

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

JOHN PAUL JONES, III,
Appellant,

DOCKET NUMBER
DE-3330-10-0168-X-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: December 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John Paul Jones, III, Albuquerque, New Mexico, pro se.

Jada Banks and Robert E. Nerthling, II, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

FINAL ORDER

The administrative judge issued a recommended decision that the Board find, under the Board's regulations in effect at that time, the agency partially

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

noncompliant with the April 30, 2010 initial decision, and the matter was referred to the Board for consideration. *See* [5 C.F.R. § 1201.183](#) (Jan. 1, 2012). The initial decision granted the appellant's request for corrective action in connection with the Veterans Employment Opportunities Act of 1998 (VEOA) and ordered the agency to reconstruct the selection process for four positions for which the appellant had applied. MSPB Docket No. DE-3330-10-0168-I-1, Initial Appeal File (IAF), Tab 30, Initial Decision at 1, 12-13. The initial decision became the Board's final decision on August 19, 2010, after the appellant withdrew his petition for review. MSPB Docket No. DE-3330-10-0168-I-1, Petition for Review (PFR) File, Tab 9, at 1-2. The administrative judge found the agency noncompliant with the initial decision and ordered it to submit additional evidence explaining its determinations regarding the appellant's qualifications. MSPB Docket No. DE-3330-10-0168-C-2, Compliance File (CF), Tab 8, Recommendation at 11.

For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement.² 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(c)(1) ([5 C.F.R. § 1201.183](#)(c)(1)).

BACKGROUND

The appellant applied for four Health Communications Specialist positions, but the agency found him not minimally qualified for each of them.³ IAF, Tab

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for enforcement in this case was filed before that date. The revisions to [5 C.F.R. § 1201.183](#) do not affect our consideration of the merits of this compliance proceeding.

³ The appellant also applied for one Technical Writer-Editor position, for which the agency also found him unqualified. The administrative judge held that the agency did not violate the VEOA with respect to this position, as "the appellant's submitted qualifications do not reveal him to be minimally qualified." IAF, Tab 30, Initial Decision at 12.

30, Initial Decision at 2-6. The administrative judge noted that the agency violated the VEOA by failing to consider the appellant's experience, reflected in his resume, "which was concededly 'relevant' or at least 'somewhat related' to communication and dissemination of public health related information" (as required by the positions). IAF, Tab 30, Initial Decision at 11-12; *see Lazaro v. Department of Veterans Affairs*, [666 F.3d 1316](#), 1321 (Fed. Cir. 2012) (the Board has jurisdiction to consider whether an agency correctly found a veteran not qualified for a position). The administrative judge ordered the agency to reconstruct the selection process for the four vacancy announcements, this time specifically considering the appellant's public health communications-related experience. IAF, Tab 30, Initial Decision at 12-13. The administrative judge's decision became the final decision of the Board on August 19, 2010. PFR, Tab 9 at 1-2.

On August 25, 2010, the appellant filed a petition for enforcement,⁴ contending that the agency failed adequately to reconstruct the selection process for the four positions because it again found him unqualified for all of them. CF, Tab 8, Recommendation at 1. On December 21, 2010, the administrative judge issued a recommendation finding the agency noncompliant with the initial decision. The administrative judge found that the agency had not submitted "any evidence of its reconstruction efforts" and that the reconstruction determination the agency supplied to the appellant was conclusory. *Id.* at 3, 5. The reconstruction documents provided to the appellant included a memorandum from Linda Bishop-Milton, Director of the agency's Delegated Examining Division, but did not contain the documentation which the agency had reviewed "or any detailed explanation from the individual HR specialists how they came to their

⁴ The appellant filed two other appeals with the Board and requests that they be consolidated with this action. CRF, Tab 4 at 2-3; *see* MSPB Docket Nos. DE-3330-10-0154-I-1, DE-3330-10-0361-I-1. Both appeals have already been adjudicated. Accordingly, the appellant's request is denied as moot.

conclusions” regarding the appellant’s qualifications. *Id.* at 4-5. The administrative judge instructed the agency to submit detailed documentation, including declarations or affidavits from human resources personnel, supporting its determination that the appellant was not qualified for any of the four positions. *Id.* at 9, 11.

The agency responded to the recommendation on January 6, 2011. The agency submitted a reconstruction package for each position and included the reconstruction certificates of eligibles, declarations by the assigned human resources specialists, evaluations by subject matter experts, the appellant’s application packages, applicant listing reports, OPM qualification standards, vacancy announcements, and position descriptions. MSPB Docket No. DE-3330-10-0168-X-1, Compliance Referral File (CRF), Tab 3 at 11. The agency maintained that this documentation demonstrated that it properly found the appellant not qualified for the positions. *Id.* at 5-6.

The appellant disagreed, contending that the agency failed to consider and credit his relevant public health communications experience. CRF, Tab 4 at 3. The appellant contended that his application revealed that he possessed the knowledge and experience required for the positions; that he had “tangible proof” of his qualifications in the form of “a sample newsletter, a sample CD ROM, [and] a sample Significant Achievement Report”; and that he would have successfully responded to any questions pertaining to his knowledge and skills if the agency had interviewed him. *Id.* at 10-11. Specifically, the appellant pointed to his answers to questions 4/5 and 6/7 from vacancy announcement HHS-CDC-D1-2010-0007, in which he responded to questions inquiring about his experience with print and electronic media and working with multi-disciplinary teams to develop public health education programs. *Id.* at 11-14. The appellant asserted that the agency applied an excessively narrow interpretation of what constituted qualifying experience in health communications and argued that the agency should have determined that his “entire career in the health care field, 33

years” involved “communicating health care issues and marketing health care services.” *Id.* at 21. The appellant also asserted that the Board should apply collateral estoppel to find him qualified for the positions because, in his view, the administrative judge had found him qualified in the initial decision.⁵ *Id.* at 6-10. Finally, the appellant alleged that the agency acted in bad faith in its dealings with him during the application process and during the reconstruction process. *Id.* at 29-30.

ANALYSIS

As the administrative judge in the initial decision stated, the agency’s violation of the appellant’s VEOA rights (by failing to consider whether his experience qualified him for the positions at issue) entitles the appellant to a lawful selection process, not to an appointment. *Gingery v. Department of Veterans Affairs*, [117 M.S.P.R. 354](#), ¶ 14, *aff’d*, No. 2012-3110, 2012 U.S. App. LEXIS 20797 (Fed. Cir. 2012). Moreover, the VEOA “does not enable veterans to be considered for positions for which they are not qualified.” *Lazaro*, 666 F.3d at 1319. The initial decision ordered the agency to reconstruct the selection process and properly consider the appellant’s experience. IAF, Tab 30, Initial Decision at 12-13. The agency bears the burden to prove its compliance with the Board’s order. The agency’s assertions of compliance must include a clear explanation of its compliance actions supported by documentary evidence. *Vaughan v. Department of Agriculture*, [116 M.S.P.R. 319](#), ¶ 5 (2011).

We reject the appellant’s contention that we should apply collateral estoppel to find him qualified because the initial decision found him to be so. *See* CRF, Tab 4 at 6-20. Contrary to the appellant’s claims, the initial decision

⁵ The appellant also renewed his request for interim relief (payment of the salary paid to the selectee for the 0007 position). CRF, Tab 7 at 1-2; CF, Tab 8, Recommendation at 3 n.3. The appellant’s request is denied for the reasons stated in the recommendation. CF, Tab 8, Recommendation at 3 n.3.

did not find him qualified. Rather, the administrative judge found it appeared from the agency's submissions that it had not properly considered his experience and, therefore, did not provide him the lawful selection process to which he was entitled. IAF, Tab 30, Initial Decision at 11-12.

As explained below, we have reviewed the reconstruction packages submitted in response to the recommendation as well as the appellant's contentions and objections. We find that, for each position, the agency has now sufficiently explained and provided documentary support for its determination that the appellant was not qualified. *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5.

Position 1 – HHS-CDC-D1-2010-0007 (GS-13)

For this Health Communications Specialist Position, the agency's vacancy announcement listed the basic qualifications as 1 year of specialized experience equivalent to the GS-12 level which "include[s] experience in utilizing communication science and marketing techniques in planning, implementing, managing and evaluating public health communication and marketing programs and strategies."⁶ CRF, Tab 3, Exhibit (Ex.) 4h at 3. The agency submitted a declaration from Marcia Wimpye, the human resources specialist who performed the reconstruction of the selection process for this position in accordance with the initial decision.⁷ CRF, Tab 3, Ex. 4b. Ms. Wimpye provided her written comparison of the position requirements and the appellant's qualifications. CRF,

⁶ The written comparison provided by Ms. Wimpye explains the basic qualifications as 1 year at the GS-12 level of specialized experience "to include experience in planning, implementing, managing and evaluating health communication and marketing public health programs, projects, and strategies." CRF, Tab 3, Ex. 4b, Ex. 1 at 1. This change in wording is not materially different from the requirements stated in the vacancy announcement.

⁷ The agency also stated that the incumbent was removed from the position and reassigned to another position during the reconstruction process, as required by Board law. *See* CRF, Tab 3 at 6; CRF, Tab 7 n.2, Ex. 1; *Phillips v. Department of the Navy*, [114 M.S.P.R. 19](#), ¶ 15 (2010).

Tab 3, Ex. 4b, Ex. 1; *see also* CRF, Tab 3, Ex. 4b at 2. Ms. Wimpye evaluated each of the appellant's previous duties as explained in his resume and responses and explained why each did not show him to possess the specialized experience the agency sought. For example, Ms. Wimpye evaluated the appellant's experience as a Senior Advisor for the King Faisal Specialist Hospital Research Center, including the specific duties he performed there, but found that these duties did "not directly relate to the required specialized experience for the position" because the duties related to "administration/operations type work" rather than "influencing the public audiences, advocat[ing] for policies and programs, [or] promot[ing] positive changes in socioeconomic and physical environment[s]." CRF, Tab 3, Ex. 4b, Ex. 1 at 2.

The agency also provided the declaration of Donna Sanders, Supervisory Human Resources Specialist, who reviewed Ms. Wimpye's reconstruction assessment of the appellant's qualifications. CRF, Tab 3, Ex. 4c at 2. Ms. Sanders concurred with Ms. Wimpye's assessment. She noted that the appellant's experience was "closely related to that of Health Administrator" but did not meet the minimum qualification standards for a Health Communication Specialist. *Id.* at 6.

Finally, the agency provided the assessment of Nadya Belins, a subject matter expert, who opined that the appellant's "experience is in administration and operations, not communication or, specifically, health communication . . . resume and question responses do not offer evidence that applicant meets the basic requirements for developing, managing and overseeing complex multi-media, and multi-disciplinary communication projects." CRF, Tab 3, Ex. 4d.

After reviewing the reconstruction package, including the declarations of the two human resources specialists, the statement of the subject matter expert,

the appellant's resume, and the appellant's application responses,⁸ we find that the agency has adequately explained and documented its determination that the appellant did not meet the minimum qualifications for the position. We concur with the agency's determination that the appellant demonstrated significant experience in the areas the agency describes as administrative or operational, rather than health communications. Although his responses demonstrate experience in communicating on various projects, and in health care administration, they do not demonstrate that he possesses health communication experience or technical expertise under the agency's definition and understanding of those terms. For example, the appellant contends that his experience "formulating and evaluating" various programs at the hospital, coordinating with health care groups and committees, and analyzing health care issues satisfied the health communications requirements. CRF, Tab 4, Ex. 4b. As the agency explained, however, this experience does not demonstrate technical expertise in influencing public audiences, promoting positive changes in socioeconomic and physical environments, or serving "as a mediator in the world of communications and media, playing a vital role in shaping how the public hears and speaks about health issues." CRF, Tab 3, Ex. 4b, Ex. 1 at 2; CRF, Tab 3, Ex. 4c at 2-3.

Although the appellant insists that he is qualified, both the human resources specialists and an agency employee who performs the same job for which the appellant applied concurred that his experience, while impressive, did not reveal the specific expertise required to qualify for the position. "[A]bsent evidence of bad faith or patent unfairness, the Board defers to the agency's determination as to the requirements that must be fulfilled in order for an

⁸ The agency failed to supply the full text of the appellant's responses, but the appellant provided the portions he contended demonstrated his qualifications. CRF, Tab 4, Ex. 4a. The responses are similar to the information contained in the appellant's extensive resume.

individual to qualify for appointment to a particular position.”⁹ *Anderson v. United States Postal Service*, [76 M.S.P.R. 16](#), 19-20 (1997); *see also Hayes v. Department of Health and Human Services*, [829 F.2d 1092](#), 1100 (Fed. Cir. 1987). We find that the agency has supplied the documentation required by the recommendation. Because the agency found the appellant not qualified, it was not required to interview or appoint him. *See Lazaro*, 666 F.3d at 1319; *Gingery*, [117 M.S.P.R. 354](#), ¶ 14. Accordingly, we find that the agency has proven its compliance with the initial decision with respect to this position.¹⁰ *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5.

Position 2 – HHS-CDC-D1-2010-0017 (GS-12)

For this Health Communications Specialist Position, the agency’s vacancy announcement listed the basic qualifications as 1 year at the GS-11 level of “specialized experience . . . to include experience in developing, implementing, and evaluating health communication and marketing programs and strategies to inform the public and other audiences of public health programs.” CRF, Tab 3, Ex. 5g at 3. The agency submitted a declaration from Ms. Wimpye, who found the appellant not qualified for the position for largely the same reasons as for the 0007 position.¹¹ CRF, Tab 3, Ex. 5b. As she had done for the 0007 position, Ms.

⁹ The appellant contends that the Board should apply a heightened standard because the agency dealt with him in bad faith, both in its initial selection process and during the reconstruction. CRF, Tab 4 at 29-34. We disagree. After reviewing the record, we see no evidence that the agency acted in bad faith in its dealings with the appellant. Moreover, as we explain, we have thoroughly examined the agency’s submissions and concur with its determinations.

¹⁰ The recommendation raised an issue regarding the appellant’s standing to object to the agency’s reassignment of the previous incumbent and its selection of a different preference eligible during the reconstruction process. *See* CF, Tab 8, Recommendation at 9-10. Because the agency adequately documented its determination that the appellant was not qualified, this issue is moot. *See id.*

¹¹ Unlike the 0007 vacancy, there was no incumbent to remove before conducting the reconstruction process. The agency had never made a selection for the position. CF, Tab 8, Recommendation at 10.

Wimpye assessed the appellant's experience and concluded that he had not demonstrated technical expertise, equivalent to 1 year at the GS-11 level, of "developing, implementing, and evaluating health communication and marketing programs, projects, and strategies to inform the public and other audiences of public health programs." *Id.* at 2. Rather, the appellant's experience related primarily to health care administration and operation. *Id.* at 2-3. The agency also submitted an evaluation from David Johnson, a subject matter expert occupying a GS-12 Health Communications Specialist position. CRF, Tab 3, Ex. 5c. Mr. Johnson opined that the appellant's experience showed him to be "a highly skilled and experienced writer and administrator" but revealed no "extensive background in editing and ushering through a structured production process of scientific manuscripts," as required for the position. *Id.* at 1.

After reviewing the reconstruction package, we find that the agency has adequately explained and documented its determination that the appellant did not meet the minimum qualifications for the position. The appellant insists that he is qualified, as he did for the 0007 position, but both the human resources specialist and an agency employee who performs the same job for which the appellant applied concurred that his experience, while impressive, does not reveal the specific expertise required to qualify for the position. We concur. *See Anderson*, 76 M.S.P.R. at 19-20; *see also Hayes*, 829 F.2d at 1100. Because the agency found the appellant not qualified, it was not required to interview or appoint him. *See Lazaro*, 666 F.3d at 1319; *Gingery*, [117 M.S.P.R. 354](#), ¶ 14. Accordingly, we find that the agency has proven its compliance with the initial decision with respect to this position.¹² *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5.

¹² The recommendation raised an issue regarding the appellant's standing to object to the agency's failure to make a selection from the certificates. CF, Tab 8, Recommendation at 10-11. Because the agency adequately documented its determination that the appellant was not qualified, this issue is moot. *See id.*

Position 3 – HHS-CDC-D3-2010-0044 (GS-13)

For this Health Communications Specialist Position, the agency’s vacancy announcement listed the basic qualifications as 1 year at the GS-12 level of “specialized experience . . . to include experience in the utilization of communication science and marketing techniques in planning, implementing, managing and evaluating public health communication and marketing programs and strategies.” CRF, Tab 3, Ex. 6g at 3. The agency submitted a declaration from Christine Wright, Senior Human Resources Specialist, who conducted the reconstructed selection process for this position. CRF, Tab 3, Ex. 6b at 2. Ms. Wright found the appellant not qualified for the position for largely the same reasons as for the 0007 position.¹³ CRF, Tab 3, Ex. 6b. Ms. Wright assessed the appellant’s experience and concluded that he had not demonstrated the required technical expertise. *Id.* at 2-5, 7-8. Rather, the appellant’s experience related primarily to health care administration. *Id.* at 5, 7-8. The agency also submitted an evaluation from Joanne Cox, a subject matter expert occupying a GS-13 Health Communications Specialist position. CRF, Tab 3, Ex. 6c. Ms. Cox opined that the appellant’s experience “is that of an Administrator – one who oversees projects, budget, logistics, database design and development, operations, personnel, and other administrative tasks.” *Id.* at 1. Ms. Cox stated that the appellant’s experience might qualify him for other positions, but it did not demonstrate expertise in marketing, media relations, press, audience research and program evaluation, or developing, implementing, and managing national campaigns. *Id.* at 1-2.

After reviewing the reconstruction package, we find that the agency has adequately explained and documented its determination that the appellant did not

¹³ Unlike the 0007 vacancy, there was no incumbent to remove before conducting the reconstruction process. The agency had never made a selection for the position. CF, Tab 8, Recommendation at 10.

meet the minimum qualifications for the position. Again, as he did for the 0007 position, the appellant insists that he is qualified, but both the human resources specialist and an agency employee who performs the same job for which the appellant applied concurred that his experience, while impressive, does not reveal the specific expertise required to qualify for the position. We concur. *See Anderson*, 76 M.S.P.R. at 19-20; *see also Hayes*, 829 F.2d at 1100. Because the agency found the appellant not qualified, it was not required to interview or appoint him. *See Lazaro*, 666 F.3d at 1319; *Gingery*, [117 M.S.P.R. 354](#), ¶ 14. Accordingly, we find that the agency has proven its compliance with the initial decision with respect to this position.¹⁴ *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5.

Position 4 – HHS-CDC-D3-2010-0057 (GS-13)

For this Health Communications Specialist Position, the agency’s vacancy announcement listed the basic qualifications as 1 year at the GS-12 level of “specialized experience . . . to include experience in the planning, implementing, managing, and evaluation of health communications and the marketing of public health programs.” CRF, Tab 3, Ex. 7g at 3. The agency submitted a declaration from Dale Martin, Human Resources Specialist, who conducted the reconstructed selection process for this position. CRF, Tab 3, Ex. 7b at 1-2. Ms. Martin found the appellant not qualified for the position for largely the same reasons as for the 0007 position.¹⁵ CRF, Tab 3, Ex. 7b. Ms. Martin exhaustively assessed the appellant’s experience and concluded that he had not demonstrated the required technical expertise. *Id.* at 2-6, 9-11. Rather, the appellant’s experience related

¹⁴ The recommendation raised an issue regarding the appellant’s standing to object to the agency’s failure to make a selection from the certificates. CF, Tab 8, Recommendation at 10-11. Because the agency adequately documented its determination that the appellant was not qualified, this issue is moot. *See id.*

¹⁵ Unlike the 0007 vacancy, there was no incumbent to remove before conducting the reconstruction process. The agency had never made a selection for the position. CF, Tab 8, Recommendation at 10.

primarily to health care administration. *Id.* The agency also submitted an evaluation from Jason Cecil, a subject matter expert occupying a Public Health Analyst position. CRF, Tab 3, Ex. 7c. Mr. Cecil opined that the appellant's experience in health administration and working with health care professionals did not demonstrate technical expertise in health communications. CRF, Tab 3, Ex. 7c at 1. In particular, Mr. Cecil noted that, in response to Question 20, about experience in planning health communication or marketing programs, the appellant stated: "I have education and training in developing strategic plans for health communications and marketing programs and activities, but no work experience in this area." *Id.*; CRF, Tab 3, Ex. 7d at 6.

After reviewing the reconstruction package, we find that the agency has adequately explained and documented its determination that the appellant did not meet the minimum qualifications for the position. Once again, as he claimed for the 0007 position, the appellant insists that he is qualified, but, again, both the human resources specialist and an agency employee who is a subject matter expert concurred that his experience, while impressive, does not reveal the specific expertise required to qualify for the position. Indeed, the appellant stated as much in his application. CRF, Tab 3, Ex. 7d at 6. We concur with the agency's determination. *See Anderson*, 76 M.S.P.R. at 19-20; *see also Hayes*, 829 F.2d at 1100. Because the agency found the appellant not qualified, it was not required to interview or appoint him. *See Lazaro*, 666 F.3d at 1319; *Gingery*, [117 M.S.P.R. 354](#), ¶ 14. Accordingly, we find that the agency has proven its compliance with the initial decision with respect to this position.¹⁶ *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5.

¹⁶ The recommendation raised an issue regarding the appellant's standing to object to the agency's failure to make a selection from the certificate. CF, Tab 8, Recommendation at 10-11. In addition, in his compliance referral materials, the appellant charged that the agency's failure to make a selection from the certificate constituted a prohibited personnel practice. CRF, Tab 4 at 17. Because the agency

In sum, we find that the documentation submitted by the agency in response to the recommendation adequately explains and supports its determination that the appellant was not minimally qualified for the four positions at issue. Accordingly, we find the agency in compliance with the initial decision and DISMISS the petition for enforcement.

**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

adequately documented its determination that the appellant was not qualified, this issue is moot. *See id.*

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.