

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

2012 MSPB 106

Docket No. PH-0752-12-0012-I-1

William J. Clark,

Appellant,

v.

United States Postal Service,

Agency.

September 18, 2012

Angela J. Davis, Esquire, Jessup, Maryland, for the appellant.

Jasmin A. Dabney, Esquire, Landover, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal of the removal action against him for lack of jurisdiction. For the reasons set forth below, we VACATE the initial decision and REMAND the appeal for further adjudication regarding the appellant's "preference eligible" status.

BACKGROUND

¶2 The appellant was employed as a Sales and Service Distribution Clerk with the U.S. Postal Service. Initial Appeal File (IAF), Tab 9, Subtab 7 at 1. The

agency issued a letter of decision removing the appellant from the Postal Service, and the appellant subsequently filed the instant appeal with the Board challenging his removal. IAF, Tab 1. In his appeal, the appellant alleged that he was a preference eligible veteran as defined at [5 U.S.C. § 2108\(3\)](#). IAF, Tab 1 at 4. The appellant also alleged discrimination and whistleblower reprisal. *Id.* at 14; IAF, Tab 9, Subtab 1 at 5-9.¹

¶3 The agency filed a narrative response and motion to dismiss the appeal for lack of jurisdiction, alleging that the appellant was not a preference eligible employee with Board appeal rights due to the fact that he received a discharge under other than honorable conditions in 1985 and was thus disqualified from preference eligible status under [5 U.S.C. § 2108\(3\)](#). IAF, Tab 5 at 7-8. The agency further stated that the appellant was not a supervisor or manager, or in a personnel position subject to Board jurisdiction under [39 U.S.C. § 1005\(a\)\(4\)\(A\)\(i\)\(I\)](#). *Id.* at 7. Therefore, the agency argued, the Board lacked jurisdiction over the appeal of the removal action and lacked independent jurisdiction over the appellant's discrimination and whistleblower claims. *Id.* at 8-10.

¶4 The appellant filed a response to the agency's motion to dismiss, renewing his claim that the Board has jurisdiction over his appeal because he is a preference eligible veteran pursuant to [5 U.S.C. § 2108\(3\)](#). IAF, Tab 9, Subtab 1 at 4. The appellant argued that he is a veteran who served during a war, in a campaign or expedition for which a campaign badge was authorized and that he was discharged under honorable conditions in 1977. *Id.* at 3-5; IAF, Tab 9, Subtab 8 at 2. Thus, the appellant argued, the Board has jurisdiction over his

¹ The appellant initially indicated that he was also pursuing a veterans' preference claim. IAF, Tab 1 at 14. However, in a subsequent filing the appellant made it clear that he is not pursuing a Veterans Employment Opportunities Act of 1998 claim. IAF, Tab 9, Subtab 1 at 6-7.

removal action and over his discrimination and whistleblower claims. IAF, Tab 9, Subtab 1 at 5-8.

¶5 The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant completed two periods of military service, one from 1973 to 1977, for which the appellant received an honorable discharge, and one from 1978 to 1985, for which the appellant received a discharge under other than honorable conditions. IAF, Tab 11 at 3. The administrative judge determined that because the appellant's second discharge was under other than honorable conditions, the appellant did not qualify as a preference eligible under [5 U.S.C. § 2108](#)(1)-(3), and as a result, he was not an "employee" with appeal rights under [5 U.S.C. § 7511](#)(a)(1)(B) and [39 U.S.C. § 1005](#)(a)(4)(A)(i). *Id.* The administrative judge also found that the appellant failed to establish that he was a supervisor or management employee, or was engaged in personnel work in other than a purely nonconfidential clerical capacity. Therefore, the administrative judge concluded that the Board did not have jurisdiction over the appeal under [39 U.S.C. § 1005](#)(a)(4)(A)(ii), and further, that the appellant's discrimination claim did not constitute an independent source of Board jurisdiction. *Id.* at 3-4. Finally, the administrative judge determined that, because the appellant failed to demonstrate that he raised his whistleblower reprisal allegations with the Office of Special Counsel, the Board did not have independent jurisdiction over that claim as an individual right of action appeal. *Id.*

¶6 The appellant has filed a petition for review alleging that the administrative judge erred in determining that he is not a preference eligible veteran under [5 U.S.C. § 2108](#)(3) and in determining that the Board does not have jurisdiction over his appeal. Petition for Review (PFR) File, Tab 1 at 3. The appellant also alleges that he is a disabled veteran. *Id.* The agency has responded in opposition, renewing its argument that the administrative judge properly found that the Board lacks jurisdiction because the appellant's other than honorable discharge disqualified him from the preference eligible status necessary for Board

jurisdiction. PFR File, Tab 3 at 4-5. Additionally, the agency argues that the appellant's claim that he is a "disabled veteran" is unsupported and was not properly raised in his initial appeal. *Id.* at 5. Finally, the agency argues that the administrative judge was correct in finding that the Board does not have independent jurisdiction over the appellant's discrimination and whistleblower claims. *Id.* at 5-6. As a result, the agency requests that the Board dismiss the appellant's petition for review and affirm the initial decision dismissing the appeal. *Id.* at 6.

ANALYSIS

The administrative judge erred in finding that the appellant is not a "preference eligible" veteran pursuant to [5 U.S.C. § 2108\(3\)](#).

¶7 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). In order for a Postal Service employee to appeal a removal under 5 U.S.C. chapter 75, he must: (1) be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity; and (2) have completed 1 year of current continuous service in the same or similar positions. See [39 U.S.C. § 1005\(a\)](#); [5 U.S.C. § 7511\(a\)\(1\)\(B\)\(ii\)](#); *Toomey v. U.S. Postal Service*, [71 M.S.P.R. 10](#), 12 (1996). For the purpose of this appeal, a "preference eligible" veteran is defined under [5 U.S.C. § 2108](#) as an individual who served on active duty in the armed forces during one of several proscribed periods and who was discharged or released from active duty "under honorable conditions."

¶8 It is uncontested that the appellant has completed 1 year of current continuous service, that he is not a manager or supervisor, and that he is not engaged in personnel work in other than a nonconfidential clerical capacity. IAF, Tab 1; Tab 5 at 17, 23. Thus, in order for the Board to have jurisdiction over his

appeal, the appellant must be a preference eligible under [5 U.S.C. § 2108](#). In finding that the appellant was not a preference eligible as defined under [5 U.S.C. § 2108](#)(3), the administrative judge relied on the language of the statute, finding that on its face the statute required that a preference eligible be separated under honorable conditions and so “the appellant’s second discharge for Under Other than Honorable Conditions disqualifie[d] him for preference eligibility and the concomitant right of appealing his removal to the Board.” IAF, Tab 11 at 3.

¶9 However, the “under honorable conditions” requirement in [5 U.S.C. § 2108](#)(1) is not “limited to the ultimate or last period of military service,” and if an individual has received an unconditional discharge following a period of qualifying military service, the individual may meet the definition of “preference eligible” even though his last discharge was under other than honorable conditions. *Dooley v. Tennessee Valley Authority*, [43 M.S.P.R. 462](#), 467 (1990). As is the case here, in *Dooley* the appellant challenged the dismissal of his appeal of the removal action against him, arguing that the Board had jurisdiction because he was a preference eligible veteran entitled to Board appeal rights under [5 U.S.C. § 7511](#)(a)(1)(B). *Dooley*, 43 M.S.P.R. at 463. The appellant in *Dooley* received honorable discharges from the Navy in 1974, 1979, and 1983, and received a discharge under other than honorable conditions in 1987. *Id.* Reversing the administrative judge’s initial decision finding that the appellant was not discharged “under honorable conditions,” the Board found that, despite the appellant’s last discharge, he was a preference eligible for the purpose of [5 U.S.C. § 2108](#) under the plain language of the statute due to his three previous honorable discharges. *Id.* at 464-67. In reaching this conclusion, the Board determined that a distinction was to be made between the effect of “conditional” discharges (discharges that do not complete the individual’s obligated service), and unconditional discharges (discharges that occur at a time when the person has completed the service he was obligated to perform). *Id.* at 466-67. Finding that the appellant in *Dooley* had completed the service he was obligated to perform

after each of his honorable discharges, the Board found that his honorable discharges were not conditional. *Id.* The Board then evaluated the text of [5 U.S.C. § 2108](#) and found that “Congress did not expressly define ‘separated from the armed forces under honorable conditions’ as being limited to the ultimate or last period of military service,” and therefore the appellant’s qualifying military service followed by unconditional honorable discharges qualified him as a preference eligible under 5 U.S.C. § 2108. *Id.*

¶10 Thus, under Board precedent, if an individual is separated from a qualifying period of military service under honorable conditions, a subsequent discharge under other than honorable conditions does not necessarily disqualify him from preference eligible status under [5 U.S.C. § 2108](#). *Dooley*, 43 M.S.P.R. at 467; *see also Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶¶ 5, 10 (2008) (holding that a disabled veteran with an honorable discharge raised nonfrivolous allegations that he was a preference eligible under [5 U.S.C. § 2108](#)(3) despite another discharge under other than honorable conditions). Accordingly, the appellant’s discharge under other than honorable conditions in 1985 did not necessarily disqualify him from preference eligible status. IAF, Tab 11 at 3.

¶11 The parties did not address the Board’s decision in *Dooley* or whether the appellant’s 1977 discharge was conditional or unconditional. On remand, the administrative judge should permit the parties to further develop the record on the appellant’s preference eligible status consistent with *Dooley*. The administrative judge shall make new findings regarding the Board’s jurisdiction over this matter and, if appropriate, adjudicate the merits of the appeal.²

² Because the focus of the administrative judge’s jurisdictional ruling in the initial decision was only on the effect of the appellant’s discharge under other than honorable conditions, on remand, the appellant is not precluded from alleging that the Board has jurisdiction over his appeal because he is a disabled veteran.

ORDER

¶12 Accordingly, we REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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