

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

2009 MSPB 14

Docket No. AT-3443-06-0118-C-1

**Eric Williams,
Appellant,**

v.

**Department of the Air Force,
Agency.**

February 11, 2009

Eric Williams, North Charleston, South Carolina, pro se.

David H. Ward, Esquire, Warner Robins, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board upon a timely petition for review (PFR) of an initial decision that found the agency in compliance with the Board's Opinion and Order in *Williams v. Department of the Air Force*, [108 M.S.P.R. 567](#) (2008), in which we concluded that the agency had violated the appellant's rights under the Veterans Employment Opportunities Act of 1998 (VEOA) when it selected non-preference eligibles using the Outstanding Scholar Program (OSP) instead of him for several GS-7 Contract Specialist positions, and ordered the agency to reconstruct the selection process, consistent with veterans' preference statutes

and regulations. For the reasons set forth below, we GRANT the appellant's PFR under [5 C.F.R. § 1201.115\(d\)](#), we FIND that the agency is NOT IN COMPLIANCE with the Board's Opinion and Order, and we REVERSE the initial decision.

BACKGROUND

¶2 The agency issued vacancy announcement WR383583 for a Contract Specialist, GS-1102-7 target 11 position. *See Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-06-0118-I-1, Initial Appeal File (IAF), Tab 6, subtabs 4c, 4f. Pursuant to this announcement, the agency filled 13 positions; 6 vacancies were filled competitively via a certificate of Administrative Careers with America (ACWA) candidates, and 7 vacancies were filled through the OSP. *Id.*, subtab 4c. The preference eligible appellant, who was on the ACWA list, was not selected for any of the positions. *Id.* As the result of his nonselection, the appellant filed an appeal, claiming that the agency violated his VEOA rights.¹ *See* IAF, Tab 1.

¶3 When this appeal came before the Board, we concluded, based in part on the agency's admission that it would have hired the appellant but for its use of the OSP, that the agency violated the appellant's veterans' preference rights when it improperly selected OSP applicants instead of him, and we ordered the agency to reconstruct the hiring process in a manner that did not violate these rights. *Williams*, [108 M.S.P.R. 567](#), ¶¶ 3, 9-10. We also forwarded the appellant's request for lost wages, benefits and liquidated damages to the Atlanta Regional Office for adjudication, *id.*, ¶ 14, and that matter was docketed as *Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-06-0118-P-1.

¹ The appellant also claimed that his nonselection violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)), but those claims are not relevant to this compliance matter. *See Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-07-0858-B-1.

¶4 Pursuant to our Opinion and Order, the agency reconstructed the selection process and the appellant was still not selected for the position. *See Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-06-0118-C-1 (CF), Tab 10, subtabs 4b, 4c. The appellant filed a petition for enforcement (PFE), complaining that the agency’s reconstructed selection process failed to comply with our directive in *Williams*, [108 M.S.P.R. 567](#). CF, Tab 1; *see* CF, Tabs 3, 4, 6. The agency filed submissions and included a detailed explanation of its reconstructed selection process and its reasons for not selecting the appellant. CF, Tabs 7, 10. The administrative judge issued an initial decision, concluding that the agency complied with the Board’s Opinion and Order. CF, Tab 14 at 6. The appellant filed a timely PFR and the agency filed a response. Compliance Petition for Review File (CPFRF), Tabs 1, 3-4.

ANALYSIS

The legal standard and the Board’s authority in a compliance appeal.

¶5 The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). The Board’s authority to remedy noncompliance is broad and far-reaching and functions to ensure that employees or applicants for employment are returned to the status quo ante or the position that they would have been in had the unlawful agency action not occurred. *Id.*; *see Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 9 (2007), *enforcement dismissed*, [108 M.S.P.R. 606](#) (2008). The agency has the burden of proving that it has fully complied with a Board final decision. *See Hill v. Department of the Air Force*, [60 M.S.P.R. 498](#), 501 (1994). In order to comply with our Opinion and Order, therefore, the agency must show that its reconstruction of the competitive process for vacancy announcement WR383583 “was in accordance with veterans’ preference laws and that any subsequent

appointment to the [GS-7 Contract Specialist] position[s] was the result of its fair and lawful consideration of the pool of candidates (including the appellant) under the appropriate and lawful reconstruction.” *Endres*, [107 M.S.P.R. 455](#), ¶ 9.

The agency’s reconstructed selection process.

¶6 The agency presented an affidavit from Max Wyche, Chief of Employment, attesting that the “reconstruction . . . exclude[d] all Outstanding Scholar candidates who obtained positions to determine if [the appellant] would have been selected if *all the positions were filled competitively*.” CF, Tab 10, subtab 4b at 1-2 (emphasis added). The following is the agency’s explanation of how it reconstructed the selection process without considering the OSP candidates:

The Appellant applied for a Contract Specialist, GS-1102-7 target 11 position, under vacancy announcement 383583. The Office of Personnel Management (OPM) furnished the Agency [with] applications for this position [from] a list of eligibles. OPM provided two certificates for this vacancy: [ACWA and OSP]. The Appellant was listed as a ten-point disabled veteran and his name was placed on the . . . [ACWA] certificate.² OPM did not give him an OS[P] certification. All candidates with Veteran’s [sic] preference on the ACWA certificate were interviewed. Appellant was interviewed on August 30, 2005. Appellant received an interview score of 16 out of a possible 50 points. . . .

. . . .

Based on [the appellant’s] placement on the competitive certificate and the number of available positions, he was within reach for consideration and possible selection. All of the candidates with whom [the appellant] was considered within the Rule of Three³

² The ACWA applicants’ scores can be found at CF, Tab 10, subtab 4c. We note that this was the same list utilized by the agency during its original selection process, *see* IAF, Tab 6, subtab 4d.

³ Under the “rule of three,” an appointing officer is not required to consider a civil service eligible who has been considered by him for three separate appointments from the same or different certificates for the same position. [5 C.F.R. § 332.405](#); *see Lackhouse v. Merit Systems Protection Board*, [773 F.2d 313](#), 316-17 (Fed. Cir. 1985)

were veterans with 10 point veteran's [sic] preference. All of the candidates listed below, except for candidate P.W., were 10 point disabled veterans. P.W. has a 5 point veteran's preference.^[4]

The following is a narrative of the selection process for these positions.

1. For the first vacancy, J.M., D.L., and M.L. were considered. J.B. was not considered since he had declined consideration.^[5] The interview scores were as follows: J.M. – 39; D.L. – 42; M.L. – 39. **J.M. was selected.**

2. For the second vacancy, D.L., M.L., and D.B. were considered. Again, J.B. was not considered since he had declined consideration. The interview scores were as follows: D.L. – 42; M.L. – 39; D.B. – 50. **D.L. was selected.**

3. For the third vacancy, M.L., D.B., and D.S. were considered. The interview scores were as follows: M.L. – 39; D.B. – 50; D.S. – 20. **M.L. was selected.**

4. For the fourth vacancy, D.B., D.S., and [the appellant] were considered. The interview scores were as follows: D.B. – 50; D.S. – 20; [the appellant] – 16. **D.B. was selected.**

5. For the fifth vacancy, D.S., [the appellant], and G.H.^[6] were considered. The interview scores were as follows: D.S. – 20; [the appellant] – 16; [H.G.] – 37. **[H.G.] was selected.**

(distinguishing [5 C.F.R. § 332.405](#) from the veterans' preference statutes found at [5 U.S.C. §§ 3317](#)(b), 3318(b)(1), and concluding that the "rule of three" is lawful).

⁴ We note that the ACWA score list showed that candidate P.W.'s veterans' preference status was originally described as "TP" for "tentative preference," *see* CF, Tab 10, subtab 4c. Although we understand the agency's statement herein to mean that the agency has confirmed that candidate P.W. has a 5-point veterans' preference, there is no evidence in the record to support this conclusion.

⁵ The ACWA score list shows that candidate J.B. declined the agency's offer. *See* IAF, Tab 6, subtab 4d; CF, Tab 10, subtab 4c.

⁶ The agency referred to this candidate as "G.H.," however, his initials should have been "H.G." CF, Tab 10, subtab 4c. We will continue to refer to this candidate as "H.G."

NOTE: D.S. has now been considered three times and not selected. Therefore, [h]e will no longer be considered for the remaining vacancies and will be coded "NS³" on the certificate.[⁷]

6. For the sixth vacancy, [the appellant], L.W., and L.L. were considered. The interview scores were as follows: [the appellant] – 16; L.W. – 36; L.L. – 28. **L.W. was selected.**

NOTE: [The appellant] has now been considered three times and not selected. Therefore, [h]e will no longer be considered for the remaining vacancies and will be coded "NS³" on the certificate[.]

7. For the seventh vacancy, L.L., S.O. and W.P. were considered. The interview scores were as follows: L.L. – 28; S.O. – 24; W.P. – 16. **L.L. was selected.**

8. For the eighth vacancy, S.O., W.P., and R.T. [were considered]. Candidate R.B. was not considered since he had declined consideration. **[S.O.] was selected.**

9. For the ninth vacancy, W.P., R.T., and P.W. were considered. Again, candidate R.B. was not considered since he had declined consideration. The interview scores were as follows: W.P. – 16; R.T. – 23; P.W. – 26. **P.W. was selected.**

NOTE: W.P. has now been considered three times and not selected. Therefore, [h]e will no longer be considered for any future vacancies and will be coded "NS³" on the certificate.

[10.] The agency cannot speculate [regarding] further selections for the 10th – 14th[⁸] hypothetical vacancies since management did not interview every applicant on the ranked ACWA list. However, management was under no obligation to consider [the appellant] any further than the sixth consideration, where he received his third consideration. Management would not have, nor was it required [to, reconsider the appellant] after he had been appropriately considered under the "rule of three[.]"

CF, Tab 10, subtab 4b at 3-4 (emphasis in original).

⁷ The agency has not included a copy of any certificate with such a notation.

⁸ It is not clear why the agency referred to a "14th hypothetical vacanc[y]," since it was undisputed that it had only filled 13 Contract Specialist positions through this vacancy announcement.

The agency's reconstructed selection process does not comply with our Opinion and Order.

¶7 The appellant's PFR is somewhat confusing. He cites a variety of statutes and regulations, in no particular order, and argues, among other things, that the reconstructed selection process does not comply with his veterans' preference rights, that the pass over was not properly done, that he was entitled to a hearing, that he should have been selected for the position, that the agency was making new arguments in the compliance matter that it did not raise in the initial appeal, and that the administrative judge was biased. CPFRF, Tab 1. The appellant's claim of administrative judge bias is without merit, and we need not address each of his remaining PFR arguments because, for the following reasons, we agree that the administrative judge improperly concluded that the agency's reconstruction process complies with our Opinion and Order.

¶8 Borrowing from our language in *Endres*, another VEOA compliance case, we note that, in such a case, the agency has the following obligations:

In reconstructing the selection process, the agency must rely on the circumstances at the time of the original selection [T]he agency must enter qualified candidates for a job in the competitive service into registers or lists of eligibles in rank order derived from scores based on qualifications and examinations and any additional points for preference eligible status (as of the time of the original invalid selection process). *See Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#), ¶ 14 (2005), *reaffirmed on reconsideration*, [104 M.S.P.R. 1](#) (2006); [5 U.S.C. § 3309](#); [5 C.F.R. § 337.101\(b\)](#). Preference eligibles who hold the same score as non-preference eligibles are placed ahead of the nonpreference eligibles. *Id.*; [5 U.S.C. § 3313](#); [5 C.F.R. § 332.401](#). Except for scientific and professional positions in grades GS-9 or higher, disabled veterans who have a compensable service-connected disability of 10 percent or more are entered onto registers in order of their ratings ahead of all remaining applicants. [5 U.S.C. § 3313\(2\)\(A\)](#); [5 C.F.R. § 332.401](#). The appointing authority must "consider at least three names for appointment to each vacancy in the competitive service" from a certified list obtained by the examining authority from the top of the appropriate register. [5 U.S.C. § 3317\(a\)](#). The appointing authority

“shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a).” [5 U.S.C. § 3318\(a\)](#). However, if an appointing authority wishes to select a non-preference eligible rather than a preference eligible on the certificate, the appointing authority may not do so unless he or she files written reasons with OPM for passing over the preference eligible and obtains OPM’s approval. 5 U.S.C. § 3318(b)(1). In addition, should the preference eligible be a veteran with a 30 percent or more disability, he or she is statutorily entitled to notice of the proposed “pass over” and an opportunity to respond to OPM. 5 U.S.C. § 3318 (b)(2).

Endres, [107 M.S.P.R. 455](#), ¶ 10 (some internal citations omitted).

¶9 The agency has not shown that its reconstructed selection process is consistent with its prior stipulation or these veterans’ preference requirements. We acknowledged in our earlier Opinion and Order in this case that “the agency stipulated that the appellant was a preference eligible who would have been hired as a GS-7 Contract Specialist in 2005 but for the agency’s use of the Outstanding Scholar Program.” *Williams*, [108 M.S.P.R. 567](#), ¶ 3. It further stipulated that the appellant is entitled to back pay and benefits as a result of the improper hiring process. *Id.*, ¶ 4. Based on the agency’s stipulations, and its explanation that, as part of settlement discussions, it had offered the appellant the GS-7 Contract Specialist position, *see id.*, it appeared that the agency would reconstruct the selection process and would place the appellant in that position. It further appeared that the dispute between the parties at that point concerned the proper GS level in which to place the appellant, as several years had passed since the 2005 appointments were made, and the appellant argued that he would have advanced to the GS-9 or GS-11 level by then. *See id.*, ¶ 11 (noting that the agency and the appellant disagreed regarding the GS level to which he should be appointed, and directing the appellant to file a PFE if the agency reconstructed the hiring process and placed the appellant “at a grade level with which he disagrees”). Instead, the agency submitted a description of the reconstructed

selection process, which purportedly excluded all of the selected OSP candidates, and the appellant was still not selected for the position. CF, Tab 10, subtab 4b. The agency has not made any attempt to reconcile these inconsistencies.

¶10 Moreover, the agency's reconstructed selection process is incomplete. It is undisputed that the agency originally hired 13 candidates to fill vacancy announcement WR383583, having hired 6 candidates from the ACWA list and 7 candidates from the OSP. Therefore, in order to comply with the appellant's veterans' preference rights, the agency had to show how it filled these 13 positions competitively in its reconstructed selection process. *See Endres*, [107 M.S.P.R. 455](#), ¶ 10 (in reconstructing the hiring process, the agency must rely on the circumstances at the time of the original selection).

¶11 The agency only produced the ACWA list below, which identifies 17 candidates, and this list appears to represent the ACWA candidates with some veterans' preference status or potential veterans' preference status. CF, Tab 10, subtab 4c; *see* CF, Tab 10, subtab 4b at 3 (noting that only the candidates on the ACWA list with veterans' preference rights were interviewed). Based on its description of its reconstructed selection process, however, the agency stopped considering candidates after the 9th round of consideration. Despite its assertion that the reconstruction "exclude[d] all Outstanding Scholar candidates who obtained positions to determine if [the appellant] would have been selected *if all the positions were filled competitively*," *see* CF, Tab 10, subtab 4b at 1 (emphasis supplied), the agency did not, in fact, fill all 13 positions competitively in the reconstructed process, *id.* at 4. Notably, the agency provided no further information regarding the remaining candidates, including those who did not have veterans' preference status and those who were not interviewed, nor did it explain what it may have done to fill the remaining vacancies, in the absence of interview scores, to show good faith compliance with our Opinion and Order. Because of

this lack of critical information, the reconstructed hiring process does not satisfy the *Endres* requirements described above.

¶12 In the absence of a complete reconstructed selection process, we are left to speculate about how the agency filled these remaining vacancies and, in particular, whether some of the original OSP candidates remained in the Contract Specialist positions. This would obviously be a violation of [5 U.S.C. § 3304\(b\)](#) and would not comply with our Opinion and Order. *See Dow v. General Services Administration*, [109 M.S.P.R. 343](#), ¶¶ 3, 10 (2008) (because the agency did not show that it removed individuals selected from the OSP from the positions in question, the agency was in violation of [5 U.S.C. § 3304\(b\)](#) and it did not comply with the Board's order to reconstruct the selection process and comply with the appellant's veterans' preference rights).

¶13 Even if the agency had not stipulated that it would have given the appellant the position but for its use of the OSP *and* it had demonstrated that it filled all of the positions competitively in the reconstructed hiring process, there appears to be an error in the order of the agency's consideration of candidates in the reconstructed selection process. We note that the ACWA score list shows that candidate R.B., like candidate W.B., was marked as having "[d]eclined interview," and they both lacked interview scores. *See* CF, Tab 10, subtab 4c. Since the interview scores were the criterion that the agency apparently "used as the merit based factor for selection" in its original and reconstructed selection processes, *see* IAF, Tab 6 subtab 4d, CF, Tab 10, subtab 4c, and these two candidates lacked such scores, the agency should have excluded these candidates from any consideration during the reconstructed selection process. Accordingly, using the ACWA score list, before the interviews, there would have been only 15 ACWA candidates competing for the 13 vacant positions and, based on the agency's submission, the rounds of consideration would have proceeded as follows:

1st round: J.B. declined the position; J.M, D.L. and M.L. were considered; J.M. was selected. After this round, 13 ACWA candidates were left to fill 12 positions.

2nd round: D.L., M.L. and D.B. were considered; D.L. was selected. After this round, 12 ACWA candidates were left to fill 11 positions.

3rd round: M.L., D.B. and D.S. were considered; M.L. was selected. After this round, 11 ACWA candidates were left to fill 10 positions.

4th round: D.B., D.S. and the appellant were considered; D.B. was selected. After this round, 10 ACWA candidates were left to fill 9 positions.

5th round: D.S., the appellant and H.G. were considered; H.G. was selected; D.S. was excluded from further rounds of consideration pursuant to the “rule of three.” After this round, 8 ACWA candidates were left to fill 8 positions.

¶14 Therefore, during the 6th round of consideration, after which the appellant had previously been excluded by the “rule of three” in the reconstructed selection process, if all of the positions were filled competitively, it appears that the appellant and the other 7 remaining ACWA candidates *could* have been selected for the remaining 8 positions. However, since the agency’s reconstructed selection process is incomplete,⁹ it has failed to prove that its reconstruction was proper, and if so, whether the appellant was, at least on paper, properly excluded pursuant to the “rule of three.”¹⁰

¶15 For all of the foregoing reasons, we conclude that the agency’s reconstructed selection process does not comply with our Opinion and Order. *See*

⁹ We note also that the agency has failed to establish that candidate P.W., the selectee for the 9th position in the reconstructed hiring process, was a preference eligible, and lacking such information, we are unable to address the appellant’s PFR arguments regarding “pass over,” pursuant to [5 U.S.C. § 3318\(b\)](#). *See, e.g.*, CPFRRF, Tab 1 at 3.

¹⁰ Even if the agency’s reconstructed selection process did show that all 13 positions were filled competitively, the agency still must reconcile its most recent nonselection of the appellant with its prior stipulations. *See supra* at ¶ 9.

Endres, [107 M.S.P.R. 455](#), ¶ 19 (concluding that, although VEOA does not require the agency to make a selection from a certificate to fill a vacancy, once it decides to make a selection, it must comply with veterans' preference rights).

Relief.

¶16 An individual, like the appellant, whose veterans' preference rights have been violated, is not "automatically" entitled to the position for which he applied. *Deems v. Department of the Treasury*, [100 M.S.P.R. 161](#), ¶ 17 (2005). However, in light of our stated concerns, the appropriate remedy is for the agency to reconstruct the selection process in accordance with the appellant's veterans' preference rights. See [5 U.S.C. § 3330c](#)(a) (the Board "shall order the agency to comply with" veterans' preference statutes and regulations); see also *Marshall v. Department of Health & Human Services*, [110 M.S.P.R. 114](#), ¶ 9 (2008); *Dow*, [109 M.S.P.R. 342](#), ¶ 16; *Endres*, [107 M.S.P.R. 455](#), ¶ 20. This time, however, we are including specific instructions to the agency, so that there is no misunderstanding with respect to its subsequent reconstructed selection process. See, e.g., *Dow*, [109 M.S.P.R. 342](#), ¶ 16 (setting forth requirements for the agency's second reconstructed selection process); *Endres*, [107 M.S.P.R. 455](#), ¶¶ 11, 20 (concluding that the agency's reconstructed selection process, and its claim that it had "regularized" the Chief Financial Officer appointment, did not comply with the veterans' preference statutes or the Board's prior Opinion and Order, and ordering the agency to reconstruct the selection process for the position with specific instructions).

ORDER

¶17 Because of the deficiencies in the agency's reconstructed selection process, we ORDER the agency to provide a list of the names of the candidates originally selected for the 13 vacancies, the order in which they were selected, their ACWA or OSP status, and their veterans' preference status, if applicable. We further

ORDER the agency to reconstruct the selection process for all 13 positions under vacancy announcement WR383583, in accordance with this Opinion and Order and with VEOA, by following these instructions: (1) the agency must remove as selectees all individuals originally selected from the OSP list for the Contract Specialist positions in question; (2) it shall provide a full, ranked list of candidates considered by the agency during the reconstructed selection process, including their scores and veterans' preference status; (3) at least three names must be available on the certificate of eligibles for appointment to each vacancy in order for the appointing authority to validly make a selection for the Contract Specialist positions under [5 U.S.C. §§ 3317](#) and 3318; (4) the tentative preference for candidate P.W. must be verified in order to place his name ahead of the appellant's, if appropriate, and/or to select him for any of the positions; (5) if the agency wishes to select an applicant who is a non-preference eligible over the appellant for the Contract Specialist positions, the agency must obtain evidence of OPM's approval under [5 U.S.C. § 3318\(b\)\(1\)](#), and, because the appellant has a compensable service-connected disability of 30 percent or more, the agency must also submit evidence that it gave him notice and an opportunity to respond to OPM under [5 U.S.C. § 3318\(b\)\(2\)](#); (6) the agency must identify all candidates selected for the 13 vacancies in the reconstructed selection process, the order in which they were selected and their veterans' preference status, if applicable; (7) to the extent that the agency does not select the appellant for a position in its next reconstructed selection process, it must provide an explanation, supported by evidence, reconciling its failure to do so with its prior admission that it *would have* hired him but for its improper use of the OSP, and that he is entitled to back pay and benefits as a result.

¶18 We ORDER the agency to submit proof of compliance with the above instructions no later than 15 days after the date of this decision. If the agency, however, wishes to obtain approval from OPM to pass over the appellant and

cannot comply within the above deadline, the agency is ORDERED to submit evidence within the 15-day deadline that it has petitioned OPM for pass over authority and has notified the appellant and given him an opportunity to respond to OPM. Failure to comply with this deadline will lead to the issuance of a show cause order to explain why the Board should not order that Max Wyche, Chief of Employment, Robins Air Force Base, Georgia, the agency's official responsible for compliance, "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." [5 U.S.C. § 1204\(e\)\(2\)\(A\)](#).

FOR THE BOARD:

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