UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 31

Docket No. DA-3330-10-0506-I-1

Milo D. Burroughs,

Appellant,

v.

Department of the Army,

Agency.

March 4, 2011

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, 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 his appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for review concerning the appellant's Veterans Employment Opportunities Act of 1998 (VEOA) claim and we AFFIRM the initial decision AS MODIFIED by this Opinion and Order to the extent that it dismissed the VEOA claim for lack of jurisdiction. We GRANT the petition for review under 5 C.F.R. § 1201.115 concerning the appellant's employment practices claim and REMAND that claim for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency issued two vacancy announcements for a single competitive service DB-0861-03 Aerospace Engineer position – one under open competitive examining procedures and one under merit promotion procedures. Initial Appeal File (IAF), Tab 7 at 12, 48-53. The appellant, a five-point preference eligible veteran, applied under both announcements and the agency placed his name on both registers. *Id*. at 22, 26-28. Ultimately, the agency did not select the appellant for the position. It selected another five-point preference eligible instead. *Id*. at 8-9, 12, 15-22.

¶3 On or about May 11, 2010, the appellant filed a Board appeal under VEOA, alleging that the agency's selection process violated his veterans' preference rights. IAF, Tab 1 at 1. The appellant filed a copy of a March 10, 2010 e-mail to the Department of Labor (DOL) complaining about the selection process, but he did not include any information about the outcome of his communication. IAF, Tab 1, Subtab 3 at 1.

¶4 The administrative judge issued an acknowledgment order, informing the appellant of how to establish jurisdiction over a VEOA appeal. IAF, Tab 2 at 2. Among other things, the administrative judge ordered the appellant to establish that he exhausted his administrative remedy with DOL. *Id*. The appellant responded, stating that the agency violated his veterans' preference rights by prescribing a minimum educational requirement for the position in question and that he "filed with the Secretary of Labor . . . within 60 days after the date of the agenc[y's] violation." IAF, Tab 4 at 1-2. He did not, however, provide any information on the outcome of the complaint. The appellant further alleged that he "filed with the Office of Special Counsel" (OSC) and that the minimum educational requirement was in violation of 5 C.F.R. § 300.103, i.e., the Office of Personnel Management's (OPM) basic requirements for employment practices. *Id*.

¶5 The administrative judge then issued a show cause order, again notifying the appellant of his jurisdictional burden in a VEOA appeal and ordering him to establish that he exhausted his remedy with DOL. IAF, Tab 6 at 2-3. She also notified the appellant of his jurisdictional burden in an individual right of action (IRA) appeal, *id*. at 3-5, but she did not address the appellant's employment practices allegation. The appellant did not respond to the show cause order.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 13, Initial Decision (ID) at 1, 7. She found that the appellant failed to establish that he exhausted his remedy with DOL because the record does not contain any acknowledgment from DOL that it received the appellant's March 10, 2010 e-mail, and there is no evidence that DOL processed the e-mail as a VEOA complaint. ID at 6. The administrative judge further found that, even if the appellant exhausted his remedy with DOL, he failed to make a nonfrivolous allegation that the agency violated his veterans' preference rights. *Id*. The initial decision did not address the IRA or employment practices issues.

¶7 The appellant has filed a petition for review, arguing that the Board has jurisdiction over his appeal pursuant to the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (VPA), irrespective of VEOA. Petition for Review File (PFR File), Tab 1 at 1-5, Tab 3 at 1-5, Tab 5 at 1-3. The appellant also argues that the minimum educational requirement for the position in question constitutes an unlawful employment practice. PFR File, Tab 1 at 5-6, Tab 3 at 5-6.

¶8 After the appellant filed his petition for review, the Clerk of the Board issued a show cause order providing the appellant fuller notice on the exhaustion issue and ordering him to file evidence and argument to show that he either received written notification of the results of DOL's investigation or notified DOL in writing of his intention to file a Board appeal. PFR File, Tab 7. The appellant responded, asking the Board how he might have his case heard under

both VEOA and the VPA. PFR File, Tab 6 at 1. He also resubmitted copies of his DOL and OSC complaints. *Id*. at 3-9. The appellant then filed additional argument that appears to pertain to the basis of his VEOA claim.[1] PFR File, Tab 8. The agency has filed a response, briefly arguing that the petition for review provides no basis to disturb the initial decision. PFR File, Tab 4 at 4-6.

ANALYSIS

VEOA Exhaustion

¶9 To establish jurisdiction over a VEOA appeal, an appellant must, among other things, prove that he exhausted his administrative remedy with DOL. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 7 (2008). As explained above, the administrative judge found that the appellant failed to prove that he exhausted his administrative remedy because there was no evidence that DOL accepted or construed his e-mail as a VEOA complaint under 5 U.S.C. § 3330a(a). ID at 6; IAF, Tab 1, Subtab 3 at 1. We are unconvinced by the administrative judge's reasoning. The subject line of the appellant's e-mail was "VEOA appeal," and in it he described what he believed was a violation of his veterans' preference rights regarding the specific vacancy at issue. IAF, Tab 1, Subtab 3. In addition, the copy of the e-mail reveals that the appellant sent it to the Veterans' Employment and Training Service, which is the office that DOL has designated to receive VEOA complaints. *Id*.; *see* DOL Veterans' Preference Operations Manual § 1.3, *available at* http://www.dol.gov/vets/vp/vpmanual/vp_ops_manual.pdf. In addition, it appears that although the appellant's e-mail was not in DOL's preferred format, DOL is relatively liberal in accepting VEOA

---

[1] The appellant also filed a request to reopen the record for the purpose of filing additional argument relating to a relatively recent Board decision, *Dean v. Office of Personnel Management*, 115 M.S.P.R. 157 (2010). PFR File, Tab 9. The appellant has not explained how any additional argument based on *Dean* would be relevant to the issues in this appeal and we therefore DENY the appellant's request.

complaints, including complaints by e-mail. *See* Veterans' Preference Operations Manual §§ 4.1.b, 4.2. It therefore appears that the appellant's e-mail was sufficient to satisfy the complaint requirement of 5 U.S.C. § 3330a(a), and any decision that DOL made not to process it as such cannot be attributed to the appellant.

¶10 Nevertheless, as explained in the Clerk of the Board's show cause order, more is required to show exhaustion than merely to file a complaint with DOL. PFR File, Tab 7 at 1. The appellant must also show either that he received written notification of the results of DOL's investigation of the complaint or, if DOL was unable to resolve the complaint within 60 days, that he provided written notification to DOL of his intention to bring a Board appeal. *See* 5 U.S.C. § 3330a(d)(1)-(2); *Becker v. Department of Veterans Affairs*, 107 M.S.P.R. 327, ¶¶ 9, 11 (2007); 5 C.F.R. § 1208.23(a)(5). The appellant's responses to the show cause order failed to address the issue. PFR File, Tabs 6, 8. Accordingly, we dismiss the appellant's VEOA claim for lack of jurisdiction on that basis.[2] *See Burroughs v. Department of Defense*, 114 M.S.P.R. 647, ¶¶ 8-9 (2010).

The Veterans' Preference Act of 1944

¶11 The appellant argues on petition for review that the VPA vests the Board with jurisdiction over his veterans' preference claims independently of VEOA, and that the Board should therefore not require him to meet the VEOA jurisdictional test in order to bring a claim under the VPA. PFR File, Tab 1 at 1-5, Tab 5 at 1-3. However, prior to the enactment of VEOA in 1998, the Board did

---

[2] We disagree with the administrative judge's alternative finding that the appellant failed to make a nonfrivolous allegation that the agency violated his veterans' preference rights. ID at 6. The appellant sufficiently described below the ways in which he believed that the agency's selection process violated his rights as a preference eligible veteran. IAF, Tab 1 at 1, Tab 4 at 1; *see Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006) (claims of veterans' preference violations are liberally construed and an allegation in general terms that an individual's veterans' preference rights were violated is sufficient to satisfy this jurisdictional element).

not have general jurisdiction over veterans' preference claims arising from the VPA or otherwise. *Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶¶ 10-12 (2004); *see also Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1351 (Fed. Cir. 2010) (distinguishing between the substantive veterans' preference rights granted by the VPA and the right to appeal an alleged violation of those rights under VEOA); *Lapuh v. Merit Systems Protection Board*, 284 F.3d 1277, 1279 (Fed. Cir. 2002) ("[VEOA] establishes vindication rights for veterans who consider themselves the victims of violation of their veterans' preferences."); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 30 (2007) ("[O]ne of the VEOA's primary purposes was to supplement the [VPA] by providing a mechanism through which preference eligibles could seek redress for alleged violations of the rights provided by the VPA."); S. Rep. No. 105-340, at 16 (1998) (describing the Board's role in redressing veterans' preference complaints before and after VEOA).

¶12 Although the VPA created many substantive rights for preference eligibles, the VPA itself does not vest the Board with jurisdiction to adjudicate claims arising out of alleged violations of those rights. *See generally Johnson v. U.S. Postal Service*, 67 M.S.P.R. 573, 577 (the Board does not have jurisdiction over all matters involving a federal employee that are allegedly unfair or incorrect; rather, the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation), *review dismissed*, 65 F.3d 186 (Fed. Cir. 1995) (Table). The Board's authority to adjudicate veterans' preference claims in general arises from VEOA. *See Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 315 n.4 (Fed. Cir. 1985) (prior to VEOA, the court rejected the appellant's contention that the Board had general jurisdiction over all veterans' preference matters; that authority belonged to OPM). Accordingly, the appellant must satisfy VEOA's jurisdictional requirements.

Whistleblower Protection Act

¶13 The administrative judge construed the appellant's assertion that he filed a complaint with OSC as an attempted whistleblower claim and she afforded him jurisdictional notice for an IRA appeal. IAF, Tab 4 at 1, Tab 6 at 3-5. The appellant did not respond to the jurisdictional order, and the administrative judge did not address the whistleblower issue any further. Arguably, she should have done so. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law). However, the appellant did not respond to the administrative judge's jurisdictional order by the deadline for doing so, and in any event, it is apparent at this point that the appellant was not attempting to raise a whistleblower claim. Rather, he seems be under the mistaken impression that he must first contact OSC in order to establish Board jurisdiction under VEOA. IAF, Tab 4 at 1; PFR File, Tab 1 at 4, Tab 6 at 8-9.

Employment Practices

¶14 The appellant alleged below that the minimum educational requirement that the agency prescribed for the Aerospace Engineer position was in violation of 5 C.F.R. § 300.103. IAF, Tab 1 at 1, Tab 4 at 1. He further alleged that the instant appeal is akin to *Mapstone v. Department of the Interior*, 106 M.S.P.R. 691 (2007), *appeal after remand*, 110 M.S.P.R. 122 (2008), another employment practices case regarding a challenge to a minimum educational requirement. IAF, Tab 1 at 1, Tab 4 at 1. Under the circumstances, we find that the administrative judge should have notified the appellant of how to establish Board jurisdiction over an employment practices claim. However, she did not do so, and the initial decision does not address the employment practices issue.[3] *See Spithaler*, 1

[3] The initial decision quotes one of the appellant's citations to 5 C.F.R. § 300.103 (although the appellant's citation was in improper format) in the course of discussing the appellant's failure to establish Board jurisdiction over his VEOA claim. ID at 4.

M.S.P.R. at 589. The appellant argues on petition for review that the Board has jurisdiction over his employment practices claim, and he requests a jurisdictional ruling on the matter. PFR File, Tab 1 at 5-7.

¶15 An applicant for employment who believes that an employment practice applied to him by OPM violates a basic requirement in 5 C.F.R. § 300.103 is entitled to appeal to the Board. 5 C.F.R. § 300.104(a). The Board has jurisdiction under 5 C.F.R. § 300.104(a) when two conditions are met: First, the appeal must concern an employment practice that OPM is involved in administering; and second, the appellant must make a nonfrivolous allegation that the employment practice violated one of the "basic requirements" for employment practices set forth in 5 C.F.R. § 300.103. *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1373 (Fed. Cir. 2003); *Mapstone v. Department of the Interior*, 110 M.S.P.R. 122, ¶ 7 (2008).

¶16 In this case, the appeal concerns the validity of a minimum educational requirement. IAF, Tab 1 at 1, Tab 4 at 1, Tab 7 at 49, 52; PFR File, Tab 1 at 5-6. The Board has found that the prescription of a minimum educational requirement is an "employment practice" within the meaning of 5 C.F.R. § 300.104(a). *Mapstone*, 106 M.S.P.R. 691, ¶ 13. It also appears that OPM was involved in administering this employment practice because the vacancy announcements themselves explicitly attribute the basic qualification requirements to OPM. IAF, Tab 7 at 49, 52; *see Mapstone*, 106 M.S.P.R. 691, ¶ 14 (OPM was involved in administering the qualification standard at issue because OPM formulated it); *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 12 (2007) (same); *see also Lackhouse*, 773 F.2d at 315 (OPM was involved in administering the "rule of three" because OPM promulgated the governing regulation).

¶17 So far, it appears that the first condition of jurisdiction is satisfied. However, implicit in the requirement that the appeal concern an employment practice is that it concern an employment practice that was applied to the

appellant. An individual's right to appeal an employment practice arises under the following regulation:

> A candidate who believes that an employment practice *which was applied to him or her* by the Office of Personnel Management violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations.

5 C.F.R. § 300.104(a) (emphasis added).

¶18 In this case, the challenged employment practice is a minimum educational requirement. IAF, Tab 1 at 1, Tab 4 at 1. The purpose of a minimum educational requirement, like other minimum qualification standards, is to:

> identify applicants who are likely to perform successfully on the job, and to screen out those who are unlikely to do so. The standards are not designed to rank candidates, identify the best qualified applicants for particular positions, or otherwise substitute for a careful analysis of the applicant's knowledge, skills, and abilities.

Office of Personnel Management, Operating Manual: Qualification Standards for General Schedule Positions, Policies and Instructions, Introduction, http://www.opm.gov/qualifications/policy/index.asp. Accordingly, agencies may not appoint applicants to positions for which they do not meet the minimum qualification standards. *See* 5 C.F.R. §§ 335.103(b)(3), 338.301.

¶19 The documentary evidence suggests that the appellant's nonselection was not based on his failure to meet the minimum educational requirement. Only applicants who meet the minimum qualification standards will appear on a register of eligibles, *see* 5 U.S.C. § 3313, and the record shows that the agency placed the appellant on registers of eligibles for both of the vacancy announcements at issue here. IAF, Tab 7 at 22, 27. Because it appears that the agency found that the appellant satisfied the allegedly unlawful minimum educational requirement, its application of that requirement may not have been the basis of appellant's nonselection.

¶20 The United States Court of Appeals for the Federal Circuit has found that, in order for the Board to have jurisdiction over an employment practices appeal,

it is "necessary that the challenged employment practice have been applied to the applicant as the basis for the adverse hiring decision." *Dow v. General Services Administration*, 590 F.3d 1338, 1342 (Fed. Cir. 2010); *see* 5 C.F.R. § 300.104(a) (an applicant is entitled to relief from an unlawful employment practice that "was applied to him"). In this case, the evidence tends to show that the agency's reason for not selecting the appellant was not, nor could it have been, based on any failure to meet the minimum educational requirement. In addition, there is no indication in the record that the agency would have hired the appellant in the absence of the minimum educational requirement. *See Dow*, 590 F.3d at 1344.

¶21 Nevertheless, we decline to dismiss the appellant's employment practices claim for lack of jurisdiction at this stage of the appeal. The appellant raised his employment practices claim below, and the administrative judge failed to notify him of his jurisdictional burden over such a claim. IAF, Tab 1 at 1, Tab 4 at 1. As with any other basis for jurisdiction, when an appellant raises an employment practices claim, an administrative judge must inform him with specificity of his burden of proving the claim, his burden of going forward with the evidence, and the types of evidence necessary to make a nonfrivolous allegation.[4] *Parker v. Department of Housing & Urban Development*, 106 M.S.P.R. 329, ¶ 7 (2007); *Scott*, 105 M.S.P.R. 482, ¶ 13. Moreover, neither the agency's filings nor the initial decision notified the appellant of what is required to establish jurisdiction over his claim. *See Parker*, 106 M.S.P.R. 329, ¶ 8.

---

[4] Assuming that the appellant can establish that the appeal concerns an OPM employment practice that was applied to him as the basis of the adverse hiring decision, we find that he has met the second condition for Board jurisdiction over his claim, i.e. he made a nonfrivolous allegation that the employment practice violated one of the basic requirements for employment practices set forth in 5 C.F.R. § 300.103. *Mapstone*, 110 M.S.P.R. 122, ¶ 7. Specifically, the appellant alleges on review that the minimum educational requirement bears "no rational relationship" to performance in the Aerospace Engineer position for which he applied. PFR File, Tab 1 at 6; *see Sauser v. Department of Veterans Affairs*, 113 M.S.P.R. 403, ¶ 9 (2010); *Mapstone*, 110 M.S.P.R. 122, ¶ 8; 5 C.F.R. § 300.103(b)(1).

¶22 We note that the appellant first learned of his nonselection no later than March 10, 2010, when he filed his complaint with DOL. IAF, Tab 1, Subtab 3 at 1. It therefore appears that the appellant's Board appeal, which he filed on or about May 11, 2010, may have been untimely. IAF, Tab 1 at 1; *see* 5 C.F.R. § 1201.22(b) (an appellant must file his appeal no later than 30 days after the effective date of the action being appealed, or 30 days after the date he receives the agency's decision, whichever is later). Nevertheless, the appellant has not received the notice on the timeliness issue to which he is entitled, nor has he had a full and fair opportunity to litigate it. *See Scott*, 105 M.S.P.R. 482, ¶ 14. In particular, the record is not developed regarding whether the agency was obligated to notify the appellant of his Board appeal rights when it notified him of his nonselection. *See generally O'Leary v. Office of Personnel Management*, 86 M.S.P.R. 87, ¶ 11 (2000), *request to reopen denied*, 90 M.S.P.R. 124 (2001). Accordingly, we decline to adjudicate the timeliness issue at this stage of the appeal.

ORDER

¶23 We remand the appeal to the Dallas Regional Office for adjudication of the appellant's employment practices claim.[5] Because the jurisdictional and timeliness issues are inextricably intertwined, *see supra* ¶ 22, the administrative judge shall notify the appellant of his jurisdictional burden and adjudicate the

[5] The appellant is not precluded from filing a new Board appeal on the VEOA claim if he cures the jurisdictional defect underlying the dismissal of the instant appeal by submitting evidence in his new appeal showing that exhaustion has now been completed. *See Brown v. Department of the Navy*, 102 M.S.P.R. 377, ¶ 14 (2006); *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 338 (1995).

jurisdictional issue before proceeding to the timeliness issue, see Wright v. Department of Transportation, 99 M.S.P.R. 112, ¶¶ 13-14 (2005).

FOR THE BOARD:

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