



NOV 21 2007

DIRECTOR'S MEMORANDUM NO. 05-08

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DIRECTORS
FOR VETERANS' EMPLOYMENT AND TRAINING
SERVICES

FROM: RUTH SAMARDICK 
Director, Compliance and Investigation

SUBJECT: Guidance to Field Investigators Resultant of Recent
Veterans Employment Opportunities Act (VEOA)
Decisions of the Merit Systems Protection Board (MSPB)

I. Purpose: To notify Veterans' Employment and Training Services (VETS) investigative staff of changes to investigative guidance and changes to the Office of Personnel Management (OPM) policies and procedures referenced in MSPB VEOA decisions.

II. Authorities: Title 5, United States Code, and Title 5, Code of Federal Regulations; *Dean v. Department of Agriculture*, 104 M.S.P.R. 1 (2006); *Walker v. Department of the Army*, 104 M.S.P.R. 96 (2006); *Hesse v. Department of the Army*, 104 M.S.P.R. 647 (2007); *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104 (2007); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223 (2007).

III. Background:

Several MSPB decisions published from October 26, 2006, through February 22, 2007, will impact the way VETS investigates future VEOA cases. Below are a list of these cases with a summary of the issue and the result of the MSPB decision in each case.

A. *Dean v. Department of Agriculture*: The claimant was not selected for a position to which he applied because the agency made a non-competitive appointment of a non-preference eligible through the Outstanding Scholar Program, even though the claimant was a qualified, preference eligible

candidate under veterans' preference. The Outstanding Scholar Program authorizes the use of a non-competitive selection process where there is under-representation of blacks and Hispanics in competitive positions. The agency claimed that they did not need to adhere to veterans' preference requirements when they used this program. The claimant filed a claim with VETS and we determined the case to be without merit. The claimant then filed an appeal with the MSPB. The MSPB held that it had jurisdiction to review the claim and order a remedy because it found that section 5 U.S.C. 3304(b) is a statute "relating to veterans' preference . . .," as required by the VEOA. Pursuant to 5 U.S.C. 3304(b), an individual can only be appointed in the competitive service if he has passed an examination or is specifically excepted from examination under 5 U.S.C. 3302. The MSPB concluded that the agency's selection of an applicant from the Outstanding Scholars Program did not comport with, and therefore violated, the claimant's rights under Section 3304(b). In reaching its conclusion, the MSPB determined that the Outstanding Scholar Program cannot be used to avoid the competitive examination process when a preference eligible may be available for appointment. The MSPB then held the appropriate remedy was for the agency to reconstruct the hiring process in accordance with 3304(b), entitling the claimant to compete for the position in a selection process consistent with law.

- B. *Walker v. Department of the Army*: Claimant, a qualified preference eligible disabled veteran, was not considered for a merit promotion position; because the agency failed to properly process his application for the position. The claimant filed a claim with VETS, but we closed the case due to a non-response from the agency. The claimant filed an appeal with the MSPB. An administrative judge (AJ) held that the MSPB had jurisdiction to review the claim and order a remedy because it found that section 5 U.S.C. 3304(f) is a statute "relating to veterans' preference . . .," as required by the VEOA. Pursuant to 5 U.S.C. 3304(f), veterans meeting its eligibility requirements are entitled to compete for any vacancy opened to applicants outside an announcing agency's workforce under its merit promotion procedures. The AJ concluded that the agency's failure to process the claimant's application and its failure to include him among the list of candidates referred to selecting officials for consideration violated his right to compete for the vacant position as a preference eligible under section 3304(f). The agency appealed the AJ decision, but the MSPB upheld the AJ's decision. Following the *Dean* decision, the MSPB required the agency to reconstruct the selection process in accordance with the preference eligible provisions it violated, 5 U.S.C. 3304(f).
- C. *Hesse v. Department of the Army*: The claimant applied for a security guard position, which, under 5 U.S.C. 3310, requires hiring a preference eligible if one is available. The claimant was tentatively selected, but the Army later said he was not a preference eligible because he claimed to be eligible as a result of a service-connected disability incurred during Active Duty for

Training. Hesse filed a complaint with VETS, which concurred with the agency's finding that the claimant was not a preference eligible and determined that the case had no merit. This determination was based on guidance from OPM, which stated that in order for a disabled veteran to qualify as a preference eligible under 5 U.S.C. 2108, the service-connected disability must be based on an injury sustained while on active duty as defined in 38 U.S.C. 101(21). The claimant filed an appeal with the MSPB and an AJ also agreed that the claimant was not a preference eligible. The claimant appealed the AJ decision to the MSPB, which disagreed with OPM's interpretation and held that "active duty," as defined in 5 U.S.C. 2108, may consist entirely of service for training purposes. The MSPB ordered the agency to reconstruct the selection process, pursuant to MSPB's interpretation of 5 U.S.C. 2108. The MSPB decision has resulted in OPM modifying its guidance to agencies to reflect that those sustaining an injury while on Active Duty for Training may be qualified for veterans' preference in hiring. The MSPB decision did not address whether those injured while on Inactive Duty for Training were also entitled to veterans' preference under 5 U.S.C. 2108.

- D. *Jolley v. Department of Homeland Security*: The claimant was a Federal employee of the Department of Housing and Urban Development who applied under merit promotion procedures for a position with the Department of Homeland Security (DHS) as a VEOA candidate. DHS did not consider him because it claimed that VEOA is for initial appointments in the Federal workforce and, because the claimant was already a Federal employee in another agency, he was not within the area of consideration specified on the announcement. The claimant filed a claim with VETS and we determined that the case had no merit. This determination was based on guidance from OPM, which stated that a current Federal employee is not eligible to apply for a position utilizing the VEOA appointing authority. The claimant filed an appeal with the MSPB and an AJ also agreed that the case had no merit. The claimant filed a petition for review with the MSPB. The MSPB determined that under the plain language of 5 U.S.C. 3304(f)(1), all covered individuals, including current Federal employees, must be permitted to compete when applications will be accepted from persons outside the hiring agency's workforce. The MSPB ordered the agency to determine whether the claimant was qualified for the position, and if qualified, to reconstruct the hiring process based on its interpretation of 5 U.S.C. 3304(f)(1).
- E. *Styslinger v. Department of the Army*: The claimant was a Federal employee of the Department of Energy who applied under merit promotion procedures for a position with the Department of the Army as a VEOA candidate. The claimant is also a retired Major who did not have a service-connected disability. The agency did not consider his application because it determined that as a current Federal employee, he was not eligible to apply as a VEOA candidate. The claimant filed a complaint with VETS and we determined that the case had no merit. This determination was based on guidance from OPM,

which stated that a current Federal employee is not eligible to apply for a position utilizing the VEOA appointing authority. The claimant filed an appeal with the MSPB and an AJ also agreed that the case had no merit, but dismissed the case for lack of jurisdiction because as a retired Major without a service-connected disability, the claimant was determined not to be a preference eligible. The claimant filed a petition for review with the MSPB. The MSPB determined that based on the *Jolley* decision, the agency could not rely on the claimant's status as a current Federal employee to deny him an opportunity to compete for the position under the VEOA. The MSPB also noted that the Veterans Benefits Improvement Act of 2004 amended the VEOA to allow a non-preference eligible described in 5 U.S.C. 3304(f)(1) the right to file an appeal with the MSPB. Therefore, the MSPB determined that although the claimant was not a "preference eligible," as a retired Major, he is considered a "veteran" under 5 U.S.C. 3304(f)(1), and was entitled to file an appeal with the MSPB. The MSPB ordered the agency to determine if the claimant was qualified for the position, and if so, to reconstruct the selection process for that position.

IV. Investigative Guidance: The MSPB decisions cited above should be considered in analyzing any claim under the VEOA. These decisions should be relied upon in determining whether an agency has violated the veterans' preference rights of a claimant. If we determine that a violation occurred, we will advise the agency that it must determine the qualifications of the claimant for the position recruited, and if the claimant is qualified, to reconstruct the selection process consistent with the law.

OPM is currently in the process of modifying Title 5, Code of Federal Regulations (CFR), the VetGuide, the VetsInfoGuide, and their Delegated Examining Unit Handbook to incorporate the changes in veterans' preference eligibility and procedures resultant of the above referenced cases. Although many of the changes to these publications have not yet been made by OPM, the changes to veterans' preference investigative guidance are effective immediately. Until such changes are made by OPM, where OPM guidance conflicts with the MSPB decisions above, the MSPB decisions should be followed.

IV. Action Required: Regional Administrators for VETS ensure that all assigned staff are aware of the changes to veterans' preference eligibility and policy as well as the new investigative guidance provided in this DM.

V. Inquiries: Any question concerning this DM should be directed through your regional senior investigator to Pat Harvey at (304) 528-5873 or e-mail at harvey.patrick@dol.gov.

Expiration date: None.