

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

**2008 MSPB 91**

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Docket No. AT-3443-06-0118-I-2

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**Eric Williams,  
Appellant,**

**v.**

**Department of the Air Force,  
Agency.**

April 15, 2008

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Eric Williams, North Charleston, South Carolina, pro se.

David H. Ward, Esquire, Warner Robins, Georgia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decision that ordered corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA) with respect to the agency's non-selection of the appellant for a GS-7 Contract Specialist position. For the reasons set forth below, we DENY the appellant's petition, REOPEN the appeal on the Board's own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

**BACKGROUND**

¶2 The appellant applied for a GS-1102-07 target 11 Contract Specialist position with the agency under vacancy announcement WR383583, which closed on July 15, 2005. Initial Appeal File (IAF), Tab 6, Subtabs 4C, 4F. On August 8,

2005, the Office of Personnel Management forwarded two certificates of eligible candidates to the agency to fill thirteen positions. The appellant's name appeared on the Administrative Careers with America (ACWA) certificate as a 10-point preference eligible veteran. *Id.*, Subtabs 4C, 4D. The appellant's name did not appear on the second certificate, which was for Outstanding Scholars. *Id.*, Subtab 4C. The appellant was interviewed for the position, but ultimately was not selected. *Id.* The selections were made around September 13, 2005. *Id.*, Subtabs 1 at 1, 4C, 4F. The appellant subsequently filed a VEOA complaint with the Department of Labor (DOL) alleging that he was denied veterans' preference in hiring. *Id.*, Subtab 4B. After exhausting his remedies with DOL, the appellant filed the instant appeal, contending that the agency filled seven of the Contract Specialist positions through the Outstanding Scholar Program in violation of his veterans' preference rights. IAF, Tab 1.

¶3 While the appeal was pending, the agency stipulated that the appellant was a preference eligible who would have been hired as a GS-7 Contract Specialist in 2005 but for the agency's use of the Outstanding Scholar Program. Refiled Appeal File (RAF), Tab 7 at 2. It indicated that it was "now aware" that at the time the appellant filed his appeal, *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), *aff'd on recons.*, 104 M.S.P.R. 1 (2006), had been decided. RAF, Tab 7 at 1. In *Dean*, the Board concluded that the Outstanding Scholar Program cannot be used as a hiring method to avoid the competitive examination process when veterans' preference rights are at issue. *Dean*, 104 M.S.P.R. 1, ¶¶ 14-23; *Dean*, 99 M.S.P.R. 533, ¶¶ 21-38.

¶4 The agency offered to place the appellant in a GS-7 Contract Specialist position and stipulated that he is entitled to back pay and benefits as a result of the agency's improper hiring process. RAF, Tab 7 at 2. The appellant argued that he should be placed at the GS-11 level because most people hired as a result of the relevant vacancy announcement in 2005 have been promoted to GS-9 or GS-11 by this time. *See* RAF, Tab 9 at 2. The appellant further contended that

the agency's veterans' preference violation was willful and that he is therefore entitled to damages. RAF, Tab 3 at 4, Tab 4 at 1.

¶5 Without resolving the damages issue or explaining at which grade level the appellant is entitled to be placed, the administrative judge found that the agency had violated the appellant's veterans' preference rights by filling the vacancies at issue using the Outstanding Scholar Program and ordered the agency to place the appellant in a GS-7 Contract Specialist position with appropriate back pay and benefits. RAF, Tab 10, Initial Decision (ID) at 2-7. The appellant has filed a petition for review of that decision in which he claims that the administrative judge erred by not awarding him interim relief, by not ordering the agency to place him at the GS-9 or GS-11 level, and by failing to award him liquidated damages. Petition for Review File (PFRF), Tab 1. The agency did not file a timely response to the petition for review.

#### ANALYSIS

¶6 Under 5 U.S.C. § 7701(b)(2)(A), if an applicant for employment is the prevailing party in a Board appeal "under this subsection," the employee shall be granted the relief provided in the decision effective upon the making of the decision and remaining in effect pending the outcome of any petition for review, unless among other things, "the deciding official determines that the granting of such relief is not appropriate." *Dean*, 99 M.S.P.R. 533, ¶ 40. Here, the administrative judge concluded that awarding interim relief was inappropriate. ID at 7.

¶7 Even assuming that a VEOA appeal under 5 U.S.C. § 3330a is subject to the interim relief provisions of 5 U.S.C. § 7701, *see Scharein v. Department of the Army*, 91 M.S.P.R. 329, ¶ 5 n.2 (declining to address the propriety of awarding interim relief in a VEOA appeal because the Board found that the agency complied with the administrative judge's interim relief order), *review dismissed*, 44 F. App'x 478 (Fed. Cir. 2002), we find that the appellant has shown no abuse of discretion by the administrative judge in declining to order interim relief in this case. *See Dean*, 99 M.S.P.R. 533, ¶ 41.

¶8 Furthermore, the Board grants petitions for review only when significant new evidence is presented that was unavailable for consideration earlier or when the administrative judge made an error interpreting a law or regulation. 5 C.F.R. § 1201.115(d). After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable evidence and that the administrative judge made no error in law or regulation that affects the outcome of his finding that the agency violated the appellant's veterans' preference rights. *See id.* We therefore DENY the appellant's petition for review. Nevertheless, we REOPEN this appeal on the Board's own motion to modify the relief granted by the administrative judge. *See* 5 C.F.R. § 1201.118.

¶9 The agency admitted that it improperly selected non-preference eligibles instead of the appellant in 2005 by using the Outstanding Scholar Program to fill some of the GS-7 Contract Specialist positions. RAF, Tab 7 at 1-2. The agency's actions violated 5 U.S.C. § 3304(b), which is a statute related to veterans' preference. *See Dean*, 104 M.S.P.R. 1, ¶¶ 8-23. The appellant therefore is entitled to corrective action under VEOA. *See Dean*, 99 M.S.P.R. 533, ¶¶ 38, 43-45.

¶10 Contrary to the administrative judge's determination, however, the appropriate remedy in this case is not an automatic and retroactive appointment of the appellant to the GS-7 Contract Specialist position. Rather, the agency must reconstruct the selection process and comply with the applicable veterans' preference laws. *See Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 18 (2006); *Dean*, 99 M.S.P.R. 533, ¶¶ 43-45. Even though the agency offered to place the appellant in a GS-7 Contract Specialist position and stipulated that he is entitled to back pay and other benefits (RAF, Tab 7 at 2), VEOA provides that, if the Board determines that an agency has violated a statute or regulation relating to veterans' preference, it "shall order the agency to comply with such provisions." 5 U.S.C. § 3330c(a); *Dean*, 99 M.S.P.R. 533, ¶ 43. The Board's regulation at 5 C.F.R. § 1208.25 echoes this statutory provision. Accordingly, consistent with *Dean*, we find that the agency must reconstruct the selection

process for the GS-7 Contract Specialist position and follow 5 U.S.C. § 3304(b) in so doing.

¶11 The appellant has alleged that he is entitled at least to a GS-9 position at this point because, if he had been hired in 2005, he would have advanced to the GS-9 or GS-11 level by now. PFRF, Tab 1. If, after the agency reconstructs the hiring process, the appellant is placed at a grade level with which he disagrees, he may file a petition for enforcement with the office that issued the initial decision.

¶12 The appellant has also argued that the agency's violation in this matter was willful, thereby entitling him to liquidated damages. RAF, Tab 3 at 4, Tab 4 at 1; PFRF, Tab 1. 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). The Board has recently interpreted the term "willful" in 5 U.S.C. § 3330c(a) as meaning that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by VEOA. *Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶¶ 6-8 (2007).

¶13 The administrative judge indicated in the initial decision that "the appellant may file a motion for appropriate damages" and cited 5 C.F.R. § 1208.25(a) for that proposition. ID at 6. That regulation provides that, if the Board determines an agency has willfully violated an appellant's veterans' preference rights, "it will order the agency to pay the appellant an amount equal to back pay as liquidated damages." 5 C.F.R. § 1208.25(a). The administrative judge did not, however, set forth the standard order language used in VEOA appeals entitled "Notice to the Appellant Regarding Your Right to Request Damages." *See, e.g., Walker*, 104 M.S.P.R. 96, ¶ 22. That standard notice, which we set forth below, expressly informs the appellant that he may be entitled to liquidated damages in

an amount equal to back pay if the agency's veterans' preference violation was willful. *Id.* The notice further informs the appellant that he may file a petition for such damages with the office that issued the initial decision within 60 calendar days of the date of the decision. *Id.*

¶14 On August 5, 2005, the Board issued *Dean*, in which it concluded that the Outstanding Scholar Program cannot be used as a hiring method to avoid the competitive examination process when veterans' preference rights are at issue. *Dean*, 99 M.S.P.R. 533, ¶¶ 21-38. The relevant selections in this case took place approximately 5 weeks after the Board issued *Dean*. IAF, Tab 6, Subtab 4C. There is therefore a question regarding whether the agency's violation of the appellant's veterans' preference rights was willful. The administrative judge made no findings on this issue. Based upon the appellant's submissions, we find that he has already filed a request for lost wages, benefits, and liquidated damages, and we forward that request to the Atlanta Regional Office for adjudication.\* *See Walker*, 104 M.S.P.R. 96, ¶ 22. The appellant need not file another such request pursuant to the Notice to the Appellant Regarding Your Right to Request Damages, which is set forth below.

#### ORDER

¶15 Accordingly, we FORWARD the appellant's request for lost wages, benefits, and liquidated damages to the Atlanta Regional Office for adjudication. We ORDER the agency to reconstruct the hiring process for the Contract Specialist positions under vacancy announcement WR383583 consistent with the requirements set forth in 5 U.S.C. § 3304(b) that "[a]n individual may be appointed in the competitive service only if he has passed an examination or is

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\* Because liquidated damages under VEOA are equal to the amount of back pay the appellant recovers (5 U.S.C. § 3330c(a)) and there has not yet been a determination regarding the amount of back pay to which the appellant may be entitled, the administrative judge may wish to dismiss without prejudice the appellant's request for lost wages, benefits, and liquidated damages until the reconstruction of the hiring process has been completed.

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 to describe 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 in 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 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  
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 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). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. 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 or damages with the office that issued the initial decision **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.**

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <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:

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