

Fed Government Continues Sparring with Veterans in MSPB

By Mathew B. Tully

The federal government continues to fumble with veteran's preference matters, even as it attempts to employ more veterans returning from tours in Iraq and Afghanistan. With a new law streamlining the process that provides veterans with preference in the federal hiring process, it remains to be seen how many more veterans will be working for the federal government or appealing personnel actions that violate their rights.

According to the Merit System Protection Board's latest annual report, MSPB regional and local field offices decisions on Veterans Employment Opportunity Act cases rose by 1 percent to 215 in the 2011 fiscal year, compared to the previous fiscal year. It would not be surprising to see the number of VEOA complaints continue to rise in the near future, owing partly to the incompetence of federal agencies.

VEOA cases primarily deal with veteran's preference issues, such as awards of five to 10 extra "preference points" on civil service examination scores, depending on when the veterans served and their disability status. Other preferences include exemptions from minimum education level requirements for federal positions and the special consideration of all valuable experience (i.e. service, welfare, religious, civic, and organizational activities) in regard to experience level requirements, according to the MSPB.

Last fall, President Barack Obama signed the Veterans Opportunity to Work (VOW) to Hire Heroes Act of 2011. The VOW Act featured a bevy of initiatives aimed at spurring the hiring of veterans in the public or private sectors. One of the act's provisions enabled service members to initiate the process of obtaining veteran's preference status before they undergo separation.

The VOW Act builds on the administration's efforts to grow the ranks of veterans in the federal civil service, particularly through the creation of the Council of Veterans in 2009 under Executive Order 13518. This initiative helped drive the 47,172 Executive Branch new veteran hires that the Office of Personnel Management reported for the first three quarters of the 2011 fiscal year.

Even though the federal government has gotten better at hiring veterans, recent MSPB and U.S. Federal Circuit Court of Appeals decisions suggest its understanding of their VEOA rights still needs improvement. For example, in the case of *Lazaro v. Dep't of Veterans Affairs* (2012), a preference-eligible veteran claimed that the Department of Veterans Affairs failed to grant him special consideration for an IT specialist position with a required minimum experience level. The VA argued that the MSPB had no right to second guess its determination that the applicant was not qualified, and the Board denied the veteran relief

under VEOA.

The Federal Circuit, however, found that there was no record of the agency taking into consideration the veteran's "other valuable experience," as required by VEOA. The Federal Circuit rejected the VA's claim that its qualification determinations are outside the jurisdiction of the MSPB. Under the VA's reasoning, "a veteran could never assert a claim within the jurisdiction of the Board," the Court said. "There is simply no way to analyze whether a veteran's preference rights were violated without examining the grounds upon which the veteran's non-selection was predicated." The Federal Circuit vacated the MSPB's decision and remanded the case.

Another case showing how agencies will trample VEOA rights is *Russell v. Dep't of Health and Human Services* (2011), in which the Department of Health and Human Services denied a service-disabled veteran his full 10 preference points simply because he used the wrong fax cover letter when sending supporting documentation to the agency. DHHS only granted him five preference points and selected a higher-scoring, non-veteran for the position. Had the veteran received the extra five points for his disabled status, he would have received the highest score.

The Board slammed DHHS, saying that "the agency deprived the appellant of his full 10-point preference because of what is at most a minor technical mistake, even though the information the agency had should have alerted it that he might be eligible for the preference." The Board reversed an administrative judge's decision and ordered the agency to reconstruct the hiring process and grant the veteran his 10 preference points.

Clearly, mistakes are being made in the application of veteran's preferences in the federal hiring process. With more veterans returning to the civilian work force and applying for federal jobs, more mistakes are bound to happen. Veterans who believe they were wrongly passed over for a federal position should immediately consult a federal employment law attorney.

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