

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

**2009 MSPB 122**

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Docket No. DC-3443-08-0249-B-1

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**Julius L. Phillips,  
Appellant,  
v.  
Department of the Navy,  
Agency.**

June 30, 2009

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Leamon D. Brinson, Dahlgren, Virginia, for the appellant.

Orville Thomas Crane, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 This case is before the Board upon both the appellant's and the agency's petitions for review (PFR) of an initial decision that granted in part the appellant's request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we DENY the appellant's PFR and the agency's PFR under [5 C.F.R. § 1201.115\(d\)](#). We FORWARD the appellant's allegations of agency noncompliance to the Washington Regional Office for docketing and adjudication as a compliance matter, consistent with this Opinion and Order.

## BACKGROUND

¶2 The appellant, a GS-6 police officer, applied for higher grade police officer positions under vacancy announcement DON0083, which was an open continuous announcement for which merit promotion procedures were used, and he was not selected for any positions. *Phillips v. Department of the Navy*, [110 M.S.P.R. 184](#), ¶¶ 2, 6 (2008). After exhausting his administrative remedies with the Department of Labor (DOL), the appellant filed a VEOA appeal based on his nonselection for GS-7 and GS-8 police officer positions, but the administrative judge denied his request for corrective action. *Id.*, ¶¶ 3-4. In its Opinion and Order, the Board, noting that the appellant indicated in his resume that he was applying for GS-7 police officer positions, and the agency's admission that it did not consider him for those positions because it incorrectly believed that he did not indicate interest in them, concluded that the agency violated the appellant's veterans' preference rights, and it directed the administrative judge to order the agency to reconstruct the selection process for the GS-7 positions in Dahlgren, Virginia (the appellant's preferred location), under this vacancy announcement. *Id.*, ¶¶ 7, 9-10, 14. With respect to the GS-8 positions, the Board expressed concern because it appeared that the agency did not consider him for these positions solely because of his GS-6 grade level, without an examination of his specialized experience; therefore, the Board remanded the appeal to the Washington Regional Office for the agency to explain whether it considered the possibility that the appellant had sufficient specialized experience to qualify for the GS-8 positions. *Id.*, ¶¶ 8, 12. The Board also directed the administrative judge to give the appellant proper jurisdictional notice regarding the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA), as it was unclear whether the appellant had attempted to make a claim under that statutory scheme. *Id.*, ¶ 14.

¶3 On remand, the administrative judge issued an Order Scheduling Proceedings, in which she directed the agency to "provide evidence concerning

its selection process for any GS-0083-07 position filled pursuant to vacancy announcement number DON0083, for which the Board has found the appellant should have been considered.” *Phillips v. Department of the Navy*, MSPB Docket No. DC-3443-08-0249-B-1 (B-1 File), Tab 2 at 1. She also ordered the agency to “provide evidence concerning whether and how it considered the appellant’s prior work experience in determining that he did not have the minimum qualifications for promotion to a GS-0083-08 position.” *Id.* The administrative judge further ordered the appellant to state “whether or not he wishes to raise a claim under USERRA,” and after apprising him of his burden of proof for such a claim, she ordered him to submit evidence and argument on this issue. *Id.* at 2-3. The parties filed responsive submissions. B-1 File, Tabs 4, 5.

¶4 The administrative judge issued an initial decision, consistent with the Board’s Opinion and Order, granting the appellant’s request for corrective action for the GS-7 positions, and ordering the agency to reconstruct the selection process with respect to GS-7 positions filled pursuant to the relevant vacancy announcement from July 30, 2007, to the present, at Dahlgren, Virginia. B-1 File, Tab 6 at 3. The administrative judge denied the appellant’s request for corrective action for the GS-8 positions, finding that the agency properly considered his work experience in its decision.<sup>1</sup> *Id.* at 2-3.

¶5 The appellant and the agency both filed timely PFRs. B-1 Petition for Review File (B-1 PFRF), Tabs 1, 2. The appellant filed a response to the agency’s PFR, and the agency filed a response to the appellant’s submissions and a response to his PFR. B-1 PFRF, Tabs 5-7.

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<sup>1</sup> In his response to the order regarding USERRA, *see* B-1 File, Tab 5, the appellant failed to articulate any USERRA claim, and he has not raised this issue on PFR. Therefore, we need not consider it further.

### ANALYSIS

¶6 The appellant's PFR and the agency's PFR each fail to meet the review criteria and we deny them herein.<sup>2</sup> See [5 C.F.R. § 1201.115\(d\)](#).

¶7 In its PFR, the agency asserts that it complied with the administrative judge's reconstruction order. B-1 PFRF, Tab 2 at 8 & n.4. As support for this contention, the agency attaches a March 20, 2009 letter to the appellant, which informed him that, from July 30, 2007, to the present, two selections were made under the relevant vacancy announcement for GS-7 positions at the Dahlgren location: 1) lead police officer (sergeant), which was processed via certificate NW7-GS0083-07-K180223-C-MP-17; and 2) police officer (instructor), which was processed via certificate NW8-GS0083-07-K1059014-VA-C-MP-28. *Id.* at 12. The agency further states that it reconstructed the selection process for both positions, that the appellant was placed on both certificates, he was interviewed, and his name was referred to the selecting official, but based on his responses to the interview questions, he was not recommended for selection, and he was ultimately not selected for either position. See B-1 PFRF, Tab 2 at 12-13 (the agency's letter to the appellant regarding the reconstructed selection process), 14-20 (showing that the appellant's name was on both certificates), 30 (March 18, 2009 Memorandum to Commander Dennis Quick from Karen A. Ramming, Selection Advisory Panel Chairperson), 31-32 (Commander Quick's explanation of why he did not select the appellant for either position).

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<sup>2</sup> We note that, with respect to the agency's PFR, it appears that the agency is essentially seeking reconsideration of the Board's prior Opinion and Order. The law of the case doctrine "limits relitigation of an issue once that issue has been decided . . . in a different stage of the same litigation." *Nease v. Department of the Army*, [103 M.S.P.R. 118](#), ¶ 10 (2006); see *Seas v. U.S. Postal Service*, [78 M.S.P.R. 569](#), 573 (1998) (the Board invoked the law of the case doctrine and declined to reconsider its prior findings regarding the merits of the agency's charges). We similarly invoke this doctrine and decline to reconsider our prior decision.

¶8 In his response to the agency's PFR, the appellant alleges that the agency failed to comply with the administrative judge's reconstruction order. *See* B-1 PFRF, Tab 5 at 3. Specifically, the appellant complains that, among other things, the agency's reconstructed internal certificates, showing that he was not selected for either of the above-referenced positions, were dated 8 days before the appellant's interview date, and thus, his "interview was pointless," there was no information regarding the other candidates' scores or resumes or the questions asked of the other candidates, and he was not given advance notice of his March 18, 2009 interview, whereas "3 of the applicants from the hiring process in 2007 were afforded the questions in advance of the interview." *Id.*; *see* B-1 PFRF, Tab 2 at 14-20. From our review of the agency's submission, it is also not clear whether the individuals hired were removed as selectees from their respective positions during the reconstructed selection process.<sup>3</sup> *See, e.g., Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 20 (2007) (ordering the agency to remove as the selectee the individual originally chosen for the Chief Financial Officer position, because his placement in that position was contrary to [5 U.S.C. § 3318](#)), *enforcement dismissed by*, [108 M.S.P.R. 606](#) (2008). Additionally, we note that each internal certificate states "N/A" in response to the question of whether a selection was made from the certificate, and it does not appear from the agency's submission that a candidate was selected for either vacancy during the reconstructed selection process. *See id.* at 14-20. These allegations are properly first addressed by the administrative judge. *See, Rose v. U.S. Postal Service*, [77 M.S.P.R. 139](#) 144 n.5 (1997).

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<sup>3</sup> Indeed, we note that Commander Quick stated that he "reviewed the resumes for the current candidate [presumably, the appellant] and the personnel that were selected for the Police Sergeant positions previously." B-1 PFRF, Tab 2 at 31. This admission raises questions regarding whether, during the reconstructed selection process for the GS-7 positions, the agency *only* compared the appellant to the original selectees.

## ORDER

¶9 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\(c\)](#)).

¶10 We **FORWARD** the appellant's allegations of noncompliance to the Washington Regional Office for docketing and adjudication as a compliance matter, consistent with this Opinion and Order.

### 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 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:

The 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.