

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

STEPHEN W. GINGERY,
Appellant,

DOCKET NUMBER
CH-3443-06-0582-X-1

v.

DEPARTMENT OF DEFENSE,
Agency.

DATE: September 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Stephen W. Gingery, Macomb, Michigan, pro se.

Susan L. Lovell, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

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

FINAL ORDER

This case is before the Board on the appellant's petition for enforcement of the Board's November 30, 2009 final decision finding that the agency violated the appellant's rights under the Veterans Employment Opportunities Act of 1998 (VEOA) when it noncompetitively filled three Auditor positions in Sterling

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

Heights, Michigan. *See Gingery v. Department of Defense*, MSPB Docket No. CH-3443-06-0582-M-1, Remand Initial Decision (Nov. 30, 2009). For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement.

BACKGROUND

Initial Phase

In February 2006, the appellant, a 10-point preference eligible with a service-connected disability rated at 30% or more, applied for an auditor position in the Sterling Heights, Michigan office of the agency's Defense Contract Audit Agency (DCAA). Initial Appeal File (IAF), Tab 1 at 24; Tab 19 at 1. The DCAA was seeking to recruit GS-7 and GS-9 auditor applicants through Monster.com, an independent recruiting website, for the Federal Career Intern Program (FCIP) and through competitive examining procedures using an agency email address. Remand File (RF), Tab 21 at 2-3. The appellant used both avenues to apply. IAF, Tab 19 at 1-2. Although he was interviewed for the FCIP positions, the appellant was not recommended by the interview panel for a second interview because of his poor work history, his firing from a CPA firm for "not working out," and his college grades. *Id.* at 2-4. The selecting official decided not to hire the appellant, and he requested and obtained from the Human Resource Manager approval to pass over the appellant and select nonveterans under the FCIP appointment authority. *Id.* at 4. Under the competitive procedure, the appellant's name was placed first on the certificate of eligibles, but not selected. Another veteran on the certificate was later selected after an earlier FCIP selectee was unable to meet the security requirements of the position. IAF, Tab 19 at 4; RF, Tab 21 at 3, 9.

After unsuccessfully seeking relief from the Department of Labor, the appellant filed a VEOA claim with the Board. IAF, Tab 1 at 2. His complaint, as revised on September 5, 2006, contended that DCAA violated his veterans'

preference rights when it failed to select him for any of the auditor-trainee positions, failed to request permission to pass him over from the Office of Personnel Management (OPM), and failed to notify him of its intent to pass him over in accordance with [5 U.S.C. § 3318](#). IAF, Tabs 1, 14. In an initial decision, the administrative judge determined that [5 U.S.C. § 3318](#) applies only to the competitive service and that the auditor positions at issue were excepted service positions under FCIP. IAF, Tab 19 at 9. Thus, she concluded that DCAA did not violate the appellant's veterans' preference rights. *Id.* On petition for review by the appellant, the Board affirmed the initial decision. *Gingery v. Department of Defense*, [105 M.S.P.R. 671](#) (2007). The Board held that the FCIP was a valid exception to hiring in the competitive service because it was authorized by an Executive Order promulgated under [5 U.S.C. § 3202](#) and that the agency was in compliance with OPM regulations that were promulgated pursuant to the Executive Order. *Id.*, ¶¶ 9-13.

The appellant appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit, which reversed the Board's decision. *Gingery v. Department of Defense*, [550 F.3d 1347](#) (Fed. Cir. 2008). The court found that the passover procedures required by [5 U.S.C. § 3318](#) are made applicable to the excepted service by [5 U.S.C. § 3320](#) and that OPM's passover regulation providing less protection to disabled veterans than that provided by section 3318 was invalid. *Id.* at 1351-54. In remanding to the Board, the court noted that its finding that the appellant's veterans' preference rights were violated based on its invalidation of the OPM regulation made it unnecessary to address his broader challenge to the validity of FCIP's placement of the auditor positions in the excepted service. *Id.* at 1351 n.1. The court stated that, if its remand did not resolve the appellant's case, he would not be precluded from renewing his FCIP challenges before the Board. *Id.*

Remand Phase

On remand, the Board determined that the issue raised by the appellant of whether the FCIP's exception of the auditor positions complied with the "necessity" requirement of [5 U.S.C. § 3302](#)(1) should be addressed. *Gingery v. Department of Defense*, [112 M.S.P.R. 306](#) (2009). It noted that the arguments presented to the court regarding the agency's authority to except its auditor positions from the competitive service were not in the record and that the record was otherwise undeveloped. The Board therefore remanded the case to the regional office with directions to provide the parties an opportunity to present evidence and argument and to issue an initial decision on the issue. *Id.*, ¶¶ 15-17.

In the decision on remand, the administrative judge found that [5 U.S.C. § 3302](#)(1) permits departure from the use of competitive hiring procedures through excepted hiring authorities only where "necessary" for "conditions of good administration." RF, Tab 21, Remand Initial Decision (RID) at 4. The administrative judge noted that the FCIP was authorized by Executive Order 13,162 to be used as a supplement to competitive recruitment for the purpose of attracting to the federal workforce exceptional individuals with diverse professional experience, training and competencies, and that a previous decision in this case found that the FCIP is a valid exception to the competitive examination requirement. *Id.* at 4-5. The administrative judge also noted that OPM's implementing regulation grants agencies the authority to determine the appropriate use of the FCIP and that the agency's stated policy is to use the FCIP for auditors to supplement competitive recruitment in order to attract exceptional or diverse candidates, especially in those instances when competitive recruitment methods fail to do so. *Id.*

In this case, the agency said that it announced auditor vacancies through FCIP only after there was a lack of competitive candidates. RID at 5. However, the administrative judge found that the record did not support this claim.

Specifically, the administrative judge found that the agency simultaneously announced the auditor vacancies using the FCIP and competitive examining procedures. There was no evidence in the record that the agency determined there was a lack of competitive candidates before it issued the FCIP employment list; the competitive process did in fact produce qualified candidates; and the agency considered the FCIP candidates before considering the competitive candidates. *Id.* at 5-9. The administrative judge concluded that the agency failed to comply with the “necessity” requirement of section 3302(1) when it excepted the auditor positions at issue and that it therefore violated the appellant’s veterans’ preference rights in placing positions for which he applied in the excepted service. *Id.* at 9. The administrative judge ordered the agency to reconstruct the hiring for the auditor positions consistent with the competitive examination requirements of [5 U.S.C. § 3304\(a\)\(1\)](#). *Id.* at 9-10. In the absence of a petition for review, the remand initial decision became the final decision of the Board on January 4, 2010.

The agency notified the appellant on January 7, 2010, that it had reconstructed the hiring process for the auditor positions in Sterling Heights, Michigan, consistently with the requirements of section 3304(a)(1) and that it had determined that he was the top candidate for the GS-9 Auditor position. It therefore informed the appellant that he was tentatively selected for the position. The notice also informed the appellant, *inter alia*, that his employment in the position with back pay and benefits to March 27, 2006, was contingent on his ability to obtain a security clearance, and it directed him to submit an online security investigation form. Compliance File (CF), Tab 3, Attachment 1.

Compliance Phase

On September 28, 2010, the appellant filed a petition for enforcement of the Board’s decision, contending that the agency was not in compliance because of its imposition of a security clearance requirement and because it had not

shown that its reconstruction of the hiring process included the removal of the unlawfully selected applicants for the auditor positions. CF, Tab 1 at 4-6. The agency responded that it was in full compliance with the Board's decision. CF, Tab 3. The agency denied violating the rule that reconstructing the selection process requires removing any individual improperly appointed to the position at issue. The agency submitted a sworn statement that individuals who were appointed to the auditor positions no longer occupied them. The agency noted that it was therefore impossible to remove them, and it pointed out that the Board has stated that an improperly appointed individual need not be removed from the federal service. *Id.* at 4-5, Attachment 2. With respect to the appellant's objection to the ability to obtain a security clearance as a new qualification, the agency noted that the job announcement for the position lists completion of a background and security investigation as a "key requirement." *Id.* at 5-6 & Attachment 3 at 3.

The appellant replied that the circumstance cited by the agency was immaterial to the required removal of the selectees. With respect to the security clearance requirement, the appellant charged that the vacancy announcement provided by the agency was not the announcement he saw, but one that had been issued at a later time. The appellant also raised a new issue, contending that the agency's selection was made through FCIP and not through competitive examination procedures, as ordered by the Board. CF, Tab 4 at 2-5.

The agency responded with further evidence that the original selectees were no longer in the auditor positions and stated that the positions are not occupied by anyone. Noting that it was then free to offer the position to the appellant, the agency stated that the appellant has nothing to gain by his apparent suggestion that the selectees should in some way be punished. CF, Tab 5 at 3-5. With respect to the vacancy announcement, the agency explained that the original announcement, which was no longer available, was an open, continuous announcement so that the more recent one it provided was identical to the one the

appellant saw, except for its opening and closing dates. *Id.* at 5. The agency submitted an unsworn affidavit to support its assertions concerning the nature of the vacancy announcement it submitted. *Id.* at 14.

The appellant in reply to the agency's response disputed the agency's assertions about the vacancy announcement it submitted because it differed from the Monster.com announcement through which he also applied. CF, Tab 8 at 1-2. He questioned the agency's statement that the position he was offered was vacant and also expressed concern that, after the original selectees left, others who may not have been qualified were placed in the positions for a time. *Id.* at 2-5.

In her Recommendation, the administrative judge noted that the agency had provided the appellant with a letter stating that it had determined that he was the top candidate for the GS-9 Auditor position on the OPM certificate and had tentatively selected him for the position. However, she also noted that along with the letter the agency enclosed the regional DCAA FCIP Employment List annotated with "Reconstruction, December 2009." CF, Tab 9 at 5. Despite the agency's statement that its selection of the appellant met competitive appointment requirements, she determined that the latter evidence indicated he was selected under FCIP for an excepted service position. *Id.* Thus, she found that the agency failed to make an appointment under an open competitive examination from the highest three names on a certificate furnished under [5 U.S.C. § 3317\(a\)](#). *Id.* at 5-6. The administrative judge concluded that the agency was in noncompliance and recommended that it be ordered to reconstruct the hiring process using competitive procedures. *Id.* at 6. She did not reach the appellant's arguments concerning the removal of selected applicants and the imposition of new qualification requirements. *Id.*

The appellant filed a response to the Recommendation in which he contended that the agency had used competitive procedures in appointing him and that the inclusion of the FCIP document was an insignificant error. Compliance Referral File (CRF), Tab 3 at 5-6. The appellant also maintained that both his

applications were generated by the Monster.com vacancy announcement that did not mention any security clearance requirement and that it was too late for the agency to introduce the announcement referring to such a requirement. *Id.* at 7-8. He reiterated his argument that restoring him to the status quo ante required additional action against the improper selectees to prevent the agency or the selectees from further profiting from their appointments. *Id.* at 9-12. He also sought the disqualification of the administrative judge because of various rulings in his case. *Id.* at 13-14.

The agency responded that it has fully complied with the administrative judge's Recommendation. CRF, Tab 6 at 3. The agency attached an unsworn declaration from William Oelfke, Human Resources Officer, stating that a reconstruction of the 2006 selection process for the Auditor positions was accomplished using competitive procedures and the OPM certificates and that two selections were made, mirroring the hiring in 2006. *Id.*, Attachment A. The declaration states that the appellant was number 1 on the revised GS-9 Auditor certificate issued to DCAA and that he was selected for one of the two auditor positions. *Id.* The agency stated that a letter offering the appellant the position of Auditor, GS-09, in Sterling Heights, Michigan was sent to him on February 1, 2011. *Id.* at 4.

The appellant submitted a reply to the agency's response in which he acknowledged the agency's offer. CRF, Tab 7. However, the appellant raised various objections to the agency's reconstruction of the selection process, despite the fact that it resulted in his selection. He also repeated his argument that actions should be taken against the improper selectees even though they were no longer in the Auditor position at the time of the reconstruction leading to his selection. The appellant's principal argument, which was the basis for his statement that he would neither accept nor decline the job offer, was based on the offer's requirement that he be able to obtain a security clearance. *Id.* at 7, 19. The appellant objected to this requirement as a new imposition because he said

that it was not mentioned in the vacancy announcement. The appellant also objected on the same basis to the agency's requirement that he agree to be subject to a rotation policy. *Id.* at 15-16.

ANALYSIS

The agency has complied with the Board's order to reconstruct the selection process using competitive procedures, with the result that it has selected the appellant for the GS-9 Auditor position for which he applied, effective March 27, 2006. As noted above, the appellant has raised various objections to the agency's reconstructed selection process. The appellant objected that: William Oelfke's statement describing the selection process was not sworn; the process was not conducted by the initial selecting official; the agency used category rating and ranking instead of numerical rating and ranking in making the selections; and actions have not been taken to deprive the initial selectees from gaining any benefit from their improper appointments. However, in view of the appellant's selection and the agency's tentative offer of the position, which would be an appointment retroactive to the original selection date, it is evident that these alleged errors by the agency have not prevented the appellant's selection and are therefore at most harmless errors that the Board need not address.

In contrast, the appellant's contention that the agency has improperly made its offer contingent on his ability to obtain a security clearance is clearly one that he is entitled to have addressed. In evaluating this argument, we note first that it is well established that the scope of the Board's review of an adverse action based on denial or revocation of a required security clearance is limited. In such a case, the Board's review is limited to determining whether a security clearance was denied, whether the security clearance was in fact a requirement of the appellant's position, and whether the procedures set forth in [5 U.S.C. § 7513](#) were followed. *Hesse v. Department of State*, [217 F.3d 1372](#), 1376 (Fed. Cir. 2000). Thus, the Board has no authority to examine the underlying merits of a

security clearance determination, including whether a security clearance was properly made a requirement for holding the position. *Skees v. Department of the Navy*, [864 F.2d 1576](#), 1578 (Fed. Cir. 1989). For this reason the Board cannot order the agency to waive its requirement that the appellant submit to a security background check or order it to place him in the position without regard to his eligibility for a clearance.

However, the appellant's claim that eligibility for a security clearance is a newly imposed requirement raises an issue of whether a security clearance was in fact required for the Auditor position in 2006 when the appellant should have been selected. Since the appointment which he has been offered is one retroactive to that date, this issue is properly before the Board. The appellant asserts that the vacancy announcement to which he responded gave him no notice of this requirement, and he disputes the authenticity of the vacancy announcement provided by the agency which states that a background and security investigation must be completed. We find that the preponderance of the evidence in the record supports the agency's position that a security clearance was required in 2006.

The agency submitted an August 2009 competitive procedures vacancy announcement used by OPM for the GS-9 Auditor position stating that a security investigation was a key requirement for the position. Although the announcement was not dated in 2006, the agency also provided an unsworn declaration and supporting emails stating that, apart from its opening and closing dates for applications, this announcement was identical to the announcement used in 2006 because it was an open, continuous announcement. CF, Tab 5 at 14-15. While the appellant states that he saw only a Monster.com announcement of the position that lacked any reference to a security investigation, the vacancy announcement used by OPM is evidence that eligibility for a security clearance was a requirement for the position in 2006. The appellant has submitted no documentary evidence to refute the evidence submitted by the agency. In addition, the administrative judge noted in her October 2, 2006 initial decision

that one of the auditor positions was filled from the OPM certificate after a previous selectee was unable to take the job because he did not satisfactorily complete the background security check for the position. IAF, Tab 19 at 4. Indeed, the administrative judge noted that the appellant referred to this fact during a telephonic conference on September 7, 2006. *Id.* at 6. Thus, we conclude that successful completion of a security background check was a requirement of the position at the time the appellant would have been selected.

As noted above, the appellant has also objected to the agency's requirement that he agree to the agency's rotation policy. This objection is also without merit. The same vacancy announcement that required a security background check also stated that signing a mobility agreement was a requirement for appointment to the auditor position. CF, Tab 3, Attachment 3 at 3.

Under these circumstances, we find that the agency has properly reconstructed the selection process for the GS-9 Auditor position and has made the appellant a bona fide offer of the position. In view of these actions, we find that the agency is in compliance with the Board's order.

This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

**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.