UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 185

Docket No. DA-3330-09-0730-I-1

David M. Pecard,

Appellant,

v.

Department of Agriculture,

Agency.

September 8, 2010

David M. Pecard, Phoenix, Arizona, pro se.

Martin A. Gold, Esquire, and Veronica Clark, Esquire, Riverdale, Maryland, 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 petition for review of an initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA) and concluded that the Board lacked jurisdiction over his claim of a negative suitability determination. For the following reasons, we GRANT the petition, AFFIRM the initial decision in part, VACATE the initial decision in part, and REMAND the appellant's VEOA claim to the regional office for further adjudication.

BACKGROUND

¶2 The appellant applied for the position of GS-07 Mounted Patrol Inspector (MPI) pursuant to vacancy announcement number 24VS-2009-0154 (0154), as well as several other MPI positions at different locations in Texas (under similar vacancy announcement numbers). Initial Appeal File (IAF), Tab 1 at 9-11; *see* IAF, Tab 12, Subtab 2l (vacancy announcement). He was interviewed and tentatively selected for the 0154 position. IAF, Tab 1 at 9-11. Before the appellant started working in the position, he was told that there was a problem with his veterans' preference, and he later learned from the Office of Personnel Management (OPM) in a July 1, 2009 letter that the agency referred his application for a suitability investigation.[1] *See* IAF, Tab 1 at 10; *id.*, Exhibit B. The agency conducted a Google search, which revealed several newspaper articles and a report based on a CBS "48 Hours" telecast, which portrayed the appellant as a con man, a criminal, and a bigamist, among other things. *See* IAF, Tab 12, Subtab 2c at 6-14 (newspaper articles). On August 10, 2009, the agency withdrew its offer of employment to the appellant. *See* IAF, Tab 1, Exhibit C. On August 11, 2009, the agency requested permission to object to or pass over the appellant based on qualifications and suitability, and this request was "sustained" on August 13, 2009. *See* IAF, Tab 12, Subtab 2c at 1 (Form 62). Although Form 62 is an OPM form and indicates that an OPM official would make such a decision, the individual who signed the form was Steve Downs, an employee of the responding agency. *Id.*

¶3 The appellant filed a Board appeal, claiming that he was terminated during his probationary or initial service period, that he was the subject of a negative suitability determination, that he involuntarily resigned and that there was a

[1] There is no evidence in the record that OPM issued a decision on the suitability determination referral.

"withdraw[al] of veteran[s'] preference status and 5 points."[2] IAF, Tab 1 at 2. The appellant did not request a hearing. *See id.* at 2. The administrative judge issued an Order to Show Cause Regarding Jurisdiction, noting that the appeal did not provide any details regarding the appellant's VEOA claim or whether he exhausted his administrative remedy with respect to that claim, and providing the appellant with notice of his jurisdictional burden with regard to exhaustion. *See* IAF, Tab 8. The appellant filed a response to this Order at IAF, Tab 11. The agency filed a motion to dismiss. *See* IAF, Tab 12, Subtab 1.

¶4 In the Amended Summary of Close of Record Conference, the administrative judge confirmed that the only issues in dispute were: 1) whether the Board has jurisdiction over the appellant's claim that he was subjected to an appealable suitability action; and 2) whether the agency violated the appellant's veterans' preference rights when it did not select him for the GS-07 MPI position, advertised under the 0154 vacancy announcement. IAF, Tab 27 at 1-2. The administrative judge also indicated that the appellant raised an affirmative defense of harmful procedural error and that the appellant "confirmed that he is not raising any additional affirmative defenses." *Id.* at 2.

¶5 The administrative judge issued an initial decision, finding that the Board has jurisdiction over the VEOA appeal,[3] but denying the appellant's request for

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[2] The appellant later clarified that he was not alleging that he involuntarily resigned from any agency position or that the agency terminated him during his probationary or initial service period; rather, he was only challenging the agency's action of withdrawing its tentative offer of employment for the MPI position, which we understand to be his claims of a negative suitability determination and that the agency violated a law or regulation related to veterans' preference. *See* IAF, Tab 7 at 1.

[3] To establish Board jurisdiction over an appeal brought under VEOA, an appellant must: (1) show that he exhausted his remedy with the Department of Labor (DOL); and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA, (ii) the action(s) at issue took place on or after October 30, 1998, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Hillman v. Tennessee Valley Authority*, 95 M.S.P.R. 162, ¶ 9 (2003). It does not appear that the administrative judge gave the appellant explicit notice of his

corrective action. The administrative judge dismissed for lack of jurisdiction the appellant's claim that he was subjected to a negative suitability determination, and found that the Board lacks jurisdiction to hear the appellant's claim of harmful error. *See* IAF, Tab 30. The appellant filed a petition for review and the agency filed a response. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶6 The appellant makes a number of arguments in his petition, including that the administrative judge improperly issued the initial decision before she could consider the appellant's timely-filed Close of Record Statement and Arguments, that the administrative judge wrongly denied his request for sanctions, and that the administrative judge's substantive rulings on his VEOA and negative suitability determination claims were erroneous.[4] *See* PFR File, Tab 1.

¶7 Based on our review of the appellant's petition, including his U.S. Postal Service Track and Confirm printout, purportedly showing that his Close of Record Statement and Arguments was not received by the administrative judge until January 15, 2010, *see* PFR File, Tab 1 at 33, one day after the initial

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burden to make nonfrivolous allegations in a VEOA appeal. *See* IAF, Tab 8. However, based on our review of the record, the appellant satisfied his jurisdictional burden because he exhausted his administrative remedies with DOL, and he nonfrivolously alleged that the action at issue took place after October 30, 1998, that he was entitled to veterans' preference, and that the agency violated his veterans' preference rights when it did not select him for the 0154 position. *See, e.g.*, IAF, Tab 1 at 1; IAF, Tab 12, Subtab 2c at 32 (the appellant's DD-214); *id.*, Tab 20 at 11-12 (showing that the appellant exhausted his administrative remedy with DOL).

[4] The appellant also contends that the administrative judge erred when she "released [OPM] for failure to join as they were listed as one of the original defendants in the complaint . . . ." PFR File, Tab 1 at 12. We note that the appellant included OPM in the case caption of his initial submission at IAF, Tab 1 at 8, and this submission discussed OPM's actions, *see id.* at 11-13, 15-16, 18-20. However, the appellant did not include OPM in the case caption of his subsequent submissions. *See* IAF, Tabs 11, 14, 16, 17, 20, 21, 26, 28. In light of our disposition and the lack of any evidence that OPM rendered a determination regarding the appellant, we discern no basis upon which to join OPM as a party at this stage of the proceedings.

decision was apparently issued, it does not appear that the administrative judge considered this submission. Because this submission was timely filed before the close of the record below, IAF, Tab 27; PFR File, Tab 1 at 33, we have considered the appellant's January 11, 2010 Close of Record Statement and Arguments on review. *See* IAF, Tab 28.

¶8 We affirm the administrative judge's conclusion that the Board lacks jurisdiction over the appellant's claim of a negative suitability determination and his affirmative defense of harmful procedural error. However, we grant the appellant's petition because we have identified problems with the agency's Form 62 request, which could impact the outcome of his VEOA appeal, and the administrative judge's adjudication of the appellant's motion for sanctions.

The problems with the agency's Form 62 request

¶9 The appellant raised important issues, both below and on petition for review, regarding the agency's apparent reliance on the Form 62 (its request to pass over a preference eligible or to object to an eligible) to justify its decision to withdraw the tentative offer made to him for the 0154 MPI position. IAF, Tab 26 at 12-13; PFR File, Tab 1 at 9-10, 17; *see* IAF, Tab 12, Subtab 2c at 1 (the agency's Form 62 request to pass over or object to the appellant, dated August 11, 2009). Notably, under the section of the Form 62 request in which a box is checked, indicating that OPM sustained the action and removed the eligible, *i.e.*, the appellant, from consideration, the signature of the "OPM" official is Steve Downs, but Mr. Downs appears to be an agency employee. *See* IAF, Tab 12, Subtab 2c at 1 (showing that Mr. Downs works for "USDA, APHIS, HRD, Staffing"). The appellant also complained that the agency withdrew its tentative offer of employment on August 10, 2009, *one day before* the agency completed its Form 62 request, and that the agency's request appears to apply to an MPI position based on a different vacancy announcement than the 0154 vacancy

announcement in question.[5] IAF, Tabs 26 at 12-13, 28 at 5-6; *see* IAF, Tab 12, Subtabs 2c at 1, 2d (the agency's letter to the appellant withdrawing its employment offer). Significantly, the administrative judge appears to have disregarded these discrepancies in the initial decision in concluding that *OPM* sustained the pass over request on August *13*, 2009, and that "subsequently," in an August *10*, 2009 letter, the agency withdrew its tentative offer of employment. IAF, Tab 30 at 3.

¶10 There are two related considerations that were not specifically discussed by either party or the administrative judge. First, OPM promulgated a new regulation at 5 C.F.R. § 332.406, which became effective July 27, 2009, approximately 2 weeks before the agency completed the Form 62 request in question. Notably, the new regulation specifically delegates to agencies the authority to adjudicate objections to eligibles, including pass over requests, except under circumstances that are not applicable here.[6] *See* 5 C.F.R. § 332.406(a) (effective July 27, 2009). Therefore, if the agency had delegated authority, it could have properly adjudicated the instant objection or pass over request. However, the record contains no information on this issue.

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[5] The record contained an Affidavit from Martha Gravagna, Lead Human Resources Specialist, which indicates that the pass over request was completed for vacancy announcement 0153, but that the agency submitted an addendum, so that the pass over request would apply to vacancy announcement numbers 0149, 0150, and 0153. *See* IAF, Tab 25 at 6-7. The record also contained an undated form INV 60, which is used to make pass over or suitability requests, and this form indicated that the determination would be used to apply to MPI vacancy announcement numbers 0144, 0149, 0150, 0152, 0153, 0154, and 0155. *See* IAF, Tab 12, Subtab 2c at 2-3. However, it is not clear if this form INV 60 is the addendum to which Ms. Gravagna referred, or if it was ever submitted to an entity with pass over authority. Significantly, the sections for OPM to indicate its decision are blank.

[6] OPM apparently delegated this authority to agencies before the regulation was enacted. *See* 74 Fed. Reg. 30459; *see also* http://www.opm.gov/deu/Handbook_2007/DEO_Handbook.pdf at 163. However, it appears that the new regulation at 5 C.F.R. § 332.406(a) codifies this delegation of authority.

¶11 Second, it was not clear whether Saul Garza, the ultimate selectee for the 0154 position, was entitled to veterans' preference. *Compare* IAF, Tab 12, Subtab 2b at 1-2 (the agency's Request for Personnel Action, which does not state if Mr. Garza has veterans' preference), *with* IAF, Tab 25 at 7 (Ms. Gravagna's affidavit, stating that Mr. Garza was a "5 point veteran"). If Mr. Garza was not a preference eligible, then the agency was required to request pass over under 5 U.S.C. § 3318. However, if Mr. Garza was entitled to veterans' preference, then there was no reason for the agency to submit the Form 62 request in the first place. The record is not clear in this regard.

¶12 Since we are unable to resolve these discrepancies on the record before us and the parties have not had an opportunity to argue the impact of the new regulation on the appellant's VEOA claim, we vacate the portion of the initial decision that discusses VEOA, and we remand the appellant's VEOA claim to the Dallas Regional Office, so that the administrative judge can take evidence and argument regarding these discrepancies and the impact of the new regulation at 5 C.F.R. § 332.406, and issue a new initial decision.

The appellant's motion for sanctions

¶13 The appellant filed a motion for sanctions and other submissions, complaining, among other things, that the agency sanitized documents that it produced[7] and that, by not producing all of the documents related to his case,[8] the agency failed to comply with 5 C.F.R. §§ 1201.25 and 1201.73(a); that it committed misconduct; and that it violated his due process rights. IAF, Tabs 16 (motion for sanctions), 21 at 1-2 (discussing the agency's obligation to produce initial disclosures under 5 C.F.R. § 1201.73(a)), 26 at 26 (explaining that,

[7] As support for this claim, the appellant pointed to the agency's submission of an article with the handwritten words "Don't send" on it. *See* IAF, Tab 16 at 6-8.

[8] We understand the appellant's claim to be that the agency failed to produce all documents generated by its Google search. *See* IAF, Tab 26 at 5.

pursuant to 5 C.F.R. § 1201.25(a), the agency was required "to forward . . . all documents contained in the Agency's record of the action"). The agency filed a response to the motion for sanctions, stating that the appellant "***has never propounded any discovery on the Agency at any time whatsoever***." IAF, Tab 19 at 4 (emphasis in original). The administrative judge denied the appellant's motion for sanctions in a single paragraph because he failed to comply with the procedure for filing a motion to compel, as set forth in 5 C.F.R. § 1201.73(e). IAF, Tabs 23 at 5, 27 at 5. For the following reasons, we affirm the administrative judge's decision to deny the motion for sanctions, as modified herein.

¶14 The appellant properly noted the agency's obligations. Indeed, 5 C.F.R. § 1201.25(c) requires the agency to provide, in its response file, "[a]ll documents contained in the agency record of the action," and subsection 1201.73(a) requires the agency to provide, as part of its initial disclosures, a "copy of, or a description by category or location of all documents in the possession, custody, or control of the agency that the agency may use in support of its claims or defenses." However, the appellant's motion for sanctions was not styled as a motion to compel, and there is no evidence that he propounded any discovery in this matter; thus, we believe it was error for the administrative judge to analyze this motion only under 5 C.F.R. § 1201.73(e).

¶15 Sanctions may be imposed upon a party for failure to follow the Board's regulations. *Williams v. Office of Personnel Management*, 71 M.S.P.R. 597, 603 (1996), *aff'd*, 119 F.3d 16 (Fed. Cir. 1997) (Table). The Board's regulations authorize an administrative judge to impose sanctions upon a party "as necessary to serve the ends of justice." 5 C.F.R. § 1201.43. "Under 5 C.F.R. § 1201.43, the imposition of sanctions is a matter for the presiding official's sound discretion, and absent a showing that such discretion has been abused, the presiding official's determination will not be found to constitute reversible error." *McVay v. Department of Transportation*, 17 M.S.P.R. 175, 177 (1983) (internal citations

omitted). The abuse of discretion standard is "a very high standard" and it allows for "great deference." *Lipscomb v. Department of Defense*, 69 M.S.P.R. 484, 487 (1996).

¶16 We cannot conclude that the administrative judge abused her discretion with regard to the appellant's motion. While 5 C.F.R. § 1201.25 requires an agency's response to an appeal to contain all documents in the agency's record of action, the Board has held that an agency's response is sufficient if it contains the agency's reasons for taking the action at issue, accompanied by supporting documentation. *McVay*, 17 M.S.P.R. at 177. We find the agency's response in this matter to have been sufficient in that it contained its reasons for the nonselection at issue, and at least some of the documents presumably generated by the Google search and relied upon by the agency, including online newspaper articles and a report based on a CBS "48 Hours" telecast. IAF, Tab 12, Subtabs 1, 2c at 6-14.

¶17 Moreover, in contemplating whether sanctions are appropriate for an agency's alleged failure to comply with 5 C.F.R. § 1201.25, the Board will consider whether the appellant has been harmed by the agency's purported failure. *McVay*, 17 M.S.P.R. at 177. In this appeal, the appellant has not identified the specific documentation or evidence that the agency did not submit that was allegedly contained in its record of action, nor has he identified, except in vague terms, how he was prejudiced by the agency's action. Indeed, on review, the appellant acknowledges that a Google search "would have resulted in not less [than] 600 documents and as many [as] 57,400 documents." PFR File, Tab 1 at 4. It is clear that the appellant has conducted or could conduct the same Google search that the agency conducted,[9] and that he was aware of the agency's

[9] With respect to the appellant's claim that the agency failed to provide all documents contained in its record of the action under section 1201.25, we note that the Board has remanded cases where an agency has failed to comply with such obligations. *See, e.g.*, *King-Roberts v. Office of Personnel Management*, 80 M.S.P.R. 431, ¶¶ 3-4 (1998);

reasons for not selecting him. *See* IAF, Tab 12, Subtabs 1, 2c at 6-14. Thus, he has not demonstrated that he was harmed by the agency's failure to produce additional documentation supporting its rationale for the nonselection.

¶18 Similarly, under 5 C.F.R. § 1201.73(a)(1), the agency was to provide a copy of, or a description by category or location of all documents in its possession, custody, or control that it was to use in support of its claims or defenses. As stated previously, the agency provided several, but possibly not all, salient documents supporting its reasons for not hiring the appellant. *See* IAF, Tab 12, Subtab 2c at 6-14. However, as was the case with his allegations regarding 5 C.F.R. § 1201.25, the appellant has not specifically indicated how he was harmed by the agency's alleged failure to strictly comply with 5 C.F.R. § 1201.73(a)(1). *See* IAF, Tab 16 at 3 ("The Agency's conduct put[s] the Board and the Appellant in the position of having to guess at what specific item or documents were withheld, what was destroyed, if anything, and most of all it denied the Appellant the meaningful opportunity to be heard."). The agency's response file put the appellant on notice of its reasons for the nonselection. IAF, Tab 12, Subtabs 1, 2c at 6-14. We cannot conclude that the administrative judge

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Garduno v. Office of Personnel Management, 43 M.S.P.R. 3, 5-6 (1989); *May v. Office of Personnel Management*, 39 M.S.P.R. 576, 578-79 (1989). These cases are distinguishable from the instant appeal. In *King-Roberts*, *May*, and *Garduno*, the evidence that OPM allegedly failed to produce was either clearly identified, *i.e.*, hearing tapes, or it was evidence that could plainly impact the Board's ultimate determination regarding the timeliness of the appeal or the propriety of OPM's denial of a disability retirement application. *See King-Roberts*, 80 M.S.P.R. 431, ¶¶ 2-4 (finding, in a disability retirement appeal, that OPM failed to submit a copy of hearing tapes from the appellant's removal appeal, which included testimony from the appellant's treating psychologist); *Garduno*, 43 M.S.P.R. at 5-6 (noting that the appellant alleged that OPM "withheld evidence establishing that its December 8, 1988, decision letter was sent to [his supervisor], at the appellant's place of work, rather than to the appellant's residence," and concluding that resolution of this issue could impact the Board's decision on the timeliness of the appeal); *May*, 39 M.S.P.R. at 577-79 (discussing that, based on the appellant's production of a July 28, 1987 reconsideration decision, there was a question as to whether OPM's reconsideration decision was issued on June 11, 1987, or July 28, 1987).

abused her discretion in denying the motion for sanctions, nor do we conclude that sanctions are otherwise warranted to serve the ends of justice.

ORDER

¶19 On remand, the administrative judge shall order the parties to present evidence and argument regarding the discrepancies discussed above with respect to the agency's Form 62 request, namely whether it had delegated authority to sustain the pass over request under 5 C.F.R. § 332.406, whether it withdrew the job offer to the appellant before the pass over request was sustained, whether the pass over request applied to the 0154 position in question, and whether Mr. Garza was entitled to veterans' preference. The administrative judge shall issue a new initial decision that makes findings regarding these issues and adjudicates the appellant's VEOA claim.

¶20 This is the final decision of the Merit Systems Protection Board with respect to the appellant's claim of a negative suitability determination. 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:

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