

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

2010 MSPB 76

Docket Nos. SF-4324-09-0406-I-1
SF-3330-09-0295-I-1

Patrick K. Harellson,

Appellant,

v.

United States Postal Service,

Agency.

April 26, 2010

William H. Brawner, Esquire, Ventura, California, for the appellant.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 These appeals are before the Board on the appellant's petition for review (PFR) of the initial decision (ID) that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA), and his PFR of the ID that denied his request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA). We have JOINED these appeals for consideration in order to expedite their processing, given our determination that they are factually interdependent and that it would not adversely affect the interests of the parties to

decide the appeals simultaneously. [5 C.F.R. § 1201.36\(a\)\(2\), \(b\)](#). We GRANT the appellant's PFR of the ID addressing his VEOA claim and AFFIRM that ID as MODIFIED, still DENYING his request for corrective action. We GRANT the appellant's PFR of the ID addressing his USERRA claim, VACATE that ID, and REMAND the appeal for further proceedings, consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a 10-point preference eligible veteran, was employed by the agency as an Electronic Technician in Denver, Colorado until his May 28, 2000 resignation. Initial Appeal File, Docket No. SF-3330-09-0295-I-1 (IAF 3330), Tab 7 at 361. He subsequently relocated to Hawaii, and on December 16, 2005, requested reinstatement in his former position, or in a Maintenance Mechanic or Custodian position. *Id.* at 132. He also went to the Honolulu Processing and Distribution Center to inquire about taking, and to take, examinations for certain of these positions. *Id.* at 125. He earned a passing score on the Custodian (Laborer) examination, and was afforded an additional 10 points for veterans' preference.¹ *Id.* at 133. He again requested reinstatement, later complaining that his request had been rejected.² *Id.* at 146, 153. The agency responded that he did qualify for reinstatement, and that, while it was not then hiring for his requested positions, his request would be considered when there was a need to hire. *Id.* at 146.

¹ The appellant earned passing scores on the examinations he took for other positions, and was properly afforded 10 additional points for veterans' preference. IAF 3330, Tab 7 at 134-35. These positions, however, are not at issue in either of his Board appeals. *Id.*, Tab 33 at 8-10.

² According to the appellant, in November 2006, when he applied for a Christmas Casual position in Honolulu for which he was not selected, the interviewer had inquired about his former supervisor. When the appellant checked his records, he learned that his former supervisor had not recommended him for rehire. IAF 3330, Tab 7 at 153.

¶3 The appellant subsequently completed an application for full-time and part-time regular Custodian positions in Honolulu and Pearl City.³ IAF 3330, Tab 7 at 155. During an interview for a part-time position in Pearl City for which he was not selected, he learned from the interviewer, the Postmaster, that he had recently hired Custodians. *Id.* at 197. The appellant also became aware that two other Custodian positions had been filled in Honolulu. *Id.* at 192. He was not interviewed or selected for any of these positions. *Id.* at 193, 198. He filed an equal employment opportunity (EEO) complaint in which he alleged that the agency discriminated against him on the basis of his race, sex, and age when he was not interviewed for the two Custodian positions that were filled in Honolulu, and was not interviewed and/or hired for the Custodian position filled in Pearl City. *Id.* at 9. After conducting an investigation, the Equal Employment Opportunity Commission dismissed the appellant's request for a hearing in connection with his EEO complaint and referred him to the Board for consideration of his claim that the agency had violated his veterans' preference rights. *Id.*, Tab 5 at 3-4.

¶4 The appellant also filed a complaint with the Department of Labor (DOL) in which he alleged that the Postal Service had violated his veterans' preference rights by not hiring him for numerous Custodian positions. *Id.*, Tab 8 at 7-10. He argued that such positions are normally reserved for preference eligible veterans, but that the agency had recently decided to exempt its non-maintenance employees from having to take and pass the examination for Custodian positions, and that the effect of the new policy was a discriminatory "end run around veteran[s'] preference in hiring" *Id.*, Tab 8 at 9. DOL determined that the appellant's claim did not have merit and advised him that it was closing its investigation. *Id.*, Tab 8 at 4. He then filed a VEOA appeal. *Id.* at Tab 1. He

³ The appellant's non-selection for positions at Pearl City is not at issue in either of these appeals. IAF 3330, Tab 33 at 8-10.

did not request a hearing. *Id.*, Tab 1 at 2. Subsequently, he narrowed his claim to include only the two Custodian positions that the agency filled in Honolulu with non-veterans. *Id.*, Tab 33 at 8.

¶5 During adjudication of the appeal, the appellant advised the administrative judge that he was also raising a separate claim under USERRA based on the same set of facts. Initial Appeal File, Docket No SF-4324-09-0406-I-1 (IAF 4324), Tab 1. This claim was that, through its new policy targeting Custodian positions, the agency had discriminated against him and other veterans by eliminating the availability of jobs traditionally reserved for them. *Id.* at 1-2. The administrative judge docketed a USERRA appeal. *Id.*, Tab 2. The appellant did not request a hearing.

¶6 In her ID on the VEOA appeal, the administrative judge addressed the appellant's claim that he was initially considered for the two vacant Custodian positions in Honolulu, but that, when the agency determined to fill those positions by reassigning career employees whose positions had been excessed, the agency, in violation of his veterans' preference rights, stopped considering him because he was not an employee. IAF 3330, Tab 34 (ID 3330) at 6. The administrative judge found that the appellant had established Board jurisdiction over his claim, *id.* at 8, but she denied his request for corrective action on the basis that he failed to show that he had a right to compete for the positions in question under the statutory authority on which he relied, *id.* at 9-12.

¶7 In her ID on the USERRA appeal, the administrative judge also found that the appellant had established Board jurisdiction over his claim. IAF 4324, Tab 25 (ID 4324) at 6. She denied his request for corrective action, though, finding that the provision in the agency's Employee Labor Handbook which states that Custodian positions, and some others, are restricted to applicants eligible for veterans' preference applies only to appointments from external recruitment sources, and that both individuals chosen for the Custodian positions in Honolulu were employees whose positions had been excessed and who were internally

reassigned. *Id.* at 7; *see* IAF 4324, Tab 23 at 17. As to the appellant’s claim regarding the agency’s decision to suspend the Custodian examination requirement for such employees, the administrative judge found that the suspension applies equally to all employees, regardless of military service, so that, in suspending the examination, the agency was not making a distinction based on military service, but was distinguishing between current employees and non-employees. ID 4324 at 7.

ANALYSIS

The VEOA Appeal:

¶8 The Board has found that subsection (f)(1) of [5 U.S.C. § 3304](#), “Competitive service; examinations,” expressly provides preference eligibles with a right to compete for vacant positions under certain circumstances. *Boctor v. U.S. Postal Service*, [110 M.S.P.R. 580](#), ¶ 6 (2009). The circumstances under which such preference eligibles may not be denied the opportunity to compete are those in which the agency making the announcement will accept applications from individuals outside its own workforce. *Id.* ¶ 7. The Board has also found that [5 U.S.C. § 3304\(f\)\(1\)](#) applies to preference eligible applicants for employment, officers, and employees of the U.S. Postal Service, notwithstanding that Postal Service positions are in the excepted service. *Id.* ¶ 6.

¶9 The appellant’s argument is that he was denied the right to compete under [5 U.S.C. § 3304\(f\)\(1\)](#) for the Custodian positions the agency filled in Honolulu because, after the agency demonstrated, by initially considering him for these positions, that they were open to candidates from outside its workforce, it improperly excluded him from further consideration by choosing to hire employees through its internal hiring registers. The appellant argues that excluding him from consideration in this fashion is improper under *Boctor* and *Brandt v. Department of the Air Force*, [103 M.S.P.R. 671](#) (2006), appeals that

arose under [5 U.S.C. § 3304\(f\)\(1\)](#). PFR File, Docket No. SF-3330-09-0925-I-1, Tab 3 at 8-24.

¶10 The record includes evidence that could be regarded as supporting the appellant's claim that he was considered for the Custodian positions at issue here. In a sworn declaration submitted in connection with the appellant's EEO complaint, Kurt Daniels, Maintenance Engineering Specialist, who was involved in the selection process for the positions in question, stated that Lawrence Kami, Manager, Maintenance Operations, asked him to review the appellant's file to determine his qualifications for a Custodian position, and that, upon doing so, he noted problems with the appellant's past performance. IAF 3330, Tab 7 at 330-31. Mr. Kami did not deny having asked Mr. Daniels to review the appellant's file, stating only that he determined to fill the positions internally. *Id.* at 263.

¶11 If the evidence described above is sufficient to establish that the agency accepted the application of the appellant, an outside candidate, then it would also establish that the appellant, as a preference eligible, was entitled to compete for the Honolulu Custodian positions. *See Boctor*, [110 M.S.P.R. 580](#), ¶ 7. We need not determine, however, whether the evidence is sufficient for these purposes. Even if it is, the appellant would be entitled only to compete for the positions in question, that is, to be considered for them. *See id.*; *Brandt*, [103 M.S.P.R. 671](#), ¶¶ 9-10. The same evidence that suggests that the agency considered the appellant's application also indicates that, to the extent that it did so, it permitted the appellant to compete for the Custodian positions. The right to compete under § 3304(f)(1) does not preclude an agency from eliminating a veteran or a preference eligible from further consideration for a position based on his qualifications for the position. *Cf. Montee v. Department of the Army*, [110 M.S.P.R. 271](#), ¶ 9 (2008) (section 3304 does not exempt veterans or preference eligibles from the qualification requirements of the positions for which they may apply). Moreover, nothing in *Boctor*, *Brandt*, or any other authority requires that the veteran or preference eligible be considered at every stage of the selection

process, up to that process's final stage. Instead, those authorities, and section 3304(f)(1) itself, require only that the individual be permitted to compete on the same basis as other candidates. The consideration the appellant alleges he received accordingly would be sufficient to satisfy any obligation the agency may have had to permit the appellant to compete for the Custodian positions. Therefore, we find that the agency did not violate the appellant's rights under [5 U.S.C. § 3304](#)(f)(1) when it considered and selected two internal employees to fill those positions

The USERRA Appeal:

¶12 The appellant argues on PFR that the administrative judge misconstrued the nature of his USERRA claim. PFR File, Docket No. SF-4324-09-0406-I-1 (PFR File 4324, Tab 5 at 6-7.⁴ As noted, the administrative judge found that a provision in the agency's Employee Labor Handbook on which the appellant relied, which states that Custodian positions, and some others, are restricted to applicants eligible for veterans' preference, applies only to appointments from external recruitment sources, and that both individuals chosen for the Custodian positions in Honolulu were employees whose positions had been excessed and who were internally reassigned. ID 4324 at 7; *see* IAF 4324, Tab 23 at 17. As to the agency's decision to suspend the Custodian examination requirement for such employees, the administrative judge found that the suspension applies equally to all employees, regardless of military service, so that, in suspending the examination, the agency was not making a distinction based on military service,

⁴ The appellant also argues, in connection with his USERRA appeal, that the administrative judge erred in not considering his claim that, after initially considering him for the Custodian positions it filled in Honolulu, the agency violated his veterans' preference rights by limiting further consideration to internal candidates. PFR File 4324, Tab 5 at 5-6. Any such violation, however, would relate to the appellant's VEOA appeal, as indicated above, rather than to his USERRA appeal. Moreover, we have found above that the agency did not violate the appellant's right to compete.

but was distinguishing between current employees and non-employees. ID 4324 at 7. She concluded, therefore, that the appellant failed to show that the agency discriminated against him on the basis of his prior military service. ID 4324 at 7.

¶13 We agree that the administrative judge misstated the appellant's USERRA claim. The appellant alleged below that, when the agency decided to waive the Custodian examination requirement for internal candidates, the effect was that more internal candidates would be available for consideration, allowing the agency to more readily hire such internal candidates, who might be non-veterans, instead of outside preference-eligible candidates like the appellant. IAF 4324, Tab 24 at 13-15. He also argued below that the agency specifically targeted Custodian positions for elimination from external hiring, well knowing that those positions were traditionally reserved for veterans. IAF 4324, Tab 24 at 13; *id.*, Tab 7 at 8-9. He further argued that the agency's failure to explain why it selected only Custodian jobs evidences a discriminatory motive. *Id.*, Tab 24 at 15.

¶14 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980). Because the administrative judge did not address this aspect of the appellant's USERRA's claim, or indicate to the parties that it was an issue to be adjudicated, it is appropriate to vacate the ID⁵

⁵ The review rights information the administrative judge included in her initial decision in the USERRA appeal, ID 4324 at 10, was appropriate for an appeal presenting issues of discrimination on bases such as race, *see* [5 U.S.C. §§ 7702](#), 7703(b)(2). The appellant did refer below to a claim of racial discrimination, but the claim concerned positions other than the Honolulu positions at issue here, *see* IAF 4324, Tab 22 at 5. In any event, the Board lacks jurisdiction to consider such discrimination claims in a USERRA appeal. *See Metzenbaum v. Department of Justice*, [89 M.S.P.R. 285](#), ¶ 15 (2001).

and remand this appeal so that the parties can submit evidence and argument on this issue, and so that the administrative judge can render a decision, based upon a complete record.⁶

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this VEOA appeal, Docket No. SF-3330-09-0295-I-1. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

¶16 The ID in the USERRA appeal, Docket No. SF-4324-09-0406-I-1, is vacated, and the appeal is remanded, as set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS IN THE VEOA APPEAL

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:

⁶ After the record closed on PFR, the appellant submitted what he described as previously unavailable evidence in support of his USERRA claim, specifically, a copy of an Executive order signed by President Obama on November 9, 2009, entitled Employment of Veterans in the Federal Government. Petition for Review File 4324, Tab 6 at 5-9. The order sets forth the policy of the current Administration as enhancing recruitment of and promoting employment opportunities for veterans within the executive branch, consistent with merit system principles and veterans' preferences prescribed by law. Exec. Order No. 13,518, 74 Fed. Reg. 58,533 (2009). This evidence, which post-dates the date of the ID in this appeal, is new in that it was unavailable before the record closed below. However, the order specifically provides that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or other persons." Exec. Order No. 13,518, § 6(c). Therefore, we find that the appellant has not shown that the evidence is material. See *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

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.