

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

2011 MSPB 19

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

**Eric Williams,
Appellant,**

v.

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

February 9, 2011

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

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

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter is before the Board upon the appellant's petition for review of an initial decision that denied his request for damages under the Veterans Employment Opportunities Act (VEOA), [5 U.S.C. § 3330c](#). For the reasons discussed below, we GRANT the petition for review and AFFIRM the initial decision insofar as it determined that the appellant is not entitled to an award of liquidated damages for the agency's violation of his veterans' preference rights in its 2005 selection process for the position of GS-7 Contract Specialist, because the agency's violation was not willful. We VACATE the remainder of the initial

decision and find that the appellant may be entitled to an award of lost wages or benefits.¹ We REMAND the appeal to the regional office: (1) for the administrative judge to determine the appellant's entitlement to an award of lost wages or benefits; and (2) for the parties to submit evidence and argument on the question of whether the agency's failure to properly reconstruct the selection process after the Board's April 15, 2008 reconstruction order constituted a willful violation of the appellant's veterans' preference rights, thus entitling him to an award of liquidated damages, and for the administrative judge to make findings thereto.

BACKGROUND

¶2 In 2005, the appellant, a preference eligible, applied to be a Contract Specialist, GS-1102-7 target 11, under vacancy announcement WR383583. *Williams v. Department of the Air Force*, [110 M.S.P.R. 451](#), ¶ 2 (2009). The agency filled six of these positions competitively via a certificate of Administrative Careers with America (ACWA) candidates, and seven of these positions were filled through the Outstanding Scholar Program (OSP). *Id.* The appellant, who was on the ACWA list, was not selected for any vacancy, and he filed a Board appeal, claiming that the agency violated his veterans' preference rights.² *Williams*, [110 M.S.P.R. 451](#), ¶ 2. While the appeal was pending, the

¹ As discussed below, the VEOA statute authorizes the Board to award compensation "for any loss of wages *or* benefits suffered by the individual" because of a VEOA violation. [5 U.S.C. § 3330c\(a\)](#) (emphasis supplied). During the pendency of this appeal, however, the parties and the administrative judge discussed the appellant's entitlement to lost wages *and* benefits. Even though we may use the conjunction "and" to describe the parties' positions and/or the administrative judge's conclusions in this Opinion and Order, we are aware, and we remind the parties and the administrative judge, that the statute only permits an award of lost wages *or* benefits.

² The appellant also alleged that the nonselection violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA). The Board issued its final decision denying relief under USERRA on July 16, 2010. *Williams v. Department of the Air Force*, MSPB

agency offered to place the appellant in a GS-7 Contract Specialist position, and it “stipulated” that he was entitled to back pay and benefits as a result of its improper hiring process. *Williams v. Department of the Air Force*, [108 M.S.P.R. 567](#), ¶ 4 (2008). 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 had been promoted to GS-9 or GS-11, and he was entitled to damages for the agency’s willful violation. *Id.*

¶3 On April 15, 2008, the Board issued an Opinion and Order finding that the agency’s appointment of non-preference eligibles under the OSP violated the appellant’s veterans’ preference rights in light of its earlier decision in *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#) (2005), *aff’d on recons.*, [104 M.S.P.R. 1](#) (2006), noting that 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 [OSP],” and concluding that the agency’s actions violated [5 U.S.C. § 3304\(b\)](#) and that the appellant was entitled to corrective action under VEOA. *Williams*, [108 M.S.P.R. 567](#), ¶¶ 3, 9. The Board ordered the agency to reconstruct the selection process for this position “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 specifically excepted from examination under section 3302 of this title.’” *Id.*, ¶¶ 10 (citing *Walker v. Department of the Army*, [104 M.S.P.R. 96](#), ¶ 18 (2006); *Dean*, [99 M.S.P.R. 533](#), ¶¶ 43-45), 15. The Board also forwarded the appellant’s claim for lost wages, benefits, and liquidated damages to the Atlanta Regional Office for adjudication. *See id.*, ¶ 14.

¶4 The agency reconstructed the selection process and determined that the appellant would not have been selected, and the appellant filed a petition for

enforcement, which the administrative judge denied. *Williams*, [110 M.S.P.R. 451](#), ¶¶ 4, 6. On review, the Board concluded that the reconstructed selection process, which excluded candidates from the OSP list, did not otherwise comport with the appellant's veterans' preference rights and its prior Opinion and Order, and it ordered the agency to reconstruct the selection process "in accordance with the appellant's veterans' preference rights" with specific instructions.³ See *Williams*, [110 M.S.P.R. 451](#), ¶¶ 6-17.

¶5 The agency thereafter reconstructed the selection process a second time and determined that it would have selected the appellant under a properly-reconstructed selection process. *Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-06-0118-X-1 (X-1 File), Tab 3. The agency also provided evidence that it offered the appellant the GS-7 Contract Specialist position on March 11, 2009. *Id.*, Tab 4. The appellant rejected this offer of employment, stating that he preferred to pursue his appeals to a final decision or enter into settlement negotiations with the administrative judge. *Id.*, Tab 5 at 3. On June 5, 2009, the Board issued an Order finding that the agency complied with its directive in *Williams*, [108 M.S.P.R. 567](#), because it provided evidence that it selected the appellant and offered him the GS-7 Contract Specialist position, and dismissing the matter as moot. *Williams v. Department of the Air Force*, [111 M.S.P.R. 356](#), 357 (2009). The Board also noted that there was an issue regarding lost wages, benefits, and possible liquidated damages, and it forwarded the appellant's requests to the Atlanta Regional Office for adjudication. *Id.*

¶6 Below, the administrative judge issued an order providing the appellant with notice of his burden to prove his entitlement to liquidated damages under

³ The Board's two decisions directing the agency to reconstruct its selection process predated the court's ruling in *Marshall v. Department of Health & Human Services*, [587 F.3d 1310](#), 1316-17 (Fed. Cir. 2009), which held that reconstruction is not appropriate in a case like this, where the agency conceded that it would have selected the appellant but for its violation of veterans' preference rules.

[5 U.S.C. § 3330c](#). *Williams v. Department of the Air Force*, MSPB Docket No. AT-3443-06-0118-P-2 (P-2 File), Tab 2. After the parties submitted responses, *see* P-2 File, Tabs 4, 6, the administrative judge issued an initial decision that denied the appellant's motion for liquidated damages but did not address the appellant's claim for lost wages or benefits. P-2 File, Tab 7. The appellant filed a timely petition for review and the agency filed a response and a Reconsideration of Request for a Protective Order. P-2 Petition for Review (PFR) File (P-2 PFR File), Tabs 1, 2, 4-5.

ANALYSIS

¶7 In his petition for review submissions, the appellant contends that the administrative judge erred by concluding that the agency's violation was not willful without holding a hearing and by not addressing his request for lost wages and benefits. P-2 PFR File, Tab 1 at 1-2. He also claims that the administrative judge was biased. *Id.* at 22. We have reviewed the record and we find no merit to the appellant's claim that the administrative judge was biased. We will, however, address his other petition for review contentions.

Construction of the VEOA damages provision

¶8 The Board has recognized that VEOA is a remedial statute and, as such, should be "construed broadly in favor of those whom it was intended to protect, and to suppress the evil and advance the remedy of the legislation." *Weed v. Social Security Administration*, [107 M.S.P.R. 142](#), ¶ 8 (2007), *appeal dismissed*, [571 F.3d 1359](#) (Fed. Cir. 2009); *see Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 17 (2007); *Dean*, [99 M.S.P.R. 533](#), ¶ 19. The VEOA provision regarding damages states:

If the Merit Systems Protection Board (in a proceeding under section 3330a) . . . 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\(a\)](#); *see* [5 C.F.R. § 1208.25\(a\)](#) (containing virtually identical language). The first sentence thus provides for an award for any loss of wages or benefits suffered as a result of an agency’s violation of an individual’s veterans’ preference rights, while the second sentence provides an award of backpay,⁴ as liquidated damages, when the violation is willful. However, this provision does not explain how to calculate an award of liquidated damages.

¶9 Our statute is similar to other labor and employment statutes that provide for an award of liquidated damages, and we look to those statutes for guidance. For example, the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the provisions of the Family and Medical Leave Act of 1993 (FMLA) applicable to the private sector,⁵ and the provisions of USERRA applicable to the states and the private sector, all permit an award of liquidated damages, and each concludes that liquidated damages is in addition to an award of non-liquidated damages. *See* [29 U.S.C. §§ 216\(b\), 260, 626\(b\), 2617\(a\)\(1\)\(A\)\(iii\)](#); [38 U.S.C. § 4323\(d\)\(1\)\(C\)](#). In fact, these other statutes provide an explicit means for calculating an award of liquidated damages, namely that the amount of liquidated damages awarded is *equal to an additional award of non-liquidated damages*.⁶ [29 U.S.C. §§ 216\(b\), 626\(b\), 2617\(a\)\(1\)\(A\)\(i\)\(I\)](#),

⁴ The term “backpay” in the context of a VEOA appeal is not to be construed to have the same meaning as the term of art “back pay” under the Back Pay Act, because VEOA appeals are not governed by the Back Pay Act.

⁵ The provisions of FMLA applicable to the federal government do not provide for liquidated damages. *See* [5 U.S.C. §§ 6381-6387](#).

⁶ The ADEA provides that liquidated damages are payable only in cases of willful violations and are to be calculated in the same manner as under the FLSA, which in turn provides for unpaid minimum wages or unpaid overtime compensation and “an additional equal amount as liquidated damages.” [29 U.S.C. §§ 216\(b\), 626\(b\)](#). USERRA states that liquidated damages for a willful violation are to be awarded in an amount equal to the amount of lost wages or benefits awarded. [38 U.S.C.](#)

2617(a)(1)(A)(iii); [38 U.S.C. § 4323\(d\)\(1\)\(B\)-\(C\)](#); cf. *Trans World Airlines, Inc. v. Thurston*, [469 U.S. 111](#), 125-26 (1985) (double damages under the ADEA); *Bankston v. State of Illinois*, [60 F.3d 1249](#), 1254 (7th Cir. 1995) (“The FLSA presumptively authorizes the district court to award liquidated double damages against employers who violate the FLSA.”) (internal citations omitted); *Traxler v. Multnomah County*, [596 F.3d 1007](#), 1015 (9th Cir. 2010) (double damages under FMLA); *Serricchio v. Wachovia Securities, LLC*, 606 F. Supp. 2d 256, 265 (D. Conn. 2009) (double damages under USERRA).

¶10 The provisions of the FLSA, ADEA, USERRA and FMLA discussed above are different than our VEOA damages provision because these statutes use consistent terms and directly relate an award of liquidated damages to a calculation of non-liquidated damages. The VEOA damages provision, by contrast, uses two different terms to describe an award of non-liquidated damages and liquidated damages, lost wages or benefits, and backpay, respectively. We have reviewed the legislative history of VEOA and we could not find any explanation to account for this difference in terminology.

¶11 In the absence of any legislative guidance, and given the similarities between VEOA and the other labor and employment statutes like the FLRA, ADEA, USERRA and FMLA, we adopt the construction of these statutes, and we hold that the term “backpay,” for an award of liquidated damages under VEOA, is equal to an additional award of non-liquidated damages (“lost wages or benefits”). In other words, we find that our VEOA statute provides for an award

[§ 4323\(d\)\(1\)\(B\)-\(C\)](#). The FMLA provides for an award of liquidated damages in “an additional amount . . . equal to the sum of” any wages, salary, employment benefits, or other compensation denied or lost by reason of the violation, except that an employer may escape liability for liquidated damages if it shows that its actions were taken in good faith and the employer had reasonable grounds for believing that its actions did not violate FMLA. [29 U.S.C. §§ 2617\(a\)\(1\)\(A\)\(i\)\(I\)](#), 2617(a)(1)(A)(iii). Like FMLA, the FLSA, as amended by the Portal-to-Portal Act, allows employers to escape liability for liquidated damages upon a showing of good faith and reasonable grounds to believe that its actions did not violate FLSA. 29 U.S.C. § 260.

of lost wages or benefits for an ordinary violation and an additional amount, equal to the award of lost wages or benefits, for a willful violation.

¶12 In order for the appellant to prevail on his request for liquidated damages under VEOA, however, he must prove, among other things, that he is entitled to an award of lost wages or benefits, for our interpretation of the statute contains no means of awarding liquidated damages in the absence of an award of lost wages or benefits. *Cf. Greene v. Safeway Stores, Inc.*, [210 F.3d 1237](#), 1245-46 (10th Cir. 2000) (jury award of unrealized stock option appreciation in an ADEA case was not unpaid wages or unpaid overtime compensation and therefore was not subject to doubling as liquidated damages); *Persky v. Cendant Corporation*, 547 F.Supp.2d 152, 164-66 (D. Conn. 2008) (liquidated damages are directly based on a plaintiff's economic damages). We therefore proceed to an analysis of his entitlement to lost wages or benefits.

The appellant's entitlement to an award of lost wages or benefits

¶13 Section 3330c(a) provides that, when the Board "determines that an agency has violated a right described in section 3330a, the Board . . . shall . . . award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved." An award for lost wages or benefits thus includes two requirements, that the agency must have violated the appellant's veterans' preference rights, and that the appellant must have lost wages or benefits as a result of the violation. The first requirement has been met here, as the Board has twice found that the agency violated the appellant's preference rights. *Williams*, [108 M.S.P.R. 567](#), ¶ 9; *Williams*, [110 M.S.P.R. 451](#), ¶ 9. Where, as here, the agency conceded that it would have selected the appellant but for its violation of his veterans' preference rights, the second requirement also may have been met if the appellant suffered lost wages or benefits.

¶14 The Board's previous decisions specifically forwarded the appellant's claims for lost wages, benefits and liquidated damages to the regional office for adjudication. *Williams*, [110 M.S.P.R. 451](#), ¶ 15; *Williams*, 111 M.S.P.R. at 357.

However, as noted by the appellant on petition for review, the administrative judge did not discuss the appellant's claim for lost wages and benefits in the initial decision. This was error. *See Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980) (an initial decision must identify and resolve all material issues of fact and law). Therefore, remand is appropriate.

¶15 Our reviewing court recently provided guidance on the proper parameters for an award of lost wages or benefits under such circumstances. In *Marshall*, 587 F.3d at 1318, the Federal Circuit held that “Mr. Marshall is entitled to the lost wages or benefits pursuant to § 3330c from the June 2004 selection date that violated his veterans’ preference rights until such time as he is placed in the position at issue or declines the position at issue.”

¶16 This appeal is unusual because the agency argued below that, once it learned of *Dean* and the Office of Personnel Management’s (OPM) suspension of its use of the OSP, “it immediately went into negotiations with Appellant to settle the case and make him whole[,] subject to any requirements and offsets.” P-2 File, Tab 6 at 6. Indeed, the parties do not dispute that such offers were made and declined, with the appellant contending that the agency’s offers were inadequate.⁷ After the Board ordered the agency to reconstruct the selection process for a second time, the agency selected the appellant for the GS-7 Contract Specialist position and, on March 11, 2009, it offered him that position, but the appellant declined the offer. *See* X-1 File, Tab 4 at 2 (the agency’s offer of the Contract Specialist GS-1102-07 target GS-11 position, which noted that his start

⁷ For instance, on June 20, 2007, the agency sent correspondence to the appellant, confirming that an offer regarding the GS-7 Contract Specialist position was issued two weeks earlier and that the offer included backpay and the “normal increases [he] would have received during the period [he] did not work and while [he was] on military duty.” P-2 File, Tab 6, Subtab A at 5. On August 30, 2007, the agency indicated that the appellant had not responded to the offer. *See id.* at 9. In an October 19, 2007 letter, the agency confirmed the appellant’s declination of the job offer and training start date. *See id.* at 10-11. On October 23, 2007, the appellant sent a letter to the agency, stating that he did not agree to the agency’s settlement offer. *Id.* at 12-13.

date would be “no later than 11 May 2009,” and that, if he successfully completed the required training and career assessment boards, he could be eligible for promotion to the GS-9 and GS-11 levels), Tab 5 at 3 (“I recommend we wait until the (MSPB) [sic] render[s] their decisions in each one of my appeals, or the Air Force and I discuss settlement with the Administrative Judge who will render the decision in my appeals.”). As discussed above, the Board previously found that the agency’s 2009 offer complied with its prior Opinion and Orders.

¶17 While *Marshall* directs that the appellant’s claim for lost wages or benefits properly terminates when he declined the agency’s offer, this appeal presents unique circumstances and, as a result, we do not believe that it is appropriate to use the agency’s 2007 offer as the end point for an award of lost wages or benefits. Although we did not have the benefit of the court’s guidance in *Marshall* when we first ordered the agency to reconstruct the selection process, the fact remains that the agency’s failure to properly reconstruct the selection process following the Board’s April 15, 2008 reconstruction order constituted an ongoing VEOA violation based on the law that was in effect at the time. We therefore find that the appellant’s entitlement to lost wages or benefits, if any, extends from the date of the agency’s original 2005 nonselection until March 11, 2009, when the agency offered the appellant the GS-7 Contract Specialist position.

¶18 In his calculation of damages on remand, we expect that the administrative judge will make findings regarding several outstanding issues, including when, if at all, the appellant would have been entitled to grade, step and/or pay increases after the retroactive starting date. The administrative judge shall also instruct the appellant to provide records of his income, if any, and his efforts to obtain other employment during the relevant time period, as well as proof of any relevant expenses that should be offset in an award of lost wages or benefits.

The administrative judge correctly found that the agency's violation of the appellant's veterans' preference rights during the initial selection process was not willful.

¶19 In order for the appellant to prevail on his request for liquidated damages under [5 U.S.C. § 3330c\(a\)](#), he must prove that the agency violated his veterans' preference rights and that the violation was willful. With respect to the September 2005 nonselection, this first element is satisfied because we already concluded that the agency violated the appellant's veterans' preference rights when it used the OSP during the original selection process. *See Williams*, [110 M.S.P.R. 451](#), ¶ 3; *Williams*, [108 M.S.P.R. 567](#), ¶ 9. As to the second element, the Board has held that a violation is willful, under [5 U.S.C. § 3330c\(a\)](#), when the agency either knew or showed reckless disregard for whether its conduct was prohibited. *Weed*, [107 M.S.P.R. 142](#), ¶¶ 7-8.

¶20 The agency claimed that, at the time that it made the selections, around September 13, 2005, *see Williams*, [108 M.S.P.R. 567](#), ¶ 2, it was unaware of the *Dean* decision, which had been issued a few weeks earlier, on August 5, 2005. P-2 File, Tab 6 at 3. In fact, the agency claimed that it did not know of the *Dean* decision, or its implications, until January 3, 2006, when OPM first informed agencies that it was temporarily suspending its use of the OSP hiring authority. *Id.* The record supports the agency's assertion that it did not know of the Board's decision in *Dean*, or the impact of this decision on its use of the OSP, at the time of the appellant's original nonselection. The agency provided evidence that, on December 23, 2005, the Department of Defense issued a Memorandum to military agencies, including the Department of the Air Force, indicating that in light of the *Dean* decision, OPM was temporarily suspending its use of the Outstanding Scholar appointment authority and OPM was advising each agency to determine its own appropriate course of action in regard to that decision. *See id.*, exhibit C at 1. In response to OPM's direction, the Department of Defense indicated that it was also suspending its use of the Outstanding Scholar appointing authority. *Id.*

This Memorandum was sent, via e-mail, to the military agencies on approximately January 3, 2006. *Id.* at 3-4. We agree with the administrative judge that, because the agency did not know about the *Dean* decision, or its implications on the propriety of the OSP, its failure to select the appellant in September 2005 was not a willful violation under [5 U.S.C. § 3330c\(a\)](#). Thus, the appellant is not entitled to an award of liquidated damages for this violation of his veterans' preference rights.

There is a question as to whether the agency willfully violated the appellant's veterans' preference rights after the Board ordered it to reconstruct the selection process in April 2008, and thus, whether the appellant is entitled to an award of liquidated damages.

¶21 This case is unusual because the agency stipulated that it would have hired the appellant but for its improper use of the OSP, we gave the agency an opportunity to remedy its original violation when we directed it to reconstruct the selection process for the GS-7 Contract Specialist position, consistent with the appellant's veterans' preference rights, on April 15, 2008, but the agency's first reconstructed selection process was not proper. Rather, it was only after we issued a second reconstruction order that the agency properly reconstructed the selection process, selected the appellant for the GS-7 Contract Specialist position and offered him that position.⁸ Below, the administrative judge did not analyze the appellant's request for liquidated damages after the Board's first reconstruction order, nor did he question the agency regarding the outcome of the first reconstructed selection process, considering its prior stipulation.

⁸ We do not view the agency's failure to select the appellant per se as a VEOA violation, but rather, its failure to properly reconstruct the selection process, consistent with our prior Opinion and Orders and the law in effect at the time, is the ongoing VEOA violation for which we are concerned. We base our rulings in this appeal on the Board's statutory authority to remedy violations of any statute or regulation relating to veterans' preference under [5 U.S.C. § 3330c](#), and not on the Board's authority under [5 U.S.C. § 1204\(a\)\(2\)](#) to enforce compliance with Board orders and decisions.

¶22 Resolution of these issues is critical to a determination of whether the agency's violation of the appellant's veterans' preference rights, after our April 15, 2008 reconstruction order and up until March 11, 2009, was willful. For instance, the agency's obligation to comply with the appellant's veterans' preference rights did not end at the time of the original nonselection, but rather, it was an ongoing obligation, and thus, it is appropriate for the administrative judge to consider this subsequent timeframe in his analysis of willfulness. Moreover, the outcome of the agency's first reconstructed selection process appears to conflict with its prior stipulation, and thus, this conflict may be evidence of the agency's intent to willfully violate the appellant's veterans' preference rights. Conversely, the agency's 2007 offer to the appellant may be evidence of its intent to comply with the appellant's veterans' preference rights, and would warrant against a finding of willfulness, notwithstanding the appellant's apparent dissatisfaction with the terms of that offer. Under these circumstances, it is appropriate to remand this issue to the administrative judge so that he may take evidence and argument and make findings regarding the agency's willfulness during this time frame.⁹

ORDER

¶23 We remand the appellant's request for lost wages or benefits to the regional office for adjudication, including a hearing, if necessary, consistent with this Opinion and Order. The administrative judge shall also allow the parties to submit evidence and argument on the issue of whether the agency's actions, after the Board's April 15, 2008 reconstruction order up until its March 11, 2009 offer to the appellant, constituted a willful violation of the appellant's veterans'

⁹ In its Reconsideration of Request for Protective Order, the agency asks the Board to "issue a protective order ceasing the accumulation of back pay." P-2 PFR File, Tab 5 at 4. We herein grant that request. As discussed above, we find that, based on the unique circumstances of this appeal, the appellant's entitlement to lost wages or benefits, and if appropriate, liquidated damages, terminates on March 11, 2009.

preference rights, and thus, whether the appellant is entitled to an award of liquidated damages, and the administrative judge shall make findings thereto.

FOR THE BOARD:

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