No._____

IN THE
SUPREME COURT OF THE UNITED STATES

****

FAYE RENNELL HOBSON,
Petitioner,

v.

DEPARTMENT OF DEFENSE,
Respondent

****

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE
PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORBLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND JUSTICE FOR THE FEDERAL CIRCUIT:

NOW COMES petitioner, Faye Rennell Hobson (Morales), pursuant to Supreme Court Rule 13.5, and respectfully requests a sixty-day extension of time for filing a petition for a writ of certiorari to the United States Supreme Court. This application is being submitted more than (10) days prior to the scheduled filing date for the petition, which is February 3, 2025. However, the petitioner believes her request is an extraordinary circumstance (the sudden illness of her eldest sister followed by a sudden death). In support of this application, petitioner shows the following:

1. This is a Petition for review of the Merit Systems Protection Board three-member panel: Cathy A. Harris, Chaiman, Raymond A. Limon, Vice Chairman and Tristan L. Leavitt member and all nominated by Former President Joseph R. Biden between June

24, 2001 and June 6, 2022. MSPB Case No. CH-3330-20-0418-X-1 filed in the United States Court of Appeals for the Federal Circuit. Petitioner is asking this Court to review the final judgment made by the three panel Circuit Court Judges: Leonard P. Stark, nominated by on March 17, 2010 for District Court by President Barack Obama and Federal Appeals Court on January 3, 2022 by President Joe Biden, Todd M. Hughes, nominated in November 2013 by President Barack Obama to the Federal Appeals Court and Senior Judge Halden Robert Mayer, nominated in 1987. Senior Judge Mayer once served as the deputy and acting special counsel at the U.S. Merit Systems Protection Board. The petitioner now wishes to file a petition for writ of certiorari to the United States Supreme Court.

2. The petitioner is attaching copies of the Mandate, Judgment, Initial Decision of MSPB February 17 & May 26, 2021, and Final Order of the Board June 2, 2023.
3. During the month of October 2024 petitioner's eldest sister became gravely ill and petitioners' presence was required. On October 22, 2024 she passed and on November 2, 2024 petitioner celebrated her homegoing.
4. On November 5, 2024 petitioner received the Judgment of the Circuit Court, she was still mourning the loss of her beloved sister and attempting to assist nephews in handling family matters. Petitioner had a very close and loving relationship with her sister.
5. Petitioner have attempted to obtain counselor for stated case, but many FEAR taking on a case that involves the federal government. As such, the petitioner has been working on the case as a pro se litigant and such is time consuming, but petitioner promised her sister she would take it all the way to the Supreme Court. This case is one

for the history books. There are interesting undocumented facts about this case and all others in which the petitioner has filed with MSPB/Federal Circuit and the United States Supreme Court. The undocumented facts are one of many reasons petitioner should be granted an extension of time to file a writ of certiorari in the Supreme Court. Facts disclosed to Respondents have purposely not been addressed because such involves known Retaliation against TRUMP supporters by Democratic attorneys, District Attorneys and Judges.

6. In addition to the above stated reasons, the petitioner was under the assumption she had 90 days in which to file a writ of certiorari, but research shows such is 60 days when the federal government is involved. On January 14, 2025, the petitioner was informed by the Court a petition for a writ of certiorari to review a judgment in any case, civil or criminal entered by a state court of last resort or a United States court of appeals is timely when it is filed with the Clerk of the Court within 90 days after entry of the judgment Rule 13.1.

7. Because this VEOA case is so important to the petitioner and her disabled Veteran spouse of 32 years, it's essential that onset of stated case be addressed, but within the three-member Boards nonprecedential order, the Board did not address the onset and neither did the three-judge panel of the Appeals Court. This case came to fusion by agency attorneys stating the petitioner was not entitled to derived preference and as such, preference was not granted. The Court states "Because there is substantial evidence for the Board's conclusion that the agency complied with the order, we affirm." The petitioner disagrees. This case's onset hinders many Veterans and Preference Eligible applicants on a daily bases when applying for federal employment

and such needs to be addressed by the highest Court of the United States as well as the federal appeals court slated to handle such cases, which is the appeals court purpose. As a paralegal I first hand know such important details are being overlooked. Agencies are being allowed to fabricate documents after continuous hints and instructions afforded to them by MSPB judges and EEOC judges representing the federal government on every level. In addition to the petitioners VEOA violation, the agency officials of the Department of Defense Education Activity (DoDEA) by way of the Department of Defense (DOD) for years have underrated the petitioner as was done in stated case and refuses to show how they arrived at such ratings and decisions makers such as judges allows the overt submissions and noncompliance of Court Orders. Congress put such a preference in place for good reasons and Congress as well as the Courts need to hold such violators accountable.

8. The United States Court of Appeals for the Federal Circuit rejected petitioner's federal constitutional challenges. Arguments and Standard of Review in stated case is based practically on the underlying factual determinations which should have been reviewed for substantial evidence. Bolton v. Merit Sys, Prot. Bd. 154F.3d 1313, 1316 (Fed. Cir.1998). The facts and record in this case call for adjudication of the Petitioner's challenge to the bypass of a preference eligible applicant based on the Merits and not political affiliations. In this stated case, the agency's imposition of bypass violated appellants due process rights as well as the Presentment Clause of the Constitution. Unlike federal affirmative-action (which no longer exist) law and policy, the Veterans' preference is a firm entitlement at law, expressly conferring a benefit under a specific statutory scheme whose very strength lies in its preservation as a set forth by the

Congress of the United States. As such, the petitioner has also submitted stated case to Congress.

9. In addition to the above, the petitioner intends to show how prejudice, retaliation, and politics played a role in decisions from the Agency Officials, MSPB and the Appeals Court.
10. For-the-record: Prior to the petitioner filing her federal appeal, the BOARD granted the AGENCY four (4) extensions of time to file a response to the Petitioners claims and the federal circuit granted three (3) extensions of time to comply and after seven (7) extensions of time; the Agency still did not fully comply with the Board or Circuit Orders.
11. Let-the-record show the petitioner missed the deadline of filing a request for a rehearing for the same reasons as the need to file stated extension. The petitioners track record of on time filings and compliance is well noted within this Court as well as all other court filings and submissions.
12. In the event your Honor is not willing to grant stated extension because the petitioner did not request a rehearing; the petitioner ask the Honorable Judge John G. Roberts, JR., to REMAND stated case back to the United States Federal Circuit for a rehearing. Research shows that even if the petitioner requests a rehearing, she would still be held accountable for a timely submission to the Supreme Court, such is two-fold.
13. The sixty-day extension is fully justified and necessary. The extension will give petitioner sufficient time to write the petition for a writ of certiorari as well as time to consult with attorney's that have filed a writ of certiorari.

14. No prejudice to respondent's concerns will result from this requested extension. Attorney of record for respondent will be informed of stated request and provided a copy of petitioner's request by way of prepaid certified mail.

15. WHEREFORE, petitioner respectfully requests that an order be entered extending the time for filing a petition for writ of certiorari in this matter until April 3, 2025.

This the 21st day of January, 2025.

Respectfully submitted,

Faye Rennell Hobson (Morales
Pro Se Litigant
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Email: moralesfaye04@gmail.com

COUNSEL OF RECORD

Kristin E. Olson
P. O. Box 480, Ben Franklin Station
Washington, DC 20044
Kristin.Olson@usdoj.gov

LIST OF EXHIBITS

CERTIFICATE OF SERVICE

I certify that on January 21, 2025 a true and accurate copy of this Motion for Extension of Time was served on the following by way of prepaid certified mail.

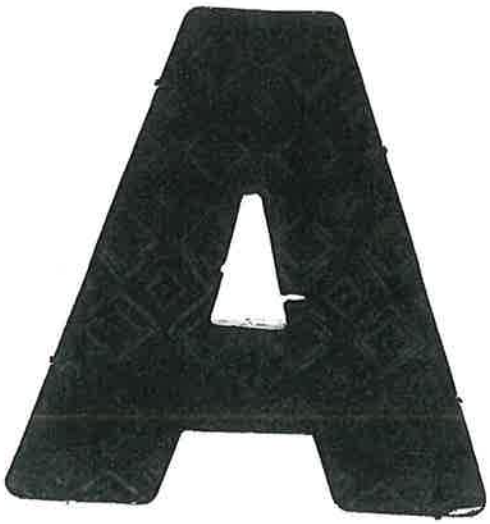
Clerk of Court
U.S. Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Kristin E. Olson
Counsel for Respondent
P. O. Box 480, Ben Franklin Station
Washington, D.C. 20044

Clerk
The Honorable Chief Justice John G. Roberts, JR.,
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

Respectfully submitted,

Faye Rennell Hobson (Morales)



NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

FAYE R. HOBSON,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2023-2228

Petition for review of the Merit Systems Protection Board in No. CH-3330-20-0418-X-1.

Decided: November 5, 2024

FAYE RENNELL HOBSON, Clarksville, TN, pro se.

KRISTIN ELAINE OLSON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, STEVEN JOHN GILLINGHAM, PATRICIA M. MCCARTHY.

Before HUGHES, MAYER, and STARK, *Circuit Judges*.

PER CURIAM.

Petitioner Faye Hobson challenges the Merit Systems Protection Board's dismissal of her petition for enforcement of an earlier Board order directing Respondent, Department of Defense, to reconstruct a job selection process of which Ms. Hobson was a part. Because there is substantial evidence for the Board's conclusion that the agency complied with the order, we affirm.

I

In October 2019, Ms. Hobson was considered for a position as a teacher of Middle School Social Studies at Fort Campbell in Kentucky with the Department of Defense Education Activity in the Americas Region (DoDEA). The agency considered both internal and external candidates for the position, ultimately generating a referral list of 26 internal candidates and 26 external candidates. *See Joseph v. F.T.C.*, 505 F.3d 1380, 1381–82 (Fed. Cir. 2007) (describing government hiring mechanisms). For external candidates, the agency's web-based Employment Application System (EAS) performed an automated review of each applicant's data and assigned a corresponding score to that applicant. For external candidates seeking veterans' preference benefits or derived veterans' preference benefits, a Human Resources (HR) specialist reviewed supporting documentation and added veterans' preference points to the applicant's EAS-assigned score, if appropriate. While Ms. Hobson did submit information claiming entitlement to derived veterans' preference benefits resulting from her husband's status as a disabled veteran, the agency found that her documentation was insufficient and denied awarding her additional points on her application. Ms. Hobson was awarded a score of 45, which ranked her application number 14 out of the 26 external applicants.

The selecting official for the Social Studies teaching position interviewed two candidates from the referral list—

the top-ranked external candidate, who had received a score of 71, and an internal candidate, Ms. Obermite, who did not receive an EAS score per agency procedure. The selecting official originally selected the top-ranked external candidate, but he declined the offer. The selecting official then selected Ms. Obermite, who accepted the offer and was appointed to the position on February 16, 2021.

After being informed that she was not selected for the position, Ms. Hobson sought relief from the Department of Labor. When that effort was unsuccessful, she appealed to the Board. The administrative judge found that Ms. Hobson was entitled to derived veterans' preference, and since the agency had not accorded Ms. Hobson her preference rights under the competitive examination process, the administrative judge found that the agency had violated the Veterans Employment Opportunities Act (VEOA) and granted Ms. Hobson's request for corrective action. *See* S.A. 34–42 (*Initial Decision*). The administrative judge ordered the agency to reconstruct the hiring process for the Social Studies teacher position within 30 days. The administrative judge declined to order interim relief, explaining "[t]here is no appropriate relief available unless and until there is a finding that, as a result of the agency's reconstruction of the selection process or appeal thereof, the appellant would have been selected and is entitled to compensation." S.A. 42 (citing 5 U.S.C. § 7701(b)(2)(A)).[1]

In March 2021, the agency notified Ms. Hobson that it had completed the reconstruction process and that she was again not selected for the position. The agency noted that when she was assigned the 10 additional derived veterans' preference points, her application ranking moved up from 14 to 9 out of the 26 external candidates. The agency

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[1] References to S.A. refer to the Supplemental Appendix filed with the agency's brief.

concluded that the recalculated score "did not [a]ffect the validity of the selection made by the hiring official" in the original hiring process, S.A. 55, "because the primary selectee (the original top-ranked external candidate) remained the top-ranked external applicant, while the alternate selectee . . . was an internal candidate (and thus, the agency could select her without regard to veterans' preference)." S.A. 14. Ms. Hobson filed a petition for enforcement of the Board's previous order, which the administrative judge granted, finding that the agency's reconstructed hiring process was deficient for a number of reasons. *See* S.A. 68–78 (*Compliance Initial Decision*). Ms. Hobson's petition was then referred to the Board for a final decision on the issue of the agency's compliance with the administrative judge's *Initial Decision* ordering reconstruction. At the order of the Office of the Clerk of the Board, the agency submitted additional evidence of compliance explaining the reconstructed hiring process and providing supporting documentation.

On June 2, 2023, the Board issued a final order finding that the agency showed "by preponderant evidence that its reconstructed selection process was in accordance with law." S.A. 19. Ms. Hobson timely petitioned for review in this court. We have jurisdiction to review a final decision of the Board under 28 U.S.C. § 1295(a)(9).

II

We must affirm the Board's decision unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *Higgins v. Dep't of Veterans Affs.*, 955 F.3d 1347, 1353 (Fed. Cir. 2020).

III

When an agency fails to properly apply veterans' preference rights during selection in the competitive service, "[r]econstruction seeks to determine whether the agency would have selected the [applicant] at the time of the original selection process" had the preference rights been properly applied. *Marshall v. Dep't of Health & Hum. Servs.*, 587 F.3d 1310, 1317 (Fed. Cir. 2009). In this case, when reviewing the record evidence, the Board was "satisfied that the agency ha[d] shown by preponderant evidence that its reconstructed selection process was in accordance with law." S.A. 19. Ms. Hobson alleges that the Board's decision dismissing her petition for enforcement was erroneous, arguing that the agency improperly bypassed her application and that the Board should have granted her interim relief. The agency disagrees, arguing that the Board correctly determined that the agency fulfilled its obligations under the *Initial Decision* and the *Compliance Initial Decision*. Upon review of the record, we see no legal or procedural error in the Board's decision and determine that it is supported by substantial evidence.

With respect to the sufficiency of evidence, the Board credited record evidence from the agency showing that it (1) "removed [Ms. Obermite] from the subject position by reassigning her to a different teaching position . . . thereby creating a vacancy in the subject position," (2) "calculated [Ms. Hobson's] correct score and ranking on the external candidate list by adding 10 points representing the appellant's derived veterans' preference to her EAS-assigned score of 45," and (3) "elected not to hire from the external list at all and instead decided to select an applicant from the internal list, . . . which was lawful." S.A. 19–20. The Board also noted that "the same selecting official as in the original hiring process considered the applications of the candidates on the certificate of best qualified candidates, including [Ms. Hobson's], and selected [Ms. Obermite] based on her interview and her

experiences as reflected on her resume." S.A. 20. Accordingly, the Board concluded that "[a]lthough the reconstructed process did not alter the outcome, we find that the agency has shown that it gave [Ms. Hobson] a bona fide opportunity to compete for the subject position, which is what the VEOA requires." S.A. 20.

The Board also considered and rejected many of Ms. Hobson's arguments about falsified documents or manipulation of EAS scores, stating that Ms. Hobson's challenges were "unavailing." S.A. 20. The Board noted that "[c]ontrary to [Ms. Hobson's] assertions, the agency has shown how it arrived at her pre-veterans' preference score of 45: the EAS algorithm assigned it based on her answers to application questions." S.A. 20. The Board further noted that Ms. Hobson "ha[d] not presented any evidence that would tend to show that the agency manipulated the EAS algorithm to depress her score or to elevate others' scores." S.A. 20. Additionally, the Board rejected Ms. Hobson's argument that the agency was required to prove that Ms. Obermite was "the most qualified" applicant because "her selection was in accordance with law so long as she was 'among a group of best qualified candidates,' . . . which she was by virtue of being on the referral list of qualified candidates along with [Ms. Hobson] and the other 50 applicants." S.A. 21. Finally, the Board rejected Ms. Hobson's argument that she was improperly "passed over" in favor of Ms. Obermite—who was not preference-eligible—stating that this argument was "inapposite because veterans' preference rules such as the prohibition on passing over a preference eligible without dispensation from the Office of Personnel Management, *see* 5 U.S.C. § 3318(c)(1), do not apply to [internal] merit promotions." S.A. 21.

The record evidence discussed above constitutes substantial evidence, which simply means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v.*

NLRB, 305 U.S. 197, 229 (1938). Many of Ms. Hobson's arguments to this court amount to disagreement about what the facts of the case are, the weighing of evidence, and the overall outcome of her appeal to the Board. *See e.g.*, Pet. Br. 9–10 (disputing her EAS score of 45 and stating that she "would have been the selectee had she been properly rated with or without the 10 point preference, because she would have been the highest scored applicant on all list[s] provided"); *id.* at 15 (arguing that Ms. Obermite was never removed from her position and that the record contains falsified documents). That Ms. Hobson may disagree with the Board's conclusion and its weighing of the record evidence does not warrant reversal.

Further, we find Ms. Hobson's arguments of legal error and constitutional violation regarding "bypass" procedures to be equally unpersuasive. Ms. Hobson asserts that the agency improperly imposed a "bypass" when it selected Ms. Obermite for the position instead of Ms. Hobson, despite Ms. Hobson having derived veterans' preference status. Pet. Br. 5 ("When an agency official bypasses a veteran or preference eligible [individual,] the agency is obligated to disclose its bypass action to the Appellant when it occurs and the agency has made no such attempts."); *id.* at 16 (asserting that the agency's bypass "rises to a constitutional violation"). While Ms. Hobson is correct that under VEOA, an agency generally cannot pass over a preference eligible employee to appoint a non-preference eligible one without written reasoning, *see* 5 U.S.C. § 3318(c), such a requirement only applies to the competitive examination process for external hires, not the merit promotion process for internal hires. *See Miller v. Fed. Deposit Ins. Corp.*, 818 F.3d 1357, 1360–61 (Fed. Cir. 2016) (explaining that veterans' preference rights under merit promotion procedures only confer a right to compete by submitting an application, not a quantitative boost to the strength of the application). Since the agency ultimately chose an internal candidate, the bypass

requirements did not apply, and Ms. Hobson's assertions of legal error must fail. *See Joseph*, 505 F.3d at 1384 (affirming board's decision that agency did not violate VEOA where it gave appellant 10-point veterans' preference but selected the internal candidate instead).

IV

We have considered Ms. Hobson's remaining arguments and find them unpersuasive. Because the Board's decision was supported by substantial evidence, obtained with proper procedure, and otherwise in accordance with law, we affirm.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

FAYE R. HOBSON,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2023-2228

Petition for review of the Merit Systems Protection Board in No. CH-3330-20-0418-X-1.

JUDGMENT

THIS CAUSE having been considered, it is

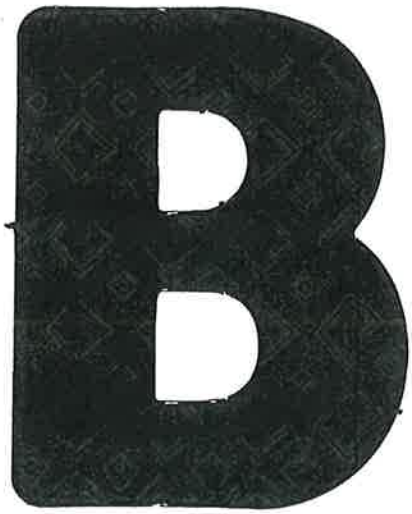
ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

November 5, 2024
Date

Jarrett B. Perlow
Clerk of Court



United States Court of Appeals for the Federal Circuit

FAYE R. HOBSON,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2023-2228

Petition for review of the Merit Systems Protection Board in No. CH-3330-20-0418-X-1.

MANDATE

In accordance with the judgment of this Court, entered November 5, 2024, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

December 27, 2024
Date

Jarrett B. Perlow
Clerk of Court

23-2228-ZZ Hobson v. Defense "Mandate (No Costs)" (CH-3330-20-0418-X-1)

1 message

FilingNotice@cafc.uscourts.gov <FilingNotice@cafc.uscourts.gov> Fri, Dec 27, 2024 at 11:58 AM
To: fhobson2652@charter.net

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United States Court of Appeals for the Federal Circuit

Notice of Docket Activity

The following transaction was entered on 12/27/2024 at 12:57:16 PM Eastern Standard Time and filed on 12/27/2024

Case Name: Hobson v. Defense
Case Number: 23-2228
Document(s): Document(s)

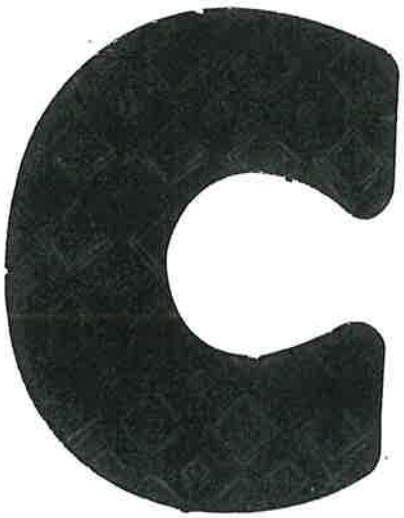
Docket Text:
Mandate issued to the Merit Systems Protection Board. Service as of this date by the Clerk of Court. [1057243] [MVH]

Notice will be electronically mailed to:

Faye Rennell Hobson, -: fhobson2652@charter.net
Kristin Elaine Olson, Trial Attorney: kristin.olson@usdoj.gov, natcourts.dockets@usdoj.gov, national.courts@usdoj.gov, keolson2012@gmail.com

The following document(s) are associated with this transaction:
Document Description: Mandate_No_Cost
Electronic Document Stamp:
[STAMP acecfStamp_ID=1222887174 [Date=12/27/2024] [FileNumber=1057243-0] [4e484e1f73f4c81674ac7506a59e460d5894616670844a2079191cc756277f810fcee9870c901afee034de0b6fbeb044a0319318013c2f2681e14ce1fd907f2b]]
Recipients:

- Faye Rennell Hobson, -
- Kristin Elaine Olson, Trial Attorney



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

FAYE R. HOBSON,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-3330-20-0418-I-1

DATE: February 17, 2021

Faye R. Hobson, Fort Campbell, Kentucky, pro se.

Melissa Martinez, Peachtree City, Georgia, for the agency.

BEFORE
Daniel R. Fine
Administrative Judge

INITIAL DECISION

The appellant, Faye R. Hobson, seeks corrective action under the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, 112 Stat. 3182 (1998) (the "VEOA"). She argues that the agency violated the VEOA by failing to include a 10-point derived veteran's preference when she applied for a position as a middle school social studies teacher through the Department of Defense Education Activity. *See* Initial Appeal File ("IAF"), Tabs 1 and 6.

The appellant waived her request for a hearing and elected to have this matter resolved on the written record. *See* IAF, Tabs 29, 30, 38. For the reasons set forth below, Ms. Hobson's request for corrective action is GRANTED.

Background

Federal law provides that a husband or wife of a service-connected disabled veteran meets the definition of a "preference eligible" so long as the veteran "has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia." *See* 5 U.S.C. § 2108(3)(E). This statutory language relating to so-called derived preferences dates back to the codification of Title 5 of the U.S. Code more than 50 years ago. *See* Pub. L. No. 89-554, 80 Stat. 378, 410 (1966). Substantially similar language had been included in the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387, 388 (1944). This appeal concerns the appellant's claim that she was entitled to such a preference, and the agency's decision to deny it.

In October 2019, the appellant applied for a position as a teacher, 0220 Middle School Social Studies at Fort Campbell, Referral No. 081475 (the "Social Studies Teacher Position"). *See* IAF, Tab 1 at E-1. To do so, she completed an online application using the agency's Employment Application System ("EAS"). The EAS is a web-based application system that the agency uses to fill educator-position vacancies; applicants enter personal and professional information into EAS and identify "teaching categories and location preferences for which they would like to be considered." *See* IAF, Tab 56 at 27.

In the EAS application at issue in this appeal, the appellant identified her husband as Franklin A. Morales, provided his social security number, and stated that she was entitled to a 10-point veteran's preference. *See id.* at 37–45. Beneath the box where the appellant input this information in an online form, the instructions state that "[a]pplicants claiming 10-point veteran's preference must submit a copy of DD-214."[1] *Id.* at 34.

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1 A separate agency printout indicates that applicants may have been advised to submit additional documents. But here and elsewhere the agency did not authenticate documents or offer evidence explaining them. I say more about this aspect of the appeal in the Findings And Analysis portion of the decision.

According to the agency, the appellant in fact submitted documentation that included: (1) the DD Form 214 for Franklin Morales (the "DD-214"); (2) a May 3, 2017, letter from the Department of Veterans Affairs (the "May 2017 Letter"); and (3) a Standard Form 15, dated January 10, 2010 (the "SF-15"). *See id.* at 29.

A DD-214 is a Certificate of Release or Discharge from Active Duty. The DD-214 for Franklin Morales documents that he served in the United States Army for 20 years and earned the rank of Staff Sergeant. *Id.* at 49. Staff Sergeant Morales spent 17 years of his service as a Cannon Crewmember, earned multiple decorations, and was honorably discharged in September 2007. *Id.*

The May 2017 letter from the Department of Veterans Affairs contains a "Certificate" that "is considered a permanent record of [a] Veteran's service-connected disability(ies)." *Id.* at 58. The certificate portion of the letter repeats certain information contained in the DD-214 and further states that "the records of the Department of Veterans Affairs disclose that Franklin A Morales * * * has existing service-connected disability(ies) rated at 100 percent." *Id.*

The SF-15 is an Application for 10-Point Veteran Preference, which the appellant completed in 2010. *Id.* at 47; IAF, Tab 40 at 45. The appellant signed that form, subjecting herself to criminal penalties under Section 1001 of Title 18 of the United States Code for any false statements. *Id.* The provision makes it a crime, punishable by up to five years of imprisonment, to make false statements regarding a matter within the executive branch of the Government of the United States. *See* 18 U.S.C. § 1001(a)(2). The SF-15 signed and submitted by the appellant identifies the appellant's husband as Franklin A. Morales and states that she is claiming a preference based on her spouse, a "veteran [who], because of a service-connected disability, has been unable to qualify for a Federal or D.C. Government job, or any other position along the lines of his/her usual occupation." IAF, Tab 56 at 47; IAF, Tab 40 at 45.

These documents were not acceptable to the agency: the appellant was not awarded a 10-point preference, and her application for the Social Studies Teacher

Position was not successful. She was notified of her non-selection in February 2020. *See* IAF, Tab 1 at E-1. Thereafter, the appellant sought relief from the Department of Labor, Veterans' Employment and Training Service ("VETS"). In correspondence to the appellant dated May 22, 2020, VETS concluded that the appellant "did not provide the documentation stating your spouse was unable to work due to a service-connected disability." *Id.* at A-1.

This timely appeal followed. At an earlier phase of the proceedings, I found that the Board has jurisdiction over the appeal. *See* IAF, Tab 13.

Legal Standard

An appellant is entitled to relief under the VEOA if he or she establishes by a preponderance of the evidence that an agency's action violated one or more of his statutory or regulatory veterans' preference rights. *Dale v. Department of Veterans Affairs,* 102 M.S.P.R. 646, ¶ 10 (2006). A preponderance of the evidence means that there is enough relevant evidence for a reasonable person to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q) (2016).

Where an appellant proves a VEOA violation, the appropriate remedy is to reconstruct the selection process consistent with law. *Lodge v. Department of Treasury,* 109 M.S.P.R. 614, ¶ 7 (2008). "In other words, the appellant is not entitled to a position with the agency that violated his [or her] veteran's preference rights." *Id.* Instead, "the individual is entitled to a lawful selection process." *Id.*

Findings And Analysis

The appellant urges that she is entitled to a 10-point preference as the wife of a service-connected disabled veteran who has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia. *See* 5 U.S.C. §§ 2108(3)(E), 3309(1). There is no dispute that the agency did not accord her this preference when she applied for the Social Studies Teacher Position. The principal issue on appeal is whether the appellant was entitled to such a preference. That question should be answered in the affirmative.

I find that the appellant has proved by preponderant evidence that the agency violated her rights under the VEOA. The appellant proved she is the wife of a veteran who is 100-percent disabled due to service-connected disabilities. She provided the DD-214 the agency specifically requested, as well as the May 2017 Letter and the SF-15 in which the appellant made representations under threat of criminal penalty. *See* IAF, Tab 56 at 37–64. The agency's own EAS records in 2019—under a section entitled "DoDEA Use Only"—in fact state "[v]erified derived preference" and "[v]erified XP preference," the latter using the code for derived preferences. *Id.* at 45.

I find that this evidence is sufficient to prove by preponderant evidence that the appellant is a preference eligible who should have been awarded a 10-point preference in her application for the Social Studies Teacher Position. *See also Cox-Vaughn v. U.S. Postal Service*, 100 M.S.P.R. 246, ¶ 7 (2005) ("The Board has indicated that a 100 percent disability rating such as this is sufficient to establish that the veteran has been unable to qualify for any appointment in the civil service.") (quotation marks omitted).

The agency's arguments to the contrary are unconvincing, fail to rebut the appellant's showing on these matters, and disregard both congressional commands and Board case law. The agency argues that the appellant is not entitled to a derived preference because she stated on her EAS application that her husband was also applying for the Social Studies Teacher Position. *See* IAF, Tab 62 at 5. But the statutory test for the appellant's preference eligibility is whether the appellant's husband was able to qualify for employment in the civil service or in the government of the District of Columbia. 5 U.S.C. § 2108(3)(E). The agency has not attempted to argue that the appellant's husband was able to qualify for this or any other position in the civil service. The agency has also not stated whether the appellant's statement that her husband was applying for positions through EAS was factually correct and not just a scrivener's error. *See* IAF, Tab 45 at 8 ("The HRS [Human Resource Specialist] determined that the appellant's

application in EAS indicated in the dropdown menu that her husband was also applying for the same position.").

The agency similarly misses the mark by arguing that trial and deposition testimony from the appellant disentitle her to a derived preference. In the testimony, the appellant indicates that her husband has worked with the Wounded Warrior Project "off and on" for several years. *See* IAF, Tab 45 at 31–32, 38. The excerpts provided by the agency are superficial, at-best equivocal, and do not suggest that the appellant's husband was able to qualify for a civil service position (the gating criterion in 5 U.S.C. § 2108). The agency's seeming position that an appellant is required to show that his or her spouse is entirely "unemployable" (*see, e.g.*, IAF, Tab 45 at 9)—by any one—is simply not the law.

The agency also maintains that an HR specialist acting under its auspices acted appropriately in denying a veteran's request because the appellant did not submit a copy of her marriage license with her application. The agency argues that the EAS application website "specifies in the online application [that] 'Applicants claiming 10-point veteran's preference must submit a copy of the service member's DD-214'" and that "[s]pouses must submit a copy of Marriage Certificate/License and VA Letter/documentation AND the service member is unable to work." *See* IAF, Tab 56 at 11.

This argument fails to convince. As an initial matter, the agency has not authenticated or explained any of the numerous documents that it has submitted in this appeal. No affiant or declarant operating under penalty of perjury provided the Board with evidence about the instructions that were actually provided to the appellant. The agency's counsel has made numerous statements in her pleadings with the Board, but factual assertions from lawyers are not evidence. *E.g., McClain v. Office of Personnel Management*, 76 M.S.P.R. 230, 238 (1997) (statements of purported fact by representatives are not evidence).

And the documents that the agency has left the Board to sift through do not obviously bare out the assertions made by agency counsel. To be sure, the agency

has submitted what seems to be a general "Test" printout of the EAS portal that *might* represent what a user would see when completing the application online—at least at some point in time. IAF, Tab 56 at 31. The "Test" printout contains the language that the agency says it does. *Compare id.*, with *id.* at 11. But, just a couple of pages later in the agency file, the agency has also included what appears to be the EAS screen that the *appellant* actually saw—the document at least has the appellant's name on it—and the document simply does not contain the marriage-certificate language that the agency says it does. *See id.* at 34. Yet another document submitted by the agency (again without explanation) appears to be a printout from a webpage where EAS users could check their application status; that printout seems to show that the appellant was advised of the need for her to submit a DD-214, but not of any obligation to submit a marriage license. *See id.* at 65. In sum, this mosaic of inconsistencies that the agency has presented to the Board without explanatory evidence fails to negate the appellant's otherwise adequate showing that the agency violated her rights under the VEOA.

Even if the EAS system did request a marriage certificate, the evidence as a whole shows that the agency knew or should have known that the appellant qualified as a preference eligible. Although "[a]n applicant who seeks a veterans' preference must provide the agency with sufficient proof of his [or her] entitlement to the preference . . . the agency may not deprive the applicant of his [or her] rights merely because me makes a minor technical mistake" in the application process. *Russell v. Department of Health and Human Services*, 117 M.S.P.R. 341, ¶ 11 (2012) (agency should have known applicant might be entitled to preference even where VA letter was missing). Thus, it does not matter that the appellant did not list "Morales" on her application under "other names used" or that the May 2017 Letter is addressed to "Faye Morales" instead of "Faye Hobson." The record as a whole demonstrates—and the agency does not attempt to dispute—that the appellant is married to Mr. Morales and that Mr. Morales was 100-percent disabled due to service-connected disabilities. *See also* IAF, Tab 45

at 10 (agency statement that it was willing to stipulate to these facts). As the agency concedes and as I have noted above, an agency HR specialist in fact stated that the appellant's derived-preference status had been "verified" in 2019. IAF, Tab 56 at 45.

To the extent the agency contends that its own processes condition the granting of a veteran's preference on an appellant submitting all that the EAS system demands (*e.g., id.* at 10 (seeming to place talismanic significance on the absence of the appellant's marriage certificate)), such processes cannot override the agency's statutory obligations. *Kirkendall v. Department of Army*, 573 F.3d 1318, 1324 (Fed. Cir. 2009); *Russell*, 117 M.S.P.R. 341 at ¶ 11; *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245, ¶ 9 (2010); *Gingery v. Department of Veterans Affairs*, 114 M.S.P.R. 175, ¶ 10 (2010). An agency that treats its own processes as a lodestar may well stray from the statutory language that Congress enacted in the VEOA. That appears to have been the case here.

Finally, the agency suggests that reconstructing the hiring for the Social Studies Teacher Position would make no difference to the appellant's ultimate job prospects. IAF, Tab 56 at 11–12. This assertion by agency counsel is not evidence, of course, and the technical documentation and marginalia that perhaps lend credence to counsel's assertion consist of unauthenticated, rank hearsay. *See id.* at 74–81. To the extent the agency is relying on something like a "futility exception" to VEOA claims, the agency has cited no legal authority that the doctrine exists. And, predictably, the appellant disagrees with the agency's view on this matter; she has submitted a scoring sheet suggesting that she should have been rated much more highly for the Social Studies Teacher Position than the agency says she was. *See* IAF, Tab 1 at F-1–2. The appellant's correct ranking is a matter that the agency must undertake in response to this Initial Decision. *Cf. also Lodge*, 109 M.S.P.R. 614 at ¶¶ 9–11.

Decision

The appellant's request for corrective action is GRANTED.

ORDER

I ORDER the agency to reconstruct the hiring for the position of 0220 Middle School Social Studies at Ft Campbell, Referral No. 081475. The reconstruction must be completed no later than 30 calendar days after the date this decision becomes final. I further ORDER the agency to tell the appellant promptly in writing when the agency believes that it has fully carried out the Board's Order and to explain the actions that 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).

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 this office if she 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).

INTERIM RELIEF

Although the appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C § 7701(b)(2)(A). There is no appropriate relief available unless and until there is a finding that, as a result of the agency's reconstruction of the selection process or appeal thereof, the appellant would have been selected and is entitled to compensation.

FOR THE BOARD: /S/
Daniel R. Fine
Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **March 24, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the

authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's eAppeal website (https://eappeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross

petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the

documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5

C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

notice OF APPEAL rights

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most

appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at

http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a courtappointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

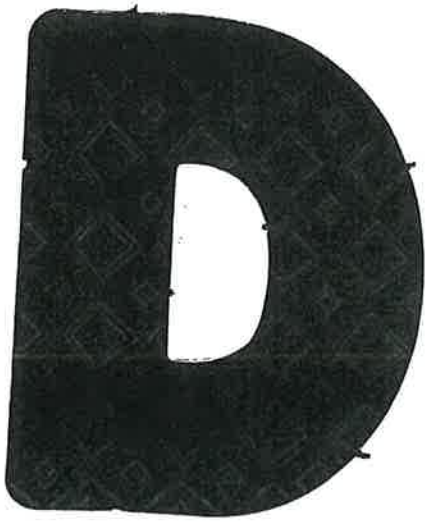
If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

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). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. 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 or damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

FAYE R. HOBSON,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-3330-20-0418-C-1

DATE: May 26, 2021

Faye R. Hobson, Fort Campbell, Kentucky, pro se.

Melissa Martinez, Peachtree City, Georgia, for the agency.

BEFORE
Daniel R. Fine
Administrative Judge

INITIAL DECISION

The appellant, Faye R. Hobson, has filed a petition for enforcement with the Board. *See* Initial Appeal File ("IAF"), Tab 1. She argues that the agency did not comply with the Board's final decision in this appeal. The final decision found that the agency had violated the Veterans Employment Opportunities Act of 1998 (the "VEOA") and directed the agency to reconstruct the hiring for a position to which the appellant had applied, a middle school teaching position at Fort Campbell, Kentucky.

For the reasons set out below, the appellant's petition for enforcement is GRANTED.

Background

In October 2019, the appellant applied for a position as a teacher, 0220 Middle School Social Studies at Fort Campbell, Referral No. 081475 (the "Social Studies Teacher Position"). *See* MSPB Docket No. CH-330-20-0418-I-1, Tab 66 (the "Initial Decision") at 2. The appellant claimed that she was entitled to a 10-point veteran's preference based on the service-connected disability of her husband, Franklin Morales. *See id.* The agency determined, however, that the appellant was not entitled to a veteran's preference, and her application for the Social Studies Teacher Position was ultimately not successful. *Id.*

The Initial Decision found that the appellant proved by preponderant evidence that the agency violated the VEOA with respect to her application for the Social Studies Teacher Position. *Id.* at 5–9. The Initial Decision then ordered the agency to reconstruct the hiring for that position. *Id.* at 9. Because no party filed a petition for review, the Initial Decision became the final decision of the Board on March 24, 2021. *See id.* at 10.

On March 19, 2021, before the Initial Decision had become the Board's final decision, the agency's representative notified the appellant by letter that the Civilian Human Resources Agency ("CHRA"), North Central Region, had "reconstructed the certificate of qualified candidates" for the Social Studies Teacher Position. IAF, Tab 4 at 13–14. The March 19 letter describes the efforts undertaken by the agency. The agency compared the original 3-page certificate of qualified candidates with a "reconstructed" certificate that gave the appellant a ten-point increase in her rating. *Id.* at 13.

As a result of this exercise, the appellant moved from 14th to 9th on a list of external candidates. *Id.* A printout attached to the letter indicates that the additional points made the appellant the second-highest ranked external candidate to have received an interview during the original hiring process and the second highest-ranked external candidate who was also a former agency teacher. *See id.* at 22–23. The appellant's "competency" score remained tied with that of the

external candidate who originally obtained the highest overall rank, Daniel Lynch. *Id.* at 22.

The March 19 letter concluded that the agency's reconstruction efforts—that is, reconstructing the certificate of qualified candidates—"did not effect [sic] the validity of the selection made by the hiring official." *Id.* The letter explains the agency's reasoning in reaching this conclusion:

> The primary selectee was Daniel Lynch, who was ranked first on the External (All Other Candidates) list. Mr. Lynch declined the job offer and the alternate selectee was Mary Obermite, a candidate listed on the Internal (Current DDESS Employees) list, and to which veterans' preferences does not apply. Ms. Obermite was the selectee for this position.
>
> Accordingly, both the initial and alternate selectees (Mr. Lynch and Ms. Obermite) ranked higher on both the original and the reconstructed list.

Id. at 14. There is no indication in the letter that any hiring official was involved in the agency's reconstruction process. Although the documents are styled as "Referral and Selection List Processing" and include space for the selecting official to list the top-three selectees and to report the action taken with respect to those selectees, the documents have not been filled in and are unsigned. *See id.* at 20, 23, 26.

The March 19 letter closes by stating that, during the reconstruction process, the agency learned that the appellant's husband "is currently a civil service employee with the Department of the Army and has been so employed since last fall 2020." *Id.* The letter does not argue that the appellant was not entitled to a derived veteran's preference at the time she applied for the Social Studies Teacher Position. And the letter also does not argue that the preference ought not apply for purposes of reconstruction. *See id.*; *see also Marshall v. Department of Health and Human Services*, 587 F.3d 1310, 1317 (Fed. Cir. 2009) ("Reconstruction seeks to determine whether the agency would have selected the veteran at the time of the original selection process."); *Endres v. Department of*

Services, 110 M.S.P.R. 114, ¶ 8 (2008) (same); *Dow v. General Services Administration*, 109 M.S.P.R. 342, ¶¶ 9–10 (2008) (same); *Endres*, 107 M.S.P.R. 455 at ¶ 18 ("Concern for a non-party to the proceeding is not a basis to deny a remedy to a preference eligible harmed by a veterans' preference violation.").[1]

Second, the reconstruction process must be bona fide in that the appellant must be afforded the opportunity to "actually compete[]" for the position. *Phillips*, 114 M.S.P.R. 19 at ¶ 18. For instance, an agency must, in addition to taking any original selectees out of their positions, "conduct[] and evaluat[e] interviews so that they are meaningfully comparable with the original selectees' interviews, and fill[] the same number of vacancies." *Washburn v. Department of the Air Force*, 119 M.S.P.R. 265, ¶ 14 (2013). And if different selecting and hiring officials are used in the reconstructed process and rely on candidate interviews as part of the process, the agency must be able to show that it has either conducted new interviews of the candidates up for consideration or that it otherwise properly took old information into account (*i.e.*, it must be able to show that it used an appropriate reconstruction process to make an "apples to apples" comparison among candidates evaluated by different personnel comparing old and new information). *E.g., Phillips*, 114 M.S.P.R. 19 at ¶ 18 ("Because Commander Quick did not have comparable assessments of the original selectees before him during the reconstructed selection process, we cannot conclude that the appellant actually competed with the original selectees.").

Analysis

I find that the agency has not shown that it complied with the Board's final order. The agency did not remove the incumbent of the Social Studies Teacher Position and has not shown that it undertook other efforts that would qualify as a

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[1] Removing the original selectee for the position does not require removal from federal service. Reassignment to another position is appropriate. *Endres v. Department of Veterans Affairs*, 108 M.S.P.R. 606, ¶ 3 (2008).

conclusion by making the assertion that Daniel Lynch (who was offered the job and declined it) and Mary Obermite (who was offered the job and took it) were ranked more highly than the appellant—and that Obermite was selected off a list of internal candidates. *Id.* at 7, 14. The agency thus contends that its reconstruction efforts did not affect "the validity of the selection" of Obermite. *Id.* at 7–8.

No further action is described by the agency, and the March 19 letter indicates that it sets out the totality of the agency's reconstruction efforts. *Id.* at 14 ("These are the actions taken by the agency to reconstruct what would have occurred had the derived preference been adjudicated to your application in the original certificate.").

The Agency Has Failed to Meet Its Burden

I find that the agency has failed to meet its burden of proving compliance with the Board's final decision for the following reasons.

First, the agency acknowledges that the original selectee of the Social Studies Teacher Position, Mary Obermite, was not removed from that position during the reconstruction process. The agency states without authority that this "is not an action that is necessary for reconstruction." *Id.* at 11. But the Board has many times held otherwise. *E.g.*, *Phillips*, 114 M.S.P.R. 19 at ¶¶ 16, 17, 22. Failing to remove an original selectee is itself sufficient to establish that the agency's process was hypothetical. *Id.* at ¶ 17 (concluding "that the agency's reconstructed process in this matter was hypothetical . . . because it did not remove the original selectees" from the positions at issue).

Second, the documents submitted by the agency bolster the conclusion that the agency completed only a hypothetical paper exercise in response to the Board's final decision rather than undertaking a bona fide reconstruction process. *E.g.*, IAF, Tab 4 at 6–7 ("[T]he CHRA provided two separate lists of qualified candidates to *illustrate* the reconstruction of the selection process using the veterans' preference ordered by AJ Fine.") (emphasis added); *id.* at 7 ("List

14) had the appellant been awarded a 10-point preference in the original selection process.

Fourth, the documentation submitted by the agency does not include the external vacancy announcement or other evidence indicating the legal rules that would apply to a lawful selection process.[3] This is a foundational issue. The contours of a lawful selection process may be shaped by attributes of the position, the hiring process, and the candidates. The undersigned can make some educated guesses about these matters and suppositions about documents that have been provided by the agency, but such conjecture is incapable of meeting the agency's burden of showing compliance with the Board's final decision by preponderant evidence. Without information from the agency (in the form of evidence), the sufficiency of the agency's process cannot be meaningfully evaluated.

For these reasons, I find that the agency failed to establish that it complied with the Board's final order. In addition, a further word about evidence is in order. I have noted evidentiary shortcomings in this decision, but in a very real sense the agency has not provided the Board with evidence of anything at all. I mean this not just in the sense that the agency failed to present evidence that any selecting official or other hiring official was involved in any reconstruction efforts, or in the sense that the agency failed to present evidence that a meaningful and lawful reconstruction process was undertaken. I mean that, in arguing that it has complied with the Board's decision, the agency has offered

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[3] No external vacancy announcement was included in the initial appeal file in the underlying appeal and it is unclear if one exists. *See* MSPB Docket No. CH-3330-20-0418-I-1, Tab 56 at 9 (submission from agency noting the omission). In the underlying appeal, there was no dispute that the appellant would have been entitled to a 10-point preference if she established her entitlement to one. The only issue was whether she had made a sufficient showing.

To the extent the agency decides to take the actions required by this decision, it "must submit to the Clerk of the Board, within the time limit for filing a petition for review under [5 C.F.R.] § 1201.114(e) . . . a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision." 5 C.F.R. § 1201.183(a)(6)(i).

If the agency decides not to take all the actions required by this decision, then it must file a petition for review under 5 C.F.R. §§ 1201.114 and 1201.115.

FOR THE BOARD: /S/
Daniel R. Fine
Administrative Judge

NOTICE TO THE PARTIES

If the agency takes the actions ordered above, it must submit to the Clerk of the Board a statement that it has done so, along with evidence establishing compliance. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in this decision. *See* 5 C.F.R. § 1201.183(a)(6)(i). Any such submission must be filed with the Clerk of the Board within 35 days of the date of issuance of this decision, or if the agency/appellant shows that it was received more than 5 days after the date of issuance, within 30 days of the date the agency received this initial decision. The address of the Clerk of the Board is:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a),

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date

statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) **Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) **Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012**. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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-50s (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.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail

Faye R. Hobson
P.O. Box 168
Fort Campbell, KY 42223

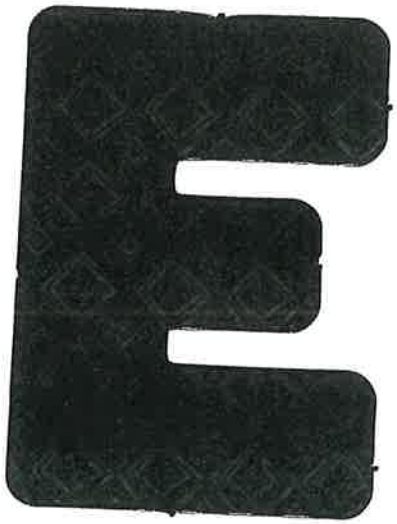
Agency Representative

Electronic Mail

Melissa Martinez
Department of Defense
Office of General Counsel, DDESS
700 West Park Drive, 3rd Floor
Peachtree City, GA 30269

May 26, 2021
(Date)

/s/
Rosa Canchola-Cudaback
Paralegal Specialist



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FAYE R. HOBSON,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-3330-20-0418-X-1

DATE: June 2, 2023

THIS ORDER IS NONPRECEDENTIAL[1]

Faye R. Hobson, Clarksville, Tennessee, pro se.

Emeka Nwofili, Esquire, and Melissa Martinez, Peachtree City, Georgia, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member[2]

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

[2] Member Leavitt's name is included in decisions on which the three-member Board completed the voting process prior to his March 1, 2023 departure.

FINAL ORDER

¶1 In a May 26, 2021 compliance initial decision, the administrative judge found the agency in noncompliance with the Board's February 17, 2020 final decision in the underlying Veterans Employment Opportunities Act of 1998 (VEOA) appeal on the basis that the agency had not removed the incumbent, M.O., of the Social Studies Teacher position during its reconstructed hiring process and had "not shown that it undertook other efforts that would qualify as a bona fide reconstruction process." *Hobson v. Department of Defense*, MSPB Docket No. CH-3330-20-0418-C-1, Compliance File (CF), Tab 6, Compliance Initial Decision (CID); *Hobson v. Department of Defense*, MSPB Docket No. CH-3330-20-0418-I-1, Initial Appeal File (IAF), Tab 66, Initial Decision (ID).[3] Accordingly, the administrative judge ordered the agency "to again reconstruct the hiring for the position of 0220 Middle School Social Studies at [Fort] Campbell, Referral No. 081475 in accordance with the Board's final order and consistent with the case-law." CID at 10.

¶2 The agency thereafter filed a timely motion to extend the deadline to submit a petition for review or statement of compliance.[4] *Hobson v. Department*

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[3] The administrative judge's February 17, 2020 initial decision in the underlying appeal became the final decision of the Board by operation of law on March 24, 2021, because neither party filed a petition for review. ID at 10.

[4] As noted in the compliance initial decision, the Board's regulations provide that, upon a finding of noncompliance, the party found to be in noncompliance must do the following:

> (i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under § 1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision.

of Defense, MSPB Docket No. CH-3330-20-0418-X-1, Compliance Referral File (CRF), Tab 3. The Board granted the motion over the appellant's objection and extended the agency's deadline to July 30, 2021. CRF, Tab 5 at 1. The agency, however, did not file a petition for review or a statement of compliance by the July 30, 2021 deadline. CRF, Tab 9 at 1. Consequently, the appellant's petition for enforcement has now been referred to the Board for a final decision on issues of compliance pursuant to 5 C.F.R. § 1201.183(c)(1). *See* CRF, Tab 9 at 2.

¶3 On August 4, 2021, the Office of the Clerk of the Board issued an acknowledgement order in the instant proceeding ordering the agency to submit evidence of compliance within 15 calendar days. *Id.* at 3. On August 19, 2021, the agency submitted its statement, in which it represented that it was in full compliance with the compliance initial decision. CRF, Tab 10. The appellant has submitted several filings responding to the agency's statement of compliance. CRF, Tabs 11, 12, and 13. For the reasons discussed below, we now find the agency in compliance and dismiss the petition for enforcement.

BACKGROUND

¶4 This proceeding arises out of the appellant's nonselection for a position as a teacher, 0220 Middle School Social Studies at Fort Campbell, Referral No. 081475 ("the Social Studies Teacher position" or "subject position"), with the Department of Defense Education Activity in the Americas Region (DoDEA). On an unspecified date, the appellant applied to DoDEA using the agency's

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> (ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§ 1201.114 and 1201.115 of this part.

5 C.F.R. § 1201.183(a)(6). The Board's regulations further provide that if "a party found to be in noncompliance under paragraph (a)(5) of this section does not file a timely pleading with the Clerk of the Board as required by paragraph (a)(6) of this section, the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section." 5 C.F.R. § 1201.183(b).

online Employment Application System (EAS) and indicated her interest in a variety of teaching positions within the agency. IAF, Tab 1 at 30-38. "[E]AS is a web-based application system that the agency uses to fill educator-position vacancies; applicants enter personal and professional information into EAS and identify 'teaching categories and location preferences for which they would like to be considered.'" ID at 2.

¶5 According to the agency's submission, the agency does not announce vacant positions in DoDEA pursuant to 10 U.S.C. § 2164. CRF, Tab 10 at 2. Instead, to fill a vacancy for a teacher position, an agency school administrator submits a Request for Personnel Action (RPA) to the agency's recruitment division. *Id.* at 29. Once the recruitment division receives the RPA, a human resources (HR) staffing specialist queries EAS for qualified candidates. *Id.* at 29-30. At that time, EAS performs an automated review of the applicants' data and assigns a score to each applicant that cannot be "manipulated" by the HR staffing specialist or the applicant. *Id.* at 30.

¶6 An external applicant claiming veterans' preference or derived veterans' preference may submit documentation supporting the claim through EAS. ID at 2. EAS, however, does not determine eligibility for veterans' preference. CRF, Tab 10 at 30. Rather, an HR specialist will evaluate the supporting documentation, determine whether the applicant is eligible for veterans' preference, and, if so, add the appropriate amount of veterans' preference points to the applicant's EAS-assigned score. *Id.*

¶7 After running the EAS query, an HR specialist will then generate a candidate referral list consisting of all internal candidates—who are not ranked or scored by EAS—and the 25 highest-scoring external candidates, listed in the

order of their score from highest to lowest.[5] *Id.* The referral list will then be provided to a selecting official for consideration. *Id.*

¶8 On or about October 11, 2019, the agency completed the referral process for the subject position. ID at 2; CRF, Tab 10 at 30. The referral list contained 52 candidates, consisting of 26 internal candidates and 26 external candidates. *See* CRF, Tab 10 at 19-21, 30-31. The EAS algorithm assigned the appellant a score of 45 based on her answers to the questions in the online application. *Id.* at 31-32. In connection with her application, the appellant identified her husband by name and submitted paperwork that the administrative judge later found established her entitlement under the VEOA to a 10-point preference as the spouse of a service-connected disabled veteran who has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia. ID at 2-5. The agency, however, found her documentation insufficient and thus denied her the 10-point preference to which she was entitled. ID at 4. Based on this decision, the appellant was erroneously ranked number 14 on the external candidates list with a score of 45, when in fact, she should have been ranked number 9 with a score of 55. CID at 2; CRF, Tab 10 at 31-32.

¶9 The selecting official decided to interview two candidates for the Social Studies Teacher position: the top-ranked external candidate who had been assigned a score of 71; and an internal candidate, M.O., whom, per procedure, EAS did not score. CRF, Tab 10 at 19-21, 27. The selecting official originally selected the top-ranked external candidate, but he declined the offer. *Id.* at 31. The selecting official then selected M.O. who accepted the offer and was appointed to the position on February 16, 2021. *Id.* The agency notified the appellant that she had not been selected for the position in February 2021. ID

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[5] The agency will refer more than 25 external candidates if the 25th-ranked candidate's score ties that of another candidate, as occurred here. *See* CRF, Tab 10 at 17.

at 4. The appellant sought relief from the Department of Labor, and when that effort was unsuccessful, she appealed to the Board. *Id.*

¶10 In the underlying appeal, the administrative judge framed the principal issue as "whether the appellant was entitled to . . . [derived veterans'] preference," which the administrative judge determined "should be answered in the affirmative." ID at 5. Since the appellant had shown that the agency had not accorded the appellant her preference rights under the competitive examination process and given her the correct ranking, the administrative judge found that the agency had violated the VEOA and granted her request for corrective action.[6] ID at 9. Accordingly, the administrative judge ordered the agency to reconstruct the hiring for the Social Studies Teacher position within 30 days of March 24, 2021. ID at 9-10.

¶11 On March 19, 2021, the agency notified the appellant by letter that the agency had "reconstructed the certificate of qualified candidates" for the Social Studies Teacher position and given her the additional 10 points to which she was entitled. CID at 2-3. The agency concluded that the recalculated score "did not [a]ffect the validity of the selection made by the hiring official" in the original hiring process because the primary selectee (the original top-ranked external candidate) remained the top-ranked external applicant, while the alternate selectee (M.O.) was an internal candidate (and thus, the agency could select her without regard to veterans' preference) who, the agency asserted, "ranked higher on both the original and the reconstructed list." CID at 3.

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[6] It is unclear whether this approach to the issue was entirely correct because, as discussed *infra* at paragraphs 19 through 23, veterans' preference points do not apply when an agency selects an internal candidate for a position through merit promotion procedures, which is effectively what occurred in this case when the agency ultimately selected the internal candidate, M.O., for the subject position. However, since neither party has challenged the initial decision, the decision is the law of the case and we address the compliance issues under the framework set forth in the initial decision and the CID.

¶12 The appellant thereafter filed a petition for enforcement, which the administrative judge granted. The administrative judge found that the agency's reconstructed hiring process was deficient in four aspects. First, the agency had not removed the incumbent, M.O., from her role while it conducted the reconstructed process, as required under Board precedent. CID at 7. Second, the agency did not show that it actually presented the reconstructed certificate of eligible candidates to a selecting official or did anything more than seek to justify its past actions "instead of affording the appellant the reconstructed hiring that she was entitled to." CID at 8. Third, the agency's documentation did not show, as the agency claimed in its letter, that M.O. had a superior ranking to the appellant, and the administrative judge noted there was "no explanation why [M.O.] was selected, over the appellant or anyone else." *Id.* Finally, the administrative judge found that the agency had not provided the "external vacancy announcement or other evidence indicating the legal rules that would apply to a lawful selection process," and indeed, did not present evidence regarding its supposed reconstructed hiring process generally, opting instead to rely primarily on its "lawyers' words." CID at 9-10.

DISCUSSION OF ARGUMENTS AND EVIDENCE ON COMPLIANCE

¶13 In its August 19, 2021 statement of compliance, the agency states that it has complied with the final decision because the evidence shows that it removed the incumbent, M.O., from the position, had the same selecting official review and rely on all candidates' files available during the original selection process, corrected the appellant's score, and gave the appellant an opportunity to compete for the vacancy at issue. CRF, Tab 10 at 7-8. In support of its statement of compliance, the agency provides, *inter alia*, the sworn declaration of an agency Supervisory HR Specialist, *id.* at 28-33; a memorandum signed by the selecting official, *id.* at 27; and a Notification of Personnel Action (Standard Form 50)

reflecting M.O.'s August 1, 2021 reassignment from the subject position to another teaching position, *id.* at 24.

¶14 The Supervisory HR Specialist's declaration explains EAS, the agency's procedures for filling teacher vacancies, and the method by which the agency assembled the certificate of best qualified candidates for the selecting official in this case. The declaration further states that on August 1, 2021, the agency reassigned M.O. from the position at issue and manually reconstructed the certificate of eligible candidates to ensure that the applicants' scores appeared as they were in October 2019. *Id.* at 32. The Supervisory HR Specialist then provided the reconstructed certificate to the selecting official, who is the same selecting official as in the original hiring process, and instructed her to review it and document selections as if it were the only referral received. *Id.* at 27, 33. The selecting official reviewed it and returned the referral with the selection of M.O. *Id.* at 33. The selecting official did not re-interview M.O. or conduct any further interviews. *Id.* at 27. The selecting official explained that she had selected M.O. for an interview previously because of her "experiences as reflected on her resume." *Id.* Based on this evidence, the agency requests that the Board find it in compliance.

¶15 The appellant disputes virtually all the agency's evidence of compliance. She broadly accuses the Supervisory HR Specialist, the selecting official, and the agency's representative of lying to the Board and "falsifying documents," CRF, Tab 11 at 10, but has offered nothing to substantiate those allegations. More specifically, she disputes her score and the score of the top-ranked external candidate, who she suggests has been over-rated, *see id.* at 5, 8-9, and alleges that the agency "manipulates the scoring rubric for their benefit."[7] *Id.* at 7. She

[7] The appellant asserts that she attached documents to support her allegations of score manipulation, including a purported submission to the MSPB dated March 19, 2021 (of which the MSPB has no record), but her filings do not say what she claims they say. For example, the appellant cites to a purported "Exhibit C 1-97," but the Exhibit C

further contends that the agency has not shown how they arrived at her score and "has not shown by a preponderance of the evidence that [M.O.] is the most qualified and should have been selected over all, to include the [a]ppellant." *Id.* at 9. Additionally, the appellant observes that "[t]he [a]gency [has] yet to show [M.O.'s] rating and competencies score, but continue[s] to say hers[] is higher than the [a]ppellant's without any proof." *Id.* at 11. She also disputes whether M.O. was, in fact, reassigned from the position at issue. *Id.* at 8. Finally, she contends that the agency violated her rights under the VEOA because "[a]ppellant Hobson at the time of the agency's selection for [the] stated case was [a] preference-eligible applicant and she was passed over for not one, but two non-preference applicants." CRF, Tab 12 at 5. The appellant requests sanctions for the agency's alleged noncompliance. CRF, Tab 11 at 13-14.

ANALYSIS

¶16 "The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order." *Phillips v. Department of the Navy*, 114 M.S.P.R. 19, ¶ 7 (2010). The Board's power to compel compliance with its orders "is broad and far-reaching and functions to ensure that . . . 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." *Id.* The agency bears the burden of proving compliance by a preponderance of the evidence. 5 C.F.R. § 1201.183(d).

¶17 Under the VEOA, an appellant whose veterans' preference rights were violated is entitled to a selection process "consistent with law." *Weed v. Social*

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attached to her response contains only 3 pages and appears to concern a third party's EEO complaint and alleged involuntary resignation. *See* CRF, Tab 11 at 8 *and* 83-86. The Board reviewed the appellant's exhibits attached to her submissions in this proceeding and found nothing therein to support her claims that the agency manipulates EAS's score assignments.

Security Administration, 110 M.S.P.R. 468, ¶ 6 (2009). Critically, the outcome of "a lawful selection process may benefit individuals other than the appellant," *id.* ¶ 12, because an appellant is generally not entitled to a position with the agency. *See Phillips*, 114 M.S.P.R. 19, ¶ 21; *Weed*, 110 M.S.P.R. 468, ¶ 6; *see also Scharein v. Department of the Army*, 91 M.S.P.R. 329, ¶ 10 (2002) ("The VEOA does not guarantee a preference eligible a position but only an opportunity to compete with the other candidates on the certificate of eligibles."). Accordingly, to establish compliance, "the agency must show that its reconstruction of the selection process" for the position at issue "was in accordance with applicable veterans' preference laws and that any subsequent appointment . . . was the result of fair and lawful consideration of the pool of candidates, including the appellant, under an appropriate reconstruction." *See Phillips*, 114 M.S.P.R. 19, ¶ 7.

¶18 A lawful reconstructed selection process requires the agency to begin by removing the improperly appointed selectee from the subject position during the reconstruction. *E.g.*, *Weed*, 110 M.S.P.R. 468, ¶ 13. Further, to the extent possible, the selecting official should be the same person as in the original hiring process and should base their decision on the "circumstances at the time of the original selections, including filling the same number of positions during the reconstructed process as [the agency] did in the original one." *Phillips*, 114 M.S.P.R. 19, ¶ 19.

¶19 Once the agency has recreated the vacancy, the "agency has the discretion to fill [the] vacant position by any authorized method." *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶ 11 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007). "Merit promotion procedures constitute an authorized method for evaluating and selecting from among internal candidates, and competitive examination is an authorized method for evaluating and selecting from among external candidates." *Id.* (internal citations omitted). An agency may consider both internal and external candidates for the same position simultaneously, and "this results in both external and internal competitions.'" *Id.* When an agency

accepts applications both from external and internal applicants, the agency must provide a preference eligible the right to compete under merit promotion principles as well. 5 U.S.C. § 3304(f)(1). Regarding merit promotion competition, we have observed:

> Requirements governing merit promotion competition . . . differ significantly from those applicable to open competitive examinations. The regulatory provisions governing merit promotion programs do not require selection from among the three top-ranked candidates; instead, they provide for selection of any of a group of 'best qualified' candidates . . . . These authorities also do not provide for the addition of preference points or for the other special preference-related procedures . . . [required for] open competitive examinations. In fact, regulations governing merit promotions seem to prohibit such preferences. Finally, the Board has held that employees are not entitled to veteran preference under merit promotion regulations.

Brandt v. Department of the Air Force, 103 M.S.P.R. 671, ¶ 16 (2006) (internal citations omitted).

¶20 We are satisfied that the agency has shown by preponderant evidence that its reconstructed selection process was in accordance with law. The agency has presented documentary evidence that it removed M.O. from the subject position by reassigning her to a different teaching position on August 1, 2021, CRF, Tab 10 at 23-24, thereby creating a vacancy in the subject position.[8] CRF, Tab 10 at 22. It then calculated the appellant's correct score and ranking on the external candidate list by adding 10 points representing the appellant's derived veterans' preference to her EAS-assigned score of 45. *See id.* at 16. The agency then

[8] Under our precedents, it was not necessary for the agency to remove M.O. from Federal service altogether to conduct a bona fide reconstruction; rather, it was sufficient to reassign her to another position within the agency. *See, e.g.*, *Weed*, 110 M.S.P.R. 468, ¶ 13 ("[T]he 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.").

elected not to hire from the external list at all and instead decided to select an applicant from the internal list, *see id.* at 17, which was lawful. *See, e.g.*, *Joseph*, 505 F.3d at 1384 (affirming the Board's conclusion that the agency did not violate VEOA where it gave the appellant 10-point veterans' preference but selected the internal candidate because "no statute or regulatory provision . . . required the [agency], once it undertook to inaugurate the selection process by following the alternative procedure, to limit itself to the competitive examination process in making its final selection").

¶21 Thereafter, the same selecting official as in the original hiring process considered the applications of the candidates on the certificate of best qualified candidates, including the appellant's, and selected M.O. based on her interview and her experiences as reflected on her resume. CRF, Tab 10 at 27. Although the reconstructed process did not alter the outcome, we find that the agency has shown that it gave the appellant a bona fide opportunity to compete for the subject position, which is what the VEOA requires. *See, e.g.*, *Dean v. Consumer Product Safety Commission*, 108 M.S.P.R. 137, ¶ 11 (2008) (finding no violation of the applicant's preference rights where he was placed on the referral list for competitive and merit promotion announcements, although he was not selected to interview); *Brandt*, 103 M.S.P.R. 671, ¶ 23 (same).

¶22 The appellant's challenges to the agency's evidence of compliance are unavailing. Contrary to the appellant's assertions, the agency has shown how it arrived at her pre-veterans' preference score of 45: the EAS algorithm assigned it based on her answers to application questions. The appellant has not presented any evidence that would tend to show that the agency manipulated the EAS algorithm to depress her score or to elevate others' scores. While the appellant is correct that the selecting official referred to M.O. as having "high scores," *see* CRF, Tab 10 at 27, despite there being no evidence in the record regarding those scores, the referral list and the Supervisory HR Specialist's sworn declaration

both confirm that M.O. did not, in fact, receive a score because she was an internal candidate appointed under merit promotion procedures.

¶23 Although the appellant contends that the agency has not proven that M.O.is "the most qualified" applicant, *see* CRF, Tab 11 at 9, the agency was not required to prove that; rather, her selection was in accordance with law so long as she was "among a group of best qualified candidates," *see* 5 C.F.R. § 335.103(b)(4), which she was by virtue of being on the referral list of qualified candidates along with the appellant and the other 50 applicants. *See* CRF, Tab 10 at 15-17. Finally, the appellant's contention that she was "passed over" for M.O., who is not preference eligible, is inapposite because veterans' preference rules such as the prohibition on passing over a preference eligible without dispensation from the Office of Personnel Management, *see* 5 U.S.C. § 3318(c)(1), do not apply to merit promotions. *See Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, ¶ 10 (2001) ("The statutes that may have given the appellant an advantage in a competitive examination were not violated because those statutes did not apply to the selection at issue.").

¶24 For the reasons stated above, we find the agency in compliance and dismiss the petition for enforcement. 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(c)(1) (5 C.F.R. § 1201.183(c)(1)).

NOTICE OF APPEAL RIGHTS[9]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit

[9] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) **Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at

http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 229 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case,

and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[10] The court of appeals must receive your petition for

[10] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals

review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

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for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

Electronic Mail	Faye R. Hobson 1948 Whirlaway Circle Clarksville, TN 37042
Electronic Mail	Emeka Nwofili, Esq. Department of Defense 700 Westpark Drive Peachtree City, GA 30269
Electronic Mail	Melissa Martinez Department of Defense Office of General Counsel, DDESS 700 West Park Drive, 3rd Floor Peachtree City, GA 30269

June 2, 2023
(Date)

/s/
Dinh Chung
Case Management Specialist