

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

2014 MSPB 8

Docket No. DC-3330-11-0538-M-1

Kenneth P. Beyers,

Appellant,

v.

Department of State,

Agency.

February 12, 2014

Kenneth P. Beyers, Arlington, Virginia, pro se.

Dawn Bennett-Ingold, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on remand from the U.S. Court of Appeals for the Federal Circuit, which vacated the Board's prior decision. *See Beyers v. Department of State*, 505 F. App'x 951 (Fed. Cir. 2013); *Beyers v. Department of State*, MSPB Docket No. DC-3330-11-0538-I-1, Final Order (Jan. 30, 2012) (hereinafter Final Order). For the reasons set forth below, we DENY the appellant's request for corrective action under the Veterans Employment Opportunities Act (VEOA).

BACKGROUND

¶2 The appellant applied to be appointed as a Diplomatic Security Engineering Officer in the Foreign Service of the U.S. Department of State. Initial Appeal File (IAF), Tab 7 at 84-97. He received a conditional offer of appointment as a Foreign Service Career Candidate, subject to satisfactory completion of the Foreign Service suitability review process. *Id.* at 77-79. The agency's background examination turned up unfavorable information, and its Final Review Panel terminated his candidacy for employment. *Id.* at 72-74, 76. The Appeals Committee of the Board of Examiners for the Foreign Service upheld the decision, and the appellant filed the instant appeal. *Id.* at 17-19; IAF, Tab 1.

¶3 The appeal originally pertained to the agency's suitability determination, and the appellant sought Board review pursuant to [5 C.F.R. § 731.501](#). *See Beyers v. Department of State*, MSPB Docket No. DC-0731-11-0467-I-1, Initial Decision (Apr. 25, 2011) (Suitability ID). He amended the appeal to include a claim under VEOA and a claim that agency personnel engaged in prohibited personnel practices. IAF, Tabs 2, 3. The VEOA appeal was docketed separately and is the instant appeal. *See* IAF, Tabs 1, 8. In the suitability appeal, the administrative judge held that the Board lacks jurisdiction to review the agency's suitability determination pursuant to [5 C.F.R. § 731.203\(b\)](#), as well as [5 C.F.R. § 731.101](#) and *Hester v. U.S. Information Agency*, [38 M.S.P.R. 39](#), 41 (1988). Suitability ID at 2-8. That decision became the Board's final decision on May 30, 2011. *Id.* at 9.

¶4 In the appeal now before the Board, the administrative judge found that the appellant established the Board's jurisdiction pursuant to [5 U.S.C. § 3330a\(a\)](#), but that his VEOA appeal failed on the merits.¹ IAF, Tab 19, Initial Decision (ID)

¹ The administrative judge did not consider the appellant's claim – made without further elaboration – that the agency committed unspecified prohibited personnel practices, explaining that the Board's authority to adjudicate claims under VEOA would not extend to such issues. IAF, Tab 19, Initial Decision at 7; *see* IAF, Tabs 2-3. The

at 2-7. On review, the Board dismissed the appeal for failure to state a claim on which relief may be granted and declined to reconsider the suitability decision based on the law-of-the-case doctrine. Final Order at 2-3 (located at Petition for Review (PFR) File, Tab 7). The appellant appealed to the Federal Circuit. *Beyers*, 505 F. App'x at 951.

¶5 The Federal Circuit found the Board's reliance on the law-of-the-case doctrine to be incorrect. The court explained that the merits of the suitability determination might serve as a factual predicate for a valid VEOA claim, and thus the Board was not foreclosed from considering the merits of the suitability determination. *Beyers*, 505 F. App'x at 953. The court explained, citing *Lazaro v. Department of Veterans Affairs*, [666 F.3d 1316](#), 1321 (Fed. Cir. 2012), that the Board, under VEOA, "has jurisdiction to determine whether [an agency] afforded [the petitioner] the right to compete for [a position] and properly determined, in accordance with [relevant veterans preference statutes or regulations], that [the petitioner] was not qualified for the position."² *Beyers*, 505 F. App'x at 954. The court stated that the Board should address whether it "may (or must) similarly address suitability issues in the context of the petitioner's VEOA claim." *Id.* On remand now, we do so.

appellant did not identify any discrete issues related to prohibited personnel practices except to the extent that the agency's alleged failure to comply with a statute and a regulation pertaining to the appointment of veterans would have been a prohibited personnel practice. See [5 U.S.C. § 2302\(b\)\(12\)](#).

² This appeal was decided pursuant to [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#). See ID at 1-2. The court appears to have instructed the Board pursuant to the standard set forth in [5 U.S.C. § 3304\(f\)\(1\)](#) and [3330a\(a\)\(1\)\(B\)](#). See [5 U.S.C. § 3304\(f\)\(1\)](#) ("Preference eligibles . . . may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures."). The outcome of the appeal would be the same under either standard, as the agency clearly gave the appellant the opportunity to compete for a position.

ANALYSIS

¶6 VEOA affords a preference eligible veteran who asserts that an agency has violated his rights under any statute or regulation relating to veterans' preference with respect to federal employment the right to file a complaint with the Secretary of Labor. *See* [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#). After he has exhausted his remedies with the Department of Labor, VEOA affords a preference eligible the right to appeal the alleged violation to the Board. *See* [5 U.S.C. § 3330a\(d\)](#). Because the appellant here has satisfied the jurisdictional elements of VEOA, *see* ID at 3-4, on the merits he must show by preponderant evidence that the agency violated his rights under a statute or regulation relating to veterans' preference. *Lis v. U.S. Postal Service*, [113 M.S.P.R. 415](#), ¶ 11 (2010).

¶7 The appellant alleged that the agency violated his veterans' preference rights under [22 U.S.C. § 3941\(c\)](#) and [22 C.F.R. § 11.20\(a\)\(4\)](#) when it delayed a final decision on his application while non-veterans were being hired for a limited number of existing positions, issued a negative suitability determination, incorrectly described his alleged poor social skills and a client complaint as "employment misconduct," ignored his submissions contravening the evidence underlying the suitability determination, failed to follow its own procedures and policy in denying his agency appeal, and denied his internal agency appeal of the suitability determination.³ *See* IAF, Tab 3 at 3, Tab 11 at 8-9, Tab 12 at 9-12,

³ The appellant argued on review that the agency additionally violated [5 U.S.C. § 3311\(2\)](#), which states, "In examinations for the competitive service in which experience is an element of qualification, a preference eligible is entitled to credit . . . for all experience material to the position for which examined, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he received pay therefor." *See* PFR File, Tab 1 at 17-18. We were unable to find any evidence in the record that the appellant raised this issue prior to filing the petition for review, either with the Department of Labor or with the Board on appeal. An appellant's failure to exhaust his administrative remedy with respect to some of his VEOA claims precludes the Board from jurisdiction over those particular claims on appeal. *See Burroughs v. Department of the Army*, [115 M.S.P.R. 656](#), ¶¶ 9-10, *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). We also generally will not consider an argument

Tab 15 at 4-6. Section 3941(c) states that “[t]he fact that an applicant for appointment as a Foreign Service officer candidate is a veteran or disabled veteran shall be considered an affirmative factor in making such appointments.” [22 U.S.C. § 3941\(c\)](#). Section 11.20(a)(4) states that “[v]eterans’ preference shall apply to the selection and appointment of Foreign Service specialist career candidates.” [22 C.F.R. § 11.20\(a\)\(4\)](#). The appellant alleged that the agency’s actions denied him affirmative consideration for the position and constituted an inappropriately narrow construction of sections 3941(c) and 11.20(a)(4). *See, e.g.*, IAF, Tab 12 at 9 n.3, 10-11.

¶8 However, during the Board appeal process, the appellant was given a full and fair opportunity to show that the agency failed to follow sections 3941(c) and 11.20(a)(4). *See, e.g., id.* at 9-11, Tab 15 at 4-5. The agency’s submissions include documentary evidence related to its hiring process in this matter. *See* IAF, Tab 7 at 12-97, 17 at 10-48. The record shows that the appellant simply failed to meet all qualifications for the Foreign Service position for which he applied. On passing the Foreign Service examination, he received a *conditional* offer of employment *contingent upon* satisfactory security, medical, and suitability clearances. IAF, Tab 7 at 77-80. The background investigation turned up suitability issues. *Id.* at 76. The Final Review Panel, which evaluates candidates for suitability for appointment to the Foreign Service, concluded that he was not suitable for the position. *Id.* at 72-76. The Appeals Committee of the Board of Examiners for the Foreign Service upheld that decision, and his candidacy was thus terminated. *Id.* at 12-15, 17-19.

raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party’s due diligence. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980); *see also* IAF, Tab 12 at 11, Tab 15 at 4-5. Accordingly, we will not address these issues at this stage of the case.

¶9 Had the appellant been found suitable and thus met all qualifications for employment, the appropriate number of points reflecting his status as a veteran would have been added to his examination score pursuant to the agency's procedures, and his name would have been placed on the rank-ordered register from which the agency hires. IAF, Tab 14 at 32-33, Tab 17 at 45, 47-48. He never reached that point in the application process because he was found unsuitable, that is, unqualified for the position. "VEOA does not enable veterans to be considered for positions for which they are not qualified." *Lazaro*, [666 F.3d at 1319](#). The record evidence does not suggest that the agency improperly concluded that he was unqualified.

¶10 On review, the appellant sought to show that the agency should have given him an "affirmative factor preference" in determining his qualifications for the position at issue. PFR File, Tab 1 at 18-23. The appellant, however, has not identified any statute or regulation relating to veterans' preference allowing an agency to disregard findings made during a suitability determination that would otherwise disqualify a preference eligible. The statute upon which the appellant relied, [22 U.S.C. § 3941\(c\)](#), states that status as a veteran is an "affirmative factor" in hiring. The regulation he cited, [5 C.F.R. § 11.20\(a\)\(4\)](#), states that "[v]eterans' preference shall apply to the selection and appointment of Foreign Service specialist career candidates." Neither section specifies when veterans' preference points must be added, or whether the "affirmative factor" of status as a preference eligible would offset an applicant's inability to meet all qualifications for employment. Neither creates specific obligations for the agency with respect to the assessment of suitability of preference eligibles.

¶11 The circumstances here clearly differ from cases where agencies have failed to heed specific statutes or regulations relating to veterans' preference that require, for example, a more generous assessment of the qualifications of preference eligibles who apply for positions. In *Lazaro*, the Federal Circuit remanded the appeal to the Board to determine whether the agency had properly

assessed the appellant's qualifications under [38 U.S.C. § 4214\(b\)](#), [5 U.S.C. § 3311](#), and [5 C.F.R. § 302.302\(d\)](#). *Lazaro*, [666 F.3d at 1318-21](#). These provisions require agencies to consider preference eligible candidates who have not attained the minimum level of education required for some positions and to credit those candidates with all experience material to the position, even if such experience is unpaid. *Id.* at 1318-19 (citing [5 U.S.C. § 3311](#); [38 U.S.C. § 4214\(b\)](#)).

¶12 Similarly, in *Phillips v. Department of the Navy*, the Board remanded the appeal in part to determine whether the agency had considered whether the appellant's listed experience would satisfy the requirements for the GS-8 level position set forth in the Office of Personnel Management's (OPM's) Operating Manual for Qualification Standards for General Schedule Positions. *Phillips v. Department of the Navy*, [110 M.S.P.R. 184](#), ¶¶ 7-10 (2008). It appeared from the agency's documentary submission that the agency "relied on the single fact that the appellant was a GS-6 to conclude that he did not have the minimum qualifications for a GS-8 position," which the Board concluded was improper. *Id.*, ¶ 8. In *Isabella v. Department of State*, the Board found that the agency failed to establish that maximum entry age requirements were essential to the performance of the duties of a Diplomatic Security Service Special Agent and could not be waived pursuant to veterans' preference statutes [5 U.S.C. §§ 3312\(a\)\(1\)](#) and 3320. *Isabella v. Department of State*, [106 M.S.P.R. 333](#), ¶¶ 29-44 (2007), *aff'd on recons.*, [109 M.S.P.R. 453](#) (2008); see [5 U.S.C. § 3312\(a\)\(1\)](#) ("In determining qualifications of a preference eligible . . . [OPM] or other examining agency shall waive . . . requirements as to age . . . unless the requirement is essential to the performance of the duties of the position."); [5 U.S.C. § 3320](#) (applying provisions of [5 U.S.C. §§ 3308](#) through 3318 to excepted service appointments). In contrast to the appellants in *Lazaro*, *Phillips*, and *Isabella*, the appellant here has failed to identify, and we are not aware of, any statute or regulation relating to veterans' preference that governs the

application of suitability requirements for candidates that are preference eligibles.⁴

¶13 Accordingly, the appellant has not shown that the agency has violated his rights under any statute or regulation relating to veterans' preference, and we DENY his request for corrective action.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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

⁴ We note that the appellant conceded before the Federal Circuit that jurisdiction was not present in his suitability appeal, and that the court did not remand this appeal to consider the agency's suitability determination in the absence of relevant veterans' preference statutes and regulations. *Beyers*, 505 F. App'x at 953-54. Thus, the appellant's arguments regarding the accuracy of the evidence upon which the agency relied, the agency's interpretation of the evidence, and the contrary evidence the appellant provided to the agency in the suitability matter are not within the Board's jurisdiction in the instant appeal. See, e.g., IAF, Tab 11 at 8-15.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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:

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