UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 51

Docket Nos. SF-3443-02-0159-X-2
SF-3443-02-0159-X-3

Larry M. Dow,

Appellant,

v.

General Services Administration,

Agency.

May 10, 2011

Jeremy Wright, Esquire, Austin, Texas, for the appellant.

Michael Kator, Esquire, Washington, D.C., for the appellant.

Marcia L. Smart, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner recused herself and did not participate in the adjudication of this appeal.

OPINION AND ORDER

¶1 This case is before the Board based on a Recommendation finding the agency in noncompliance with a final order in this appeal. *Dow v. General Services Administration*, MSPB Docket Nos. SF-3443-02-0159-M-1; SF-3443-02-0159-M-2 (July 15, 2010), Court Mandate Remand File (CMRF), Recommended Decision (RD), Tab 11. For the reasons set forth below, we find the agency remains in noncompliance.

BACKGROUND

¶2 The background of this appeal is set forth in the Board's decision in *Dow v. General Services Administration*, 109 M.S.P.R. 342 (2008), and will be briefly summarized here. The appellant appealed his nonselection for the position of Chief People Officer ("CPO") Intern as violative of his rights under the Veterans Employment Opportunities Act of 1998 (VEOA). The Board determined that the agency had violated VEOA by using the Outstanding Scholar Program (OSP) to select at least one nonpreference eligible for the position of CPO Intern rather than the appellant, a preference eligible found eligible for the position under competitive examination, and ordered the agency to reconstruct the hiring process. *Dow*, 109 M.S.P.R. 342, ¶ 3. The Board, on review of the appellant's November 8, 2007 petition for enforcement, rejected the agency's argument that its offer of priority consideration for the next CPO Intern position in the Washington area constituted compliance and again ordered the agency to reconstruct the hiring process in accordance with VEOA. *Dow*, 109 M.S.P.R. 342 ¶¶ 4, 16.

¶3 The record shows that the agency reconstructed the hiring process, that the CPO Intern position is no longer occupied by any person, and that the agency submitted a request to OPM to pass over the appellant whose name appeared at the top of the reconstructed "certificate of eligibles." *Dow v. General Services Administration*, 110 M.S.P.R. 215, ¶ 2 (2008). The appellant filed a second petition for enforcement on the basis that the agency failed to designate a selectee for the CPO Intern position. *Id*. The Board disagreed and dismissed the petition. It found the agency in compliance, noting that neither VEOA nor OPM's regulations require the agency to select an individual for a vacancy. *Id*., ¶ 3.

¶4 The appellant filed a third petition for enforcement after OPM denied the agency's pass-over request. *Dow v. General Services Administration*, MSPB Docket No. SF-3443-02-0159-C-2 (CF-2), Tab 2. The agency responded that, on January 30, 2009, it tentatively offered the appellant the position of Human

Resources Specialist in the Office of the Chief Human Capital Officer. CF-2, Tab 4. In an initial decision dated April 2, 2009, the administrative judge denied the appellant's petition, finding that he had no authority to reverse or modify the Board's Order of October 3, 2008, that had found the agency in compliance. CF-2, Tab 6 (Initial Decision). Shortly thereafter, on May 12, 2009, the agency withdrew its tentative offer, alleging that the appellant had failed to respond to its tentative offer. CMRF, Tab 9, Subtab 4.

¶5 After the appellant sought judicial review of the Board decisions declining to grant his second and third petitions for enforcement, the parties filed a joint motion for remand, requesting that the court vacate the Board's October 3, 2008 and April 2, 2009 decisions concerning the appellant's second and third requests for enforcement. CMRF, Tab 5. The court granted the motion so that the Board might consider whether the agency's tentative offer of a Human Resource Specialist position constitutes a sufficient remedy for the agency's initial VEOA violation. CMRF, Tab 1.

¶6 On remand, the administrative judge rejected the agency's argument that its offer of a tentative position constituted compliance. CMRF, Tab 11, RD. He noted that the Board had effectively rejected the suggestion that a tentative offer of employment constitutes compliance in this case when it previously found the offer of priority consideration insufficient to constitute compliance.[1] CMRF, Tab 11 at 7. The administrative judge noted further that the issue of the offer was now moot in light of the agency's rescission of that offer after the appellant's alleged failure to respond to the offer. *Id*. The administrative judge concluded that where, as here, it is clear that the agency would have hired the appellant but for its violation of his veterans' preference rights, VEOA requires that the

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[1] The administrative judge also rejected the agency's argument that the Board's October 3, 2008 decision and the administrative judge's April 2, 2009 decision demonstrated the agency's compliance, as the Federal Circuit vacated those decisions, pursuant to a joint motion for remand filed by the parties. CMRF, Tab 11, RD at 7.

appellant be offered the CPO Intern position for which he applied, effective July 3, 2000,[2] and entitles him to compensation for any loss of wages or benefits that he suffered by reason of the agency's VEOA violation. *Id*. at 8-9. The administrative judge also rejected the appellant's argument that the issue of the agency's willfulness was now ripe for review. CMRF, Tab 11 at 2 n.3. The administrative judge found that the issue had been disposed of in his initial decision of March 23, 2007, and in the Board's July 29, 2008 decision. *Id*.

¶7 Both parties have responded to the Recommendation. Compliance Referral File 2 (CRF-2), Tabs 3 and 4. The agency argues that it is in compliance because, by letter dated August 16, 2010, it tentatively selected the appellant for the position of Human Resources Specialist pending completion of pre-employment requirements, including a mandatory security background investigation. CRF-2, Tab 3. The agency also argues that it was error for the administrative judge to find that a tentative offer was insufficient to establish compliance where, as here, the agency requires a security background investigation prior to appointment. *Id*. The appellant objects to the Recommendation's finding that the issue of willfulness has been resolved. CRF-2, Tab 4.

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[2] The administrative judge explained in a footnote that the effective date of the appellant's appointment must be the same day as that of the nonpreference eligible who was appointed July 3, 2000. CMRF, Tab 11 at 9, RD at n.5. The reference in the text to the date June 23, 2000, appears to be in error. Both parties appear to agree that July 3, 2000, is the relevant date. Compliance Referral File-2 (CRF-2), Tab 3 at 3 and Tab 4 at 1.

ANALYSIS

The agency's tentative offer of retroactive placement in a Human Resources Specialist position contingent on a background investigation is not a proper remedy for the agency's VEOA violation.

¶8 Based on the parties' request, the Federal Circuit remanded this appeal to the Board for consideration of whether the agency's tentative offer of a position as a Human Resources Specialist constitutes a sufficient remedy for the agency's VEOA violation. CMRF, Tab 1. Although the agency withdrew the January 30, 2009 offer at issue before the Federal Circuit, as stated above, on August 16, 2010, the agency made a second offer of employment to the appellant after issuance of the compliance Recommendation. CRF-2, Tab 3. Thus, the issue is not moot as the administrative judge found with respect to the first offer. *See* CMRF, Tab 11, RD at 7. Additionally, the offer does not appear to be prospective only and therefore violative of the requirement that retroactive relief be awarded for certain VEOA violations. *See Marshall v. Department of Health & Human Services*, 587 F.3d 1310, 1318 (Fed. Cir. 2009) (the appellant is entitled to compensation for any loss of wages or benefits he suffered by reason of the agency's violation of VEOA). It is the condition attached to the offer that is problematic, as well as the position itself.

¶9 The agency's August 16, 2010 offer states that it is "tentatively select[ing]" the appellant for the Human Resources Specialist position retroactive to July 3, 2000, with back pay and benefits, following completion of a mandatory pre-appointment security background investigation. CRF-2, Tab 3. As previously stated, the position for which the appellant applied was that of CPO Intern. The record shows that the appellant's name was at the top of the reconstructed certificate of eligibles and that OPM rejected the agency's request to pass over the appellant. Compliance Referral File-1 (CRF-1), Tab 8, Subtab 6; CMRF, Tab 9, Subtab 1. Accordingly, under the circumstances existing at the time of the original selection process, the agency would have selected the appellant for the

position of CPO Intern. Therefore, the agency must offer the appellant retroactive placement in the CPO Intern position, or a substantially equivalent position. *See Marshall*, 587 F.3d at 1318 (when an agency violates an individual's veterans' preference rights during the selection process in the competitive service and when it is undisputed that the agency would have selected the veteran for the position sought but for the violation, VEOA requires the agency to offer the same or substantially equivalent position to the veteran).

¶10 The agency has asserted that the CPO Intern position was no longer in existence in January 30, 2009, when it made its first tentative offer to the appellant of the Human Resources Specialist position. *See* CMRF, Tab 9 at n.1. It has not, however, indicated when the CPO Intern position ceased to exist. The record shows that one of the original selectees, Jason Rebholz, occupied the CPO Intern position until September 7, 2002. CRF-1, Tab 98, Ex. 3. Therefore, it is possible for the agency to retroactively place the appellant in the CPO Intern position through the date the position ceased to exist. Thus, the offer to retroactively place the appellant in the Human Resources Specialist position at a time when the CPO Intern position still existed is not a proper remedy for the VEOA violation.

The agency has provided insufficient information for the Board to determine whether the appellant must undergo a background investigation prior to appointment.

¶11 There is also a question as to whether the appellant must undergo a pre-appointment background security investigation prior to placement. The agency has argued that it cannot place the appellant in the position of Human Resources Specialist until such an investigation has been completed. CRF-2, Tab 3. The agency's argument is based on the premise that the proper placement of the appellant is in the position of Human Resources Specialist, a position designated non-critical sensitive. *See* CRF-2, Tab 3. The CPO Intern position, however, is designated non-sensitive. CRF-2, Tab 4, Ex. 4, Box 44. While we note that

OPM's suitability regulations provide that competitive service positions generally are subject to an investigation requirement, there are certain exceptions to that requirement. *See* 5 C.F.R. §§ 731.101, 731.104(a). Moreover, OPM's regulations indicate that even investigations for persons receiving an appointment to a non-critical sensitive position may be initiated after appointment. 5 C.F.R. § 731.106(c). Therefore, the agency must explain whether the appellant must undergo a background investigation in this case and whether, under established policy or regulation, the investigation must be conducted prior to appointment. As was true of the reconstruction of the hiring process, the agency must rely on the circumstances at the time of the original selection and set out the investigative requirements for the non-sensitive position of CPO Intern.

The agency has provided insufficient information for the Board to determine whether the offer of a Human Resources Specialist position is a proper remedy following expiration of the CPO Intern position.

¶12 Assuming either that the background investigation is unnecessary or that the appellant has successfully completed it, the agency must produce evidence that, following the expiration of the CPO Intern position, the Human Resources Specialist position is the same as, or substantially similar to, the position the appellant would have occupied but for the agency's violation of his VEOA rights. *See Marshall*, 587 F.3d at 1317 (citing *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984)) (the Board's authority under VEOA is to order the agency to restore the appellant to the status quo ante, in which he is in the same position that he would have been in if the agency's violation of the statute had not occurred). The agency has not provided a position description of the Human Resources Specialist position or otherwise described the duties of the position and thus it is not possible to compare the duties and responsibilities of that position to the duties and responsibilities of the CPO Intern position. We note, however, that the two positions are in different job series, thereby at least suggesting that the two jobs are dissimilar. CMRF, Tab 9, Subtab 2, Tab 10, Ex.

2. Further, as previously explained, the CPO Intern position is designated non-sensitive, whereas the Human Resources Specialist position is designated non-critical sensitive. CRF-2, Tabs 3 and 4, Ex. 4, Box 44. Thus, the agency must provide additional information before it can be determined that it has placed the appellant "as near [] as possible in the *status quo ante*." *Kerr*, 726 F.2d at 733.

The appellant's assertion that the Agency's violation of his veterans' preference rights was willful is not ripe for adjudication.

¶13 We disagree with the administrative judge that the issue of willfulness has been decided. *See* CMRF, Tab 11, RD at 2, n.3. The administrative judge's conclusion was based on his failure to find willfulness in the initial decision of March 23, 2007, the Board's denial of the appellant's petition for review of that decision, and the Board's July 29, 2008 decision finding the agency in noncompliance. *Id*. Our review of those decisions, however, does not show that the issue of willfulness was adjudicated; rather, the determination of willfulness appears to have been deferred until after the reconstruction of the hiring process was complete. The Board, in its July 29, 2008 decision, simply stated that it disagreed with the appellant's argument that reinstatement with back pay and benefits based on the agency's allegedly willful violation was appropriate prior to reconstruction of the hiring process. 109 M.S.P.R. 342, ¶ 14. The Board relied on *Endres v. Department of Veterans Affairs*, 107 M.S.P.R. 455, ¶ 17 (2007), which indicated that, under the circumstances of that case, reconstruction of the hiring process was necessary before a determination could be made as to whether the appellant was entitled to a position, back pay, and other relief.

¶14 In any event, a determination of the amount of liquidated damages owed to an individual because of the agency's willful violation of VEOA cannot be determined until the issue of the individual's entitlement to a position has been decided and the right to lost wages or benefits established. *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 12 (2011). This is so because the remedy for a willful VEOA violation is liquidated damages equal to the

amount of lost wages or benefits. 5 U.S.C. § 3330c(a). The agency's obligation to comply with the appellant's veterans' preference rights is an ongoing obligation. *Williams*, 116 M.S.P.R. 245, ¶ 22. Thus, while the agency's original violation was not willful because of its good-faith reliance on the Outstanding Scholars Program, *Williams*, 116 M.S.P.R. 245, ¶¶ 19-20; *Weed v. Social Security Administration*, 107 M.S.P.R. 142 ¶¶ 7-8 (2007), it is possible that the agency's actions could become willful if it fails to meet its ongoing obligation. *Williams*, 116 M.S.P.R. 245, ¶¶ 20-21. This cannot be resolved, however, until the agency has come into compliance with the Board's order. The appellant may request liquidated damages once the agency's compliance has been determined by filing a motion for liquidated damages with the administrative judge.

ORDER

¶15 The agency is ordered to: (1) explain whether a security background investigation is required prior to appointment in the non-sensitive position of CPO Intern; (2) if such investigation is required, produce evidence that the selectees for the CPO Intern position in this case were subjected to such a pre-appointment requirement; (3) provide evidence, if an investigation is shown to be necessary, that the appellant will be subjected to the same background investigation; (4) place the appellant in the CPO Intern position effective July 3, 2000, and pay him all back pay and benefits through the date that the CPO Intern position ceased to exist, **if** the evidence shows either that the original selectees were not subject to a pre-appointment security background investigation or that the appellant fell within an exception to the investigation requirement; (5) produce evidence of the date the CPO Intern position ceased to exist; (6) provide a copy of the position description of the Human Resources Specialist position; and (7) explain how the duties and responsibilities of that position are the same as, or similar to those of the CPO Intern position.

¶16 The agency must provide proof of compliance with the above instructions no later than **15 calendar days** of this Order. Failure to comply within this deadline will lead to the issuance of a show cause order to explain why the Board should not order that, Joy A. Jones-Haskins, Director of the Central Office Human Resources Division, U.S. General Services Administration, 1800 F Street, NW, Washington, DC 20405, 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). The appellant may respond to the agency's evidence of compliance within **10 calendar days** of the date reflected on the agency's certificate of service.

FOR THE BOARD:

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