

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

2008 MSPB 245

Docket No. AT-3443-06-0811-X-1

**Raymond Marshall,
Appellant,**

v.

**Department of Health and Human Services,
Agency.**

December 2, 2008

Raymond Marshall, Hampstead, North Carolina, pro se.¹

Marie T. Ransley, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

ORDER

¶1 This case is before the Board on the issue of compliance. On November 14, 2007, the Board issued an Opinion and Order finding that the agency's

¹ On August 19, 2008, the appellant, through an attorney (i.e., Paul A. Wright), submitted a response to the agency's submission disagreeing with the administrative judge's Recommendation to the Board to grant his petition for enforcement. *See Marshall v. Department of Health & Human Services*, MSPB Docket No. AT-3443-06-0811-X-1 (Compliance Referral File ["CRF"]) at Tab 4. However, the appellant never filed any submission designating Mr. Wright as his attorney, nor has Mr. Wright ever filed an entry of appearance as the appellant's attorney in this case. Moreover, Mr. Wright has not submitted any additional documents on the appellant's behalf. Accordingly, the Board presumes that the appellant is proceeding pro se. *See* [5 C.F.R. § 1201.31\(a\)](#).

selection of a non-veteran over the appellant in 2004 for the GS-13 Budget Analyst position was a violation of [5 U.S.C. § 3318\(a\)](#). *See Marshall v. Department of Health & Human Services*, [107 M.S.P.R. 241](#) (2007). The Board determined that the proper remedy for such a violation was to properly ensure the appellant's opportunity to compete in compliance with the applicable statutory provisions at [5 U.S.C. §§ 3308-3318](#), rather than the automatic and retroactive appointment of the appellant to the Budget Analyst position. *Id.* at ¶¶ 5-7. Accordingly, the Board ordered the agency to reconstruct the selection process for the Budget Analyst position under vacancy announcements DE2-04-813 and MP2-04-813, and to follow the requirements of [5 U.S.C. § 3318\(a\)](#) in its reconstruction. *Id.* at ¶¶ 7-8.

¶2 Subsequently, the appellant filed a petition for enforcement arguing that the agency failed to comply with the Board's order. *See Marshall v. Department of Health & Human Services*, MSPB Docket No. AT-3443-06-0811-C-1 (Compliance File ["CF"]) at Tab 1. On September 19, 2008, the Board, in an Opinion and Order, granted the petition and found that the agency was not in compliance with its final order. *See Marshall v. Department of Health & Human Services*, [110 M.S.P.R. 114](#) (2008).² The Board found that the agency had failed to provide evidence that it had reconstructed the selection process in accordance with [5 U.S.C. §§ 3317](#) and 3318, or had removed the non-veteran selectee from the GS-13 Budget Analyst position. *Id.* at ¶ 8. The Board, therefore, advised the agency that it must demonstrate compliance with its final order and with the Veterans Employment Opportunities Act of 1998 ("VEOA") by providing evidence that it had: (1) removed Ms. Roberta Beach as the selectee for the GS-13 Budget Analyst position in question; (2) reconstructed the certificate of eligibles so that it contains at least three names in order for the appointment authority to validly make a selection for the GS-13 Budget Analyst position under

² This decision concisely details the history of the case.

[5 U.S.C. §§ 3317](#) and 3318; and (3) obtained evidence of the Office of Personnel Management's ("OPM's") approval, under [5 U.S.C. § 3318\(b\)\(1\)](#), in the event the agency selected a non-preference eligible over the appellant for the GS-13 Budget Analyst position. *Id.* at ¶ 9.

¶3 On October 1, 2008, the agency responded to the Board's Opinion and Order of September 19, 2008, by submitting evidence and argument stating that it has complied with the Board's instructions. *See* CRF at Tab 6. Specifically, the agency submitted evidence that it cancelled Ms. Beach's selection and appointment under vacancy announcement DE2-04-813, as a GS-13 Budget Analyst, and that it reconstructed an external certificate of eligibles with at least three names as ordered by the Board.³ *Id.* at Attachments 1 and 2. Finally, the agency stated that it was not going to make any selection for the Budget Analyst position at issue in this case. *Id.* The appellant has not responded to the agency's submission.⁴

¶4 VEOA is a statute that gives preference eligibles, and veterans, in general, the right to compete for vacant positions in the Federal civil service in accordance with veterans' preference law. *See Abell v. Department of the Navy*, [343 F.3d 1378](#), 1384-85 (Fed. Cir. 2003). However, an agency's decision not to fill a position does not violate the veteran's rights under VEOA. *Id.* *See also Joseph v. Federal Trade Commission*, [505 F.3d 1380](#), 1384-85 (Fed. Cir. 2007).

³ The agency pointed out that it reconstructed its certificate of eligibles only under vacancy announcement DE2-04-813, and not vacancy announcement MP2-04-813, because the appellant had not applied under the MP2-04-813 vacancy announcement, which was an internal merit announcement for the same position. CF at Tab 1, attachment.

⁴ We note that when the appellant's petition for enforcement was first referred to the Board's Office of General Counsel with the administrative judge's recommendation that the Board find non-compliance, the Clerk of the Board advised the appellant that failure to respond to the agency's evidence of compliance may result in the Board's assumption that the appellant is satisfied with the agency's efforts and the dismissal of the petition for enforcement. *See* CRF at Tab 2.

Under VEOA, the agency must fully comply with the violated provisions of the statute or statutes relating to veterans' preference in the selection process to restore the appellant to the status quo ante. *See Lodge v. Department of the Treasury*, [107 M.S.P.R. 22](#), ¶¶ 14-16 (2007).

¶5 We find that the agency's evidence of compliance satisfies the Board's order to reconstruct the certificate of eligibles in accordance with veterans' preference law and to remove Ms. Roberta Beach from the Budget Analyst position in question. The fact that the agency decided not to fill the position did not deny the appellant his opportunity to compete for the position, or otherwise violate his VEOA rights. *See Abell*, 343 F.3d at 1384-85. Therefore, the Board finds that the agency is now in compliance with VEOA and the Board's order, and we DISMISS the appellant's petition for enforcement. *See Endres v. Department of Veterans Affairs*, [108 M.S.P.R. 606](#), ¶ 3 (2008).

ORDER

¶6 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. 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 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](#)). 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](#).

FOR THE BOARD:

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