

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

2010 MSPB 231

Docket No. AT-4324-10-0356-I-1

Andrew Searcy, Jr.,

Appellant,

v.

Department of Agriculture,

Agency.

November 30, 2010

Andrew Searcy, Jr., Peachtree City, Georgia, pro se.

Raymond F. Montano, Albuquerque, New Mexico, 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 petition for review of the initial decision that dismissed this Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d), REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order. We also REMAND the appeal for a determination of whether the appellant has established jurisdiction under the Veterans Employment Opportunities Act of 1998 (VEOA)

and we FORWARD the appellant's involuntary resignation claim to the Atlanta Regional Office for docketing as a new appeal.

BACKGROUND

¶2 The appellant filed an appeal alleging, inter alia, that the agency and the Office of Personnel Management (OPM) violated his rights under USERRA.¹ Initial Appeal File (IAF), Tab 1 at 3-6. He contended that he performed duty in a uniformed service of the United States and the agency was aware of his prior uniformed service based on complaints he previously filed with the agency regarding various matters. *Id.* at 5. The appellant asserted that the agency: denied him employment based on his prior military service when it filled vacancies, for which he applied, with nonveterans with less experience; and denied him a benefit of employment when it withdrew funds from his Civil Service retirement account. *Id.* In support of his assertions, the appellant submitted a copy of his DD Form 214 showing that he served in the U.S. Army and a December 29, 2009 letter from the Office of Special Counsel informing him that it was closing its investigation into his USERRA complaint and advising him that he could appeal his claim to the Board. *Id.* at 10-11. The appellant requested a hearing and a stay in his appeal.² IAF, Tab 1 at 3.

¹ The appellant also alleged that the agency and OPM violated his due process rights when they withdrew funds from his retirement account. IAF, Tab 1 at 3-6. The administrative judge docketed this claim as a separate appeal against OPM. *See Searcy v. Office of Personnel Management*, MSPB Docket No. AT-0831-10-0380-I-1 (Initial Decision, Feb. 25, 2010).

² The administrative judge denied the appellant's request for a stay based on her findings that: an employee may seek a stay from the Board with respect to any personnel action taken as a result of whistleblowing activity; the appellant has not indicated that he has engaged in any whistleblowing activity; and he has not alleged that any whistleblowing activity was a contributing factor to the matters about which he is complaining. *Searcy v. Department of Agriculture*, MSPB Docket No. AT-4324-10-0356-S-1, Stay File, Tab 4 at 1.

¶3 The administrative judge informed the appellant of the elements and his burden to establish USERRA jurisdiction over his appeal and she instructed the appellant to file evidence and argument on the jurisdictional issue. IAF, Tab 5. The appellant responded to the administrative judge's order and the agency moved to dismiss the appeal for lack of jurisdiction. *Id.*, Tabs 13-14.

¶4 Without holding the appellant's requested hearing, the administrative judge issued an initial decision that dismissed the appeal for lack of USERRA jurisdiction. IAF, Tab 17, Initial Decision (ID) at 1-2. The administrative judge found that the appellant's assertions that the agency and OPM discriminated against him by withdrawing funds from his retirement account and failing to hire him because of his prior military service were conclusory and unsupported. *Id.* Therefore, the administrative judge determined that the appellant failed to make nonfrivolous allegations of fact that would establish a USERRA violation. ID at 2.

¶5 The pro se appellant has filed a petition for review asserting, inter alia, that the administrative judge erred in dismissing his appeal for lack of USERRA jurisdiction because the assertions he made below are sufficient to establish jurisdiction over his appeal. Petition for Review (PFR) File, Tab 1. The agency has not filed a response in opposition to the appellant's petition for review.

ANALYSIS

The appellant has established Board jurisdiction over his USERRA appeal.

¶6 Under USERRA, a person who has performed "service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment . . . on the basis of that . . . performance of service." [38 U.S.C. § 4311\(a\)](#); *Swidecki v. Department of Commerce*, [113 M.S.P.R. 168](#), ¶ 5 (2010). The statute further provides that an employer (including a federal agency) shall be considered to have engaged in a prohibited activity if the individual's military status is a motivating factor for one

of the actions identified above, unless the employer can prove that the action would have been taken in the absence of the military status. [38 U.S.C. § 4311\(c\)\(1\)](#). An individual who believes that he has been the victim of a violation of section 4311(a) may file an appeal with the Board. 38 U.S.C. § 4324(b); *Swidecki*, [113 M.S.P.R. 168](#), ¶ 5.

¶7 To establish Board jurisdiction over a USERRA discrimination appeal, an appellant must allege that: (1) he performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Hillman v. Tennessee Valley Authority*, [95 M.S.P.R. 162](#), ¶ 5 (2003). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has noted with approval the Board's "liberal approach in determining whether jurisdiction exists under USERRA." *Yates v. Merit Systems Protection Board*, [145 F.3d 1480](#), 1484 (Fed. Cir. 1998). The weakness of the assertions in support of a claim is not a basis to dismiss the USERRA appeal for lack of jurisdiction; rather, if the appellant fails to develop his contentions, his USERRA claim should be denied on the merits. *Randall v. Department of Justice*, [105 M.S.P.R. 524](#), ¶ 5 (2007). In addition, an appellant who raises a USERRA claim has an unconditional right to a hearing. *Kirkendall v. Department of the Army*, [479 F.3d 830](#), 844-46 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007); *Michaels v. Department of Defense*, [112 M.S.P.R. 676](#), ¶ 7 (2009).

¶8 Although the appellant's allegations below are vague and lacking in specificity, we find that he has established jurisdiction over his USERRA appeal. Specifically, the appellant has alleged that: he performed duty in a uniformed service of the United States; the agency was aware of his prior uniformed service; and the agency denied him employment in a position because of his prior uniformed service and denied him a benefit of employment when it withdrew

funds from his Civil Service retirement account. IAF, Tab 1 at 4-6. The appellant's contentions are sufficient to constitute an allegation of a USERRA violation. *See Swidecki*, [113 M.S.P.R. 168](#), ¶ 9 (the appellant established USERRA jurisdiction when he asserted that he performed duty in a uniformed service of the United States, the agency was aware of his prior uniformed service, and it denied him employment in a temporary position in part because of his prior uniformed service); *Wilson v. Department of the Army*, [111 M.S.P.R. 54](#), ¶ 10 (2009) (a claim by the appellant that agency officials "didn't like the fact" of his Army National Guard service was sufficient to establish jurisdiction over the USERRA appeal).

¶9 Thus, we remand this USERRA appeal for further adjudication consistent with this Opinion and Order. We note that it is not clear from the appellant's limited assertions below as to when the alleged instances of discrimination based on his prior uniformed service took place. The only reference to a date within the appellant's pleadings is that the agency has wrongly dismissed his "repetitive complaints since the 1970s." IAF, Tab 13 at 5. While the Board has jurisdiction under USERRA to consider claims that arose prior to the enactment of USERRA in 1994, the Board cannot adjudicate claims of practices that were not prohibited before 1994. *See Fernandez v. Department of the Army*, [234 F.3d 553](#), 555-57 (Fed. Cir. 2000) (although the Board has the authority to hear and adjudicate claims arising under both USERRA and its predecessor statute, the Veterans' Reemployment Rights Act of 1974 (VRRRA), without regard to whether the complaint accrued before, on, or after October 13, 1994, the substantive provisions of USERRA are not retroactive); *Murray v. National Aeronautics & Space Administration*, [112 M.S.P.R. 680](#), ¶ 7 (2009), *aff'd*, No. 2010-3073, 2010 WL 2688819 (Fed. Cir. June 15, 2010).

¶10 Therefore, on remand, the administrative judge must determine whether the acts complained of by the appellant fall under USERRA or its predecessor statute, the VRRRA, and whether such acts are prohibited by the applicable statute. In the

event that the acts at issue in this appeal are not prohibited by USERRA or the VRRRA, the appropriate disposition is to dismiss the appeal for failure to state a claim upon which relief can be granted. Dismissal for failure to state a claim is appropriate only if, taking the appellant's allegations as true and drawing all reasonable inferences in his favor, he cannot prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 8 (2008); *see, e.g., Murray*, [112 M.S.P.R. 680](#), ¶ 7 (the Board properly dismissed the appellant's USERRA appeal for failure to state a claim upon which relief could be granted because the VRRRA, which was the only relevant law in effect at the time the appellant's claim accrued, applied only to military reservists and the appellant was not a reservist); *Williams v. Department of the Army*, [83 M.S.P.R. 109](#), ¶ 8 (1999) (dismissing the appeal for failure to state a claim upon which relief could be granted because the law in effect at the time the appellant's complaint arose in 1984 did not provide a provision upon which the appellant could base his claim). The administrative judge shall provide the appellant with a hearing on his USERRA claim and issue a new initial decision on the merits of that claim. *See Kirkendall*, 479 F.3d at 844-46; *Swidecki*, [113 M.S.P.R. 168](#), ¶ 11.

On remand, the administrative judge must provide the appellant with the opportunity to establish VEOA jurisdiction over his claim.

¶11 VEOA provides redress for preference eligible individuals whose rights have been violated under any statute or regulation relating to veterans' preference. [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#). If an appellant raises a VEOA claim, he must receive adequate notice regarding his rights and burdens under VEOA before the Board can dismiss the appeal for lack of jurisdiction. *Loggins v. U.S. Postal Service*, [112 M.S.P.R. 471](#), ¶ 14 (2009); *Nahoney v. U.S. Postal Service*, [112 M.S.P.R. 93](#), ¶¶ 17-18 (2009). A VEOA claim should be liberally construed and an allegation, in general terms, that an appellant's veterans' preference rights were violated is sufficient to meet the requirement of a nonfrivolous allegation

establishing Board jurisdiction. *Loggins*, [112 M.S.P.R. 471](#), ¶ 14; *Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 8 (2006).

¶12 In his initial appeal, the appellant made reference to the VEOA statutory provisions, claimed veterans' preference, and alleged that the agency violated his rights when, despite knowing his veterans' preference category, it appointed nonveterans to positions for which he had applied. IAF, Tab 1 at 3-4, Tab 13 at 5. Moreover, on petition for review, the appellant asserts that he attempted to present to the Board, inter alia, a claim under VEOA. Petition for Review File, Tab 1 at 4. Thus, it appears that the pro se appellant was attempting to raise a claim under VEOA. See *Walters v. U.S. Postal Service*, [65 M.S.P.R. 115](#), 119 (1994) (a pro se appellant is not required to plead issues with the precision of an attorney in a judicial proceeding). The record shows, however, that the administrative judge did not inform the appellant of the elements and his burden to establish VEOA jurisdiction over his appeal. See *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue).

¶13 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; and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of the 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*, [95 M.S.P.R. 162](#), ¶ 9. Therefore, on remand, the administrative judge must provide the appellant with appropriate jurisdictional notice regarding his VEOA claim and the opportunity to submit evidence and argument to establish the Board's jurisdiction under VEOA. *Nahoney*, [112 M.S.P.R. 93](#), ¶ 18; *Easter v. Department of the Army*, [99 M.S.P.R. 288](#), ¶ 6 (2005).

The appellant's claim regarding a constructive removal must be forwarded for docketing as a new appeal.

¶14 It appears that the appellant may also have been attempting to raise an involuntary resignation claim. In his initial appeal, the appellant asserted that OPM's alleged withdrawal of his CSRS contributions and his related "constructive termination" were the result of his race-based discrimination complaints and his assertions to the agency concerning his "Military Service Non-Discrimination and Employment Preference Rights." IAF, Tab 1 at 4-5. On petition for review, the appellant further asserts that he was attempting to raise "constructive termination" and "involuntary retirement" claims before the Board.³ Petition for Review File, Tab 1 at 4.

¶15 As stated above, an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess*, 758 F.2d at 643-44. Although the record shows that the appellant complained in his initial appeal of a "constructive termination," he never received explicit information on what is required to establish Board adverse action jurisdiction over an alleged involuntary resignation appeal. Therefore, we FORWARD the appellant's alleged involuntary resignation claim to the Atlanta Regional Office for docketing as a separate appeal. The administrative judge must fully inform the appellant of what he is required to allege to establish the Board's jurisdiction over an appeal of an alleged involuntary resignation and of his burden to prove that his appeal has been timely filed or that good cause exists for his delayed filing.⁴ See, e.g., *Coats v. U.S. Postal Service*, [111 M.S.P.R. 268](#), ¶ 15 (2009). The administrative judge shall afford the parties a reasonable opportunity to

³ Although the appellant uses the term "involuntary retirement," it does not appear from the record that the appellant's separation from federal service was through a retirement.

⁴ As set forth above, it appears from the record below that the acts complained of by the appellant may date back to the mid-1970s. IAF, Tab 1 at 5, Tab 13 at 5.

submit evidence and argument regarding those issues. If the administrative judge finds that the appellant has raised a nonfrivolous allegation that his appeal is within the Board's jurisdiction and was timely filed or that good cause exists for the delay in filing his appeal, the administrative judge shall afford him a hearing on the jurisdictional issue. *See Crumpton v. Department of the Treasury*, [98 M.S.P.R. 115](#), ¶ 11 (2004).

ORDER

¶16 Accordingly, we reverse the initial decision and remand the USERRA appeal to the Atlanta Regional Office for further adjudication on the merits as set forth in this Opinion and Order. We also remand the appeal for a determination of whether the appellant has established VEOA jurisdiction over his appeal and we forward the appellant's claim of his alleged involuntary resignation to the Atlanta Regional Office for docketing as a new appeal.

FOR THE BOARD:

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