

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

PATRICK K. HARELLSON,
Appellant,

DOCKET NUMBER
SF-3330-09-0295-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 31, 2009

William H. Brawner, Esquire, Ventura, California, for the appellant.

Afshin Miraly, Long Beach, California, for the agency.

BEFORE
Tamara Ribas
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 10, 2009, the appellant filed a petition for appeal challenging the agency's decision not to select him for two Custodian positions at the Honolulu Processing and Distribution Center (P&DC), and he alleged that this was in violation of the Veterans Employment Opportunities Act of 1998 (VEOA), codified at 5 U.S.C. § 3330a.¹ Initial Appeal File (IAF), Tab 1. The Board has

¹ The appellant also has a companion appeal, docket no. SF-4324-09-0406-I-1, in which he alleged violations of the Uniformed Services Employment and Reemployment Rights Act.

jurisdiction over this VEOA appeal. 5 U.S.C. § 3330a(d); *see Sears v. Department of the Navy*, 86 M.S.P.R. 76, 78-79 (2000). The appellant did not request a hearing. For the reasons stated below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The appellant, a preference eligible, was formerly employed by the agency as an Electronics Technician in its Denver P&DC until his resignation, effective May 28, 2000, due to a "better job offer". IAF, Tab 7 at 361.

On December 16, 2005, the appellant, then residing in Hawaii, wrote to Debra Doles, Manager, Personnel Services, Honolulu P&DC, and requested reinstatement as an Electronics Technician, Maintenance Mechanic (MPE), or Custodian; however, he did not inform her that he had veterans' preference. IAF, Tab 7 at 132. On January 17, 2006, the appellant personally went to the Honolulu P&DC Human Resources Office seeking to take the Custodian, Maintenance Mechanic (PS-05) and Maintenance Mechanic (MPE-07) examinations. *Id.* at 125. Documentary evidence regarding the Custodian and Laborer exam shows that on August 23, 2006, the appellant received a basic rating of 97.60 with an additional 10 points for veterans' preference, culminating in an overall score of 107.60. The appellant was advised that he would be placed on a register for 2 years. *Id.* at 133. Regarding the Maintenance exam, on August 7, 2006, the appellant received a basic score for each identified position, and had an additional 10 points added to his score for veterans' preference, with the exception of one position for which he was rated ineligible. *Id.* at 134. With respect to the positions of Maintenance Mechanic (PS-05) and Maintenance Mechanic (MPE-07), the appellant received overall scores of 98.8 and 98.1, respectively. *Id.* at 134-35.

On January 5, 2007, and July 18, 2007, the appellant again requested reinstatement for the aforementioned positions and included the results of his examinations. IAF, Tab 7 at 137-38. On November 11, 2007, the appellant wrote to Daryl Ishizaki, District Manager, complaining that his request for reinstatement had been rejected.² IAF, Tab 7 at 141-44. On November 23, 2007, the appellant received a response that he qualified to be reinstated with the agency, and although the agency was not hiring for one of the appellant's requested positions, his request for reinstatement would be considered when there was a need to hire. *Id.* at 146.

According to the appellant, on December 12, 2007, the appellant received an Application for Employment form from the Honolulu P&DC Human Resources Office,³ and the appellant submitted the form for full time and part time regular Custodian positions at the Honolulu P&DC and the Pearl City Post Office. IAF, Tab 7 at 155; Tab 26, Enclosure 2. The appellant was subsequently interviewed by Gary Yamamoto, Postmaster, Pearl City Post Office, for the part time regular Custodian position at Pearl City on January 18, 2008. *Id.* The appellant stated that during the interview, he learned that Mr. Yamamoto had recently hired a full time Custodian. The appellant further stated that he was never interviewed for

² The appellant explained that he believed his rejection was due to a comment made by Luis Ernest Delgado, his former supervisor in Denver, that he would not rehire the appellant. The appellant learned of this when he was interviewed and not hired for a Christmas Casual position in November 2006 at the Honolulu P&DC. *See* IAF, Tab 7 at 153. A June 29, 2000 evaluation of the appellant's federal service that was completed by Mr. Delgado shows that he rated the appellant's behavior and attitude as poor and did not recommend the appellant for rehire. Additionally, Mr. Delgado stated that the appellant was "emotionally high strung," his attitude towards the end of his employment was bad or negative, and that he "magnified simple tasks into major problems." *Id.*, Tab 6 at 33.

³ This was the second Application for Employment that the appellant completed. The appellant stated in documentary evidence that he first completed the application on September 11, 2006, and applied for full time Custodian positions at the Honolulu P&DC and the Pearl City Post Office. IAF, Tab 7 at 121; Tab 26, Enclosure 3.

two other outstanding full time Custodian positions, and he was not hired for the part time regular Custodian position for which he interviewed. *Id.* at 156. Record evidence shows that Edward Yee, a preference eligible, was selected for the position for which the appellant interviewed at the Pearl City Post Office. *Id.*, Tab 26 at 41, Tab 7, Affidavit C at 4. In selecting Mr. Yee, Mr. Yamamoto stated that he considered the appellant's interview and that the appellant had received a negative evaluation from his former supervisor. *Id.*

While the appellant was requesting reinstatement at various times, the agency suspended its examination requirement for Custodial positions. On August 8, 2007, Deborah Giannoni-Jackson issued a memo to the Vice Presidents, Area Operations, explaining that the so-called 916 examination requirement for Custodial positions was suspended until September 30, 2008, in order to facilitate the reassignment of career bargaining-unit employees. Thus, “[c]areer employees reassigned in accordance with Article 12 [of the bargaining agreement] and/or moving voluntarily to custodial positions” would not be given the 916 examination. IAF, Tab 6 at 28. Michael Phillips, former Employment and Placement Specialist, explained that the 916 examination was suspended because there were many bargaining unit employees who were no longer needed in their units, and they had to be reassigned to custodial positions. *Id.*, Tab 32 at 50-51. On November 6, 2007, the union and the agency jointly instructed human resources on the use of the inservice custodial register selection process. Specifically, they stated, “[w]here there is a need to establish an inservice custodial register or to replenish an existing inservice custodial register, an announcement is made giving career employees the opportunity to apply,” and these applicants are to be merged on the inservice register with other employees in a specified order. *Id.* Tab 6 at 26-27.

On May 1, 2008, the appellant filed an equal employment opportunity (EEO) complaint alleging that he was discriminated on the basis of race (White), sex (male), and age when on January 15, 2008, he became aware that he was not

hired for two Custodian positions available at the Honolulu P&DC and he became aware that he was not interviewed and/or hired for Custodial positions available at the Pearl City Post Office. IAF, Tab 7, at 9.

On November 18, 2008, the appellant filed a complaint with the Department of Labor (DOL) alleging that his veterans' preference rights had been violated when he applied and was not hired for numerous Custodian positions from December 2005 to the present. IAF, Tab 8. The appellant stated:

Custodian jobs are normally reserved [for] preference eligible veterans, but the Postal Service is exempting the non-maintenance employees from its own internal regulations regarding the requirements for in-house transfers to maintenance from other crafts. This appears to have the discriminatory intention and effect of doing an end run around veteran[s'] preference in hiring rights. This is discriminatory against veterans and a violation of the VEOA. This discrimination has unlawfully prevented me from being hired into one of the many positions that have been vacant since I first applied for a custodial position with the USPS.

Id. On December 17, 2008, Tom Rosenweke, Director, Veterans Employment and Training Service, DOL, informed the appellant that it could not determine the positions that appellant had applied for since December 2005, and further informed the appellant that there is a 60-day time limit from the date that of the claimed veterans' preference violation and the filing of a complaint with DOL. IAF, Tab 26, Enclosure 1. The appellant responded that since September 2006, he had been interviewed for only one position, the part time regular Custodian position at the Pearl City Post Office, and he was not selected. The appellant also reiterated his belief that the agency, by allowing non-maintenance craft employees to transfer into the maintenance craft without having to take and pass the 916 examination, intentionally violated his veterans' preference rights. *Id.*, Tab 26 at 13-14.

On January 2, 2009, Greg Mercer, Senior Investigator, Veterans' Employment and Training Service, Department of Labor (DOL), informed the

appellant that DOL was closing its investigation of his VEOA complaint that alleged his veterans' preference rights were violated when he applied for a Custodian and Laborer position on December 12, 2007. IAF, Tab 8. Mr. Mercer stated that DOL determined that the appellant's veterans' preference was properly applied, he was properly included in the Hiring Worksheet, and in every instance, the agency selected a disabled veteran of equal or greater veterans' preference from the hiring Worksheet. The appellant was also provided information about how to appeal to the Board. *Id.*

On January 21, 2009, the EEO Administrative Judge dismissed the EEO Complaint and referred the appellant to the Board, finding that the appellant claimed a violation of his veterans' preference rights, but the EEO counselor did not inform the appellant that he could elect to appeal to the Board. The record contains a copy of a February 10, 2008 document, "Information for Pre-Complaint Counseling," that was completed by the appellant, in which he stated that the individual hired for the position in question was not a 10-point veteran, and that he (the appellant) was not selected, even though he was a 10-point veteran. IAF, Tab 7 at 86-88. This appeal followed. *Id.*, Tab 1.

During the processing of the appeal, the Board obtained the appellant's records from DOL. IAF, Tabs 15, 26. The Board provided the parties with the applicable law and ordered them to address the issues of jurisdiction, timeliness, and the merits of the appeal. *Id.*, Tabs 9, 27.

The appellant claimed that he was denied the opportunity to compete for vacant positions with the agency. Specifically, the appellant argued that he was initially considered for vacant Custodian positions, and subsequently, when the agency began excising clerks, the agency stopped considering him for the vacant positions, because he was not an inservice employee. IAF, Tab 30. Intentionally restricted the hiring of candidates from an internal list, the appellant claimed, was a violation of his veterans' preference rights. *Id.* at 18. The appellant identified the positions at issue in his appeal as Custodian positions at the Honolulu P&DC,

and explicitly stated that he was not challenging as VEOA violations the agency's hiring of Mr. Yee at the Pearl City Post Office or of Travis Wong⁴ at the Mililani Post Office. *Id.*, Tab 33 at 8. The only positions the appellant claimed were at issue in this appeal were two Custodian positions at the Honolulu P&DC for which Brian Torikawa and Michelle Enomoto, both non-veterans, were ultimately selected. *Id.* at 8-10.

The individual who selected Mr. Torikawa and Ms. Enomoto for position numbers 95518318 and 95567520, respectively, was Lawrence Kami, Manager of Maintenance Operations, Honolulu P&DC. IAF, Tab 32, Exhibit C. These positions were vacant as of December 3, 2007. *Id.*, Tab 7 at 261. Record evidence shows that Mr. Torikawa and Ms. Enomoto were both reassigned from their positions of full time Mail Processing Clerks to full time Laborer Custodians at the Honolulu P&DC, effective January 5, 2008. *Id.* Tab 32 at 47, 49. Mr. Kami explained that reassignments are different from hiring and are made when an employee transfers from one position or location to another within the agency. *Id.* at 28-29. Reassignments are made through the eReassign program, which is not available or open to non-employees, or through excessing, the terms of which are governed by the collective bargaining agreement and which is also not available to non-employees. *Id.* Excessed employees are placed on an inservice register, and Mr. Kami selects the employee to be excessed from that register, as he did with Mr. Torikawa and Ms. Enomoto. *Id.* at 30, 32. Non-employees are not placed on the inservice register, and the appellant did not appear on this inservice register. *Id.*

Timeliness

At the outset, there was a question as to whether the appellant had timely filed a VEOA complaint with DOL. IAF, Tab 9. As noted above, DOL also

⁴ Record evidence shows that Mr. Wong entered on duty at the Mililano Post Office on January 6, 2007. IAF, Tab 32 at 44.

raised the issue of the appellant's timeliness; however, I find that DOL ultimately waived the time limit and provided the appellant with a decision on the merits, as evidenced by DOL's communications with the appellant, DOL's review of documentation, and the close-out letter. *See id.*, Tab 8. Thus, I find that the appellant timely filed a VEOA complaint with DOL. *See Waddell v. U.S. Postal Service*, 94 M.S.P.R. 411 (2003).

Jurisdiction

To establish the Board's VEOA jurisdiction over an appeal with respect to a complaint filed under 5 U.S.C. § 3330a(a)(1)(B), an appellant must: (1) establish that he exhausted his Department of Labor remedy; and (2) make non-frivolous allegations that (i) he is a veteran described in 5 U.S.C. § 3304(f)(1) or a preference eligible as described above, (ii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce, and (iii) the denial occurred on or after the December 10, 2004 enactment date of the law that provides this right. A preference eligible may not pursue a claim for the same § 3330a(a) violation under any other law, rule, or regulation. 5 U.S.C. § 3330a(e)(2).

I find that the appellant has made the requisite non-frivolous allegations under section 3330a(1)(B), and that he has established Board jurisdiction. It is undisputed and I find that the appellant has exhausted his remedy with DOL and that he is a veteran who has been separated from the armed forces under honorable conditions after 3 years of active duty service. The appellant is also a 10-point preference eligible. IAF, Tab 7 at 133; *see* 5 U.S.C. §§ 2108(1)(A) and 3309(2); *see also Trabue v. U.S. Postal Service*, 102 M.S.P.R. 14 (2006).

Applicable Law and Findings

Where the Board has jurisdiction in a VEOA appeal, the appellant must prove by a preponderance of the evidence⁵ that the agency's action violated one or more of his statutory or regulatory rights, in order to be entitled to relief under VEOA. *See* 5 U.S.C. § 3330a(a)(1); *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1019 (Fed. Cir. 2002); *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 10 (2006).

Section 3304(f)(1) of 5 U.S.C. governs veterans' rights under merit promotion procedures. The statute states that preference eligibles, or veterans who have been separated from the armed forces under honorable conditions after 3 or more years of active service, may not be denied the opportunity to compete for vacant positions for which an agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures. The Board has held, in accord with OPM's regulatory interpretation that the statute means that preference eligibles and other covered veterans must be permitted to apply where an agency announces a vacancy to internal and external status candidates, but that the agency is not required to follow veterans' preference rules when it makes its selection under merit promotion procedures. *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶¶ 12-13 (2006).

At the outset, the appellant argued that Custodian positions are reserved for preference eligible veterans. *See* IAF, Tab 30 at 28. The record contains a provision from the Employee Labor (EL) Handbook, section 232.52, that states that Custodian, Custodian Laborer, and Laborer Custodial positions are restricted to applicants eligible for veterans' preference when appointments are made from external recruitment sources. *Id.*, Tab 32 at 25. This provision also states that

⁵ A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

the rule does not apply when restricted positions are filled by promotion, reassignment, or a change to a lower level. *Id.* Thus, to the extent that the appellant is arguing that the agency violated the EL Handbook, I find that the appellant has failed to show a violation, since the agency filled the vacant positions at issue through reassignment. Additionally, even if the agency violated its internal policy, I find that the appellant has failed to show that it is a regulation relating to veterans' preference.

Likewise, to the extent the appellant is arguing that suspending the 916 examination violated his veterans' preference rights, I find that he has failed to show that the requirement for a 916 examination is a regulation; therefore, he has not shown that the agency violated his rights under a statute or regulation relating to veterans' preference when it suspended the 916 examination requirement. *See Coats v. U.S. Postal Service*, 111 M.S.P.R. 268, 275 (2009).

The appellant more specifically claimed that he was initially allowed to compete for the Custodian positions at issue alongside agency employees, as evidenced by an affidavit provided by Kurt Daniels, Maintenance Engineering Specialist in the appellant's EEO report of investigation. *See* IAF, Tab 7 at 328-31; Tab 30 at 15. Mr. Daniels averred that Mr. Kami asked him to review a file and give him an opinion as to whether the "applicant" was suitable for reinstatement to a Laborer Custodian position at the Honolulu P&DC based upon attendance, safety record, and discipline, and the positions were later filled by applicants from the inservice register. *Id.*, Tab 7 at 330-31. This shows, the appellant argued, that Mr. Kami instructed Mr. Daniels to consider the appellant for hiring. *Id.*, Tab 30 at 16. The appellant further argued that at no time did Mr. Kami state that he did not consider the appellant for the positions in question at the Honolulu P&DC. *Id.*, Tab 33 at 10-11. The appellant also argued that Mr. Kami and Mr. Daniels provided reasons why other individuals were selected "instead of" the appellant, thus indicating that they considered the appellant alongside internal applicants. *Id.* at 7, 9.

I find that Mr. Kami did not state or otherwise indicate that he was considering the appellant for the Custodian positions at the Honolulu P&DC. In his affidavit submitted as part of the appellant's EEO report of investigation, Mr. Kami averred that the appellant had not applied for the position. *Id.*, Tab 7 at 261, 263. Regarding Mr. Daniels, I find that the testimony in his EEO affidavit is less than certain as evidenced by his questionable recollection that the appellant may have had attendance issues and that Mr. Kami notified the appellant that others were selected for the positions, two things Mr. Kami disputes, and Mr. Daniels' lack of recollection regarding who was on the inservice list and who was hired. *Id.* at 263, 331. Given Mr. Kami's more detailed and certain recollection, I credit Mr. Kami's affidavit over Mr. Daniel's affidavit. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Additionally, Mr. Kami provided a sworn declaration in this appeal, reaffirming that he does not consider external applicants. *Id.*, Tab 32 at 4. The only reasonable interpretation of this statement is that Mr. Kami did not consider the appellant. This is further supported by Mr. Sakagawa's November 29, 2007 statement to the appellant, that he would only be considered when there was a need for hiring at the Honolulu P&DC, and that the agency was not currently hiring. Finally, the appellant's argument that he was initially considered for the positions, since Mr. Kami and Mr. Daniels had provided reasons why others were selected "instead of" the appellant, is misplaced. I find Mr. Kami and Mr. Daniels were responding to a written question that assumed that others were selected "over" the appellant. I find that their responses did not imply that Mr. Kami and Mr. Daniels considered the appellant for the vacant positions, as the appellant argued.

The appellant also relied on the Board's holdings in *Brandt*, 103 M.S.P.R. 671, and *Boctor v. U.S. Postal Service*, 110 M.S.P.R. 580 (2009), arguing that once an agency accepts applications from external applicants, it cannot thereafter limit hiring to internal candidates. IAF, Tab 30 at 14-15. However, after careful consideration, I find that the agency did not accept applications from outside its

workforce for the vacant positions that were filled by Mr. Torikawa and Ms. Enomoto. The difference between this appeal from *Boctor* and *Brandt* is that the agency in those cases issued vacancy announcements that unequivocally stated that the agency was seeking external applicants. Here, there is no evidence that the agency issued a vacancy announcement stating that it was accepting applications from outside its workforce, and the appellant so concedes. *See id.* at 15. The vacancy announcement, 08MT08, for the positions at issue in this appeal does not state that the agency is accepting applications from outside its workforce, nor does it provide instructions for how non-employees can apply for the positions. *See id.*, Tab 7 at 261, 379-382. Thus, I find that the vacancy announcement was an internal announcement for which current employees could be reassigned. Although the appellant requested reinstatement, I find that this does not equate to the agency in fact accepting applications from outside its workforce under merit promotion procedures for these positions, especially since Mr. Sakagawa informed the appellant, that he would not be considered for hiring at the Honolulu P&DC at that time. Since the appellant has not shown that the agency announced a vacancy to external status candidates, I find that the appellant has failed to show that he had a right to compete, pursuant to 5 U.S.C. § 3304(f)(1), for the positions identified in vacancy announcement 08MT08. *See Brandt*, 103 M.S.P.R. 671, ¶¶ 12-13.

As a final matter, the appellant also alleged that the agency discriminated against him on the bases of sex, age, and race when it did not hire him. IAF, Tab 1. The Board does not have jurisdiction over non-selections. *See Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 886 (Fed. Cir. 1998). Accordingly, I find that the Board is unable to review the appellant's discrimination claims. *See IAF*, Tab 9; *see also Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985) (5 U.S.C. § 2302(b) is not an independent source of appellate jurisdiction and does not itself authorize an appeal to the Board).

Since the appellant has not shown that the agency violated a statute or regulation relating to veterans' preference, and he has not shown that the agency was accepting external applicants for the positions in question entitling him to compete, I must deny his request for corrective action.

DECISION

The request for corrective action is DENIED.

FOR THE BOARD:

Tamara Ribas
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 5, 2009**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. 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.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

