

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

2009 MSPB 17

Docket No. DE-3443-05-0248-X-1

**Alvern C. Weed,
Appellant,**

v.

**Social Security Administration,
Agency.**

February 12, 2009

Alvern C. Weed, Kalispell, Montana, pro se.

Deana R. Ertl-Lombardi, Esquire, and Allan Berger, Esquire, Denver,
Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of an administrative judge which found the agency in noncompliance with a final Board order. For the reasons set forth below, we agree with the administrative judge's recommendation and find that the agency is NOT IN COMPLIANCE WITH THE Board's final order.

BACKGROUND

¶2 The facts of this appeal are fully set forth in the Board's October 29, 2007 opinion and order, but the essential facts are set forth below. *Weed v. Social*

Security Administration, [107 M.S.P.R. 142](#) (2007). The appellant, a 10-point preference-eligible veteran, filed an appeal with the Board contending that the agency violated his veterans' preference rights when it filled two Social Insurance Specialist Claims Representative positions in its Kalispell, Montana office using the Outstanding Scholar Program hiring authority instead of competitively filling the positions. MSPB Docket No. DE-3443-05-0248-I-1, Initial Appeal File (IAF), Tab 1. After holding a hearing, the administrative judge agreed with the appellant that his statutory rights were violated and ordered the agency to reconstruct the selection process using the competitive examination process. MSPB Docket No. DE-3443-05-0248-I-3, IAF, Tab 17 (Initial Decision) at 4-7. The administrative judge further found that the violation was willful because the selections were made with reckless disregard for the appellant's rights. *Id.* at 7-8.

¶3 In the October 29, 2007 decision, the Board denied the appellant's petition for review but granted the agency's cross-petition for review to address, for the first time, the standard to be applied in determining whether an agency's denial of an appellant's veterans' preference rights was "willful." *Weed*, [107 M.S.P.R. 142](#), ¶¶ 4-5. The Board found that the agency's violation was not willful and reversed the administrative judge's finding.¹ *Id.*, ¶¶ 5-13. The Board forwarded to the administrative judge, as a petition for enforcement, the appellant's allegations challenging the sufficiency of the agency's reconstruction of the hiring process. *Id.*, ¶ 14. Finally, the Board ordered 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.'" *Id.*, ¶ 15.

¹ On January 3, 2008, the appellant filed a petition for judicial review of the Board's decision with the United States Court of Appeals for the Federal Circuit. *See* Fed. Cir. No. 2008-3112. That matter has no impact on the Board's decision in this case.

¶4 After holding a hearing on the compliance issue, the administrative judge issued a July 24, 2008 compliance recommendation in which she stated that the agency's reconstruction action was not *bona fide* and, accordingly, the agency had not shown by preponderant evidence that it was in compliance with the Board's final order. MSPB Docket No. DE-3443-05-0248-C-1, Compliance File (CF), Tab 28 (Compliance Recommendation) at 4-5. The administrative judge recommended that the Board grant the petition for enforcement, and the matter was referred to the Board's Office of General Counsel to obtain compliance. *Id.* at 5. The parties have made additional submissions before the Board that have been considered. *See* MSPB Docket No. DE-3443-05-0248-X-1, Compliance Referral File (CRF).

ANALYSIS

¶5 The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board decision. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984); *Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 9 (2007). 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. *Kerr*, 726 F.2d at 733; *Endres*, [107 M.S.P.R. 455](#), ¶ 9. It is the agency's burden to prove by preponderant evidence that it has fully complied with a final Board decision. *Endres*, [107 M.S.P.R. 455](#), ¶ 9; *see Hill v. Department of the Air Force*, [60 M.S.P.R. 498](#), 501 (1994). Thus, in the instant case, the agency must show that it properly reconstructed the hiring process for the two Social Insurance Specialist Claims Representative positions.

¶6 Under the Veterans Employment Opportunities Act of 1998 (VEOA), an appellant, whose veterans' preference rights were violated with respect to a selection process, is entitled to a selection process consistent with law. *Lodge v.*

Department of the Treasury, [109 M.S.P.R. 614](#), ¶ 7 (2008); *Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 18 (2006); see *Lodge v. Department of the Treasury*, [107 M.S.P.R. 22](#), ¶¶ 14-16 (2007). The appellant is not entitled to a position with the agency that violated his veterans' preference rights and the Board will not order a retroactive appointment as a remedy for a VEOA violation. *Lodge*, [109 M.S.P.R. 614](#), ¶ 7 (2008). Rather, as stated above, the individual is entitled to a lawful selection process. *Lodge*, [109 M.S.P.R. 614](#), ¶ 7; see *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#), ¶¶ 42-45 (2005), *aff'd on recons.*, [104 M.S.P.R. 1](#) (2006); *Deems v. Department of the Treasury*, [100 M.S.P.R. 161](#), ¶¶ 17-19 (2005).

¶7 As discussed above, in its October 29, 2007 decision, the Board ordered the agency to reconstruct the hiring process for the Social Insurance Specialist Claims Representative position consistent with the requirements of [5 U.S.C. § 3304\(b\)](#). *Weed*, [107 M.S.P.R. 142](#), ¶ 15. In reconstructing the hiring process, the agency used a certificate of eligibles for the Social Insurance Specialist Claims Representative position that it had reissued on February 2, 2007. See CF, Tab 19, Exhibit G. That certificate contained five names and corresponding scores. *Id.* All of the individuals, like the appellant, were 10-point preference eligibles. *Id.* Another applicant and the appellant had identical scores and, pursuant to a random process, the other applicant was ranked fourth and the appellant was ranked fifth. *Id.* The selecting official, District Manager Dean Johnson, testified during the compliance hearing that, during the reconstruction process, he chose the third and fourth individuals on the certificate. Hearing Transcript (HT) at 60; CF, Tab 19, Ex. G. He testified that he considered them to be the best suited for the two positions. HT at 63-68, 72.

¶8 Despite Johnson's "selections," the agency never contacted either individual to determine whether they would have accepted the position had it been offered at the time of the agency's original selection. See HT at 36-37 (testimony of Nanci Tuggle), 68-69, 72-73 (testimony of Dean Johnson). Johnson

merely informed the agency's human resources department of his selections. HT at 68-69. Johnson and an agency human resources team leader also explained that one of the individuals originally selected for the Social Insurance Specialist Claims Representative position using the Outstanding Scholar appointment authority still occupied the position while the second selectee no longer works for the agency. *See* HT at 31-32 (testimony of Nanci Tuggle), HT at 83 (testimony of Dean Johnson). The human resources team leader also agreed in her testimony that the reconstruction process was "hypothetical." HT at 32 (testimony of Nanci Tuggle).

¶9 The Board has held that, in reconstructing the selection process, consistent with law and regulation, 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, and the appointing authority must make a selection for each vacancy from the highest three names on the certificate furnished under section 3317(a). *Endres*, [107 M.S.P.R. 455](#), ¶ 10, quoting, [5 U.S.C. § 3317\(a\)](#); [5 U.S.C. § 3318\(a\)](#). The Board has also held that reconstructing the selection process requires removing from the position any individual improperly appointed to the position at issue. *Marshall v. Department of Health and Human Services*, [110 M.S.P.R. 114](#), ¶ 8 (2008); *Dow v. General Services Administration*, [109 M.S.P.R. 342](#), ¶ 16 (2008); *Endres*, [107 M.S.P.R. 455](#), ¶ 20.

¶10 As discussed above, the agency did not actually reconstruct the hiring process and instead engaged in a "hypothetical" process. As a result, the agency did not make real selections for the Social Insurance Specialist Claims Representative position. In addition, one of the two individuals appointed to the Social Insurance Specialist Claims Representative position by the agency remains in the position. Accordingly, the agency has not properly reconstructed the selection process as ordered by the Board.

¶11 In its submission to the Board, the agency argues that the Board lacks the authority to review the merits of the agency's reconstruction action. CRF, Tab 12 at 7-9. In support of its position, the agency cites *Ruffin v Department of the Treasury*, [93 M.S.P.R. 369](#) (2003), *Villamarzo v. Environmental Protection Agency*, [92 M.S.P.R. 159](#), 164 n.2 (2002), *Light v. Small Business Administration*, 208 Fed. Appx. 819 (2006) (nonprecedential decision), and *Dickman v. Department of Transportation*, 144 Fed. Appx. 881 (2005) (nonprecedential decision). First, we note that the nonprecedential decisions of the United States Court of Appeals for the Federal Circuit cited by the agency are not binding precedent. See *Hernandez v. Office of Personnel Management*, [61 M.S.P.R. 264](#), 266 (1994). Moreover, the cases relied on by the agency, while expressing limitations on the Board's authority under VEOA (including the authority to order an individual's appointment), specifically hold that the Board has the authority to determine whether an agency has violated a statutory or regulatory provision relating to veterans' preference and to order an agency to comply with the laws and regulations regarding veterans' preference when making selections. See *Ruffin*, [93 M.S.P.R. 369](#), ¶ 6 (stating that the Board may determine whether an agency has violated a statutory or regulatory provision relating to veterans' preference); *Villamarzo*, [92 M.S.P.R. 159](#), ¶ 5 (stating that VEOA authorizes the Board to determine whether an agency has violated a statutory or regulatory provision relating to veterans' preference).

¶12 In the instant case, the Board is not ordering the agency to select a particular individual for a Social Insurance Specialist Claims Representative position (including the appellant), but the Board is ordering the agency to make its selections in accordance with law and regulation. Such an order is within the Board's authority. *Lodge*, [109 M.S.P.R. 614](#), ¶ 7; see *Dean*, [99 M.S.P.R. 533](#), ¶¶ 42-45 (2005), *aff'd on recons.*, [104 M.S.P.R. 1](#) (2006); *Deems*, [100 M.S.P.R. 161](#), ¶¶ 17-19 (2005). We recognize, as asserted by the agency, that a lawful selection process may benefit individuals other than the appellant, but the agency cites

nothing to show that such an outcome would be improper. *See* CRF, Tab 12 at 8-9.

¶13 The agency also argues that VEOA does not require the agency to remove other employees who were appointed in violation of law and regulation. CRF, Tab 12 at 11. In this regard, the agency argues that such a removal would violate due process and the provision of [5 U.S.C. § 7513](#) that an adverse action may only be taken for “such cause as will promote the efficiency of the service.” *Id.* at 11-12. The agency attempts to distinguish this case, where the appellant was fifth on a list of eligibles seeking two positions, from the facts in *Dow* and *Endres* where the aggrieved individual was the highest rated veteran on the list of eligibles seeking a single position. *Id.* at 11-12. We fail to see the distinction and note that the Board has repeatedly held that, as part of the reconstruction process, an agency must remove the improperly appointed incumbent from the position. *Marshall v. Department of Health and Human Services*, [110 M.S.P.R. 114](#), ¶ 8 (2008); *Endres*, [107 M.S.P.R. 455](#), ¶ 20. Contrary to the agency’s assertion, however, the agency need not remove the individual from the federal service, but need only remove the individual from the position he or she holds as the result of the improper appointment.

ORDER

¶14 Because the agency failed to reconstruct the selection process in accordance with the Board’s final order, we ORDER the agency to reconstruct the selection process in accordance with this Opinion and Order, and in accordance with VEOA, by following these instructions: (1) The incumbent of the Social Insurance Specialist Claims Representative position in question must be removed as the selectee because her placement in that position is contrary to [5 U.S.C. §3318](#); and (2) the agency must actually reconstruct the selection process for the Social Insurance Specialist Claims Representative position and not merely conduct a hypothetical selection process. Among other things, reconstruction of

the selection process requires that the agency determine: 1) if the individuals selected for the positions as part of the hypothetical selection process would have accepted the position at the time of the agency's original selection; 2) if either or both individuals selected as part of the hypothetical selection process would not have accepted the position, who would have been selected; 3) if the appellant would not have been selected under number two above, would the individual(s) selected have accepted the position; and 4) the agency shall continue the process of determining whether individuals selected for the position would have accepted an offer of employment until two individuals have been selected and indicated that they would have accepted the position, the appellant is selected for the position, or the agency takes some other action consistent with law. If the agency wishes to select an applicant for the position who is a non-preference eligible, the agency must obtain evidence of the Office of Personnel Management's approval for passover authority pursuant to 5 U.S.C. § 3318(b)(1).

¶15 We ORDER the agency to submit proof of compliance with the above instructions no later than 30 days after the date of this decision. 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 Susan Gilbertson,² Area Director for the Social Security Administration and the official identified by the agency as being responsible for compliance, "shall not be entitled to receive payment for

² In a September 15, 2008 order granting the agency its second extension of time to file arguments supporting its disagreement with the administrative judge's compliance recommendation, the Board identified Social Security Administration Denver Regional Commissioner Nancy Berryhill, as the responsible agency official. CRF, Tab 9 at 2. Subsequently, however, the agency identified Ms. Gilbertson as the agency official responsible for compliance. CRF, Tab 12 at 13.

service as an employee during any period that the order has not been complied with.”³ [5 U.S.C. § 1204\(e\)\(2\)\(A\)](#).

FOR THE BOARD:

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

³ The appellant moved for immediate sanctions against the agency in several of his submissions. CRF, Tab 10 at 4-5; Tab 15 at 8-9; Tab 16. The imposition of sanctions is not appropriate at this point.