

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

2007 MSPB 259

Docket No. DE-3443-05-0248-I-3

**Alvern C. Weed,
Appellant,**

v.

**Social Security Administration,
Agency.**

October 30, 2007

Alvern C. Weed, Esquire, Great Falls, Montana, pro se.

Pamela M. Wood, Esquire, Denver, Colorado, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision (ID) that granted his request for relief under the Veterans Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339, 1998 U.S.C.C.A.N. (112 Stat.) 3182, codified at 5 U.S.C. § 3330a, and ordered the agency to reconstruct the selection process at issue. The agency has filed a cross petition for review of the ID. The appellant has also filed a petition for enforcement of the ID, challenging the sufficiency of the agency's reconstruction of the hiring process. For the following reasons, we DENY the appellant's petition for review, GRANT the agency's cross petition for review, REVERSE the ID's finding that the agency willfully violated the

appellant's veterans' preference rights, and FORWARD the appellant's petition for enforcement to the Denver Field Office for further adjudication.

BACKGROUND

¶2 The appellant, a 10-point compensable preference-eligible veteran, timely filed an appeal alleging that the Social Security Administration violated his veterans' preference rights. In particular, the appellant contends that the agency violated veterans' preference rules when it made no selection from a competitive service vacancy announcement for two GS-0105-05/07 Social Insurance Specialist Claims Representative positions in its Montana Field Office in Kalispell, Montana, and instead non-competitively selected two non-preference eligible applicants for the position under the Outstanding Scholar Program. Initial Appeal File, MSPB Docket No. DE-3443-05-0248-I-1 (IAF-1), Tab 1.¹

¶3 The administrative judge (AJ) found that the Board has jurisdiction over the appeal under VEOA. After holding a hearing, the AJ determined that, in accordance with *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), *aff'd on recons.*, 104 M.S.P.R. 1 (2006), the appellant's rights under statute were violated by the agency's non-competitive appointments from the Outstanding Scholar list. Initial Appeal File, MSPB Docket No. DA-3443-05-0248-I-3 (IAF-3), Tab 17, ID at 4-7. Accordingly, the AJ ordered the agency to reconstruct the selections for the two positions under the competitive examination process. The AJ further found that the appellant had shown by preponderant evidence that the agency's violation was willful because the selections were made with reckless

¹ The appellant originally filed this appeal on April 4, 2004. IAF-1, Tab 1. The appeal was dismissed without prejudice on July 25, 2005. *Id.*, Tab 22. The appeal was reinstated on August 26, 2005, and dismissed without prejudice a second time on October 31, 2005, pending the Board's reconsideration of *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005). Initial Appeal File, MSPB Docket No. DE-3443-05-0248-I-2, Tab 18. The instant appeal was re-filed *sua sponte* on May 1, 2006. Initial Appeal File, MSPB Docket No. DE-3443-05-0248-I-3, Tab 1.

disregard of his rights. *Id.* at 7-8. Although the AJ ordered corrective action, she did not order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A) based on her determination that there is no appropriate relief available unless and until there is a finding that the appellant would have been selected and is, therefore, entitled to compensation. *Id.* at 9.

ANALYSIS

¶4 We grant petitions such as the appellant’s only when significant new evidence is presented to us that was not available for consideration earlier or when the AJ made an error interpreting a law or regulation. 5 C.F.R. § 1201.115. After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the AJ made no error in law or regulation that affects the outcome of her finding that the agency violated the appellant’s right to veterans’ preference. 5 C.F.R. § 1201.115(d). We therefore DENY the appellant’s petition for review.

¶5 We GRANT the agency’s cross petition for review, however, to address an issue of first impression for the Board regarding the standard to be applied in determining whether an agency’s denial of an appellant’s right to veterans’ preference was a “willful” violation of veterans’ preference rules. VEOA’s remedial provision states, in relevant part, as follows:

If the Merit Systems Protection Board . . . determines that an agency has violated a right described in section 3330a, the Board . . . shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board . . . determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages.

5 U.S.C. § 3330c(a) (emphasis added).

¶6 The subsection of the statute that defines its terms does not define “willful.” Furthermore, the legislative history of the section sheds no light on Congressional intent. Moreover, neither the U.S. Court of Appeals for the

Federal Circuit nor any other federal court has explicitly defined the word “willful” as it is used in this subsection. *But see Pena v. Harvey*, Civil Action No. 02-CV-01459-WDM-MJW, 2006 WL 2164483 (D. Colo. July 31, 2006) (district court found a VEOA violation was not “willful,” without defining the term, because the selecting official relied upon the advice of an agency personnel specialist that veterans’ preference did not apply to the appointment). A fundamental canon of statutory construction is that, in the absence of a statutory definition or clear guidance in the legislative history, words will be interpreted as taking their ordinary, contemporary, common meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349 (Fed. Cir. 2001).

¶7 “In common usage, the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (citing Roget’s International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977)). In addition, the requirement that a violation be “willful” has long been a requirement in a number of different statutes. It is considered a word of many meanings, and its construction is often influenced by its context. *Screws v. United States*, 325 U.S. 91, 101 (1945). For example, in determining the required element of intent in criminal law, an offense may be considered “willful” only if the individual “voluntarily” and “intentionally” violated a “known legal duty.” *Cheek v. United States*, 498 U.S. 192, 200 (1991) (discussing the element of “willfulness” in criminal prohibitions against tax evasion). On the other hand, the courts have interpreted a number of civil and administrative statutes to put a slightly different gloss on the requirement to find a violation “willful.” For example, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621, 626(b), has a very similar provision to the one at issue here that provides for the award of liquidated damages for willful violations of the Act. The U.S. Supreme Court has found that such a violation is “willful” if the “employer either knew or showed reckless disregard

for the matter of whether its conduct was prohibited by the ADEA.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *see also McLaughlin*, 486 U.S. at 133 (adopting *Thurston* for all willful violations of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, to include violations of the Equal Pay Act, 29 U.S.C. § 206(d)(3)). In adopting this definition of “willful,” the Court identified this test as the “reckless disregard” standard. *Thurston*, 469 U.S. at 126.

¶8 The Board has recognized that VEOA is a remedial statute. The general principle is that remedial statutes should be construed broadly in favor of those whom it was intended to protect, and to suppress the evil and advance the remedy of the legislation. *Stysliger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 17 (2007); *Dean*, 99 M.S.P.R. 533, ¶ 19. Given the purpose of VEOA and the definition for “willful” used in similar remedial statutes, such as the ADEA and the Equal Pay Act, we believe that the *Thurston* “reckless disregard” standard is the most reasonable interpretation of the statute. We therefore find that the “reckless disregard” standard should be applied to determinations of whether violations of VEOA are “willful” under 5 U.S.C. § 3330c(a).

¶9 Applying this standard to the instant appeal, we find that the agency’s violation of veterans’ preference rules was not “willful.” The undisputed facts show that agency management official, Mark Fredenberg, District Manager, Montana Field Office, learned in late November 2004 that he would need to fill two vacancies in his office. IAF-3, Hearing CD, Fredenberg Testimony. Fredenberg testified that he contacted Personnel Specialist Joseph L. Eitel, concerning the various hiring authorities available to fill the positions. After their conversation, Fredenberg testified that he decided to use the Outstanding Scholar program to fill the vacancies. *Id.* Further, although Eitel later informed Fredenberg that he should also announce the positions in a competitive vacancy announcement, the record shows that Eitel did not inform Fredenberg that he must use the competitive examination process to fill the positions. *Id.*

¶10 In its cross petition for review, the agency argues that a finding of reckless disregard of the appellant's veterans' preference rights is unwarranted because the Outstanding Scholar Program was a valid and authorized hiring authority at the time it made the selections in this case.² Petition for Review File, Tab 6 at 4-5. It therefore contends that it believed in good faith that the appointments under the program were a bona fide exception to the requirement to use the competitive appointment process.

¶11 We agree. The Outstanding Scholar Program was authorized by a consent decree in *Luevano v. Campbell*, 93 F.R.D. 68 (1981). See *Dean*, 99 M.S.P.R. 533, ¶¶ 24-29. In the 24 years between the approval of the decree and the Board's decision in *Dean*, which was 6 months after the selections at issue in this case, no binding authority ever held that using the program's appointing authority violated veterans' preference rules.

¶12 Indeed, the non-competitive appointment of a non-preference eligible under the Outstanding Scholar Program was expressly authorized by the Office of Personnel Management (OPM) guidance in effect when Fredenberg recommended the appointments in this case. See IAF-1, Tab 11, Subtab 8 (excerpts from the 2003 edition of OPM's *Delegated Examining Operations Handbook*); *Dean*, 99 M.S.P.R. 533, ¶ 34 (discussing the 2003 edition of OPM's *Delegated Examining Operations Handbook*). Further, notwithstanding Fredenberg's agreement to issue an open competitive announcement, there is no evidence that he did not genuinely believe that he still had the discretion to recommend the

² The agency also urges the Board, without any elaboration or argument, to overrule the determination in *Dean* that the Outstanding Scholar Program is not a valid exception to the general rule that competitive service appointments must be made following the competitive examination process, including consideration of veterans' preference. Petition for Review File, Tab 6 at 4. We decline to do so for the reasons set forth in *Dean v. Department of Agriculture*, 104 M.S.P.R. 1 (2006).

Outstanding Scholar applicants for appointment instead of recommending selections from the competitive certificate of eligibles.

¶13 In *Augustine v. Department of Veterans Affairs*, 88 M.S.P.R. 407, ¶ 17 (2001), *vacated*, 95 M.S.P.R. 293 (2003), *vacated*, 429 F.3d 1334 (Fed. Cir. 2005), OPM expressly argued that hiring officials possess precisely the kind of discretion exercised by Fredenberg in this case. It was not until *Dean* that the Board rejected OPM's contention. Thus, the evidence does not support a finding that Fredenberg's violation of the appellant's veterans' preference rights was knowing and intentional, or that it was made with reckless disregard for the appellant's rights. See *Kolstad v. American Dental Association*, 527 U.S. 526, 536-37 (1999) (the reckless disregard standard is not met in cases where the employer reasonably believes that its discrimination under Title VII satisfies a bona fide exception to liability). Accordingly, we REVERSE the ID's finding that the agency's violation of veterans' preference rules was willful.

¶14 Finally, as noted above, the appellant has also submitted a petition for enforcement, challenging the sufficiency of the agency's reconstruction of the hiring process, which determined that the appellant would not have been selected for either position at issue in this appeal. The agency has responded in opposition to this petition and filed a motion to dismiss or, in the alternative, to stay, arguing that the appellant's petition should be dismissed. We find that it is now appropriate to forward this compliance issue to the Denver Field Office. See *Rose v. U.S. Postal Service*, 77 M.S.P.R. 139, 144 n.5 (1997) (allegations of compliance not previously heard by the AJ are normally forwarded to the regional or field office that issued the initial decision). Accordingly, the agency's motion is denied, and the appellant's petition for enforcement is FORWARDED to the field office for further adjudication.

order

¶15 We ORDER the agency to reconstruct the hiring for the Social Insurance Specialist positions in Kalispell, Montana, consistent with the requirements set forth in 5 U.S.C. § 3304(b) that "an individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title." *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.

¶16 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).

¶17 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 on 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 the results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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 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 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 OF 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, <http://fedcir.gov/contents.html>. 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.