

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

MICHAEL B. GRAVES,
Appellant,

DOCKET NUMBER
SF-3330-10-0788-X-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: December 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Michael B. Graves, Carson, California, pro se.

Brian N. Brillo and Tony Tomlinson, San Diego, California, 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 in partial noncompliance with the April 30, 2012 final order, and the matter was referred to the Board for consideration. *See* [5 C.F.R. § 1201.183](#) (Jan. 1, 2012). The final

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

order modified the October 22, 2010 initial decision to grant the appellant's request for corrective action in connection with the Veterans Employment Opportunities Act of 1998 (VEOA), with respect to vacancies pursuant to vacancy announcement OCA DON 0675. MSPB Docket No. SF-3330-10-0788-I-1, Petition for Review (PFR) File, Nonprecedential Final Order at 5 n.4 (Apr. 30, 2012); MSPB Docket No. SF-3330-10-0788-I-1, Initial Appeal File (IAF), Tab 41, Initial Decision at 23 (Oct. 22, 2010). The final order referred compliance issues associated with this vacancy announcement to the administrative judge for adjudication. MSPB Docket No. SF-3330-10-0788-I-1, Nonprecedential Final Order at 6. The administrative judge found the agency partially compliant with the final order and ordered it to submit additional evidence explaining its determination with respect to vacancies for which selections were made under OCA DON 0675 before October 22, 2010. MSPB Docket No. SF-3330-10-0788-C-1, Compliance File (CF), Tab 24, Recommendation at 8.

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 various vacancies under announcements OCA DON 0675, NEOA-0675-04-GROOO883-DE, and SWO-0675-08-PD709681-DE. IAF, Tab 41 at 2, 5. He alleged that the agency violated his VEOA rights with respect to these vacancies. *Id.* at 1. The administrative judge found that he had

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.

exhausted his Department of Labor (DOL) remedy with respect to all three vacancy announcements and ordered the agency to take corrective action. *Id.* at 8-9, 22-24. Upon review, the Board held that the appellant had exhausted his DOL remedy only with respect to announcement OCA DON 0675. PFR File, Tab 12 at 4-5 & n.4. The Board vacated the Initial Decision with respect to the other two announcements, and forwarded to the administrative judge compliance issues relating to corrective action required of the agency for announcement OCA DON 0675. PFR File, Tab 12 at 6.

With respect to this announcement, the Initial Decision ordered the agency to retain the appellant's application in a special file for up to three years from the date of receipt for referral on certificates for future vacancies, in accordance with [5 U.S.C. § 3305](#)(b), and to refer it as appropriate. IAF, Tab 41 at 22. It also ordered the agency to determine whether the appellant was qualified for the GS-04 and GS-05 Medical Records Technician (MRT) positions he applied for under announcement OCA DON 0675, in San Diego, CA. If the agency determined he was qualified, it was to reconstruct the hiring for those positions. *Id.* at 23-24.

Following the Board's referral of compliance issues to the administrative judge, the parties filed various submissions. *See* CF, Tabs 2-3, 5-9, 11-22. On August 29, 2012, the administrative judge issued a Recommendation finding the agency partially compliant with the Final Order. CF, Tab 24 at 2, 8. The Recommendation found that the agency correctly determined that the appellant was not qualified for any MRT position at GS-05 or higher because he lacked the required one year of specialized experience. *Id.* at 5. The Recommendation also found that the agency correctly determined that the appellant was minimally qualified for GS-04 MRT positions but did not meet the highly qualifying criteria for such positions because his resume did not show specific knowledge of medical records or medical terminology. *Id.* at 6. The Recommendation further found that the agency demonstrated that it retained the appellant's application

(submitted March 11, 2009) for three years. *Id.* In addition, the agency submitted evidence that, between October 22, 2010, and March 10, 2012, no vacancies were announced through the delegated examining process at a grade level for which the appellant was qualified. *Id.* Nor, during this time period, were any vacancies filled under merit promotion procedures, where external applications were considered, for which the appellant met the highly qualifying criteria. *Id.* at 6-7. Therefore, the agency was in compliance with its obligation to refer the appellant's application between October 22, 2010, and March 10, 2012. *Id.* at 7.

The administrative judge found the agency noncompliant with its obligation to refer the appellant's application before October 22, 2010, however, because it did not submit information regarding vacancies during this time period. *Id.* at 7-8. The administrative judge ordered the agency to "address whether it considered and, where appropriate, referred the appellant's March 11, 2009 application for any vacancies where the selections were made prior to October 22, 2010" (other than those addressed in the October 22, 2010 Initial Decision³), for positions in San Diego. *Id.* at 8.

The agency responded to the Recommendation on September 10, 2012. MSPB Docket No. SF-3330-10-0788-X-1, Compliance Referral File (CRF), Tab 15. The agency submitted a declaration from Karen Trudell, Human Resources Specialist, stating that the agency filled four GS-04 MRT positions between March 11, 2009, and October 22, 2010, but that the appellant did not meet the highly qualifying criteria for any of them and so was not referred.⁴ *Id.* at 4. Ms.

³ The initial decision addressed selections made November 10, 2009; December 22, 2009; February 10, 2010; and May 17, 2010. IAF, Tab 41 at 3-5.

⁴ The agency also submitted a chart indicating that it announced several GS-05 MRT positions during the relevant time period, but did not address those positions in its declaration. CRF, Tab 15 at 5. As explained *infra*, the appellant was not qualified for those positions, and so the agency's failure to specifically address them does not bar a finding of compliance.

Trudell also stated that during this time period, the agency announced eight GS-07 and GS-08 MRT positions under its delegating examining procedures, but that the appellant was not qualified for any of them and so was not referred. *Id.* at 4, 5.

The appellant challenged the Recommendation, challenged Ms. Trudell's qualifications, and asserted that he was qualified for any MRT position at the GS-08 level or below. CRF, Tab 2 at 1-2, Tab 5 at 2-4. The appellant maintained that he was qualified for these positions because he was certified as a coding specialist by the American Health Information Management Association (AHIMA), which he stated indicated expertise in coding, medical terminology, and medical records. CRF, Tab 5 at 2.

ANALYSIS

The agency's violation of the appellant's VEOA rights 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 (2012). The VEOA "does not enable veterans to be considered for positions for which they are not qualified." *Lazaro v. Department of Veterans Affairs*, [666 F.3d 1316](#), 1319 (Fed. Cir. 2012). The Initial Decision and Recommendation ordered the agency to demonstrate that it properly considered the appellant's qualifications with respect to GS-04 and GS-05 Medical Records Technician positions announced under vacancy OCA DON 0675, at the Naval Medical Center, San Diego, between March 11, 2009, and October 22, 2010 (other than those indicated in footnote 2, *supra*). IAF, Tab 41 at 23; CF, Tab 24 at 2. 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).

As explained below, we have reviewed the information the administrative judge relied on in making his Recommendation, the information the agency submitted in response to the Recommendation, and the appellant's contentions and objections. We discern no error in the administrative judge's findings set forth in the Recommendation, and therefore reject the appellant's objections to them.

Referral for GS-04 MRT Positions

Ms. Trudell⁵ explained that the agency found the appellant minimally qualified for the GS-04 Medical Records Technician positions because he possessed more than one year of "progressively responsible" office clerical work that met the minimum qualification requirements for the occupation level. CF, Tab 3 at 20. However, the agency found the appellant did not meet the selective factors, or highly qualifying criteria, for the GS-04 positions because his resume did not demonstrate knowledge of medical records or medical terminology, or formal education or training in these areas. CF, Tab 3 at 9. The appellant's resume demonstrated coding experience, including AHIMA certification, but did not demonstrate the level of experience with or knowledge of medical records or medical technology that the agency sought. CF, Tab 3 at 20.

After reviewing the appellant's resume, the vacancy announcement, and the Office of Personnel Management's Group Coverage Qualification Standards for Clerical and Administrative Support Positions, we concur. The vacancy announcement stated the position might include "reviewing, analyzing, coding, abstracting and compiling or extracting medical records data. This work requires a practical knowledge of medical records procedures and references, organization

⁵ We reject the appellant's challenge to Ms. Trudell's qualifications. The appellant asserts that Ms. Trudell is not qualified because she herself is not a coder or Medical Records Technician. CRF, Tab 9 at 2-3. As a Human Resources Specialist, however, Ms. Trudell has expertise in determining whether applicants meet position requirements.

and consistency of medical records, and a basic knowledge of human anatomy, physiology, and medical terminology.” CF, Tab 3 at 29. The Group Coverage Qualification Standards listed Medical Records Technician as among the positions for which selective factors may be used at levels below GS-05. CF, Tab 3 at 54, 58-59. Selective factors “must represent knowledge, skills, or abilities that are essential for successful job performance and cannot reasonably be acquired on the job during the period of orientation/training customary for the position being filled.” CF, Tab 3 at 58.

As the agency explained, the appellant’s resume reveals experience as a medical coder but no specific experience or knowledge with medical records or medical technology. *See* CF, Tab 3 at 23-24. We will not disturb the agency’s determination that such knowledge is a selective or highly qualifying factor needed for the position and that the appellant did not possess it. “[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 individual to qualify for appointment to a particular position.” *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).

The appellant contends that his AHIMA certification as a medical coder demonstrates that he is qualified for any level at or below GS-08. CRF, Tab 9 at 3-4. The appellant states that his certification and experience as Medical Claims Analyst, Medical Claims Trainer, Medical Claims Section Lead, and Medical Claims Examiner qualify him for the position. CRF, Tab 9 at 4. The agency considered all of this information, however, and determined that it did not demonstrate the required highly qualifying criteria. *See* CF, Tab 3 at 23-24 (appellant’s resume listing his certification and work experience). We defer to the agency’s determination that the appellant’s certification and work history demonstrated experience as a medical coder but not the level of experience with

or knowledge of medical records or medical technology required for the GS-04 position. *Hayes*, 829 F.2d at 1100; *Anderson*, 76 M.S.P.R. at 19-20.

Having determined that the administrative judge correctly credited the agency's determinations regarding the appellant's qualifications for GS-04 Medical Records Technician positions, we turn to the specific vacancies at issue. The administrative judge instructed the agency to submit evidence regarding whether it considered and, if appropriate, reconstructed the selection process for GS-04 MRT positions in San Diego, CA, between March 11, 2009, and October 22, 2010 (other than positions already addressed in the Initial Decision). The agency submitted evidence that it filled two GS-04 MRT positions in San Diego⁶ during the relevant time frame, that both required the highly qualifying experience described above, and that it did not refer the appellant for either position because he did not possess this experience. CRF, Tab 15 at 4-5. We agree that the appellant was not highly qualified for these positions, as discussed above. Accordingly, the agency was not required to reconstruct the selection process for these positions.⁷

Referral for GS-05 MRT Positions

Ms. Trudell explained that the appellant was not minimally qualified for the GS-05 MRT positions because he did not possess one year of specialized experience equivalent to the GS-04 level, as required. CF, Tab 3 at 9, 20-21. We

⁶ The agency also submitted evidence regarding GS-04 positions at Camp Pendleton. CRF, Tab 15 at 5. As the Initial Decision and Recommendation addressed only positions in San Diego for announcement OCA DON 0675, the Camp Pendleton positions appear to be outside the scope of this compliance proceeding. In any event, the agency demonstrated that the appellant did not meet the highly qualifying criteria for these positions.

⁷ We reject the appellant's assertion that the agency was required to demonstrate compliance with the "rule of three" and "pass over requirements," CRF, Tab 13 at 2, or to compare his qualifications with those of other applicants, CRF, Tab 9 at 2. The VEOA "does not enable veterans to be considered for positions for which they are not qualified." *Lazaro*, 666 F.3d at 1319.

concur and reject the appellant's contentions regarding his GS-05 qualifications for the reasons discussed above.

The administrative judge instructed the agency to submit evidence regarding whether it considered and, if appropriate, reconstructed the selection process for GS-05 MRT positions in San Diego, CA, between March 11, 2009, and October 22, 2010 (other than positions already addressed in the Initial Decision). *See* CF, Tab 24 at 7-8 (requiring agency to address "any vacancies for which selections were made prior to October 22, 2010 ..."). The agency did not specifically explain its reasoning with respect to these positions, as it did for the GS-04 positions. However, it attached a chart indicating that it announced two GS-05 MRT positions at San Diego during the relevant time period. CRF, Tab 15 at 5. Because the appellant was not qualified for these positions, the agency was not required to reconstruct the selection process for them.

Other Issues

The agency explained that the appellant "matched" for a GS-07 position at Camp Pendleton but that it did not refer him to the selecting official because he was not qualified for it. CRF, Tab 15 at 4-5. We agree that the appellant was not minimally qualified, for the reasons discussed above, and that the agency was not required to reconstruct the selection process.

We deny the appellant's motion to strike the agency's September 4, 2012 submission on the basis that it was filed in the wrong location and under the wrong docket number. CRF, Tab 14 at 2. The MSPB Clerk's Office received the agency's submission and filed it in the CRF file as Tab 15.

In sum, we find that the documentation submitted by the agency adequately explains and supports its determination that the appellant was not highly qualified for the GS-04 MRT positions and not minimally qualified for the GS-05 MRT positions. We further find that the agency acted appropriately in declining to refer him to the selecting official for vacancies announced or filled prior to

October 22, 2010. Accordingly, we find the agency in compliance with the initial decision and DISMISS the petition for enforcement.

**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.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. 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 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 the date of this order. 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.