UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 97

Docket No. SF-4324-11-0228-I-1

Henry E. Gossage,

Appellant,

v.

Department of Labor,

Agency.

August 10, 2012

Henry E. Gossage, Olympia, Washington, pro se.

Bruce L. Brown, Esquire, and Matthew Vadnal, Esquire, Seattle, Washington, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) for lack of jurisdiction.[1] For the reasons set forth below, we GRANT

[1] Although the Clerk of the Board granted the appellant's motion to consolidate this appeal with his appeal under the Veterans Employment Opportunities Act of 1998, MSPB Docket No. SF-3330-11-0227-I-1, we have issued separate decisions addressing

the appellant's petition for review, REVERSE the initial decision of the administrative judge, and REMAND the appeal for adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 In September 2000, the appellant, a preference-eligible veteran, submitted an application for the position of Industrial Hygienist, GS-0690-11, at the agency's Occupational Safety & Health Administration (OSHA). Initial Appeal File (IAF), Tab 1 at 1, 10, 13. The appellant made the certificate of eligibles, as did two nonveterans. *Id.* at 15. Upon review of the appellant's Declaration for Federal Employment form, the agency requested the Office of Personnel Management (OPM) to make a determination regarding his suitability for employment. *Id.* at 13. On November 30, 2000, OPM sustained the agency's request to have the appellant deemed unsuitable for employment in the position.[2] *Id.* at 14.

¶3 On June 8, 2001, the appellant filed a Board appeal, *Gossage v. Office of Personnel Management*, MSPB Docket No. SE-0731-01-0261-I-1, in which he challenged, among other things, OPM's negative suitability determination and his nonselection. He also claimed discrimination and a violation of his rights as a veteran. IAF, Tab 1 at 4-6. Shortly thereafter, on July 1, 2001, the appellant filed a claim with the agency's Veterans' Employment and Training Service (VETS), using a VETS Eligibility Data Form 1010, alleging that OSHA violated

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the appellant's two appeals because we find they do not contain sufficiently related factual or legal issues. *See* 5 C.F.R. § 1201.36.

[2] OPM initially responded to the request for a suitability determination by canceling the appellant's eligibility for the Industrial Hygienist position and any other competitive position, and debarring him from applying for any competitive-service position for 2 years. OPM later rescinded both the cancellation of eligibility and its general debarment. *See Gossage v. Office of Personnel Management*, 163 F. App'x 909, 910, 912 (Fed. Cir. 2006).

his veterans' preference rights. *Id.* at 8-10. On July 5, 2001, Greg Mercer, Assistant Director, VETS, informed the appellant that his office had retained his VETS Eligibility Data Form 1010 and was in the process of researching the applicability of his case to the statute. *Id.* at 11. In a letter dated July 18, 2001, Mr. Mercer informed the appellant that his claim against OSHA under the Veterans Employment Opportunities Act of 1998 (VEOA) did not have merit. *Id.* at 12.

¶4 The administrative judge adjudicated the appellant's Board appeal as an appeal of OPM's negative suitability determination and dismissed the appeal on grounds of mootness and collateral estoppel. *Gossage*, 163 F. App'x at 910. The U.S. Court of Appeals for the Federal Circuit subsequently remanded the appeal to determine whether OPM established its case under 5 C.F.R. part 731 and for consideration of the appellant's discrimination claims. *Id.* at 912. The administrative judge again dismissed the appeal on remand, and the appellant petitioned for review. In its March 24, 2009 Final Order denying the appellant's petition for review, the Board instructed the appellant that he now could file his appeals under VEOA and USERRA, stating that the appellant had delayed their filing pending resolution of his suitability appeal. *Gossage v. Office of Personnel Management*, MSPB Docket No. SE-0731-01-0261-I-5, Final Order (Mar. 24, 2009).

¶5 On December 29, 2010, the appellant filed the present USERRA appeal. IAF, Tab 1. In the acknowledgment order, the administrative judge advised the appellant that an individual may submit an appeal alleging discrimination under USERRA directly to the Board or may submit such an appeal to the Board after filing a complaint with the Secretary of Labor and demonstrating that procedures before the Department of Labor (DOL) had been exhausted. IAF, Tab 2 at 2. The administrative judge then ordered the appellant to file a statement that he chose not to file a complaint with the Secretary of Labor and filed directly with the Board, or that adjudication of his appeal must be delayed pending exhaustion of

his administrative remedies before DOL. *Id.* The appellant did not respond. On May 23, 2011, the administrative judge issued a second order on jurisdiction finding that the record reflected that the appellant previously raised his USERRA claim in a DOL complaint in July 2001 and ordering the appellant to file evidence and argument establishing that he had exhausted his remedies before DOL prior to filing the present appeal. IAF, Tab 11. In his response, the appellant indicated that he had raised a USERRA claim before DOL in 2001. IAF, Tab 12.

¶6 In an initial decision dated July 5, 2011, the administrative judge dismissed the appeal for lack of jurisdiction without holding the requested hearing, finding that the appellant filed a USERRA complaint with DOL in July 2001 prior to filing his USERRA appeal with the Board, and that, despite the extended period of time that had elapsed since the appellant filed the DOL complaint, the record lacked evidence that DOL had terminated its investigation. IAF, Tab 15, Initial Decision. He therefore found that the Board lacked jurisdiction over the appeal. *Id.* at 3.

¶7 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. PFR File, Tab 9.

ANALYSIS

The record does not establish that the appellant filed a USERRA complaint with DOL in July 2001.

¶8 An appellant may either file a USERRA complaint with the Secretary of Labor pursuant to 38 U.S.C. § 4322 or file an appeal directly with the Board pursuant to 38 U.S.C. § 4324(b). 5 C.F.R. § 1208.11(a); *see Graham v. Commodity Futures Trading Commission*, 105 M.S.P.R. 392, ¶ 5 (2007), *aff'd*, 348 F. App'x 564 (Fed. Cir. 2009). If an appellant first files a USERRA complaint with the Secretary of Labor, he may not file a USERRA appeal with the Board until the Secretary notifies the appellant that she was unable to resolve the complaint. 5 C.F.R. § 1208.11(b); *see Graham*, 105 M.S.P.R. 392, ¶ 5.

USERRA does not provide for exhaustion of the complaint before DOL as a matter of time; it instead requires notification from DOL that the Secretary's efforts did not resolve the appellant's complaint. 38 U.S.C. § 4324(b)(2); *Graham*, 105 M.S.P.R. 392, ¶ 5. Thus, under 38 U.S.C. § 4324(b)(2), the Board does not acquire jurisdiction over an appellant's USERRA claim until the appellant receives the required notification from DOL. 38 U.S.C. §§ 4322(e), 4324(b)(2); *Graham*, 105 M.S.P.R. 392, ¶ 5.

¶9 Here, although the administrative judge found, and the appellant concedes, that the appellant filed a complaint alleging discrimination under USERRA with DOL in July 2001, the record does not support this finding. Specifically, Mr. Mercer stated, upon receipt of the appellant's July 2001 DOL complaint, that his office was in the process of researching the applicability of his case to "the statute," and he later informed the appellant that his office determined that his case under VEOA did not have merit. IAF, Tab 1 at 11-12. Mr. Mercer never stated that his office also construed the appellant's complaint as a claim under USERRA, and the record contains no evidence that DOL actually investigated his complaint as anything other than a claim under VEOA.[3] *Id.* Therefore, we find that the Board has jurisdiction over the appellant's USERRA appeal as a direct appeal under 38 U.S.C. § 4324(b)(1).[4]

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[3] In his initial decision, the administrative judge stated that the only evidence regarding DOL's consideration of the appellant's claim under USERRA was a May 25, 2004 form letter stating that the appellant sought assistance with his rights and benefits under USERRA or VEOA. Initial Decision at 3 (citing IAF, Tab 12 at 47). Because the letter states USERRA "or" VEOA, it does not provide evidence that DOL indeed considered the appellant's claim under USERRA. IAF, Tab 12 at 47.

[4] We note that there is no time limit for filing a direct appeal under USERRA. *Tierney v. Department of Justice*, 89 M.S.P.R. 354, ¶ 6 (2001).

The appellant has made sufficient nonfrivolous allegations to establish jurisdiction over his USERRA claim.

¶10 Under 38 U.S.C. § 4311(a), "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 by an employer on the basis of that . . . performance of service." To establish jurisdiction over a USERRA discrimination claim under Section 4311(a), 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. *Swidecki v. Department of Commerce*, 113 M.S.P.R. 168, ¶ 6 (2010). A claim of discrimination under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous, particularly where, as here, the appellant is pro se. *Gaston v. Peace Corps*, 100 M.S.P.R. 411, ¶ 8 (2005). Once an appellant has established Board jurisdiction, he has an unconditional right to a hearing on the merits of his USERRA claim. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶¶ 17-18 (2008).

¶11 Here, the appellant alleged that he served in the Department of the Army on active duty from 1971 until 1974 and that the agency did not select him for the Industrial Hygienist position in September 2000. IAF, Tab 1 at 1, Tab 12 at 34. He further alleged that the agency discriminated against him in part due to his status as a disabled veteran and that the agency violated his rights as a veteran and his veterans' preference rights when he was not selected for the Industrial Hygienist position. IAF, Tab 12 at 55, 57-59; *see* IAF, Tab 1 at 13, 15. Specifically, the appellant alleged that the agency interviewed a lower-scoring nonveteran and offered that nonveteran the position prior to interviewing him for it, and ultimately did not select him despite his veterans' preference rights in

violation of USERRA. IAF, Tab 12 at 58-59. Based upon these assertions, we find the appellant meets the jurisdictional requirements under 38 U.S.C. § 4311(a). *See Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 15 (2006) (the appellant raised a nonfrivolous claim of jurisdiction under USERRA when he claimed that the agency offered the appointment to a vacant position to a nonveteran who should have been ranked lower than him during the selection process); *Gaston*, 100 M.S.P.R. 411, ¶ 8 (the appellant raised a nonfrivolous claim of jurisdiction under USERRA where he claimed that his veterans' preference should have placed him ahead of the other candidates and that a nonveteran was selected over him).

¶12 Because jurisdiction has been established, the appellant is entitled to the hearing he sought. *See Downs*, 110 M.S.P.R. 139, ¶¶ 17-18. On remand, the appellant must prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency's decision to deny him employment. *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). The appellant may meet this burden by using direct or indirect evidence. *Id.* at 1014. Discriminatory motivation under USERRA may be reasonably inferred from such circumstantial evidence as temporal proximity between the appellant's military activity and the adverse employment action, "inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the [individual's] military activity, and disparate treatment of certain [individuals] compared to other [individuals] with similar work records or offenses." *Id.* If the appellant meets his burden, the burden shifts to the agency to prove that legitimate reasons, standing alone, would have induced it to take the same action. *Id.*

The appellant's USERRA claim is not barred by the doctrine of collateral estoppel.

¶13 In its response to the appellant's petition for review, the agency argues that, should the Board find that the appellant established jurisdiction over his USERRA claim, the claim should be barred by the doctrine of collateral estoppel. PFR File, Tab 9 at 8-9. Collateral estoppel is appropriate when the following conditions are met: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005); *see Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988). The "actually litigated" element is satisfied when the issue was "properly raised by the pleadings, was submitted for determination, and was determined." *Johnson v. Department of the Air Force*, 92 M.S.P.R. 370, ¶ 13 (2002) (quoting *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001)).

¶14 The appellant's USERRA claim was not "actually litigated" in the prior action because the appellant has never received a determination on the merits of his USERRA claim. Indeed, in its 2009 Final Order, the Board instructed the appellant that he now could file his USERRA appeal because the appellant had delayed its filing while he pursued the suitability appeal. *Gossage*, MSPB Docket No. SE-0731-01-0261-I-5, Final Order at 2. Thus, under these circumstances, collateral estoppel does not preclude his USERRA claim. *See Johnson*, 92 M.S.P.R. 370, ¶ 13.

ORDER

¶15 Accordingly, we remand this appeal to the regional office for further adjudication consistent with this Opinion and Order. 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.

FOR THE BOARD:

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