

Title: Mechanical Power Presses (29 CFR 1910.217).

OMB Number: 1218-0229.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal government; State, local, or tribal governments.

Number of Respondents: 191,750 (assuming one mechanical power press per employer).

Frequency of Recordkeeping: On occasion.

Average Time per Response: Varies from 5 minutes (.08 hour) to 20 minutes (.33 hour).

Total Annual Hours Requested: 1,372,930.

IV. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 3-2000 (65 FR 50017).

Signed at Washington, DC, on June 21st, 2002.

John L. Henshaw,

Assistant Secretary of Labor.

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MERIT SYSTEMS PROTECTION BOARD

[MSPB Docket No. DA-3443-00-0217-I-1]

Opportunity to File Amicus Briefs in *Kevdin D. Abrahamsen v. Department of Veterans Affairs*

AGENCY: Merit Systems Protection Board.

ACTION: The Merit Systems Protection Board is providing interested parties with an opportunity to submit *amicus* briefs in the above referenced appeal. The issues to be addressed in such briefs are set forth in the Board's June 18, 2002, Order, which is reprinted in its entirety in the Summary below.

SUMMARY:

Order

The agency issued a vacancy announcement in which it solicited applications to fill several positions as a Veterans Service Representative, GS-0996-07 with promotion potential to the GS-10 grade, in various agency offices, including four positions to be filled in the agency's Muskogee, Oklahoma office, IAF, Tab 4, Subtab 4a. The vacancy announcement stated that applicants would be evaluated on the

basis of the application package submitted, rated on the quality and extent of their total accomplishments, experience, and/or education, and ranked on the basis of the degree to which each candidate's background matched the skills and ability requirements identified for the position. *Id.* The vacancy announcement further provided that individuals could apply for these positions if they met the criteria for one of the following recruitment categories: (1) Outstanding Scholars; (2) Veterans Readjustment Act (VRA) eligibles; (3) 30% or more disabled veterans; (4) Preference eligibles and veterans separated after 3 or more years of continuous active service; (5) Chapter 31 veterans; (6) Handicapped eligibles; and (7) VA CTAP or Interagency CTAP eligibles. *Id.*

The appellant submitted an application for the vacancies in the Muskogee office and attached a letter from the agency certifying his status as a 30% or more disabled veteran. *Id.*, Subtab 4b. After the vacancy announcement closed, the agency's Human Resources Center provided the selecting official with several memoranda, each of which related to a specific recruitment category listed in the vacancy announcement, listing the candidates who were eligible for consideration under the corresponding recruitment category. *Id.* Subtab 4c. The memoranda listed the candidates in alphabetical order by last name, and there is no indication that the candidates were rated or ranked. The agency included the appellant's name on a memorandum of VRA eligibles. On June 1, 1999, the selecting official noted his selections on the memoranda and returned them to the Human Resources Center. Each of the selected candidates had been included on the memorandum corresponding to the Outstanding Scholar program, although one of the selectees also had been included on the memorandum of VRA eligibles. By letter dated June 4, 1999, the agency notified the appellant that he had not been selected. IAF, Tab 4, Subtab 4d.

On November 12, 1999, the appellant wrote the agency requesting further information regarding his nonselection.¹ In its response, the agency asserted that applications were accepted from special categories of applicants, as authorized by the Office of Personnel Management (OPM), and that veterans' preference was applied within each of these special groups as required by law. IAF, Tab 1. The appellant filed a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS) concerning his non-selection,² and, by letter dated January 7, 2000,

VETS notified the appellant that it was closing his case, "indicating no merit." *Id.*

On January 25, 2000, the appellant filed an appeal under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a, in which he claimed that the agency violated his veterans' preference rights. IAF, Tab 1. Specifically, the appellant claimed that the agency misapplied the Outstanding Scholar program when it selected the four candidates that appeared on the Outstanding Scholar program memorandum because the agency's use of this program "as a primary tool and not as a supplement did not allow the full entitlement of veterans preference when the selections were made." *Id.* The administrative judge issued an acknowledgement order requiring the appellant to submit evidence and argument to show that the agency violated his rights under a specific statute or regulation relating to veterans' preference. IAF, Tab 2. In his response to this order, the appellant alleged that the agency violated 5 U.S.C. 2302(b)(1), (b)(11)(A) and (B), and (b)(12), as well as 38 U.S.C. 4214(a)(1). IAF, Tab 3. In its response to the appeal, the agency argued that veterans' preference does not apply to appointment made under the Outstanding Scholar program and that the Board lacks jurisdiction over any allegation that the agency abused or misused the program. IAF, Tab 4.

On March 22, 2000, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, finding that the appellant failed to meet his burden of proof on the issue of jurisdiction. Initial Decision (ID) at 4-5; see 5 CFR 1201.56(a)(2)(1). The administrative judge found that the Outstanding Scholar program hiring authority permitted the agency to hire individuals without regard to veterans' preference and stated that the appellant failed to identify a specific statute or regulation relating to his veterans' preference rights which the agency violate when it used the Outstanding Scholar hiring authority as a basis for its selections. ID at 4-5. The appellant has filed a timely petition for review in which he states that the Outstanding Scholar program is outside the Board's jurisdiction but argues that the administrative judge erred in concluding that the agency did not violate his veterans' preference rights under 38 U.S.C. 4214(a)(1). Petition for Review File (PFRF), Tab 1. The agency has filed a response in which it argues that 38 U.S.C. 4214(a)(1) is not a statute relating to veterans' preference. PFRF, Tab 3.

The Board has previously discussed the issue presented by this case in *Augustine v. Department of Veterans Affairs*, 88 M.S.P.R. 407 (2001). In *Augustine*, the Board found that the Veterans Service Representative position is a competitive service position, and it discussed the means by which veterans' preference is applied in the competitive examining process. *Augustine*, 88 M.S.P.R. 407, ¶¶ 8, 10–11. In order to qualify for an appointment to a competitive service position, an applicant must pass an examination or be specifically excepted from examination under section 3302 of title 5, United States Code. 5 U.S.C. 3304(b). In this case, there is no indication that any of the candidates the agency referred to the selecting official passed an examination for the Veterans Service Representative position.³ However, when the competitive examining process is used to fill vacancies for competitive service positions other than scientific and professional positions in the grades of GS–09 or higher, disabled veterans who have a compensable service-connected disability of 10 percent or more, such as the appellant, are entered onto registers and referred on certificates of eligibles in order of their ratings ahead of all remaining applicants. 5 U.S.C. 3313(2), 3317(a). Furthermore, the appointing authority is required to select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate of eligibles provided by the examining authority. 5 U.S.C. 3318(a). If the appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not preference eligible, the appointing authority must file written reasons for the pass over with OPM and obtain OPM's approval. 5 U.S.C. 3318(b)(1). In the case of a preference eligible veteran with a service-connected disability of 30% or more, such as the appellant, the veteran is entitled to notice of the proposed pass over and an opportunity to respond to OPM. 5 U.S.C. 3318(b)(2).

It appears that only one of the candidates the agency selected was a veteran, and there is no indication that any of the selected candidates were preference eligible.⁴ Thus, had the agency used competitive examining procedures to fill the positions at issue in this case, the appellant, as a preference eligible veteran with a service-connected disability of 10 percent or more, would have been ranked ahead of at least three of the candidates the agency selected, and the agency could not have selected any of

these three candidates without obtaining OPM's approval to pass over the appellant. As the Board pointed out in *Augustine*, however, OPM's official guidance concerning the Outstanding Scholar program states:

Under the terms of the *Luevano* [v. *Campbell*, 93 F.R.D. 68 (D.D.C. 1981)] consent decree the Outstanding Scholar program was established as a supplement to the competitive examining process where under-representation of Blacks and Hispanics exists. This authority was not intended to replace competitive examining, nor to become the primary method of hiring. This authority allows agencies to appoint Outstanding Scholars [meeting specified college grade-point or class standing criteria] as an exception to normal competitive procedures, that is, the rule of three [5 U.S.C. 3318(a)] and veterans' preference [5 U.S.C. 3318(b)] do not apply.

Office of Personnel Management, *Delegated Examining Operations Handbook*, § 2.8(A). Therefore, by considering the selected candidates under the non-competitive Outstanding Scholar program, the agency deprived the appellant of a significant advantage he would have had over these candidates if the agency had used competitive examining procedures.

While an agency generally has the discretion to fill a vacancy through any authorized method, see *Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, ¶ 10 (2001), the record does not establish that the agency was authorized to use the Outstanding Scholar program in this case. The *Delegated Examining Operations Handbook* lists the criteria that positions must meet before they are covered under the *Luevano* consent decree:

There are two additional limitations on the types of occupations for which agencies can examine:

1. *Positions Covered Under the Luevano Consent Decree* (formerly called *Administrative Careers With America—ACWA*) Defined. The series and job titles covered under the *Luevano* Consent Decree are listed in Appendix B. In addition to the series being one of those listed in the Appendix, a covered position must also meet ALL of the following criteria:

- (a) it is being filled at either GS–5 or GS–7;
- (b) it is classified at 2-grade intervals; and
- (c) it must have promotion potential to GS–9, or higher.

Agencies are reminded that the *Luevano* consent decree required the establishment and application of an approved rating procedure for entry into these covered positions. OPM continues to administer an approved examining instrument on a case-by-case basis; alternatively, OPM will administer the written test developed for the *Luevano* positions for an agency, upon request. When using the approved rating

instrument, the specialized qualification questions can be modified, but the rating questions cannot be changed. Agencies that wish to consider developing an alternative examining instrument must obtain approval from the Department of Justice and the plaintiffs prior to implementation. Agencies should also be aware that there are data collection and reporting requirements that go along with examining for *Luevano* positions.

The Outstanding Scholar provision of the *Luevano* decree is still available as a supplement to a formal competitive examination.

Id., § 1.2(B) (emphasis in the original).

It appears that the positions at issue in this case meet most of the *Luevano* criteria identified in the OPM handbook. The 0996 classification series is identified in Appendix B of the handbook, and the vacancy announcement indicated that the positions were being filled at the grade of GS–7 with promotion potential to the GS–10 grade. However, the job title identified in Appendix B of the OPM handbook for the 0996 classification series is “Veterans Claims Examining,” while the job title of the advertised positions in this case was “Veterans Service Representative.” In addition, it is unclear whether the position of “Veterans Service Representative” is classified in 2-grade intervals. Therefore, to the extent that the agency relied on authority delegated from OPM to appoint Outstanding Scholar program candidates to positions covered by the *Luevano* consent decree, the record, as it currently stands, does not establish that the positions at issue were covered by that decree.

Furthermore, even if the positions were covered by the *Luevano* consent decree, the record does not show that the agency's use of the Outstanding Scholar program in this case was consistent with OPM's requirement that the program be invoked “as a supplement to the competitive examining process where the under-representation of Blacks and Hispanics exists.” *Delegated Examining Operations Handbook*, § 2.8(A); see *Augustine*, 88 M.S.P.R. 407, ¶ 18. As mentioned previously, the record does not indicate that the agency conducted a competitive examination before selecting the four individuals to fill the vacancies at issue in this case. If it had, preference eligible candidates who should have taken and passed the competitive examination presumably would have been afforded their veterans' preference rights, at least with respect to the positions filled through the competitive examining process. Furthermore, the record contains no evidence to support the proposition that the agency invoked the Outstanding

Scholar appointing authority in this case to ameliorate "under-representation of Blacks and Hispanics." See *Augustine*, 88 M.S.P.R. 407, ¶ 18.

With respect to the three selectees who were not included on the VRA memoranda, the agency has not identified any authority, other than the Outstanding Scholar program, that would have allowed these candidates to be appointed to the positions for which they were selected without passing an examination. Therefore, if the agency was not authorized to use the Outstanding Scholar hiring authority in this case, it could not have properly hired these candidates without conducting an examination. 5 U.S.C. 3304(b) ("An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title."). In addition, because at least 36 applicants applied for the four vacancies, it appears that any examination the agency may have administered should have been an open, competitive examination in which the appellant and other preference eligible candidates would have had the opportunity to compete with the selected candidates. 5 U.S.C. 3304(a)(1). Following such an examination, the agency would have been required to augment the ratings of any preference eligible candidates who passed the examination by the appropriate number of veterans' preference points. 5 U.S.C. 3309. In addition, if the appellant had taken and passed the examination, his name would have been entered ahead of the names of any of the candidates who were not disabled veterans with a compensable service-connected disability of 10 percent or more, and the agency would have had to obtain OPM's approval to pass over the appellant to select any of the candidates it actually selected who did not qualify for a non-competitive appointment under some other statutory or regulatory authority. 5 U.S.C. 3313(2), 3318(a), (b).

Accordingly, the agency's use of the Outstanding Scholar hiring authority essentially precluded the appellant from exercising any veterans' preference rights he may have had in relation to the Outstanding Scholar candidates. Because the record as it currently stands, does not establish that the agency was properly authorized to use the Outstanding Scholar program when it filled the vacancies at issue in this appeal, we ORDER the agency to show cause why the Board should not find

that the agency's use of the Outstanding Scholar hiring authority violated the appellant's veterans' preference rights by allowing the agency to appoint non-preference eligible candidates without affording the appellant the opportunity to compete against these candidates and exercise the veterans' preference rights he would have been afforded in a competitive examining process.

Within 30 days of the date of this order, the agency shall submit evidence and argument which (1) identifies the rules governing the use of the Outstanding Scholar appointing method, both in general, and when, as in this case, a qualified individual with veterans' preference applies for a competitive service position; and (2) establishes that the agency's use of the Outstanding Scholar hiring authority in this case complied with the rules identified in (1). The appellant may respond to the agency's submission within 30 days of the date of the service of the agency's argument and evidence.

The Clerk is directed to cause this order to be printed in the **Federal Register**, and to advise any interested party that it may submit an *amicus* brief on the issues identified above, within 30 days of the date of publication. The notice shall instruct *amici* to file two copies of their briefs with the Clerk of the Board, and shall include instruction for service of briefs on the agency. The Clerk will serve copies of *amicus* briefs on the appellant.

The agency and the appellant may respond to any *amicus* briefs filed within 20 days from the latest date an *amicus* brief is served, but in any case no later than 60 days from the date of publication of the notice in the **Federal Register**.

¹ Although the record does not include a copy of the appellant's letter to the agency, the agency's response identified the date of the letter and briefly summarized its contents as a request for "information regarding your nonselection as a 30 percent or greater disabled veteran for the position of Veterans Service Representative in our Veterans Service Center, at the Muskogee VA Regional Office." IAF, Tab 1.

² Because the record does not include a copy of the complaint the appellant filed with VETS, it is not clear when the appellant filed his complaint with the Department of Labor.

³ OPM requires written and/or performance tests for positions at the grades of GS-05 and GS-07 in the 0996 occupational series. *Office of Personnel Management Operating Manual, Qualification Standards for General Schedule Positions*, § 5, <<http://www.opm.gov/qualifications/sec-v/sec-v.htm>>.

⁴ As mentioned previously, one of the candidates selected appeared on the Outstanding Scholar program memorandum and the VRA memorandum. Persons qualified for a VRA appointment include veterans of the Vietnam era and veterans who first became a member of the Armed Forces or first entered on active duty as a member of the Armed Forces after May 7, 1975, and were discharged or released from active duty under conditions other than dishonorable. 38 U.S.C. 4214(b)(2). However, veterans who are eligible for VRA appointments are not necessarily preference eligible. Still, it is possible that this candidate was preference eligible. See 5 U.S.C. 2108(3)(A), (B), (C) (defining the veterans who are preference eligible).

⁵ The names of 36 applicants appear on the 6 memoranda the agency Human Resources Center provided the selecting official. IAF, Tab 4, Subtab 4c. The first merit system principle states that "[r]ecruitment should be from qualified individuals * * * after fair and open competition which assures that all receive equal opportunity," 5 U.S.C. 2301(b)(1), but the statute provides that the President may prescribe rules which shall provide for noncompetitive examinations when competent applicants do not compete after notice has been given of the existence of the vacancy. 5 U.S.C. 3304(a)(2).

DATES: All briefs in response to this notice shall be filed with the Clerk of the Board on or before July 29, 2002.

ADDRESSES: All briefs shall include the case name and docket number noted above (*Kevin D. Abrahamsen v. Department of Veterans Affairs*, MSPB Docket No. DA-3443-00-0217-I-1) and be entitled "Amicus Brief," and shall be submitted in duplicate. Briefs shall be filed with the Office of the Clerk, Merit Systems Protection Board, 1615 M St., NW., Washington, DC 20419. Because of possible mail delays caused by the closure of the Brentwood Mail facility, respondents are encouraged to file with the Clerk by facsimile transmittal to (202) 653-7130. A copy of any *amicus* brief that is submitted must also be served on Stephanie R. Darr, Esq., Office of Regional Counsel, Department of Veterans Affairs, 125 South Main Street, Muskogee, OK 74401.

FOR FURTHER INFORMATION CONTACT: Shannon McCarthy, Deputy Clerk of the Board, or Matthew Shannon, Legal Counsel to the Clerk, at (202) 653-7200.

Dated: June 21, 2002.

Bentley M. Roberts, Jr.,
Clerk of the Board.

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