

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

John D. Sujat,)
Appellant,)
)
v.)
) Case Number: 13-AC-60 (AG, VT, VP)
Architect of the Capitol,)
Appellee.)
)
_____)

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by John Sujat (“Sujat”) against the Architect of the Capitol (“AOC”). Sujat seeks review of the Hearing Officer’s August 7, 2014 Order which granted the AOC’s motion for summary judgment on Sujat’s Veterans’ Employment Opportunities Act (“VEOA”) claim.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer’s finding of summary judgment in favor of the AOC.

I. Background

Construction Representative Position

Sujat alleges that he is a Vietnam War Veteran and has over 32 years of government service. He maintains that he has supervised engineers, construction representatives, real estate personnel, and other professionals throughout his career. According to Sujat, he has taken over four years of college-level classes.¹

On January 15, 2013, the AOC posted a vacancy announcement for a GS-13 construction representative position. The vacancy announcement indicated that the successful candidate would be “the primary representative in charge of major building renewal and improvement

¹ Sujat’s resume reveals that the highest level of educational degree that he has is a two-year college degree.

projects, expected duration of 13 years, involving planning, design, pre-construction, construction, and close-out.”

The vacancy announcement was for one position, was temporary (not to exceed five years), and was non-restricted, which meant that all individuals including veteran, non-veteran, AOC, and non-AOC individuals could apply for the position. The AOC sought to fill the position through an on-line application system known as AVUE Digital Services. The vacancy announcement also stated:

“Welcome Veterans – The Veterans Employment Opportunities Act of 1998 (VEOA) gives veterans’ preference rights in the legislative branch to certain veterans as applied by the Congressional Accountability Act. Veterans’ preference is applied on this vacancy announcement. If you are a veteran and have been separated under honorable conditions, you must submit a copy of your Certificate of Release or Discharge from Active Duty (DD-214), or other proof of eligibility: Application for 10-Point Veterans’ Preference (SF-15), if applicable and Department of Veterans Affairs documentation of disability, if applicable.”

The vacancy announcement closed on February 1, 2013.

The AOC Assistant Superintendent of the Facilities Support Division for the House Office Building (“HOB”) Jurisdiction (“Assistant Superintendent”) initiated the hiring process for the position. The Human Resources Specialist in the Employment and Classifications Branch (“Human Resources Specialist”) prepared the vacancy announcement.

Sujat timely applied for the position. On the resume he submitted, under “MILITARY SERVICE,” Sujat wrote “Vietnam Veteran (10 PT).” Sujat also selected “Yes” when the electronic application asked, “Are you a recipient of the Armed Forces Services Medal?”

The electronic application also gave candidates an opportunity to select the degree of their veterans’ preference. The application stated, “I am entitled to” and listed the following options: (i) No preference; (ii) I have a service-connected disability of less than 10%; (iii) I have a service-connected disability of at least 10% but less than 30%; and (iv) I have a compensable disability of 30% or more. Sujat left this question blank on his electronic application.

AVUE computed a numerical score for each applicant based on their applications. Sujat received an additional five points to his application score because he chose “yes” in response to the question “Are you a recipient of the Armed Forces Services Medal?”

AOC Declarations

Both the Assistant Superintendent and the Human Resources Specialist submitted declarations in this case. The Human Resources Specialist contends that because Sujat did not select an answer regarding the percentage of his disability, AVUE automatically awarded him only five points for his application as opposed to ten points. AVUE calculated Sujat’s application score to be 98

points, which included the five veterans' preference points. Sujat, however, maintains that the AOC was aware he was entitled to ten points because he wrote "Vietnam Veteran (10 PT)" on his resume.

The Human Resources Specialist also alleges that she reviewed all the applications. She asserts that she prepared a referral list of 159 applicants who all received a score of 90 or above on their applications. She included Sujat on the 159 candidate referral list.² The AOC forwarded the candidate referral list and the applications of all the candidates on the candidate referral list, including Sujat's application, to the Assistant Superintendent.

The Assistant Superintendent's declaration states that the AOC wanted a construction representative to evaluate, coordinate, manage and design construction-related activities for a project to renew the Cannon House Office Building ("Cannon"). He asserts, therefore, that he was looking for a candidate with specific job experience that related to the Cannon project. Specifically, he claims that he was looking for a candidate with experience on large construction contracts or renovating historic buildings. He explains that the Cannon project was valued at approximately \$750 million and that he was looking for candidates with experience working on similar dollar value projects. He adds that he also wanted candidates with superior educational qualifications. He alleges that he reviewed all the applications of the candidates on the referral list.

The Assistant Superintendent did not select Sujat for either the interview or potential for interview lists he created. The Assistant Superintendent claims that he did not select Sujat for the interview lists because he concluded that Sujat's experience was not sufficiently relevant to the Cannon project. He states that Sujat's description of his duties as a medical engineering technician lacked specific details. He also notes that Sujat did not list any experiences with a historical building and did not include the dollar amounts of his projects or whether the projects involved historical buildings. He also alleges that Sujat had fewer years of formal education than other applicants (Sujat had a two-year college degree), and Sujat's narrative responses to the technical application questions lacked specificity. According to the Assistant Superintendent, Sujat cut and pasted the same answer for each narrative response to each technical qualification. The Assistant Superintendent further asserts that the cut and pasted answers provided only a brief recitation of Sujat's employment experience. The Assistant Superintendent maintains that Sujat's answers showed a "cavalier manner" evincing "a lack of attention to detail [that] reflected a poor work ethic."

² The Human Resources Specialist states that generally for an application to be referred to the selecting official for further action, the applicant must receive a score of 90 or above.

The Successful Candidate

The interviewer/selection team included the Deputy Superintendent of the HOB; an Architect with the Program Management Division; and the Assistant Superintendent. They conducted 14 interviews and chose the successful candidate. The successful candidate is a non-veteran.

The Assistant Superintendent maintains that the successful candidate submitted detailed descriptions of his prior work, provided the dollar amounts of his projects, and listed his duties and accomplishments with each project. He also maintains that the successful candidate indicated which of his projects were historic projects and/or had large dollar values. The Assistant Superintendent also claims that the successful candidate has a four-year civil engineering degree and his narrative responses were tailored to respond to each qualification and provided detailed, specific responses. The Assistant Superintendent also asserts that the successful candidate had several relevant awards and certifications that Sujat did not have.

On May 29, 2013, Sujat requested counseling with the Office of Compliance (“OOC”).³ On December 6, 2013, he filed an administrative complaint with the OOC. The parties later filed cross-motions for summary judgment. On August 7, 2014, the Hearing Officer granted the AOC’s motion for summary judgment.

I. Hearing Officer’s Decision

The Hearing Officer found that Sujat did not adequately inform the AOC that he was entitled to ten preference points because he did not select the degree of his disability in his electronic application. Therefore, the Hearing Officer concluded that the AOC did not violate Sujat’s veterans’ preference rights by awarding him only five points as opposed to ten points. The Hearing Officer determined that the electronic application system automatically awarded Sujat five points based on the answers he selected. The Hearing Officer also found that the Assistant Superintendent received Sujat’s application, the Assistant Superintendent gave Sujat’s application due consideration, and that the Assistant Superintendent made his decision based on factors unrelated to the numerical scores of the applicants.

Nonetheless, the Hearing Officer assumed, for purposes of summary judgment, that Sujat should have been given ten preference points.⁴ The Hearing Officer, however, found that even if the AOC should have originally awarded Sujat ten points, the AOC would have prevailed on

³ Sujat alleged that his VEOA and age discrimination rights were violated when the AOC did not award him ten preference points and select him for the construction representative position. Sujat also sought counseling for the denial of prior AOC positions which were more than 180 days before his May 29, 2013 request for counseling. The Hearing Officer issued an Addendum Order on March 10, 2014 indicating that Sujat had withdrawn his age discrimination claim and his claims relating to jobs he had applied for that were outside the statutory time limit of 180 days to file a complaint. Only his VEOA claim remained.

⁴ In addition, the Hearing Officer determined that the parties did not dispute that Sujat was a disabled veteran, that Sujat should have initially been given ten preference points, and that the position was an unrestricted position.

summary judgment because Sujat had not presented any evidence to suggest that the AOC would have selected Sujat if Sujat had initially been granted ten points. The Hearing Officer reasoned that Sujat provided no evidence to dispute the Assistant Superintendent's declaration regarding his review of the applications and selection process, including the Assistant Superintendent's criticisms of Sujat's application.

The Hearing Officer also found that although Sujat's resume indicated he had significantly more years of experience than the successful candidate, Sujat did not submit any evidence to dispute the Assistant Superintendent's reasoning for the selection of the successful candidate. The Hearing Officer ruled that Sujat made unsupported allegations of pre-selection and a post-hoc explanation that does not create a genuine dispute of fact as a result of the Assistant Superintendent's sworn declaration and a comparison of the applications of Sujat and the successful candidate. The Hearing Officer found no evidence to suggest the outcome would have been different had the AOC, at the outset, awarded Sujat ten veterans' preference points.

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

III. Analysis

VEOA

In order to obtain summary judgment, the moving party must establish that there are no genuine disputes of material fact and is entitled to judgment as a matter of law. *Celetox Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A material fact is disputed if, when resolved in the non-movant's favor, it has the potential to alter the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In evaluating a motion for summary judgment, the facts are interpreted in the light most favorable to the nonmoving party. *Id.* at 249.

Summary judgment should be affirmed because the AOC's application of veterans' preference points to Sujat's application score and the placement of Sujat on the candidate referral list was all that Sujat was entitled to receive under the OOC VEOA Regulations.

a. Award of Preference Points

Section 4(c) of the Veterans Employment Opportunities Act (VEOA) applies the rights and protections of sections 2108, 3309 through 3312, and subchapter I of chapter 35 of title 5 U.S.C., to certain covered employees within the Legislative branch. Section 3309 requires the award of

certain preference points to eligible veterans if they pass an examination for entrance into the “competitive service.” In our VEOA regulations, we note:

OPM’s regulations are designed for the competitive service (defined in 5 U.S.C. §2102(a)(2)), which does not exist in the employing offices subject to this regulation. Therefore, to follow the OPM regulations would create detailed and complex rules and procedures for a workforce that does not exist in the Legislative branch, while providing no VEOA protections to the covered Legislative branch employees. We have chosen to propose specially tailored regulations, rather than simply to adopt those promulgated by OPM, so that we may effectuate Congress’s intent in extending the principles of the veterans’ preference laws to the Legislative branch through the VEOA. OOC VEOA Regulations Section 1.103(c).

The OOC VEOA Regulations were approved by Congress.

Section 1.108 of the OOC VEOA Regulations provides with respect to the non-restricted position in issue:

Sec. 1.108. Veterans’ preference in appointments to non-restricted covered positions.

- (a) Where an employing office has duly adopted a policy requiring the numerical scoring or rating of applicants for covered positions, the employing office shall add points to the earned ratings of those preference eligible applicants who receive passing scores in an entrance examination, in a manner that is proportionately comparable to the points prescribed in 5 U.S.C. § 3309. For example, five preference points shall be granted to preference eligible applicants in a 100-point system, one point shall be granted in a 20-point system, and so on.
- (b) In all other situations involving appointment to a covered position, employing offices shall consider veterans’ preference eligibility as an affirmative factor in the employing office’s determination of who will be appointed from among qualified applicants.⁵

To effectuate these requirements, employing offices may adopt reasonable procedures by which applicants may request veterans’ preference and submit information necessary to confirm their eligibility for the preference.

Here, the record shows that the AOC had such procedures in place and that Sujat failed to substantially comply with those procedures or otherwise make the AOC adequately aware that he was entitled to ten preference points.

⁵ Section 1.107 of the OOC VEOA Regulations provide for veterans’ preference in appointments to restricted positions for the positions of custodian, elevator operator, guard, and messenger, in which employing offices “shall restrict competition to preference eligible candidates as long as qualified preference eligible candidates are available. Here, Section 1.107 is not applicable because the construction representative position was non-restricted.

The electronic application gave candidates three options to select to show the percentage of his or her disability. Sujat left that section of his application blank. The Human Resources Specialist contends that because Sujat did not select an answer regarding the percentage of his disability, AVUE automatically awarded him only five points for his application as opposed to ten points. While Sujat argues that the AOC was aware he was entitled to ten points because he wrote “Vietnam Veteran (10 PT)” on his resume, Sujat failed to select the percentage of his disability in compliance with the AOC’s requirement for a candidate to receive preference points. Moreover, Sujat failed to provide the required documentation stated in the vacancy announcement to show that he was entitled to 10 points. *See Kirkendall v. Dep’t of the Army*, 573 F.3d 1318, 1322-25 (Fed Cir. 2009) (military documents used to confirm veteran preference entitlement); *Russell v. Dep’t of Health and Human Serv.*, 2014 WL 6435049, at *1 (Fed. Cir. Nov. 18, 2014) (documentation needed to support disabled veteran’s entitlement to 10 preference points). Thus, it is undisputed that Sujat did not provide the required information to receive 10 preference points.

The record also establishes that the AOC met the requirements of Section 1.108 of the OOC VEOA Regulations when it granted Sujat five preference points in the numerically scored portion of its selection process. Accordingly, Sujat’s VEOA right to receive preference points under the VEOA was not violated. Summary judgment should be affirmed.

b. Selection of Successful Candidate

As made applicable to non-restricted positions in the Legislative branch, VEOA does not require employing offices to select preference eligible veterans over non-veterans who the employing office finds to be more qualified. Accordingly, we will not disturb the findings of the Hearing Officer that Sujat was not entitled to the non-restricted position and the AOC chose who it believed was the best candidate. Summary judgment was properly granted.

First, the AOC was not mandated to hire a disabled veteran, such as Sujat, because the position at issue was non-restricted. Indeed, Sujat conceded that the position was non-restricted. To support his appeal, Sujat makes allegations of manipulation of candidate lists and interviews, creation of interview lists after the complaint was filed, and collaboration between hiring officials and the successful candidate. Sujat, however, has failed to provide sufficient evidence to support the above allegations and should not avoid summary judgment as a result. *See Newton v. Office of the Architect of the Capitol*, 840 F.Supp.2d 384, 395 (D.D.C. 2012) (summary judgment “is most likely when a plaintiff’s claim is supported solely by the plaintiff’s own self-serving testimony, unsupported by corroborating evidence, and undermined either by other credible evidence, physical impossibility or other persuasive evidence...” *Arrington v. U.S.*, 473 F.3d 329, 342–43 (D.C. Cir. 2006) (quoting *Johnson v. Wash. Metro. Area Transit Auth.*, 883 F.2d 125, 128 (D.C. Cir. 1989))).

Second, the VEOA requires only that the hiring agency provide veterans an opportunity to compete. This requirement does not strip the hiring agency of its discretion in hiring. *See Smyth v. U.S. Postal Service*, 41 Fed. Appx. 475, 477 (Fed Cir. 2002) (no VEOA violation where agency, after awarding preference points and an interview to veteran, disqualified veteran from consideration for position, after discovering veteran's prior disciplinary records associated with another employer).

The record shows that the AOC satisfied its VEOA obligations by giving Sujat the opportunity to compete for the construction representative position by awarding him veterans' preference points, placing him on the candidate referral list, and considering him qualified for the position. The Hearing Officer found, however, that the Assistant Superintendent did not select Sujat for the position because he concluded that the successful candidate was a better candidate than Sujat. Here, the AOC was permitted to conclude, in its discretion, that the successful candidate was the best candidate for the construction representative position. *See, e.g., Asatov v. Agency for Int'l Dev.*, 542 Fed. Appx. 937, 938-40 (Fed. Cir. 2013) (no VEOA violation where although the preference eligible veteran had five preference points added to his application score and met the cutoff for proceeding to the second round, the veteran was not interviewed and determined by subject matter experts to not be one of the best qualified applicants and removed from consideration). Sujat would not have obtained the position even if he was initially awarded ten preference points. Summary judgment was properly granted.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's finding of summary judgment in favor of the AOC.

It is so ORDERED.

Issued, Washington, DC on December 16, 2014.