

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

2010 MSPB 111

Docket No. CH-3330-09-0712-I-1

**Stephen W. Gingery,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

June 16, 2010

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

Kathy K. Christian, Esquire, Detroit, Michigan, 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 that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#), REVERSE the initial decision, and GRANT the appellant's request for corrective action.

BACKGROUND

¶2 In February 2009, the agency issued essentially simultaneous vacancy announcements for a GS-5/6 Accounting Technician position under both its open

competitive process and its merit promotion process. Initial Appeal File (IAF), Tab 8, Subtabs 4-5. The appellant submitted his application under the open competitive process, IAF, Tab 1 at 26-29; however, the agency accepted his application for consideration under both the open competitive vacancy announcement and the merit promotion vacancy announcement, IAF, Tab 8, Subtab 1 at 1. The agency prepared a certificate of eligibles under the merit promotion vacancy announcement that contained only the name of an internal candidate, as its internal policy provided that outside applicants would be considered under the merit promotion process only if no internal candidate was selected. IAF, Tab 8, Subtab 6 at 2, Subtab 7 at 6; Tab 15 at 2-3; Tab 19 at 3-4. The selecting official selected the internal candidate, and the agency notified the appellant by letter dated April 28, 2009, that it selected another candidate for the position. IAF, Tab 8, Subtab 3.

¶3 After exhausting his administrative remedies with the Department of Labor, the appellant filed this appeal in which he alleged that the agency violated his veterans' preference rights and denied him the opportunity to compete. IAF, Tab 1. He requested a hearing in his appeal, *id.* at 4, but later withdrew that request, IAF, Tab 21.

¶4 In an initial decision issued on the written record, the administrative judge found that the Board has jurisdiction over the appeal. Initial Decision (ID) at 1-2. The administrative judge also found that the agency properly followed its internal procedures for filling positions under merit promotion vacancy announcements, and that the agency had no duty to submit the appellant's name to the selecting official under that internal procedure. *Id.* at 3-4. The administrative judge found that the agency accepted the appellant's application under the merit promotion vacancy announcement and the appellant would have been eligible to compete for the position if the agency did not select an internal candidate. *Id.* Because the agency selected an internal candidate, the appellant was not entitled to compete.

Id. at 4. The administrative judge therefore denied the appellant’s request for corrective action. *Id.* at 2, 5.

¶5 The appellant timely petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency has not responded to the petition for review.

ANALYSIS

¶6 A violation of the opportunity to compete guaranteed by [5 U.S.C. § 3304\(f\)](#) is remediable under VEOA. *Shapley v. Department of Homeland Security*, [110 M.S.P.R. 31](#), ¶ 7 (2008); *Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 16 (2006). Specifically, [5 U.S.C. § 3304\(f\)\(1\)](#) provides that “[p]reference eligibles . . . may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.” *Boctor v. U.S. Postal Service*, [110 M.S.P.R. 580](#), ¶ 7 (2009). Thus, under the plain language of [5 U.S.C. § 3304\(f\)\(1\)](#), all covered individuals, including current employees and those seeking initial federal appointments, must be permitted to compete when applications will be accepted from persons outside the hiring agency’s work force. *Shapley*, [110 M.S.P.R. 31](#), ¶ 7; *Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 32 (2007); *Jolley v. Department of Homeland Security*, [105 M.S.P.R. 104](#), ¶ 20 (2007).

¶7 Here, the agency issued both an open competitive vacancy announcement and a merit promotion vacancy announcement for the Accounting Technician position. IAF, Tab 8, Subtabs 4-5. The merit promotion vacancy announcement explicitly provided that “[i]n the event that this position is not filled internally, ‘Preference eligibles . . . may apply.’” *Id.*, Subtab 5 at 1 (emphasis in original). This language is ambiguous because it suggests that preference eligibles were only permitted to apply if the agency decided not to fill the position with an internal candidate. *Id.* However, in this case, it is clear that the agency accepted

applications from external candidates under merit promotion procedures while the vacancy announcement was open, and before it decided whether to select an internal candidate. IAF, Tab 8, Subtab 1 at 1; Tab 15 at 3, ¶ 8. Further, even though the appellant applied under the open competitive vacancy announcement and not the merit promotion vacancy announcement, the agency admitted that it considered his application under merit promotion procedures. IAF, Tab 8, Subtab 1 at 1.

¶8 Therefore, even though the agency's merit promotion vacancy announcement was not clear, we find that the agency issued a vacancy announcement that was open to individuals outside its workforce, and that the agency, in fact, accepted applications from individuals (such as the appellant) from outside its workforce. *See* IAF, Tab 8, Subtab 1 at 1; *but see Brewer v. Department of Veterans Affairs*, [111 M.S.P.R. 563](#), ¶ 8 (2009) (the agency did not deny the appellant the right to compete under a merit promotion vacancy announcement because the vacancy announcement was limited to internal candidates only and the appellant did not even apply under the merit promotion vacancy announcement); *Dean v. Consumer Product Safety Commission*, [108 M.S.P.R. 137](#), ¶ 12 (2008) (the agency did not violate the appellant's veterans' preference rights because it placed his name on both certificates of eligibles issued under a simultaneous open competitive and merit promotion vacancy announcements and, therefore, he "was considered under all advertised hiring authorities"). The appellant, as a covered preference eligible, was entitled under [5 U.S.C. § 3304\(f\)\(1\)](#) to the opportunity to compete for the position. *See Shapley*, [110 M.S.P.R. 31](#), ¶ 8.

¶9 The agency accepted the appellant's application under the merit promotion vacancy announcement and it reviewed the application and determined that he was qualified for the position. IAF, Tab 8, Subtab 1; Tab 15 at 3. However, it did not place the appellant's name on a certificate of eligibles or forward his name or his application package to the selecting official for consideration, as it

did with internal candidates determined to be qualified for the position. IAF, Tab 19 at 3-4. Because the agency accepted applications from individuals outside its own workforce but considered only applications from internal candidates, the agency did not afford the appellant a bona fide opportunity to compete in violation of [5 U.S.C. § 3304\(f\)\(1\)](#). See *Shapley*, [110 M.S.P.R. 31](#), ¶ 12.

¶10 The administrative judge found that the agency acted consistently with its own policy of considering internal applicants for positions before considering any external candidates. I.D. at 3-4. However, an agency's internal policy may not override applicable statutes, including [5 U.S.C. § 3304\(f\)\(1\)](#). *Boctor*, [110 M.S.P.R. 580](#), ¶ 9; *Shapley*, [110 M.S.P.R. 31](#), ¶ 16. Further, the Board has held that a preference eligible's right to compete for an announced vacancy arises whenever the agency making the announcement will accept applications from individuals outside its own workforce, and not just when it considers those applications it indicated a willingness to accept. *Boctor*, [110 M.S.P.R. 580](#), ¶ 9.

¶11 Accordingly, we find that the agency's failure to consider the appellant for the position of Accounting Technician violated [5 U.S.C. § 3304\(f\)\(1\)](#) by denying him a bona fide opportunity to compete for a vacancy in a situation where the agency was accepting applications from outside its workforce.

ORDER

¶12 We ORDER the agency to reconstruct the selection process for the Accounting Technician position, giving consideration to the appellant and any other qualified preference eligible or veteran consistent with [5 U.S.C. § 3304\(f\)\(1\)](#). See *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 30 days after the date of this decision.

- ¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).
- ¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).
- ¶15 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST
DAMAGES

You may be entitled to be paid by the agency for any loss of wages or benefits you suffered because of the violation of your rights under [5 U.S.C. § 3330a](#), [5 U.S.C. § 3330c\(a\)](#); [5 C.F.R. § 1208.25\(a\)](#). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. [5 U.S.C. § 3330c\(a\)](#); [5 C.F.R. § 1208.25\(a\)](#). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

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.