vacancies were filled; whether the agency actually excluded the appellant as unqualified when it decided not to select him; or whether the agency consistently applied this criterion as set forth in its vacancy announcements in selecting for the three AUSA positions at issue. In addition, the appellant's argument that 5 U.S.C. § 3311 required the agency to credit some of his pre-J.D. experience toward the post-J.D. experience requirement remains unresolved, and there is thus an issue of whether the appellant was actually qualified for the position. IAF, Tab 8 at 14, 17-18; PFR File, Tab 1 at 11-12. We therefore find that it would be improper at this stage to deny the appellant's request for corrective action on the basis stated in the initial decision, and that under these circumstances, it is appropriate to remand the appeal for further adjudication on the merits.[2] *See Ruffin*, 89 M.S.P.R. 396, ¶ 9; *Benson*, 83 M.S.P.R. 549, ¶¶ 5-6.

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[2] We find that the evidence that the appellant has submitted for the first time on review is not dispositive of the issues in the instant appeal, PFR File, Tab 1 at 22-38, and in any event, the agency has not had an adequate opportunity to respond to these submissions. Nevertheless, because the appellant's failure to submit this evidence below is arguably attributable to the procedural error below, the Chief Administrative

The administrative judge may need to reach additional issues on remand.

¶15 If the Chief Administrative Judge finds that the agency improperly excluded the appellant as unqualified when it decided not to select him, she will need to reach the other issues that the appellant has raised in this appeal. Regarding the appellant's claim that the agency denied him the right to compete under 5 U.S.C. § 3304(f)(1), IAF, Tab 6 at 2, Tab 8 at 15, 18-19; PFR File, Tab 1 at 8-9, 13 n.3, the Chief Administrative Judge shall consider whether the agency in this case was accepting applications outside its own workforce "under merit promotion procedures," *compare Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶ 12 (2008) (section 3304(f)(1) applied where the agency was accepting applications outside its own workforce under merit promotion procedures) *with Morris v. Department of the Army*, 2010 MSPB 35, ¶¶ 14-15 (to the extent that the agency properly declined to accept applications outside its own workforce under merit promotion procedures, section 3304(f)(1) did not apply). Regarding the appellant's claim under 5 U.S.C. § 3318, IAF, Tab 1 at 6, Tab 6 at 2, Tab 8 at 13-16; PFR File, Tab 1 at 9-16, the Chief Administrative Judge shall consider whether the pass-over provisions of that section apply to the selection process for these attorney positions.[3] The Chief Administrative Judge shall also consider the appellant's argument that the agency's actions violated 5 U.S.C.

Judge shall consider it on remand to the extent that it is relevant to the issues in this appeal.

[3] The appellant's claim in this regard appears to be based, at least in part, on an argument that *Gingery v. Department of Defense*, 550 F.3d 1347 (Fed. Cir. 2008), modified *Patterson v. Department of the Interior*, 424 F.3d 1151 (Fed. Cir. 2005). PFR File, Tab 1 at 14-15. To the extent that this is the appellant's position, the parties should brief the issue of whether the Board would still have to follow *Patterson* to the extent that it applies. *See generally Johnston v. IVAC Corp.*, 885 F.2d 1574, 1579 (Fed. Cir. 1989) (if the holdings in two Federal Circuit panel decisions cannot be reconciled, the earlier panel decision remains binding precedent unless and until the court overrules it en banc).

§ 2302(b)(11). IAF, Tab 6 at 2. The Board expresses no opinion as to whether the appellant has a viable VEOA claim under any of these sections.

ORDER

¶16 Accordingly, we REMAND this VEOA appeal for further adjudication of the merits of the appeal and a new initial decision consistent with this Opinion and Order. The Chief Administrative Judge shall provide the parties with an opportunity to submit relevant evidence and argument. If the parties' submissions show that there is a genuine issue of material fact regarding the appellant's entitlement to relief under VEOA, the Chief Administrative Judge shall hold a hearing on the appeal as requested by the appellant. *See Ruffin*, 89 M.S.P.R. 396, ¶ 9.

FOR THE BOARD:

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