

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

2010 MSPB 71

Docket No. CH-4324-08-0709-I-2

**Curt L. Wheeler,
Appellant,**

v.

**Department of Defense,
Agency.**

April 21, 2010

Curt L. Wheeler, Xenia, Ohio, pro se.

Cynthia Cummings, Esquire, Columbus, Ohio, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that dismissed his appeal without prejudice to refiling. 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, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and REMAND the case to the regional office for adjudication on the merits.

BACKGROUND

¶2 On September 22, 2009, the appellant, a preference eligible with a 30% service-connected disability, refiled an appeal in which he alleged that the agency's Defense Finance and Accounting Service (DFAS) discriminated against him, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ([38 U.S.C. §§ 4301-4333](#)) (USERRA), by not selecting him for the position of Supervisory Accountant, advertised under Vacancy Announcement NS-0091-07.¹ Refiled Appeal File, MSPB Docket No. CH-4324-08-0709-I-2 (I-2 File), Tab 1; *see* Initial Appeal File, MSPB Docket No. CH-4324-08-0709-I-1, Tab 1 ("Complaint for Relief" at 1-3).

¶3 While the appellant was pursuing this matter under USERRA, he was also separately challenging it by filing an appeal before the Board² under the Veterans Employment Opportunities Act of 1998 (VEOA), claiming that, in not referring his name to the selecting official, the agency's DFAS had violated his rights as a veteran. *See Wheeler v. Department of Defense*, 2010 MSPB 47, ¶ 2. During the pendency of his VEOA appeal, DFAS acknowledged that it had committed administrative error in not referring the appellant's name to the selecting official, and that, as a remedy, it would reconstruct the selection process, adding the appellant's name to the list of candidates referred to the selecting official. *See id.* ¶¶ 2, 3. After it did so, the appellant was again not selected. *See id.* ¶ 3. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the

¹ The administrative judge dismissed without prejudice the appellant's first USERRA appeal in connection with this matter in order to allow him to complete discovery. *Wheeler v. Department of Defense*, MSPB Docket No. CH-4324-08-0709-I-1, slip op. at 2 (Initial Decision, Nov. 3, 2008). That initial decision provided that the appellant could refile his appeal within 6 months of the date of the decision. *Id.*

² The administrative judge dismissed the appellant's first VEOA appeal without prejudice to his right to refile within 6 months in order to allow him time to complete discovery. *Wheeler v. Department of Defense*, MSPB Docket No. CH-3443-08-0337-I-1, slip op. at 2 (Initial Decision, Nov. 3, 2008).

appellant had not exhausted his remedy with the Department of Labor (DOL) because he had not filed a complaint with DOL alleging that DFAS had violated his rights as a veteran in the manner in which it reconstructed the selection process. *Wheeler v. Department of Defense*, MSPB Docket No. CH-3443-08-0337-I-2, slip op. at 6-7 (Initial Decision, Sept. 2, 2009). The appellant filed a petition for review of that initial decision. *See Wheeler*, 2010 MSPB 47, ¶ 1.

¶4 While that petition for review was pending, on December 17, 2009, the administrative judge issued an initial decision on the appellant's USERRA appeal. He stated that the appellant had indicated, during a prehearing conference, that he believed the agency's failure to properly reconstruct the selection process for Vacancy Announcement NS-0091-07 constituted evidence that it failed to select him for the position in question due to his military service. The administrative judge stated that the parties agreed that the propriety of the agency's reconstruction of the selection process was an issue that the Board would necessarily resolve in its adjudication of the appellant's VEOA appeal. *Wheeler v. Department of Defense*, MSPB Docket No. CH-4324-08-0709-I-1, slip op. at 2 (Initial Decision, Dec. 17, 2009), I-2 File, Tab 16. The administrative judge granted what he described as the parties' joint motion to dismiss the USERRA appeal without prejudice, pending the Board's adjudication of the appellant's petition for review in the VEOA appeal. *Id.* The administrative judge ordered the appellant to refile his USERRA appeal within 30 days after his receipt of the Board's final decision in the VEOA appeal. *Id.* at 3.

¶5 In his petition for review, the appellant alleges that there was no "joint request" to dismiss the appeal without prejudice, and that he "agreed" to that disposition under duress because the administrative judge indicated that he would dismiss the appeal in any event. Petition for Review File, Tab 1 at 4. The appellant also alleges that the administrative judge improperly attempted to apply laches to his claim, *id.* at 4, 6-7, and abused his discretion in denying the appellant's motion to compel discovery, *id.* at 4-6. He requests that the Board

remand the appeal to the administrative judge so that his USERRA claim can proceed to adjudication on the merits. *Id.* at 4, 7.

¶6 The agency has responded in opposition to the appellant's petition for review. *Id.*, Tab 3.

ANALYSIS

¶7 Dismissal without prejudice is a procedural option that is left to the sound discretion of the administrative judge. *Milner v. Department of Justice*, [87 M.S.P.R. 660](#), ¶ 13 (2001). Here, the administrative judge dismissed the appellant's USERRA appeal to await the Board's decision in his VEOA appeal. In so doing, he correctly acknowledged that the two appeals shared a common issue, the propriety of the agency's reconstruction of the selection process. *See* Initial Decision at 2, I-2 File, Tab 16. Under these circumstances, the administrative judge did not err or abuse his discretion in dismissing the appellant's USERRA appeal without prejudice. *See, e.g., Black v. U.S. Postal Service*, [89 M.S.P.R. 204](#), ¶ 7 (2001). However, now that the Board has issued a final decision in the appellant's VEOA appeal, *Wheeler*, 2010 MSPB 47, we deem it appropriate to remand the appeal for a decision on the merits without requiring the appellant to refile his appeal.³ *See Black*, [89 M.S.P.R. 204](#), ¶ 8.

³ Because the Board is remanding this appeal, it is unnecessary to address the other issues the appellant has raised in his petition for review.

ORDER

¶8 We REMAND this case to the Central Regional Office for adjudication on the merits.

FOR THE BOARD:

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