

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

2012 MSPB 22

Docket Nos. SF-3443-02-0159-X-2
SF-3443-02-0159-X-3

**Larry M. Dow,
Appellant,**

v.

**General Services Administration,
Agency.**

March 1, 2012

Michael Kator, Esquire, and Jeremy D. Wright, Esquire, Washington, D.C.
for the appellant.

Marcia L. Smart, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mary M. Rose, Member

Vice Chairman Wagner recused herself and
did not participate in the adjudication of this appeal.

OPINION AND ORDER

¶1 On May 10, 2011, the Board found the agency in noncompliance with the Board's final order and directed the agency to address certain compliance issues. For the reasons set forth below, we find that the agency remains in partial noncompliance.

BACKGROUND

¶2 In 2000, the appellant, a preference eligible veteran, applied for the position of Chief People Officer (CPO) Intern, GS-0301-07, with the agency. He was interviewed for the position, but not selected. He appealed his nonselection pursuant to the Veterans Employment Opportunities Act (VEOA). His appeal was put on hold for some time pending the outcome of the appeals in *Dean v. Department of Agriculture and Olson v. Department of Veterans Affairs*, [104 M.S.P.R. 1](#) (2006). Eventually, the administrative judge, relying on *Dean*, determined that corrective action was warranted pursuant to VEOA and ordered the agency to reconstruct the hiring process for the CPO Intern position. *Dow v. General Services Administration*, MSPB Docket No. SF-3443-02-0159-I-9 (Initial Decision, Mar. 23, 2007); I-9 Initial Appeal File, Tab 15. The initial decision became the final decision of the Board when the parties' petitions for review were dismissed. *Dow v. General Services Administration*, MSPB Docket No. SF-3443-02-0159-I-9 (Final Order, Sept. 11, 2007); I-9 Petition for Review File, Tab 13.

¶3 During the first compliance proceeding in this case, the Board concluded that the agency had failed to reconstruct the selection process in accordance with the Board's order. *Dow v. General Services Administration*, [109 M.S.P.R. 342](#), ¶ 16 (2008). The Board again ordered the agency to reconstruct the selection process and provided detailed instructions as to how the reconstruction should be effected. *Id.* Eventually, the agency reconstructed the selection process but requested Office of Personnel Management (OPM) approval to pass over the appellant. Based on these actions, the Board found the agency to be in compliance. *Dow v. General Services Administration*, [110 M.S.P.R. 215](#) (2008).

¶4 The appellant filed a new petition for enforcement after OPM denied the agency's pass-over request. *See* Compliance-2 File (CF2), Tab 2. The agency attempted to resolve the enforcement matter by tentatively offering the appellant the position of Human Resources (HR) Specialist, GS-201-07. *Id.*, Tab 4. On

May 12, 2009, the administrative judge denied the appellant's petition for enforcement based on his finding that he had no authority to reverse or modify the Board's 2008 order finding the agency in compliance. *Dow v. General Services Administration*, MSPB Docket No. SF-3443-02-0159-C-2 (Initial Decision, April 2, 2009); CF2, Tab 6.

¶5 The appellant sought review at the Federal Circuit. On December 16, 2009, the court granted the parties' joint motion to vacate the Board's decision and remand for further proceedings. *Dow v. General Services Administration*, 375 F. App'x 2 (Fed. Cir. 2009). The court directed the Board to determine, on remand, whether the agency's tentative offer of the HR Specialist position "constitutes a sufficient remedy for the initial VEOA violation." *Id.*

¶6 On remand, the administrative judge rejected the agency's argument that its offer of the HR Specialist position constituted compliance because the CPO Intern position no longer existed. *Dow v. General Services Administration*, MSPB Docket Nos. SF-3443-02-0159-M-1, SF-3443-02-0159-M-2 (Recommendation, July 15, 2010); Compliance Remand File, Tab 11. He found that, in order to be in compliance, the agency must retroactively appoint the appellant to the CPO Intern position. *Id.* at 9. Citing Federal Circuit precedent, the administrative judge stated that the agency is obliged to place the appellant in either the same position or one substantially equivalent in scope and status to the duties and responsibilities the appellant would have held absent the VEOA violation. *Id.* at 9-10.

¶7 In response to the recommendation, the agency asserted that it was in compliance because it tentatively selected the appellant for the position of HR Specialist pending completion of pre-employment requirements, including a mandatory security background investigation. Compliance Referral File 2 (CRF-2), Tab 3. The appellant disagreed with the agency that the HR Specialist position constituted compliance and that his placement in the position could be

conditioned on the outcome of a security background investigation. CRF-2, Tab 4.

¶8 In an Opinion and Order issued May 10, 2011, the Board found that the agency's tentative offer of the HR Specialist position was not a proper remedy. *Dow v. General Services Administration*, [116 M.S.P.R. 369](#), ¶¶ 8-10 (2011). The Board found that the appellant must be appointed to the CPO Intern position up to the date that the position ceased to exist. *Id.*, ¶ 10. The Board further found that it did not have sufficient information to determine whether the agency could properly make its offer contingent on a background investigation. *Id.*, ¶ 11. The Board stated that "the agency must rely on the circumstances at the time of the original selection and set out the investigative requirements for the non-sensitive position of CPO Intern." *Id.* The Board further determined that it had insufficient information to decide whether the HR Specialist position was the proper remedy following the expiration of the CPO Intern position. *Id.*, ¶ 12.

¶9 Accordingly, the Board directed the agency to: (1) explain whether a security background investigation is required prior to appointment in the nonsensitive position of CPO Intern; (2) if such investigation is required, produce evidence that the selectees for the CPO Intern position were subjected to such pre-appointment requirement; (3) provide evidence, if an investigation is shown to be necessary, that the appellant will be subjected to the same background investigation; (4) place the appellant in the CPO Intern position effective July 3, 2000, and pay him all back pay and benefits through the date that the CPO Intern position ceased to exist, if the evidence shows either that the original selectees were not subject to a pre-appointment security background investigation or that the appellant fell within an exception to the investigation requirement; (5) produce evidence of the date the CPO Intern position ceased to exist; (6) provide a copy of the position description of the Human Resources Specialist position; and (7) explain how the duties and responsibilities of that position are the same as, or similar to those of the CPO Intern position. *Id.*, ¶ 15. The agency has

submitted a response to that order, *see* CRF-2, Tab 14, and the appellant has filed a reply to the agency's response, CRF-2, Tab 13.

ANALYSIS

The agency's evidence does not show that a mandatory security background investigation was a condition of appointment to the CPO Intern position.

¶10 In a letter to the appellant dated August 16, 2010, the agency informed the appellant that he had been selected for the position of HR Specialist contingent on "a mandatory Pre-appointment Security Background Investigation." CRF-2, Tab 3, Ex. 1. As we explained in our May 10, 2011 order, the agency must rely on the circumstances at the time of the original selection for the nonsensitive CPO Intern position and set out the investigative requirements for that position. *Dow*, [116 M.S.P.R. 369](#), ¶ 11. Accordingly, we directed the agency to explain whether a security background investigation would be required prior to appointment in the nonsensitive position of CPO Intern. *Id.*, ¶ 15.

¶11 In a letter dated June 3, 2011, the agency informed the appellant that he had been appointed to the CPO Intern position retroactively, effective July 3, 2000, through May 28, 2006, the date that the CPO Intern position description became inactive.¹ CRF-2, Tab 14, Subtab 3. Nonetheless, the agency states that, in 2000, "all Agency employees were required to undergo personnel background investigations." *Id.*, Tab 14 at 2. In support of this statement, the agency submits a declaration from Grady Hannah, Director of Personnel Security Division, and agency policy that was in effect at the time. *Id.*, Subtabs 1 & 2. Neither the declaration nor the policy supports the position that the appellant would have been required to undergo a security background investigation in 2000.

¹ The letter is insufficient evidence to establish that the appointment has been effected. The agency must show that the appellant received the appropriate amount of back pay and benefits for that time period.

¶12 The agency's policy differentiates between suitability investigations and security background investigations. *Id.*, Subtab 1. The latter is a prerequisite for employees who will have access to classified national security information. *Id.*, Subtab 1 at 2. Appointees to these national security positions "must meet the security criteria established under [Executive Order] 10450." *Id.*, Subtab 1 at 3 & 19-26 (Appendix C). According to the agency policy, all other employees must undergo a suitability investigation as discussed in Appendix B of the agency policy. *Id.*, Subtab 1 at 18-19; *Id.*, Subtab 2 (Hannah Declaration, ¶ 2). Nevertheless, the agency concedes that the four CPO Intern selectees did not undergo either type of investigation. *Id.*, Subtab 2 (Hannah Declaration, ¶ 3).

¶13 Based on the agency's evidence, we find that a security background investigation was not required for the nonsensitive CPO Intern position. Furthermore, because the actual CPO Intern selectees were not subject to suitability investigations, such an investigation may not serve as a bar to the appellant's placement in the position effective July 3, 2000.

¶14 The agency asserts that, although the CPO Intern selectees were not subject to investigations prior to appointment, they would have been subjected to background investigations as a result of a 2007-2008 review mandated by the Department of Homeland Security. *Id.*, Subtab 2 (Hannah Declaration, ¶¶ 4-5). In light of that review and the fact that agency policy requires that all employees must undergo a suitability investigation, *see id.*, Subtab 1 at 18-19, the agency may subject the appellant to such an investigation to determine his suitability for employment from 2008 to the present.

The HR Specialist position is substantially similar to the CPO Intern position.

¶15 The Board's enforcement authority includes the power to restore, as nearly as possible, the status quo ante. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). Here, the status quo ante means that the agency must offer the appellant the original position sought or, as near as possible, a substantially equivalent position. *Marshall v. Department of Health & Human*

Services, [587 F.3d 1310](#), 1318 (Fed. Cir. 2009). As noted above, the agency asserts that, as of May 28, 2006, the CPO Intern position “was no longer active.” CRF-2, Tab 14, Subtab 3. The agency proposes to place the appellant in the HR Specialist position from May 28, 2006, to the present. *Id.* Therefore, we must make a substantive assessment of whether the actual duties and responsibilities of the HR Specialist position are either the same as or substantially equivalent in scope and status to the duties and responsibilities of the CPO Intern position. *Marshall*, 587 F.3d at 1317 (citing *Kerr*, 726 F.2d at 733).

¶16 According to the declaration of Charlotte Watson, Supervisor, National Classification Team, after the CPO Intern position became inactive, the agency determined that the HR Specialist position “was a better match for the needs of the Office of the Chief People Officer” CRF-2, Tab 14, Subtab 5 at 2. Ms. Watson’s declaration includes a side-by-side comparison of the CPO Intern, GS-301-07, and the HR Specialist, GS-201-07, positions, noting the duties and responsibilities common to both. *Id.*, Subtab 5 at 2-3. For example, both positions require “knowledge of the basic principles” associated with HR programs and involve “ongoing tasks common to HR areas.” *Id.* Both positions are intern/trainee positions, and both provide the incumbent with on-the-job training. *Id.* In addition, incumbents of both positions have contacts with employees within the agency and other government agencies. *Id.* Nevertheless, the appellant argues that the two positions are essentially different. Specifically, the appellant states that a key difference between the two positions is the career track. CRF-2, Tab 13 at 5. The CPO Intern provided “rotational assignments” that would allow the incumbent to select from different areas included in the agency’s HR offices, but the appellant asserts that the HR Specialist position would limit his “ability to select the direction of his Agency career by prescribing a single course (designated by the job title and series).” *Id.*

¶17 While not identical, the two positions have many of the same or similar duties and responsibilities. It is significant that the agency began using the HR

Specialist position description after the CPO Intern position description became obsolete in 2006. CRF-2, Tab 14, Subtab 5 at 2. Taken in its totality, we find that the agency's evidence shows the HR Specialist position to be substantially similar to the CPO Intern position and as near as possible to placement in the inactive CPO Intern position. *See Kerr*, 726 F.2d at 733.

The appellant is not entitled to retroactive promotions.

¶18 The appellant argues that the agency must offer him a job at the GS-12 level to account for the promotions he would have received while in the CPO Intern position. CRF-2, Tab 13 at 10-11. The established rule is that one is not entitled to the benefit of a position until he has been appointed to it. *United States v. Testan*, [424 U.S. 392](#), 402 (1976). “Only if some provision of law mandates a promotion during the interim period, perhaps if the employee could ‘clearly establish’ that he would in fact have been promoted, would the agency be required to reinstate him at that higher level.” *Boese v. Department of the Air Force*, [784 F.2d 388](#), 390 (Fed. Cir. 1986) (citing *Power v. United States*, [597 F.2d 258](#), 261-62 (1979)). The appellant has not identified any law mandating such a promotion, nor has he clearly established that he would have been promoted. Instead, he argues that we should presume that his performance would have been satisfactory and that he would have attained a GS-12 pay grade “in or about 2003.” CRF-2, Tab 13 at 10. The Federal Circuit has rejected such a presumption. “At best, to assume that he would have been promoted is speculative.” *Naekel v. Department of Transportation*, [850 F.2d 682](#), 684 (Fed. Cir. 1988) (citing *Power*, 597 F.2d at 261-62). Therefore, the agency may properly place the appellant in the GS-7 pay grade.

ORDER

¶19 Accordingly, we ORDER the agency to retroactively place the appellant in the position of Chief People Officer Intern, GS-301-07, in the Office of Human Resources Services, Office of the Chief People Officer, Central Office HR

Services Division, in Washington, D.C., effective July 3, 2000, through May 28, 2006. We ORDER the agency to place the appellant in the position of Human Resources Specialist, GS-0201-07, in the Office of Human Resources Services, Office of the Chief People Officer, Central Office HR Services Division, in Washington, D.C., retroactively to May 29, 2006.

¶20 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶21 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\(b\)](#).

¶22 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\(a\)](#).

¶23 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision

are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶24 As stated in our previous Opinion and Order, the appellant may file a request for liquidated damages once the agency's compliance has been determined. *See Dow*, [116 M.S.P.R. 369](#), ¶ 14. Such a request must be filed with the office that issued the initial decision in this appeal.

¶25 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) ([5 C.F.R. § 1201.183\(b\)](#)).

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.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. 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:

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:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.