UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 108

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

Alvern C. Weed,

Appellant,

v.

Social Security Administration,

Agency.

June 11, 2009

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

Pamela M. Wood, 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 find that the agency is now in compliance with the Board's final order on the merits of this matter, and accordingly, we DISMISS AS MOOT the petition for enforcement.

BACKGROUND

¶2 The facts of this appeal under the Veterans Employment Opportunities Act (VEOA) are fully set forth in the Board's decisions of October 29, 2007, and

February 12, 2009, but the essential facts are set forth below. *See Weed v. Social Security Administration*, 110 M.S.P.R. 468 (2009); *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 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, among other things, that the agency reconstruct the selection process. MSPB Docket No. DE-3443-05-0248-I-3, IAF, Tab 17 (Initial Decision) at 4-7. On petition for review and cross-petition for review, among other things, 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 selection process. *Weed*, 107 M.S.P.R. 142, ¶ 14. The Board also ordered the agency to reconstruct the selection process consistent with law. *Id.*, ¶ 15.

¶3 After holding a hearing on the compliance issue, the administrative judge issued a compliance recommendation in which she stated that the agency's reconstruction action was not *bona fide* and, accordingly, the agency was not 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. *Id.* at 5. After the parties made additional submissions, the Board issued a February 10, 2009 opinion and order. *Weed*, 110 M.S.P.R. 468.

¶4 In its February 10, 2009 decision, the Board explained that: 1) in reconstructing the hiring process, the agency used a certificate containing five names and corresponding scores; 2) all of the individuals, like the appellant, were

10-point preference eligibles; and 3) the appellant was ranked fifth on the certificate. *Id.*, ¶ 7; s*ee* CF, Tab 19, Exhibit G. The Board also explained that 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 because he considered them to be the best suited for the two positions. *Weed*, 110 M.S.P.R. 468, ¶ 7; *see* CF, Tab 19, Ex. G; Hearing Transcript (HT) at 60, 63-68, 72. The Board further explained that two agency witnesses acknowledged that the reconstruction process was "hypothetical," and that 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. *Weed*, 110 M.S.P.R. 468, ¶ 8; *see* HT at 32, 36-37 (testimony of Nanci Tuggle), 68-69, 72-73 (testimony of Dean Johnson). In addition, the Board noted that those witnesses testified 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. *Weed*, 110 M.S.P.R. 468, ¶ 8; HT at 31-32 (testimony of Nanci Tuggle), HT at 83 (testimony of Dean Johnson).

¶5 In its February 10, 2009 opinion and order, the Board concluded that, because the agency did not actually reconstruct the selection process and because one of the two individuals appointed to the Social Insurance Specialist Claims Representative position by the agency remained in the position, the agency had not properly reconstructed the selection process. *Weed*, 110 M.S.P.R. 468, ¶ 10. The Board ordered the agency to remove the individual improperly selected for the Social Insurance Specialist Claims Representative position from that position. *Id.*, ¶ 14. The Board also ordered the agency to "actually reconstruct the selection process for the Social Insurance Specialist Claims Representative position and not merely conduct a hypothetical selection process" and to determine if the two individuals selected for the positions would have accepted

the position at the time of the agency's original selection. *Id.* If either or both individuals would have declined the agency's employment offer, the agency was directed to determine who would have been selected for the position or positions and if they would have accepted. *Id.*

¶6 The agency asserts that it has now complied with the Board's order. CRF, Tab 19. As discussed below, we agree with the agency's assertion.

ANALYSIS

¶7 Under 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); *see also Weed*, 110 M.S.P.R. 468, ¶ 6. 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); *see Weed*, 110 M.S.P.R. 468, ¶ 10. 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); *see also Weed*, 110 M.S.P.R. 468, ¶ 6.

¶8 In its submission asserting compliance, the agency explains that it has removed the incumbent from the Social Insurance Specialist Claims Representative position and reassigned that individual to another position. CRF, Tab 19 at 16. To support its assertion, the agency provides an SF-50 documenting the reassignment. *Id.* at 22. The appellant does not contest the agency's assertion regarding the reassignment of this individual, and accordingly we find that the agency has removed the individual encumbering the Social Insurance Specialist Claims Representative position. With regard to the second

individual originally appointed by the agency in 2005 using the Outstanding Scholar appointment authority, as noted above, the record shows that the second selectee no longer works for the agency.[1]

¶9 The agency also asserts that District Manager Dean Johnson telephoned the third and fourth individuals on the certificate for the Social Insurance Specialist Claims Representative position – the individuals he had previously testified that he would have selected – explained the purpose of the call, confirmed that each candidate remembered submitting an application for the position in 2005, and inquired if they would have accepted the position if it had been offered in 2005. CRF, Tab 19 at 16. According to the agency, both candidates indicated that they would have accepted the position. *Id.* The agency provides declarations made under penalty of perjury from both Johnson and the Assistant District Manager, who participated in the telephone calls, in support of its assertions.2 *Id.* at 18-21.

¶10 The agency contends that it is in compliance with the instructions set forth in the Board's February 10, 2009 opinion and order. *Id.* at 4. The appellant

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[1] The appellant asserts that the agency failed to remove the individual encumbering the second Social Insurance Specialist Claims Representative position filled by the agency in 2005. CRF, Tab 20 at 3. According to the appellant, the agency misled the administrative judge into believing that the second position was vacant when, in fact, an individual was appointed to the position in 2006 after the individual originally appointed pursuant to the vacancy announcement at issue in this appeal left the agency. *Id.* This is the first time that the appellant has raised this argument despite the fact that the administrative judge issued her recommendation on July 24, 2008. Because the appellant has not explained why he did not raise this contention previously, we need not consider it. *See Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 9 (2009); *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 11 (2009). In any event, the appellant provides nothing to support his assertion that agency witnesses misled the administrative judge.

[2] The appellant attacks these statements as "inadmissible hearsay." CRF, Tab 20 at 3. It is well settled, however, that hearsay is admissible in Board proceedings, and we find no reason to doubt the accuracy of the two declarations. *See, e.g., Brown v. U.S. Postal Service*, 110 M.S.P.R. 381, ¶ 12 fn. 2 (2009); *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981).

disagrees and asserts that the agency remains in noncompliance because its selection process did not result in a bona fide offer of employment and an appointment to the agency. *Id.*, Tabs 20, 22.

¶11 We agree with the agency that it is in compliance. The agency has determined that the two individuals selected by the agency for the Social Insurance Specialist Claims Representative position would have accepted the position at the time of the agency's original selection. That is what the Board's February 10, 2009 decision required. *See Weed*, 110 M.S.P.R. 468, ¶ 14. Moreover, the agency's actions comport with the requirement that the agency reconstruct the selection process based on the circumstances as they existed at the time of the original selection. *Williams v. Department of the Air Force*, 110 M.S.P.R. 451, ¶ 8 (2009); *Endres v. Department of Veterans Affairs*, 107 M.S.P.R. 455, ¶ 10 (2007). Accordingly, we find the agency in compliance with the Board's order in this case.[3]

ORDER

¶12 Because the agency has complied with the Board's final order on the merits of this appeal by properly reconstructing the selection process for the Social Insurance Specialist Claims Representative position, the appellant's petition for enforcement is DISMISSED AS MOOT. 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(b)(3) (5 C.F.R. § 1201.183(b)(3)).

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[3] Because we find the agency in compliance, the appellant's April 1, 2009 request for sanctions against the agency and a hearing at which to present evidence and argument regarding the agency's actions is denied. *See* CRF, Tabs 20, 22; *King v. Department of the Navy*, 98 M.S.P.R. 547, ¶ 9 (2005) (stating that there is no right to a hearing in a petition for enforcement), *aff'd* 167 F. App'x 191 (Fed. Cir. 2006); *Modrowski v. Department of Veterans Affairs*, 97 M.S.P.R. 224, ¶ 13 (2004) (stating that there is no basis to impose sanctions against the agency where it is in compliance).

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, 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:

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