

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

2007 MSPB 301

Docket No. DE-3443-06-0055-X-1

**Michael A. Endres,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

December 12, 2007

Minahan and Shapiro, P.C., Lakewood, Colorado, for the appellant.

Stephen T. Patterson, 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 This case is before the Board on a Recommendation of the administrative judge finding the agency in noncompliance with the final order of the underlying appeal. That order found that the Department of Veterans Affairs (“DVA” or “agency”) had willfully violated the appellant’s rights under the Veterans Employment Opportunities Act of 1998 (VEOA) when DVA’s appointment of another individual to the position of Chief Financial Officer, GS-0505-14, contravened his rights under a statute (*i.e.*, 5 U.S.C. § 3318) relating to his veterans’ preference. The Board’s final order specifically directed the agency to reconstruct its selection process in order to afford the appellant his right to

compete consistent with law. For the reasons set forth below, we find the agency is NOT IN COMPLIANCE with the Board's final order.

BACKGROUND

¶2 On April 18, 2005, the agency opened three separate vacancy announcements for the position of Chief Financial Officer (CFO) in its Veterans Affairs Health Administration Center in Denver, Colorado. Two of the announcements were external competitive announcements under the agency's competitive examining process via the Delegated Examining Unit (DEU) that advertised for the position at grade levels 13 and 14. The third announcement presented the position as an internal merit promotion at grade level 13 or 14. *See* Initial Appeal File (IAF), Tab 41 at 4. The appellant applied for the position under announcement number "VA-1-DN-5-0076," the external competitive announcement for the GS-14 position. A certificate of eligibles under that announcement included the name of the appellant with the notation that he is a compensably disabled veteran. The certificate also noted that the appellant received a score of 92 points. The agency arrived at this score by adding 10 points for disabled veterans' preference to the 82 points the appellant achieved through the application process. *Id.* The certificate of eligibles also included the names of James McCorvey, and Graham Innis with the notation of "TP" attached to their names, connoting that they had received the status of tentative (veterans') preference. Mr. McCorvey and Mr. Innis both received 5 veterans' preference points added onto their scores resulting in scores of 97 and 94 points, respectively. Although the certificate of eligibles form (Standard Form (SF)-39) forewarned that a selection may not occur without verifying the preference status of all the candidates, the agency nevertheless selected Mr. McCorvey for the position on June 12, 2005, before any veterans' preference verification took place. *Id.*, at 5-6.

¶3 Because Mr. McCorvey had retired from the military as a Lieutenant Colonel and therefore was not entitled, during the selection process, to veterans' preference under 5 U.S.C. § 2108(4)(B), the appellant questioned the selection. IAF, Tab 41 at 6-7. The agency acknowledged that it had appointed Mr. McCorvey, a non-preference eligible, without seeking "pass over" authority from the Office of Personnel Management (OPM) and without giving the appellant an opportunity to respond to the "pass over" in accordance with 5 U.S.C. § 3318.

¶4 On November 7, 2005, the appellant filed an appeal with the MSPB under VEOA maintaining that his nonselection for the CFO position under announcement number VA-1-DN-5-0076 was in violation of his veterans' preference rights. IAF, Tab 41 at 1. On July 7, 2006, the administrative judge issued an initial decision finding that the agency had denied the appellant his statutory right to compete when it selected a non-preference candidate for the CFO position from the same DEU list containing the appellant's name. *Id.* at 7. Moreover, the administrative judge found that the agency's violation of the appellant's veterans' preference rights was willful because it had neglected to verify whether the selectee was actually entitled to preference status despite having been given instructions to do so. *Id.* The administrative judge duly noted that given the Department of Veterans Affairs' mission, it had a special responsibility to verify preference rights and to ensure that disabled veterans, like the appellant, are not passed over without regard to statutory and regulatory requirements. *Id.* at 8. The administrative judge determined that the remedy under VEOA for the agency's violation was to provide the appellant with a selection process consistent with law. Therefore, the administrative judge ordered the agency to "appropriately" reconstruct its selection process consistent with the appellant's rights as a compensably disabled veteran. *Id.* The initial decision became the final decision of the Board on August 11, 2006, when neither party filed a petition for review.

¶5 On August 15, 2006, the appellant filed a petition for enforcement after the DVA sent him a document entitled “Agency’s Compliance with Order.” The appellant contended that the agency’s submission, indicating that its most recent reconstruction of its selection process for the CFO position enabling the agency to place Mr. McCorvey in the CFO position under a “legal appointment,” did not constitute compliance with the Board’s order. Compliance File (CF), Tab 1 at 3.

¶6 The agency responded that Mr. McCorvey’s name was eliminated from all its reconstructed certificates for the CFO position, including the certificate of eligibles under the relevant vacancy announcement. CF, Tab 8, Exhibit 1-1; Tab 11 at 13. The agency further explained that Mr. McCorvey still held the CFO, GS-14, position through a “regularization” of his appointment based on obtaining a variation under 5 C.F.R. § 5.1 to correct the administrative error that led to Mr. McCorvey’s original selection. *Id.* The agency stated that the reconstructed certificate of eligibles under the relevant announcement contained only the appellant’s name, and argued that it was within its authority not to make any selection from the certificate. CF, Tab 8, Exhibit 1-2.

¶7 Following a hearing on the compliance issue and submission of post-hearing briefs by both parties, the administrative judge issued a Recommendation that the appellant’s petition for enforcement be granted by the Board. The administrative judge found that the agency had reconstructed the hiring for the position of CFO, GS-0505-14, under the competitive examining process provided for in announcement number VA-1-DN-5-0076, as ordered by the initial decision of July 7, 2006.¹ CF, Tab 13, at 3. However, the administrative judge concluded that the agency’s reconstruction and its alleged decision to make no selection from the certificate of eligibles under the above vacancy announcement was

¹ Contrary to the administrative judge’s order to reconstruct only the DEU certificate for the GS-14 CFO position from where Mr. McCorvey was selected, the agency reconstructed all 4 merit promotion and DEU certificates for the CFO position. Compliance File (CF), Tab 13, at 3, n.2; Compliance Referral File (CRF) Tab 3, at 1-5.

contrary to the facts and did not constitute a selection process consistent with law. Specifically, the administrative judge found that “[t]he agency cannot in good faith show that it made no selection for the GS-14 CFO position.” *Id.*, at 4. The administrative judge concluded that Mr. McCorvey’s non-competitive appointment through an alleged “regularization” under 5 C.F.R. § 5.1 effectively circumvented the veterans’ preference laws, including the requirement that it seek authority from OPM to pass over the appellant in order to hire a candidate that did not have preference eligibility at the time of the selection. The administrative judge therefore recommended that the agency again reconstruct the hiring process for the position of CFO, GS-14, under the competitive examining process pursuant to the DEU’s announcement number VA-1-DN-5-0076 consistent with the law. *Id.*, at 5.

ANALYSIS

¶8 The appellant and the agency have responded to the Recommendation. The agency asserts that it made good faith efforts to comply with the Board’s order by reconstructing the selection process in order to provide the appellant with proper consideration for the CFO position. Compliance Referral File (CRF), Tab 3, at 15, 17. The agency argues that its regularization of Mr. McCorvey’s appointment is a different matter from its reconstruction of the selection process as ordered by the Board. The agency concludes that it has therefore complied with the Recommendation. On the other hand, the appellant claims that the agency has not complied with its obligations under VEOA and that the pertinent question the Board should address in this compliance case is whether the appellant would have been hired by the agency in the absence of violations of his veterans’ preference rights. Compliance Referral File (CRF), Tab 4 at 2. The appellant argues that the Board’s compliance authority to fashion a “make whole” remedy to an applicant for employment or employee injured by a wrongful agency action may include ordering the agency to place the appellant in the position to which he or

she was deprived by reason of the wrongful action. *Id.* at 4-5. Indeed, the appellant urges that the Board find that the agency would have selected him for the CFO position had it not violated his veterans preference rights in the summer of 2005, and requests that the Board direct the agency to appoint him to the CFO position on a retroactive basis, with back pay and liquidated damages for its willful violations of VEOA. *Id.* at 13.

¶9 The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). The Board's authority to remedy noncompliance is broad and far-reaching and functions to ensure that employees or applicants for employment are returned to the status quo ante or the position that they would have been in had the unlawful agency action not occurred. *Id.*; *Smith v. Department of the Army*, 458 F.3d 1359, 1364 (Fed. Cir. 2006). The agency bears the burden of proving that it has fully complied with a Board final decision. *See Hill v. Department of the Air Force*, 60 M.S.P.R. 498, 501 (1994). Thus, here, the agency must show, pursuant to the Board's order, that its reconstruction of the competitive process under announcement number VA-1-DN-5-0076 was in accordance with veterans' preference laws and that any subsequent appointment to the CFO position was the result of its fair and lawful consideration of the pool of candidates (including the appellant) under the appropriate and lawful reconstruction. *See Walker v. Department of the Army*, 104 M.S.P.R. 96 ¶ 18 (2006) (VEOA requires the Board do more than merely provide a remedy for a past wrong; it mandates that the Board order the agency to comply with the violated provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation).

¶10 In reconstructing the selection process, the agency must rely on the circumstances at the time of the original selection. *Cf. Haskins v. Department of the Navy*, 86 M.S.P.R. 357 ¶¶ 3 and 11 (2000) (in reconstructing the selection process, the Board found that the successful candidate would still have been

chosen over the appellant based on information as of the date of the original selection). With this in mind, in reconstructing the selection process, the agency must enter qualified candidates for a job in the competitive service into registers or lists of eligibles in rank order derived from scores based on qualifications and examinations and any additional points for preference eligible status (as of the time of the original invalid selection process). *See Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 14 (2005), *reaffirmed on reconsideration*, 104 M.S.P.R. 1 (2006); 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b). Preference eligibles who hold the same score as non-preference eligibles are placed ahead of the non-preference eligibles. *Id.*; 5 U.S.C. § 3313; 5 C.F.R. § 332.401. Except for scientific and professional positions in grades GS-9 or higher, disabled veterans who have a compensable service-connected disability of 10 percent or more are entered onto registers in order of their ratings ahead of all remaining applicants. 5 U.S.C. § 3313(2)(A); 5 C.F.R. § 332.401. The appointing authority must “consider at least three names for appointment to each vacancy in the competitive service” from a certified list obtained by the examining authority from the top of the appropriate register. 5 U.S.C. § 3317(a). The appointing authority “shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a).” 5 U.S.C. § 3318(a). However, if an appointing authority wishes to select a non-preference eligible rather than a preference eligible on the certificate, the appointing authority may not do so unless he or she files written reasons with OPM for passing over the preference eligible and obtains OPM’s approval. 5 U.S.C. § 3318(b)(1). In addition, should the preference eligible be a veteran with a 30 percent or more disability, he or she is statutorily entitled to notice of the proposed “pass over” and an opportunity to respond to OPM. 5 U.S.C. § 3318(b)(2). The agency has not shown that it reconstructed its selection process under announcement number VA-1-DN-5-0076 in accordance with the above legal requirements as ordered by the administrative judge.

¶11 It is indisputable that Mr. McCorvey was chosen for the CFO position in question on June 12, 2005, in violation of the appellant's veterans' preference rights. *See* IAF, Tab 41 at 6. Indeed, even after the alleged reconstruction of the selection process under announcement number VA-1-DN-5-0076, from which Mr. McCorvey was originally selected, he still holds that position because of what the agency alleges is a "regularization" of his appointment. The problem with the agency's position, however, is that neither its alleged reconstruction, nor its "regularization" of Mr. McCorvey's appointment is in compliance with law or the Board's Order.

¶12 At the time the agency first initiated the process to select a candidate under announcement number VA-1-DN-5-0076 in 2005, the appellant's name was forwarded to the agency's appointment authority along with the notation that he had received a score of 92 points (which included 10 points for disabled veterans' preference) and that he was a compensably disabled veteran. Moreover, Mr. McCorvey's and Mr. Innis's names were also forwarded on the certified list of eligibles to the appointing authority during that time, with respective scores of 97 and 94 points. Both these men were tentatively given the status of 5-point preference eligibles. However, verification of Mr. McCorvey's preference-eligible status at that time revealed that, because he had retired from the military as a Lieutenant Colonel, he was not entitled to veterans' preference under 5 U.S.C. § 2108(4)(B). Thus, under a reconstructed selection process, the appellant, as a preference eligible would have had to be entered onto the register ahead of Mr. McCorvey, who, without the 5-point preference, would have had the same score as the appellant or 92 points. Additionally, the agency would have to reconstruct the list and verify Mr. Innis's preference eligibility and list him on the certificate of eligibles with either 89 points as a non-preference eligible or 94

points as a preference eligible.² 5 U.S.C. § 3313; 5 C.F.R. § 332.401. Rather than just have the appellant's name on the list of eligibles as the agency "reconstructed," the law requires that the certificate of eligibles list at least three names for appointment consideration. 5 U.S.C. § 3317(a). Thus, under a reconstruction in accordance with law, in order to select Mr. McCorvey for the position, the appointing authority must have received OPM's approval to do so after filing written reasons with OPM for passing over the appellant, a preference eligible. *See* 5 U.S.C. § 3318(b)(1). Additionally, in such a reconstruction, the agency must have given the appellant notice of the agency's intent to pass over his candidacy and the opportunity to respond to the agency's reasons. *See* 5 U.S.C. § 3318(b)(2).

¶13 Therefore, we find that the agency has as much as admitted that it has not reconstructed its selection process in accordance with these laws. *See* CF, Tab 12 at 13; CRF, Tab 3 at 18. As noted above, in its alleged reconstruction, the agency inexplicably removed Mr. McCorvey's name from its certificate of eligibles, yet kept him as the selectee in the disputed position without requesting that OPM approve a "pass over." The agency's only explanation for not seeking "pass over" authority from OPM was that in the original certificate of eligibles, Mr. McCorvey was listed as a preference eligible. This explanation, however, is untenable because the original certificate listed Mr. McCorvey as only tentatively being a preference eligible and the agency selected him before any verification of his status as required by OPM procedures. Thus, the agency has failed in its burden to show that it has complied with the Board's order to "appropriately" reconstruct the selection process in accordance with law. *See* IAF, Tab 41 at 8.

¶14 Nor can we agree with the agency that its selection process in "regularizing" Mr. McCorvey's selection to the CFO position was in accordance

² It is not clear from the record why Mr. Innis's name did not appear on any of the reconstructed certificates.

with law. The agency's contention that it "regularized" Mr. McCorvey's appointment by obtaining a variation pursuant to 5 C.F.R. § 5.1 to correct the "administrative error" that led to Mr. McCorvey's original selection is indefensible and not borne out by the evidence of record. See CF, Tab 8, Exhibit 1-1; tab 11 at 13; CRF, Tab 3 at 17. First, Mr. McCorvey's selection cannot be called an "administrative error" because the agency did not verify Mr. McCorvey's preference eligibility status prior to his selection as required.³ Moreover, because Mr. McCorvey did not have preference eligibility status at the time of his selection, his selection involved a violation of law, rather than an administrative error, when the agency failed to request pass over authority from OPM and give the appellant notice and the opportunity to respond. See 5 U.S.C. § 3318; CRF, Tab 3, attachment A.

¶15 Second, there is no evidence that the agency obtained a variation to regularize the appointment. Under 5 U.S.C. § 5.1,

[a] valid variation requires an official record showing (1) the particular practical difficulty or hardship involved, (2) what is permitted in place of what is required by the regulations, (3) the circumstances that protect the integrity of the competitive service, and (4) a statement limiting the application of the variation to the continuation of the conditions which give rise to it.

Meeker v. Merit Systems Protection Board, 319 F.3d 1368, 1376 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004). The agency has not shown that a variation in this case would be within the spirit of OPM's regulations and that the efficiency of the government and the integrity of the competitive service would be protected

³ Unlike this case where an agency neglects to verify status information as required by OPM, an administrative error has been described as an inadvertent clerical error without the approval or ratification of an authorized agency official. See *White v. Department of the Air Force*, 32 M.S.P.R. 590, 593 (1987). We also note here that a mistake in certification by the appointing official will not ordinarily validate an otherwise unlawful appointment. See *Travaglini v. Department of Education*, 18 M.S.P.R. 127, 138 (1983).

and promoted as required under section 5.1. Further, the agency has not established that the Director of OPM granted such a variation as also mandated by section 5.1.

¶16 Finally, case law has described regularizing an appointment as correcting the illegal component of the appointment. For example, in *Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504 (9th Cir. 1986), a non-veteran was appointed to a position ahead of a preference eligible from a certificate of eligibles. The court explained that the non-veteran could only be retained in the position if the appointment was “regularized” by obtaining OPM’s authorization to pass over the preference eligible or if the preference eligible withdrew his application. See *Filiberti*, 804 F.2d at 1507. Further, in *Special Counsel v. Brown*, 61 M.S.P.R. 559 (1994), the Board found that the agency violated its displaced employee regulations by an appointment, but that the agency could “regularize” the appointment by either requiring the appointing official to select a priority referral from the agency’s displaced employee program or by separating the person who had been selected. See *Brown*, 61 M.S.P.R. at 568. Thus, because the agency has not shown that Mr. McCorvey’s appointment was regularized by either a variation or by correcting the illegal component of the appointment, Mr. McCorvey’s appointment to the CFO position is not valid.

¶17 In *Dean*, 99 M.S.P.R. 533, ¶ 19, the Board citing to *Williams v. Department of the Navy*, 90 M.S.P.R. 669, ¶7, *vacated on other grounds*, 55 F. App’x 538 (Fed. Cir. 2002), observed that VEOA is a remedial statute that “should be construed to suppress the evil and advance the remedy.” In *Deems v. Department of the Treasury*, 100 M.S.P.R. 161, ¶ 17 (2005) the Board made it clear that an individual whose veterans’ preference rights were violated is not “automatically” entitled to the position to which he or she applied. Rather, in *Walker, Dean, Deems*, and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), the Board found that the proper remedy for veterans’ preference violations is to order the agency to comply with the violated provisions of the statute by

reconstructing the hiring process for the position in question. Indeed, more recently, the Board has stated:

Although an agency's unsuccessful request for pass-over authorization coupled with the appointment of a non-preference eligible is strong evidence that an agency is obligated to appoint the appellant to a position under OPM's rules and procedures, it is still necessary to reconstruct the selection process to determine the position for which the appellant would have been selected, if the violation had not occurred. Thus, to determine if the appellant is entitled to appointment to a position, back pay, and other relief, the agency must reconstruct the hiring [for the positions to which the appellant applied] ... in conformance with the appellant's rights to veterans' preference.

Lodge v. Department of the Treasury, 107 M.S.P.R. 22, ¶ 17 (2007).

¶18 Concern for a non-party to the proceeding is not a basis to deny a remedy to a preference eligible harmed by a veterans' preference violation. *See Deems*, 100 M.S.P.R. 161, ¶ 18. Indeed, the Board found that "reconstruction of the selection process ... allows the Board to make the determinations necessary to award the appropriate relief...." *Walker*, 104 M.S.P.R. 96, ¶18. This case presents the novel situation of providing a remedy when an agency's reconstruction of the selection process still results in the appointment of a non-veteran to the contested position in violation of the appellant's veterans' preference rights.

¶19 Although the agency is correct that neither VEOA nor OPM's regulations mandate that the agency make a selection from a certificate to fill a vacancy, *see Abell v. Department of the Navy*, 343 F. 3d 1378, 1384 (Fed. Cir. 2003), the fact remains that the agency did select a non-preference eligible, instead of the appellant, from the certificate that should have been reconstructed by the agency in the manner that this opinion describes above.⁴ The agency violated 5 U.S.C.

⁴ In *Abell*, the Court noted that the agency's decision to cancel the vacancy announcement did not violate VEOA and that the agency's decision not to hire the appellant was based on a good faith reason that the appellant lacked the experience to

§ 3318 as to the appellant when the appointing authority selected and appointed a non-preference eligible after allegedly reconstructing the register without asking OPM for pass over authority or giving the appellant notice and an opportunity to respond. Thus, we find that the agency is in non-compliance with the Board's order as well as the administrative judge's Recommendation to "appropriately" reconstruct the selection process under announcement number VA-1-DN-5-0076. *See* IAF, Tab 41 at 8.

ORDER

¶20 Because the agency failed to reconstruct the selection process in accordance with the Board's order and the Recommendation, we ORDER the agency to reconstruct the selection process under announcement number VA-1-DN-5-0076 and in accordance with 5 U.S.C. § 3318 by following these instructions: (1) Mr. McCorvey must be removed as the selectee for the CFO position in question, because his placement in that position is contrary to 5 U.S.C. § 3318; (2) the certificate of eligibles under announcement number VA-1-DN-5-0076 must contain at least three names for appointment in order for the appointing authority to validly make a selection for the CFO position under 5 U.S.C. §§ 3317 and 3318; (3) the tentative preference for Mr. Innis must be verified in order to place his name ahead of the appellant's name and/or to select him to the position; (4) if the agency wishes to select an applicant who was a non-preference eligible as of June 12, 2005, over the appellant for the CFO position, the agency must obtain evidence of OPM's approval under 5 U.S.C. § 3318(b)(1); and (5) if the agency does select a non-preference eligible with OPM's approval, the agency must submit evidence that it gave the appellant notice and an opportunity to respond to OPM under 5 U.S.C. § 3318(b)(2).

carry out the functions required by the position. Here, the agency made no such showing that the appellant lacked the experience and education to carry out the functions of the CFO position.

¶21 We ORDER the agency to submit proof of compliance with the above instructions no later than 15 days after the date of this decision. If the agency, however, wishes to obtain approval from OPM to pass over the appellant and cannot comply within the above deadline, the agency is ORDERED to submit evidence within the 15-day deadline that it has petitioned OPM for pass over authority and has notified the appellant and given him an opportunity to respond to OPM. Failure to comply within this deadline will lead to the issuance of a show cause order to explain why the Board should not order that, Ralph Charlip, Director, Department of Veterans Affairs, Health Administration Center, Ptarmigan at Cherry Creek, Denver, Colorado, the agency's official responsible for compliance, "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." 5 U.S.C. § 1204(e)(2)(A).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.