

## **Federal Circuit Says HHS Denied Veteran Preference Rights and Orders Agency to Award Position to Him**

By Debra D'Agostino  
January 13, 2010

*Debra A. D'Agostino is a Senior Associate with Tully Rinckey PLLC and concentrates her practice in federal sector employment and labor law.*

The U.S. Court of Appeals for the Federal Circuit, in *Marshall v. HHS*, Fed. Cir., No. 2009-3086, ruled that an applicant for a position at the Centers for Disease Control (CDC) who was passed over in violation of his veterans' preference rights is entitled to the position, not a reconstruction of the hiring process, the remedy ordered by the Merit Systems Protection Board (MSPB).

Marshall, a 20 percent disabled veteran, applied for a budget analyst position. While he was considered a "strong candidate," CDC did not hire him because of a hiring freeze. Marshall continued to express interest in the position, but, nevertheless, CDC removed his name from consideration and later selected a candidate who was ranked lower on the eligibles' list than Marshall.

Marshall then successfully appealed his non-selection to MSPB under the Veterans Employment Opportunities Act (VEOA). As relief, the administrative judge ordered Marshall's placement in the position, noting that HHS admitted that it violated VEOA and would have hired him had his name not been removed from the list.

Typically, pursuant to *Dean v. USDA*, 99 M.S.P.R. 533 (2005), individuals whose veterans' preference rights are violated are entitled to a reconstruction of the hiring process, not the position sought. Because of this precedent, the full MSPB, on HHS's petition for review, overturned the administrative judge and ordered reconstruction of the hiring process instead of the position as relief.

The CDC, however, decided not to fill the budget analyst position after reconstructing the hiring process. Despite this, the MSPB found that HHS was in full compliance with its order, prompting Marshall to appeal the decision to the Federal Circuit. On appeal, the Federal Circuit agreed with Marshall that placement in the position is the appropriate remedy where the agency concedes that it violated the VEOA and that it would have selected the veteran in the absence of the violation.

The court held there is no need for a manufactured reconstruction process in this case because, "the record here is clear regarding what would have occurred absent the violation. HHS would have selected Mr. Marshall for the Budget Analyst position."

Further, the court recognized that while in some cases appointment to the position may not be possible because the particular position may have substantially changed or may no longer exist, but held that in such cases, "the board should follow *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984), which held that individuals should be placed as near as possible to the status quo ante."

Here, however, the position still existed and HHS admitted that it would have placed Marshall in it had it not violated the VEOA. "The fact that the agency filled the position with another employee in violation of the VEOA preferences is not an adequate reason to force the aggrieved veteran into a different position," the court said.

The Federal Circuit also ruled that Marshall was entitled to lost wages and benefits, which were not precluded by virtue of the fact that he accepted employment with another agency because that position was at a lower grade than the CDC position.