

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

ALVERN C. WEED,
Appellant,

v.

SOCIAL SECURITY
ADMINISTRATION,
Agency.

DOCKET NUMBERS
DE-1221-09-0320-B-1
DE-3330-08-0490-B-2
DE-4324-09-0086-B-2

DATE: September 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Bryan Charles Tipp, Esquire, Missoula, Montana, for the appellant.

Mary Thorson, Esquire, Mary L. Senoo, Esquire, and Patrick W. Carlson,
Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

For the following reasons, we GRANT the appellant's petition for review, FIND that the agency violated the appellant's right-to-compete under [5 U.S.C. § 3304](#)(f)(1), and otherwise AFFIRM the initial decision.

Procedural Issues

The appellant asserts that the administrative judge improperly denied his request to call a former agency attorney as a witness during the hearing, and that the discovery of what the attorney knew and/or communicated to the hiring officials would have been material to the question of whether his disclosure was a contributing factor in his nonselection. The appellant initially indicated that he had no intention of calling the attorney as a witness at the Board hearing, Board Remand File (BRF), Tab 25 at 10, but subsequently filed a motion to compel discovery requesting that the administrative judge order the agency to make the attorney available for deposition if the agency intended to call her as a witness, BRF, Tab 28 at 4, 11. During conference calls with the parties the administrative judge denied the appellant's request to depose the attorney and advised the parties that she would not approve the attorney as a witness in the appeal. BRF, Tab 32 at 1-2. The appellant did not object to that ruling or the administrative judge's written summary of her rulings.

The appellant's motion to compel a deposition of the attorney was contingent upon the attorney being called as a witness at the Board hearing. BRF, Tab 28 at 4, 11. Because she was not permitted to testify at the hearing, the appellant has shown no abuse of discretion by the administrative judge. *See Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992), *aff'd*,

996 F.2d 1236 (Fed. Cir. 1993) (Table). Moreover, the appellant did not object to the administrative judge's ruling that the attorney would not be permitted to testify at the hearing. *See Miller v. U.S. Postal Service*, [117 M.S.P.R. 557](#), ¶ 8 (2012) (a failure to object to the denial of witness precludes the party from doing so on review). We also note that the attorney-client privilege is absolute, and a need for certain information does not override the privilege if it attaches. *Grimes v. Department of the Navy*, [99 M.S.P.R. 7](#), ¶¶ 7-8 (2005). The appellant's mere assertion that an exception exists when a privileged relationship is used to further misconduct is not supported by details or persuasive evidence showing such misconduct, and thus would not overcome the privilege. *See Gangi v. U.S. Postal Service*, [97 M.S.P.R. 165](#), ¶ 24 (2004) (the privilege applies if the communication was not for the purpose of committing a crime or tort).

Even assuming that the administrative judge abused her discretion and that the attorney-client privilege does not apply, the appellant has not shown that any such error prejudiced his case because, as set forth in the initial decision and below, the appellant has shown no error in the administrative judge's determinations that the appellant did not make a protected disclosure and that the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the disclosure. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). The appellant suggests on review that the attorney may have also provided testimony that she intentionally withheld information regarding the appellant's continued interest in employment in Kalispell from relevant agency officials, and that this would have shown a reckless disregard for his rights. As set forth above, the appellant did not object to the administrative judge's ruling regarding the attorney. As set forth more fully below, the agency's use of the Federal Career Intern Program (FCIP), which the Board had held was a valid hiring authority at the time, was not a willful violation of [5 U.S.C. § 3302\(1\)](#).

The appellant also asserts that the administrative judge should have applied collateral estoppel to preclude relitigation of issues involving the agency's alleged willfulness in denying him an opportunity to compete under [5 U.S.C. § 3304\(f\)\(1\)](#). The appellant claims that an Equal Employment Opportunity Commission (EEOC) administrative judge found certain agency witnesses not credible during an EEOC hearing. The appellant further contends that the issue of his "opportunity to compete" was properly before both the EEOC and the Board, that the issue was actually litigated and necessary to the resulting EEOC judgment, and that the agency had a full and fair opportunity to litigate, before the EEOC, the issue of whether the appellant was subject to retaliation.

The issues of whether the agency discriminated against the appellant based on age and retaliated against him based on equal employment opportunity (EEO) activity, which were identified in the EEOC case, are not before the Board in these appeals. Moreover, the willfulness issue before the Board involves [5 U.S.C. § 3330c\(a\)](#). Even if the EEOC's administrative judge found that the agency acted willfully when it failed to inform the appellant of vacancies because it was acting in reprisal for his EEO activity, this does not constitute a finding that the agency willfully violated [5 U.S.C. § 3302\(1\)](#) by using the FCIP. *See Williams v. Department of the Air Force*, [108 M.S.P.R. 567](#), ¶ 12 (2008) (the term "willful" under [5 U.S.C. § 3330c\(a\)](#) means that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited under the Veterans Employment Opportunities Act of 1998). In fact, when the agency used the FCIP in 2006 and 2007, the program was valid. *See Gingery v. Department of Defense*, [105 M.S.P.R. 671](#), ¶ 9 (2007) (the FCIP authority represents a valid exception to the competitive examination requirement), *rev'd and remanded*, [550 F.3d 1347](#) (Fed. Cir. 2008), *and overruled by Dean v. Office of Personnel Management*, [115 M.S.P.R. 157](#), ¶ 30 (2010). Because these are distinct issues, the question of whether the agency willfully violated section 3302(1) was not actually litigated.

Factual Findings and Credibility Determinations

The appellant contends that the initial decision is inconsistent regarding whether the agency complied with its policy guidelines and whether he made a protected disclosure in a January 2009 complaint to the Office of Special Counsel (OSC). We disagree. The administrative judge merely found that the agency's general policy guidelines required fair and open recruitment methods, but that the FCIP did not require advertising on the USAJobs website. The personnel actions at issue in this case involved nonselections in 2006 and 2007; thus, any alleged disclosure the appellant is claiming he made in 2009 could not have been a contributing factor in nonselections that took place in 2006 and 2007. *See Mason v. Department of Homeland Security*, [116 M.S.P.R. 135](#), ¶ 27 (2011).

The appellant also claims that the administrative judge incorrectly found that the approving official for the selections was credible, consistent, and without bias because the official's testimony on remand contradicted his prior testimony at a 2008 Board enforcement hearing. This argument is unavailing. The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002). The appellant has not shown any inconsistency in the testimony of the official, and he has not otherwise provided sufficiently sound reasons for overturning the administrative judge's credibility findings, which were based on her observation of the official's demeanor. BRF, Tab 65, Initial Decision (ID) at 28-29. Although the appellant contends that the administrative judge ignored certain allegedly obstructive and disingenuous conduct by the agency, an administrative judge's failure to mention all of the evidence does not mean that she did not consider it. *See Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). In any event, we have considered the

appellant's allegations and find no error in the administrative judge's credibility and factual findings, which led her to conclude that the agency chose to use the FCIP based on legitimate management concerns about budgetary constraints and strict time frames for appointing and training new hires in 2006 and 2007, not to personally thwart the appellant.

Veterans Employment Opportunities Act of 1998 (VEOA) Appeal

The appellant does not challenge on review the administrative judge's findings regarding his appeal filed under the Uniformed Services Employment and Reemployment Rights Act of 1994. Nevertheless, the appellant does claim that the initial decision applied the wrong legal standard under VEOA in finding that the agency's violation of a statute or regulation relating to veterans' preference was not willful. The appellant asserts that the initial decision did not analyze the facts in light of case law holding that willful acts include those made with reckless disregard for whether conduct is prohibited. Specifically, the appellant appears to allege that the administrative judge should have addressed whether the hiring officials attempted to determine whether their use of the FCIP would violate a statute or regulation relating to veterans' preference by, for example, checking with the agency's legal counsel. The appellant has not, however, shown error in the initial decision's findings and legal analysis. The agency reasonably believed that the FCIP was a valid hiring authority at the time of the 2006 and 2007 selections at issue in this case. *Gingery*, [105 M.S.P.R. 671](#), ¶ 9. The appellant has shown no basis, therefore, for requiring the hiring officials to have checked with legal counsel at that time.

A violation is willful when the agency either knew or showed reckless disregard for whether its conduct was prohibited by VEOA. *Williams v. Department of the Air Force*, [116 M.S.P.R. 245](#), ¶ 19 (2011); *Williams*, [108 M.S.P.R. 567](#), ¶ 12. Where, for example, an agency did not know about the implications of a Board decision on the propriety of the Outstanding Scholar

Program (OSP), its use of that program in failing to select the appellant was not a willful violation. *Williams*, [116 M.S.P.R. 245](#), ¶ 20; *see also Weed v. Social Security Administration*, [107 M.S.P.R. 142](#), ¶¶ 7-13 (2007) (finding no willfulness where the OSP had been a valid appointing authority). Similarly, we find no willful violation in this case at this time. *See Dow v. General Services Administration*, [116 M.S.P.R. 369](#), ¶ 14 (2011) (the agency's obligation to comply with the appellant's veterans' preference rights is an ongoing obligation; while the agency's original violation was not willful, the agency's actions could become willful if it fails to meet its ongoing obligation).

The appellant also contends that the Board has jurisdiction over his "right-to-compete" claim under [5 U.S.C. § 3304\(f\)\(1\)](#), the administrative judge incorrectly held that he was not in a position to be "promoted," given that he was outside the hiring agency's workforce and seeking a lower-graded position, and the Board has not interpreted section 3304(f)(1) as applying only when the vacancy announcement limits applications to those filed under a merit promotion program. The appellant asserts that [5 C.F.R. § 335.106](#) does not state or imply that only veterans seeking a promotion have a right to compete for vacancies when an agency accepts applications from individuals outside its workforce, and that *Dean v. Office of Personnel Management*, [115 M.S.P.R. 157](#), ¶ 28 n.11 (2010), specifically noted that the right to compete under section 3304(f)(1) is triggered when an agency accepts applications from outside its workforce.

The administrative judge found that, although the appellant exhausted his remedy with Department of Labor, the appellant was a veteran within the meaning of the statute, and the agency's actions took place after December 10, 2004, the appellant did not prove by preponderant evidence the jurisdictional requirement that the agency had denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce, because there was no job for which he sought a promotion, given that he was not a current employee of the

agency and he occupied a higher-graded position with the Department of the Air Force at the time of his nonselection, and there was no indication that the vacancies should have been filled using merit promotion procedures.

It appears that the administrative judge incorrectly based her jurisdictional determination on a finding that the appellant failed to prove the jurisdictional requirements by preponderant evidence, rather than on a finding of a failure to make a nonfrivolous allegation of the relevant facts. *Cf. Peterson v. Department of Veterans Affairs*, [116 M.S.P.R. 113](#), ¶ 9 (2011) (vacating an initial decision where the administrative judge incorrectly applied a preponderant evidence jurisdictional standard, rather than a nonfrivolous allegation standard, in an individual right of action appeal). Contrary to the initial decision, we find that the appellant nonfrivolously alleged that the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of [5 U.S.C. § 3304](#)(f)(1), and met his burden of proof on the merits.

The administrative judge found that the agency violated [5 U.S.C. § 3302](#)(1) when it used the FCIP to fill the positions in question because it did not submit evidence justifying its exception of those positions from the competitive service. ID at 23-26. The administrative judge made this determination within the context of her finding that the appellant was not aware of the vacancies and did not apply for them because the agency did not, among other things, advertise the FCIP positions on the USAJobs website. ID at 2, 13, 15, 18, 20. The appellant has been injured by this violation of [5 U.S.C. § 3302](#)(1) because, as a preference eligible, he had a right to compete, under merit promotion procedures, for vacancies for which the agency was accepting applications from outside its workforce. *See Dean*, [115 M.S.P.R. 157](#), ¶ 28. The appellant was thus deprived of the right to apply for the positions when the agency filled them under the FCIP without public notice, given that he could not apply for jobs about which he had no knowledge. *See id.* Thus, on the facts of this case, there is a substantial

overlap between the appellant's claims under [5 U.S.C. § 3302](#)(1) and 5 U.S.C. § 3304(f)(1), and the agency's violation of section 3302(1) in its failure to justify its use of the FCIP also denied him the right to compete under section 3304(f)(1).

The administrative judge relied on *Graves v. Department of Veterans Affairs*, [114 M.S.P.R. 245](#) (2010), in finding that the appellant's right-to-compete claim failed because there was no indication that the vacancies should have been filled using merit promotion procedures. ID at 31. The Board in *Graves*, however, did not address or even acknowledge the Board's earlier decision in *Brandt v. Department of the Air Force*, [103 M.S.P.R. 671](#), ¶¶ 12-13 (2006), in which the Board, relying on [5 C.F.R. § 335.106](#), held that "[i]nterpreting [5 U.S.C. § 3304](#)(f)(1) as applying only when the vacancy announcement limits applications to those filed under a merit promotion program therefore could reasonably be regarded as inappropriate." The Board held that the Office of Personnel Management (OPM) had interpreted the phrase "under merit promotion procedures" as modifying the verb "to compete," and that this interpretation was reasonable. *Id.*, ¶ 12. In *Dean*, [115 M.S.P.R. 157](#), ¶ 28 n.11, the Board similarly rejected OPM's argument that the statutory right to compete applied only to positions filled under merit promotion procedures.

Although the administrative judge also held that the appellant did not prove his right-to-compete claim because "there was no job for which the appellant sought promotion," ID at 30, this reasoning is not persuasive. A promotion is "a change of an employee, while serving continuously within the same agency," to a position at a higher grade or rate of pay. [5 C.F.R. § 210.102](#)(b)(11). Under the administrative judge's analysis, the section 3304(f)(1) right to compete would never be applied to external applicants from different agencies because there would be no position to which they were being "promoted." Such a result would not be consistent with the language of section 3304(f)(1), which addresses the acceptance of applications outside an agency's own workforce. *See Brandt*, [103 M.S.P.R. 671](#), ¶ 13.

IRA Appeal

The appellant asserts that his testimony at a Board hearing regarding his petition for enforcement of the Board's 2005 decision in his prior case challenging the OSP, as well as his testimony at the EEOC hearing, demonstrate that he reasonably believed he made a protected disclosure. In this regard, he contends that he testified at the enforcement proceeding that he called a Mr. Eitel, who told him that selections were not being made at that time, and that was a "big red flag" for the appellant that something was not being done in accordance with the merit system procedures, and testified at the EEOC hearing that he suspected there were other reasons for the action being taken because it was not the end of the fiscal year and the USAJobs announcement had only been posted for 4 days.

In his June 28, 2006 complaint to OSC the appellant asserted that the agency gave unauthorized preferences under the OSP contrary to the Delegated Examining Operations Handbook, and that he suspected that the agency's selecting official arbitrarily and capriciously preselected a friend or acquaintance. The administrative judge found that the latter allegation was not protected because the appellant did not establish any facts he knew or which he could have ascertained which would support a reasonable belief that agency managers preselected a friend or acquaintance for the OSP positions in January 2005. ID at 42. The administrative judge found that the appellant acknowledged in his disclosure to OSC and in his hearing testimony that his belief that agency managers had preselected or given an unauthorized preference to an OSP candidate in January 2005 was based on mere supposition, and acknowledged in his Board testimony that he "figured [he] just had to file . . . complaints and then see if they had any merit based on how the Agency responded." *Id.* The appellant has not challenged these findings on review. Moreover, the appellant has not challenged the administrative judge's finding that any alleged disclosure regarding the agency's improper use of the OSP was not protected because the Board had ruled, as early as August 5, 2005, in *Dean v. Department of*

Agriculture, [99 M.S.P.R. 533](#) (2005), and *Olson v. Department of Veterans Affairs*, [100 M.S.P.R. 322](#) (2005), *aff'd on recons.*, [104 M.S.P.R. 1](#) (2006), that non-competitive appointments, without examination, of non-preference eligibles under the OSP did not comport with [5 U.S.C. § 3302\(1\)](#), and the decisions were publicly known. ID at 42-44; *see Fields v. Department of Justice*, [452 F.3d 1297](#), 1304 (Fed. Cir 2006) (a “disclosure” must reveal something that was hidden and not known to the officials); *Francisco v. Office of Personnel Management*, [295 F.3d 1310](#), 1314 (Fed. Cir. 2002) (alleged disclosure that OPM violated civil service laws by misinterpreting a statute was not protected because it concerned publicly-known information and amounted to mere legal arguments raised by the appellant in his own prior proceedings); *Meuwissen v. Department of the Interior*, [234 F.3d 9](#), 12-13 (Fed. Cir. 2000) (a disclosure of information that is publicly known is not a protected disclosure). The Board normally will consider only issues raised in a timely-filed petition for review or cross-petition for review. [5 C.F.R. § 1201.114\(b\)](#). Here, the appellant appears to address on review different alleged disclosures that he did not raise to OSC.

In any event, even if the appellant made a protected disclosure, the administrative judge found that the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the disclosure. The administrative judge noted, among other things, the lack of evidence from which to conclude that the agency treated similarly-situated employees who were not whistleblowers differently from the appellant, the agency’s predominant use of the FCIP as a hiring method even absent whistleblowing, and the lack of a motive to retaliate for his alleged disclosure to OSC that his veterans’ preference rights were violated by the agency’s prior use of the OSP. ID at 47-48. The appellant has not timely challenged the administrative judge’s findings that the agency met its burden by clear and convincing evidence.

The appellant further claims that the administrative judge did not address his claim that the acting officials had constructive knowledge of his disclosure and that he established such knowledge because the former agency attorney had actual knowledge of the disclosure, “[i]t is inherent in the function of an agency legal office that agency counsel at least has the ABILITY to influence the officials accused of the retaliatory action,” and the selecting officials therefore “must be construed to have the same knowledge as is attributable to their agent, Denver Regional Office of Counsel.” Petition for Review File, Tab 1, Part II at 26-27. Although the appellant appears to be alleging that he proved by preponderant evidence that his disclosure was a contributing factor in the agency’s failure to appoint him merely because the attorney occupied a position that *could* influence the hiring official, he has not provided any legal support for this claim and has not proven, or even alleged, that the attorney influenced those officials. The appellant has shown no error in the administrative judge’s finding that the hiring officials testified that the attorney was not involved in the hiring process and did not speak with them about it. Even if the appellant could have proven the contributing factor element, as set forth above he has shown no error in the administrative judge’s findings that he did not make a protected disclosure and that the agency met its clear and convincing evidence burden.

The VEOA Remedy

The appellant asserts that here, as in *Marshall v. Department of Health & Human Services*, [587 F.3d 1310](#) (Fed. Cir. 2009), the record is clear that the agency would have selected him in the absence of its violation of a statute or regulation relating to veterans’ preference; thus, the appellant contends that the administrative judge’s determination to order reconstruction was improper. The appellant claims that the agency stipulated in the EEOC proceeding that he would have been selected had his name been on the certificate of eligibles, the EEOC administrative judge found that to be the case, and an agency manager admitted

that fact at his deposition. Thus, the appellant contends that the administrative judge should have awarded him compensation for the lost wages and benefits he suffered as a result of the agency's violation under [5 U.S.C. § 3330c\(a\)](#). The appellant further claims that, even assuming that a dispute exists as to whether the agency would have selected him for one of the four positions at issue, reconstruction of the hiring process is an impossibility because it cannot be known who would have applied for the positions had the agency conducted fair, open, and competitive recruitment. The appellant also suggests that the Board, not the agency, should conduct the reconstruction ordered in all VEOA cases. The appellant asserts that reconstruction will lead to a lengthy delay in receipt of a remedy, and that agencies should be required to prove lack of causation with respect to losses by appellants.

The Board has long held that, in general, the proper remedy in a VEOA appeal is reconstruction of the selection process. *See Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 18 (2006). The appellant has not provided a basis for overturning Board precedent in this regard. Moreover, the appellant has not shown that the agency would have selected him in the absence of its violation of [5 U.S.C. § 3302\(1\)](#). Although the appellant contends that the agency stipulated in the EEOC proceeding that he would have been selected had his name been on the certificate of eligibles, the stipulation was actually more specific and narrow than the appellant suggests. BRF, Tab 37, Ex. 21 at 18-19. The agency's stipulation clearly covered only the EEOC case, and was conditioned upon the appellant having "passed" an interview. More significantly, the stipulation related to what would have transpired had the appellant been on the FCIP certificate. Given the administrative judge's correct determination that the agency's use of the FCIP violated [5 U.S.C. § 3302\(1\)](#) in this case, there is no stipulation or other indication in the record as to whether the agency would have selected the appellant absent the use of the FCIP.

Although the appellant claims that an agency manager testified at a deposition that the appellant would have been selected in the absence of a violation of a statute or regulation relating to veterans' preference, the relevant testimony addresses only whether the appellant would have been selected had he been on the FCIP certificate. BRF, Tab 35, Ex. 13 at 48-49 (Deposition Transcript at 188-192). Thus, the administrative judge correctly found that there was a dispute as to whether the agency would have selected the appellant for any one of the four positions at issue, the record was not clear on the issue, the agency had not conceded the point, and reconstruction in accordance with [5 U.S.C. § 3304\(a\)\(1\)](#) was appropriate. ID at 26; *see Marshall*, 587 F.3d at 1316-17.

ORDER

We ORDER the agency to reconstruct the hiring in Kalispell, Montana, for the Social Insurance Representative (Claims Representative) position, GS-0105-07, from which an appointment was made on September 5, 2006, the Social Insurance Representative (Claims Representative) position from which an appointment was made on July 8, 2007, the Contact Representative (SRT), GS-0962-07 position, from which an appointment was made on July 8, 2007, and the Contact Representative (SRT), GS-0962-07 position, from which an appointment was made on September 30, 2007, consistent with the requirements set forth at [5 U.S.C. § 3302\(1\)](#) and [5 U.S.C. § 3304\(f\)\(1\)](#). *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 30 days after the date of this decision.

We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be found at [5 C.F.R. §§ 1201.202](#), 1201.203, and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST DAMAGES**

You may be entitled to be compensated by the agency for any loss of wages or benefits you suffered because of the violation of your veterans' preference rights. [5 U.S.C. § 3330c\(a\)](#); 5 C.F.R. § 1208.25(a). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued the initial decision in your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.