

To the

MERIT SYSTEMS PROTECTION BOARD

COMMENTS ON THE BOARD PROPOSED RULES

Provided by Rakhmatulla Asatov

A stakeholder in the Board proceedings

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COMMITTEES ON VETERANS' AFFAIRS OF
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III. SYNOPSIS.

a. On April 3, 2014, the Merit Systems Protection Board proposed to change its legislative rules by adding the following:

“Section 1201.57 Establishing Jurisdiction in Appeals Not Covered by Section 1201.56; Burden and Degree of Proof; Scope of Review This proposed regulation, which the Board proposes to insert in place of existing section 1201.57, would make clear that, in contrast to an appeal governed by section 1201.56, in IRA appeals, VEOA appeals, USERRA discrimination and retaliation appeals, and denial of restoration appeals, the appellant is not required to establish all jurisdictional elements by preponderant evidence and bears the burden of proof on the merits.” Emphasis added. *See* Federal Register, [Doc. # 2014-07443](#), p. 18660.

b. However, a close reading of this section reveals that, in addition to jurisdictional elements mentioned above, the Board is also proposing to eliminate the “Burden and degree of proof” regarding the merits of those appeals:

“ (a) Applicability. This section applies to the following types of appeals: (1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221; (2) A request for corrective action under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a(d); ... (d) Scope of the appeal. Appeals covered by this section are limited in scope. With the exception of denial of restoration appeals, the Board will not consider matters described at 5 U.S.C. 7701(c)(2) in an appeal covered by this section.” Emphasis added, *ibid.*

c. The proposed rule at 5 CFR 1201.57 if implemented, “will come as a great shock to our military veterans. For generations veterans have relied on their preference eligibility for government employment, retention, and rehiring, which has been sanctified by one Congress after another. Under the CSRA, enforcement of those rights can only be had by the MSPB.¹ The concern of the citizens of the

¹ Except for those instances provided by 5 U.S.C. 3330b, but not mentioned in the Board decisions.

United States for veteran's preference, guaranteed by law in both private and public employment, has been a solid cornerstone of American public policy.” Cf. [Noble v. Tennessee Valley Authority](#), 892 F. 2d 1013, 1017 - Federal Circuit, 1989.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

The regulations that need to be revised, instead, are [5 CFR 1208.13\(b\) & 23\(b\)](#) and [5 CFR 1201.51\(d\) & 118](#), because they raise “some embarrassing questions”:²

1. Did the Board not mean when it said that it was bound to follow its “reviewing court’s precedential decision”,³ which currently holds that (a) “the Board does not have available to it a summary judgment proceeding”⁴ (b) “Kirkendall is entitled to a hearing on his USERRA claim”⁵ (c) “the Board lacked authority to overrule section 1201... by adjudication”⁶ because its current regulations [5 CFR 1208.13\(b\) & 23\(b\)](#) and the Board law are inconsistent with those decisions?

2. Did the Congress not mean when it said that a violation of any veterans preference requirement is a prohibited personnel practice, subject to both “catch-all”⁷ sections of 5 U.S.C. 2302 and 7701, because the Board, in proposed 5 CFR

² *Ibid.*

³ See *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 n.9 (2012).

⁴ See [Crispin v. Dept. of Commerce](#), 732 F. 2d 919, 922 - Federal Circuit, 1984. See also [Garcia v. Department of Homeland Security](#), 437 F. 3d 1322, 1353 - Federal Circuit, 2006

⁵ See [Kirkendall v. Department of Army](#), 479 F.3d 830, 834 - Federal Circuit, 2007(en banc).

⁶ See [Tunik v. Merit Systems Protection Bd.](#), 407 F. 3d 1326, 1346 - Federal Circuit, 2005.

⁷ See *Kirkendall, ibid.*

1201.56 and .57, is effectively nullifying these congressional policies?⁸

3. Is the Board otherwise trying to reduce the scope of veterans employment rights to an opportunity to compete for Title 5 positions, because “an agency’s failure to comply with 5 U.S.C. § 3304(f) does not amount to a personnel practice prohibited by 5 U.S.C. § 2302(b)(11)”,⁹ a prospective relief of which violation may bring a flood of VEOA appeals and damage the federal government’s reputation?¹⁰

4. “It is provided by statute and regulation, ... that those who are fired for unsatisfactory performance can get a hearing before the MSPB, as can those fired for the efficiency of the service because of misconduct.¹¹ Is it reasonable then to hold that the law bars a hearing to a faithful ... holder of a veteran's preference and who seeks to assert his reemployment rights ahead of a nonveteran?

[5.] Has Congress now provided that the incompetent and dishonest are to be accorded MSPB hearings while heroes who have preserved our liberties are barred? Is the foregoing according to considered congressional intent and legislative history?”¹²

V. SUMMARY OF ARGUMENT.

a. The Board in proposing and promulgating those rules, as well as

⁸ See the *Register* at p. 18658.

⁹ See *Walker v. Department of the Army*, [104 M.S.P.R. 96 ¶ 10](#), 2006.

¹⁰ According to OPM’s last published review of employment certificates, the agencies have violated veterans preference laws in every fourth of them, which “is a serious violation and can constitute a prohibited personnel practice punishable by adverse action, debarment from Federal service, and/or civil penalty”. See *Assessment*, *infra*.

¹¹ See *e.g. Perez v. Department of the Air Force*, p. 1, 1988 (NP). See also [5 CFR 1201.24\(d\)](#).

¹² See *Noble*, *ibid*.

adjudicating the following appeals “definitely answers these questions in the affirmative. It does not even admit the result is unfortunate. Indeed the result is hypertechnical, whimsical, bizarre and misreads the mind of the President, and the minds of 531 Members of Congress in 1978 when the CSRA became law.”¹³

b. The direct and comparative analyses provided below show that the Board and its reviewing Court have long undermined the Congressional policies embodied in the Veterans Preference Act of 1944, continued in USERRA of 1994 and enforced in the VEOA of 1998, that is to provide the veterans assistance in obtaining a government employment and protecting their constitutional rights. As a result, in the fifteen years following the VEOA enactment, neither one of them published an order directing an agency to appoint a *pro se* veteran seeking an appointment to the position that he was certified to be the best qualified for by the agencies themselves.

c. Instead, the Board and its reviewing Court continuously aided federal agencies’ efforts to devise “variety of strategies recently used by agencies that threaten veterans preference”¹⁴ by reducing the scope of veterans preference rights to competition for Title 5 positions¹⁵ in direct contravention of the legislation.¹⁶ Even in those instances where agencies refused to allow veterans to compete for Title 5 positions by misapplying OPM rules the Board would overrule its own

¹³ See *Noble*, *ibid*.

¹⁴ See [H.R. 105-675](#), 1996. See *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#) ¶ 18, 2005.

¹⁵ See *e.g.* [Scarnati v. Department of Veterans Affairs](#), 344 F. 3d 1246, 1248 - Federal Circuit, 2003, with a couple pinpointed exceptions in *Isabella v. Department of State*, [102 M.S.P.R. 259](#) ¶ 10, 2006 and *Graves v. Department of Veterans Affairs*, [114 M.S.P.R. 209](#) ¶ 6, 2010.

¹⁶ See *e.g.* [5 U.S.C. 1302](#), Historical and Revisions Notes.

standards on reversing their decisions.¹⁷ The proposed regulation is another step of the Board's concerted effort to relieve itself from its mandatory duties on affording veterans due process of law.

d. The Board's continuous refusal to adjudicate veterans appeals based on the current legislation "by attaching strings strategically... and gradually eroding constitutional protections"¹⁸ amounts to usurpation of the Article I functions of Congress. Moreover, by overruling its legislative rules through adjudication it created an appearance of injustice that cannot be tolerated by a legal system that strives to resolve cases in a reliable, consistent and objective manner. The arbitrariness of a power that allowed the Board and its reviewing Court to acquit otherwise liable employing agencies if and when they see fit to do so simply cannot be reconciled with the Supreme Court's admonition that "to perform its high function in the best way justice must satisfy the appearance of justice."¹⁹

VI. ARGUMENT.

1. The Board Lacked A Delegated Authority To Deny Evidentiary Hearings.

a. The Board regulations at [5 CFR 1208.23\(b\)](#) states that a "hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established and it has been determined that the appeal is timely". The Board

¹⁷ See e.g. Dale v. Department of Veterans Affairs, [102 M.S.P.R. 646](#), ¶ 13, 2006. The author can cite two dozen cases to support this conclusion, however, for the purpose of brevity he will stop on those instances described below.

¹⁸ Cf. [US v. Scott](#), 450 F. 3d 863, 866 - 9th Circuit, 2006.

¹⁹ Cf. [US v. Lynch](#), 162 F. 3d 732, 747 - 2nd Circuit, 1998.

interpreted this regulations as a way of disposing “of a claim in favor of a defending party, without an evidentiary hearing, and based on matters beyond the claimant's allegations is a summary judgment”.²⁰

b. “However, the Board does not have available to it a summary judgment proceeding. 5 U.S.C. § 7701(a)(1), which covers appeals to the MSPB from agency actions, provides that: An appellant shall have the right to a hearing for which a transcript will be kept. The conference committee report which accompanied the Civil Service Reform Act of 1978 makes clear that this provision was meant to bar summary judgment proceedings.” See *Crispin*, *ibid*.

c. Although the Court agreed that the presiding official had an interest in the orderly administration of her docket, it did *not* agree that this entitled her “to act in contravention of the law and deny petitioner the hearing she is legally entitled to receive.” See *id* at 924.

d. Therefore, by holding that “both the Board and its reviewing court have held that ... the Board has the discretion to decide the case without a full evidentiary hearing”,²¹ the Board has contravened what both of them and the legislation once actually said. See *Carew v. Office of Personnel Management*, [34 M.S.P.R. 527](#) p. 3, 1987.

e. Since the Board in proposing its current rules apparently reviewed *Garcia*'s *en banc* opinion implicitly affirming its *Crispin* decision,²² the Board in

²⁰ See *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 8 (2008). See also *Jarrard Social Security Administration*, [115 M.S.P.R. 397](#), ¶ 8, (2010).

²¹ See *Wible v. Department of the Army*, [2013 MSPB 87](#), ¶ 8, 2013 relying on on other case, which cited *Crispin v. Department of Commerce*, 732 F.2d 919, 922 (Fed. Cir. 1984).

²² See the *Register* at p. 18659.

Wible, supra, could not have meant what its opinion stated. Say it ain't so, Board members.²³

2. Title 5 Section 7701 Applies To VEOA Appeals.

a. In *Kirkendall*, [479 F.3d 830, 834](#), - Federal Circuit, 2009 (*en banc*), the Court also affirmed its panel's opinion that veterans are entitled to a hearing provided by 5 U.S.C. 7701. However, it did not address the applicability of Section 7701 to the petitioner's VEOA claim. Some of its judges, like Judge Bryson, even argued against applying Section 7701 to USERRA appeals: "The USERRA statute does not refer to the proceeding before the Board as an "appeal," and it does not refer to section 7701 as providing the procedures for adjudicating USERRA complaints before the Board. Therefore, section 7701 does not confer an absolute right to a hearing before the Board in USERRA cases. Such a right, if conferred by statute, must be found in the USERRA statute itself." *Id* at 865.

b. The question is whether VEOA refers to the proceeding before the Board as an "appeal" and to section 7701 as providing the procedures for adjudicating VEOA complaints before the Board ? In addition to the majority's opinion expressed in *Kirkendall, supra* the following legislation and authorities answer that question in the affirmative.

(1). In [Stringer v. United States](#), 90 F. Supp. 375, 380 (1950) a Court of Claims,²⁴ relying on the Civil Service Commission's rules, held that "procedural

²³ Cf. [Carver v. Lehman](#), 550 F. 3d 883, 897- Court of Appeals, 9th Circuit, 2008.

²⁴ "Decisions of the Court of Claims are part of the governing body of precedent of the U.S. Court of Appeals for the Federal Circuit, ...and are therefore controlling authority on the Board, " *See* [Sanford v. Connecticut National Guard](#), [50 M.S.P.R. 120 ¶ n. 3](#), August 28, 1991.

requirements of section 14 of the Veterans' Preference Act on which Part 22 of the Commission's regulations is based,²⁵ established fixed rights, and there is no provision in the section as to waiver.".. The requirements of Section 14 are *specific* and *mandatory*. Neither this court, nor the Commission, nor the [agency] can disregard them. Strict compliance is required." Emphasis added.

(2) In [Lowe v. Department of Agriculture](#), p. 6, MSPB, 1984 (NP), the Board held that "Section 18 provided that the act shall not be construed to take away any rights granted to preference eligibles under any existing law, executive order, civil-service rule or regulation. Section 19 stated that the Commission had the duty and authority, with respect to the classified service, to make and enforce "appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this act"

(3). "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S. Rep. No. 95-969, p. 3 (1978). Under that pre-existing system, only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB. 5 U.S.C. § 7701 (1976 ed.)." See [United States v. Fausto](#), 484 US 444 - Supreme Court, 1988.

(4). The VEOA, in turn, is the *general* run of administrative statutes,²⁶ which gives the Board authority to "adjudicate" veterans claims it had previously dismissed.²⁷ "Where there is no clear intention otherwise, a specific statute will not

²⁵ See [5 CFR 1201.Subpart B](#).

²⁶ Cf. Kirkendall, [479 F.3d 830](#) *supra*, at 865. Emphasis added.

²⁷ See e.g. [Noble](#), *supra* at 1015.

be controlled or nullified by a general one, regardless of the priority of enactment”.
See [Morton v. Mancari](#), 417 US 535, 551 - Supreme Court, 1974.²⁸

(5). Moreover, ”VEOA strengthened and broadened the applicability of veterans’ preference, Government-wide, in order to improve redress for preference eligibles. [S. Rep. No. 105-340, at 14-18 \(1998\)](#). Subsection 2302(b)(11) reinforces the Government’s commitment to protecting and preserving the rights of veterans by making it a PPP [Prohibited Personnel Practice] to knowingly violate certain veterans’ preference laws, rules, and regulations”.²⁹

(6) It did not limit those rights to an opportunity “to be considered alongside internal candidates under merit promotion procedures.” *See e.g.* [Joseph v. Federal Trade Commission](#), [103 M.S.P.R. 684](#), ¶10, 2006.

(7). Furthermore, there is nothing in the legislative history of VEOA, *supra*, that indicates affirmatively any congressional intent to repeal the VPA. “Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary. This is a prototypical case where an adjudication of repeal by implication is not appropriate.

[8.] The preference is a longstanding, important component of the Government's [veterans’ assistance] program. In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable”.³⁰

(9). The rules of statutory construction that the Board is “quite familiar with”

²⁸ *See* also [Isabella v. Department Of State](#), [109 M.S.P.R. 453](#) ¶ 13, 2008.

²⁹ *See* PPP # 11 at <http://www.mspb.gov/ppp/ppp.htm>.

³⁰ *Cf.* [Morton](#) and [Isabella](#) [109 M.S.P.R. 453](#), *ibid.*

³¹ would not allow it to choose between giving effect on the one hand to 5 U.S.C. § 2302(e)(1) and on the other to 5 U.S.C. 3330a, “for the statutes do not pose an either-or proposition”. The former statute apply to veterans preference requirements, while the latter applies to their enforcement. Cf. [Connecticut Nat. Bank v. Germain](#), 503 US 249, 253 - Supreme Court, 1992.

(10). Finally, Section 2302(e)(1)(A) enumerates Section 7701 as a “veterans preference requirement”, which violation constitutes a prohibited personnel action. Section 7701(c)(2), in turn, incorporates Section 2302, as a basis to overturn the agency decisions. Therefore, Board’s failure to comply with Section 7701 requirements is prohibited by both VEOA and CSRA, *see* [5 U.S.C. 7703\(c\)](#).

c. As far as the Board’s reliance on its decision in *Goldberg v. Department of Homeland Security*, [99 M.S.P.R. 660](#), ¶ 11 (2005) concern, that reliance was misplaced, because the Board dismissed the VEOA part of that appeal for lack of jurisdiction. *See Id* at 10. Thus, the decision does not stand for the proposition that in a valid “VEOA appeal, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. 7701(c)(2)”, as the Board so apparently suggested. *See the Register* at p. 18659.

3. The Board Lacked A Delegated Authority to Overrule 5 CFR 1201.56 rules in VEOA appeals.

a. “5 CFR 1201.56 currently provides ...that the appellant will prevail if he or she can establish a successful affirmative defense under 5 U.S.C. 7701(c)(2) (specifically, that the agency action was based on a harmful procedural error,

³¹ *See* Chairman Grundmann testimony, *infra*.

constituted a prohibited personnel practice, or was not in accordance with law)”³². The Board has not applied this regulation in any VEOA appeal. In fact, it found its application to VEOA, USERRA and IRA appeals to be “anomaly”³³. Hence is the reason why it piecemealed all of Mr. Donaldson's appeals.³⁴

b. In anyway, “the Board lacked authority to overrule section 1201.[56] by adjudication. That conclusion does not foreclose the Board from repealing the rule in accordance with section 553(b). However, for purposes of the present case, the Board must adhere to its legislative rule.”

c. “So long as this [1201] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it”. Cf. *Tunik*, supra at 1341.

d. Therefore, by “attempting to overturn its regulation through adjudication” in Mr. Donaldson and other appeals the Board had contravened what its “reviewing court’s precedential decision” held in *Tunik*, *ibid*. Surely, the Board could not have meant what its opinions stated. Say it ain't so, Board members.³⁵

4. The Board Current Regulations at 5 CFR 1208.13(b) & 23(b) and Proposed Regulations 1201.56 and .57 Are Invalid.

a. The second clause of [5 U.S.C. 2302\(e\)\(1\)\(H\)](#) effectively states that a “regulation that implements a provision of law referred to in any of the preceding subparagraphs” is a “veterans preference requirement.” Since [5 CFR 1201.56](#)

³² See Federal Register, [Doc. # 2014-07443](#), *supra*, at 18659.

³³ *Ibid*.

³⁴ See [Donaldson v. Department of Homeland Security](#), 2012-3106, Part III, B, Federal Circuit, 2012.

³⁵ Cf. *Carver*, *ibid*.

implements provisions of 5 U.S.C. 7701, which is listed in [5 U.S.C. 2302\(e\)\(1\)\(A\)](#), it is also a “veterans preference requirement.”

b. Because “it is now A PROHIBITED PERSONNEL PRACTICE TO TAKE ANY ACTION THAT WOULD VIOLATE VETERANS PREFERENCE”,³⁶ and because the Board current regulations at 5 CFR 1208.13(b) and 23(b) and proposed ones at 1201.56 and .57 provide “*lesser* protections ... Congress guaranteed these veterans” in 5 U.S.C. 7701, those regulations are invalid. *Cf.* [Gingery v. Department of Defense](#), 550 F. 3d 1347, 1354 - Federal Circuit, 2008.

c. “This conclusion is buttressed by the legislative history of the Veterans Preference Act, which clearly demonstrates that Congress intended to limit the power of the executive branch to regulate in this area if such regulations resulted in the derogation of the rights and protections afforded to preference eligibles in federal employment.” *See* [Lowe v. Department of Agriculture](#), p. 9, MSPB, 1984 (NP).

5. The Board Must Examine All Personnel Actions Giving Rise To Prohibited Personnel Practices.

a. Article II vests “[t]he executive Power ... in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” *See* [Free Ent. Fund v. PCAOB](#), 130 S. Ct. 3138, 3146 - Supreme Court, 2010. Internal citations omitted.

b. The Board members are executive officers under [5 U.S.C. 1201](#) and

³⁶ *See* [Abell v. Department of Navy](#), 343 F. 3d 1378, 1381 - Federal Circuit, 2003.

therefore they have that constitutional duty to “take Care that the Laws be faithfully executed”. In addition to that, they have contractual duties to (a) “discharge ... responsibilities with integrity and in accordance with law, rule, and regulation.. in particular, (b) “do everything that is necessary to come to a full understanding of the elements of causes of action and claims that arise under each of those statutes, [c] engage in extensive research and analysis with regard to those claims”³⁷ and (d) ensure that people “know what the law says and how it applies to men and women who are leaving their jobs with the Federal Government and going to serve their country”.³⁸

c. In carrying out those duties, “the Board must examine personnel actions”,³⁹ which includes “an appointment” under 5 U.S.C. § 2302(a)(2)(A)(i). The statute further provides that “any employee who is authorized to take or approve personnel actions shall not ...knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans’ preference requirement; or (B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans’ preference requirement”. *Id.* § 2302(b)(11). Thus, the statute covers the "failure" to make an "appointment" in the federal service when that action would violate any veterans preference requirement. *Cf. Ruggieri v. Merit Systems Protection Bd.*, 454 F. 3d 1323, 1326 - Federal Circuit, 2006.

d. (1) Mr. Donaldson’s [argument](#), for example, was similar to that of Mr. Ruggieri. He essentially contended that when he was not selected for the advertised

³⁷ See Vice-Chairman Wagner’s testimony at the [Senate Hearing 111-452](#) at p. 6.

³⁸ See Member Robbins’ testimony at [Senate Hearing 112-527](#), p. 9, on March 66, 2012.

³⁹ See Chairman Grundmann testimony, *ibid.*

position under the first vacancy announcement, the action of not selecting him constituted the failure “to take . . . a personnel action,” 5 U.S.C. § 2302(b)(11), to wit, an "appointment," *id* at § 2302(a)(2), within the meaning of the VEOA. *Cf. Ruggieri, ibid.*

(2) He therefore contended that the Board improperly dismissed his VEOA appeal “on jurisdictional grounds and instead should have addressed the merits of his claim that the agency took that action for prohibited reasons.”⁴⁰ *Ibid.*

(3) The government apparently took the position that even though he “was not selected under the first vacancy announcement, there was not a failure to appoint him, because the vacancy announcement was canceled and no one was appointed to the position. In the government's view, an agency does not fail to appoint an applicant when it cancels the vacancy announcement under which the applicant applied.” *Ibid.*

(4) The government apparently argued “that the failure to appoint occurs only when the agency appoints someone else to the position sought by the applicant. Although the Board has addressed this issue on several occasions...” *Ibid.*

(5) “The Board's decisions characterize "nonselection for a position" as a qualifying "fail[ure] to take . . . a personnel action" within the meaning of the ...Act but they define nonselection narrowly, recognizing such a claim only if the position in question is ultimately filled by someone other than the complainant.” *Ibid.*

(6) “The Board's position on this issue reflects an unduly narrow construction of the statutory language "fail to take . . . a personnel action." The [VEOA] does not state that the failure to select an applicant for employment cannot be actionable unless someone else is selected for the position in the applicant's

⁴⁰ See [Mr. Donaldson's petition](#) at p. 8.

place.” *Ibid.*

(7) “If the statute defined a failure to make an appointment as the act of hiring another applicant in place of the complainant, the Board's construction would have force. But it does not. It provides that an appointment is a personnel action and that a failure to make an appointment is a trigger for” VEOA appeal.” *Ibid.*

(8) “To endorse the Board's interpretation of the statute would immunize an agency's decision not to hire a [veteran], so long as the agency was willing simply not to fill the position for which the [veteran] had applied, even if the agency's conduct was plainly motivated” by the petitioner’s protected status.⁴¹ *Ibid.*

(9) “This case illustrates the potential mischief that could be caused by the Board's interpretation. For purposes of the jurisdiction..., the administrative judge” should have accepted his allegations that the agency declined to hire him because of his status protected by section 2308(b)(11). *Ibid.*

(10) The Board's position, however, is that he is entitled to no relief under the VEOA “because the agency, even though it rejected his application and did not appoint him, did so by canceling the vacancy announcement rather than appointing a different applicant to the position.”⁴² *Ibid.*

(11) “Thus, under the Board's interpretation of the Act, the agency could lawfully refuse to hire an applicant because of” his veterans’ status, as long as it did not hire a different applicant under the particular vacancy announcement in which the veteran applied. *Ibid.*

(12) “Nothing in the statutory language or the underlying purpose of the Act

⁴¹ See [Donaldson v. Department of Homeland Security](#), 2012-3106, Part III,A, Federal Circuit, 2012, where the court conceded that the agency blatantly passed over the petitioner in favor of non-veterans.

⁴² See [Donaldson v. Department of Homeland Security](#), p. 3, MSPB, March 30, 2012 (NP).

suggests that Congress intended to endorse such a formalistic restriction on the type of agency action that would trigger the ...Act. This is not to say that any delay in making an employment decision would qualify as a failure to take a personnel action within the meaning of the Act.” *Ibid.*

(13) It is “often more difficult to determine when an agency has failed to take a personnel action than when it has taken a personnel action. For that reason, the Board has stated in an analogous setting that the failure to make an appointment must manifest itself as a "concrete matter that can be taken or done by an agency and reviewed (and undone) by the Board." *Ibid.*

(14) However, “with the Board's suggestion in this case that the only way to define nonselection as a concrete matter failing within the scope of the Act is by restricting it to cases in which an agency has hired someone other than the complainant for an announced vacancy.” *Ibid.*

(15) “Instead, the agency must take some identifiable step that constitutes a decision not to hire the complainant. That step may be the hiring of another person in the applicant's stead, but it need not be. In this case, the agency plainly took such a step, as it decided to terminate the hiring process that it had put into effect, by canceling the vacancy announcement.” *Ibid.*

(16) “The agency's conduct in this case is sufficient, under the plain language of the statute, to constitute a "fail[ure] to take . . . a personnel action." *Ibid.* Including such conduct within the reach of VEOA is consistent with Congress's purpose to protect veterans from a wide variety of actions taken against them,⁴³ such as a “Manipulation of the Category Rating Process”.⁴⁴

⁴³ See e.g. [H.R. 105-675](#), 1996, *supra*.

⁴⁴ See “Review of Allegations Regarding Prohibited Personnel Practices at the Bonneville Power

(17) In the light of VEOA's congressional purpose reflected in the broad statutory language, as well as [H.R. 105-675](#), 1996, *supra*, the Board should have concluded that his evidence regarding his nonselection for the position is sufficient to satisfy the requirement that an appellant in such case make a nonfrivolous allegation that the agency has failed to take a personnel action under 5 U.S.C. 2302. *Ibid.*

e. Therefore, by agreeing that "the Board does not have jurisdiction to consider the merits of the underlying action" in Mr. Donaldson's VEOA appeal, *supra*, p.4, the Board has contravened what its "reviewing court's precedential decision" in [Lazaro v. Department of Veterans Affairs](#) 666 F. 3d 1316, 1320 - Court of Appeals, Federal Circuit 2012, a month before held: "If the position urged by the Government, and accepted by the AJ and the Board, was correct, a veteran could never assert a claim within the jurisdiction of the Board because the only way to determine whether the agency violated the veteran's preference rights would be to analyze whether the agency properly took the veteran's preference rights into account when making its personnel decision, i.e., examining the merits of the agency's decision. There is simply no way to analyze whether a veteran's preference rights were violated without examining the grounds upon which the veteran's non-selection was predicated." Surely, the Board could not have meant what it stated in its decision. Say it ain't so, Board members.

6. The Board Is Responsible For Protecting Veterans Constitutional Rights.

a. "The Pendleton Act of 1883 replaced the political patronage system that

Administration", [DOE/IG Report 0895](#) at p.11.

had existed until that time with a merit-based system for filling most civil service positions. The drafters of the Civil Service Reform Act of 1978 believed that this merit-based system had broken down over the ensuing century. Thus, they codified the merit principles and created a new agency, the Merit Systems Protection Board, as the "[vigorous protector of the merit system](#)." One of the merit system principles states that “[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights.”⁴⁵

b. In a case of “a former government employee claiming that he is entitled to due process of law in hearing procedures wherein he is contesting his non-selection [t]here is no claim ... of an abstract right to a government position. [It] is under *legislative protection*. The vehicle is the Veterans' Preference Act. See [Fitzgerald v. Hampton](#), 467 F. 2d 755, 762 - District of Columbia, 1972.

c. In the case of a veteran seeking initial employment, who “has the highest numerical rating on the list, the agency *must appoint* that individual, unless the agency seeks and receives from the Office of Personnel Management ("OPM") written authority to appoint someone ranking below the veteran. 5 U.S.C. § 3318(b); see *Scharein v. Dep't of Army*, [91 M.S.P.R. 329, 334](#) (2002).”⁴⁶

d. “It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being

⁴⁵ See [5 U.S.C. 2301\(b\)\(2\)](#).

⁴⁶ See [Joseph v. FTC](#), 505 F. 3d 1380, 1382 - Federal Circuit, 2007. Emphasis supplied.

hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

[e] It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring." When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct."⁴⁷ Needless to say that it is the Board's responsibility to ensure that such justification is forthcoming. *See* [5 CFR 1201.56](#).

7. The Board and its Reviewing Court Have Been Consistently Denying Veterans the Due Process of Law.

a.(1) "Our Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." The four words—due process of

⁴⁷ *See* [Board of Regents of State Colleges v. Roth](#), 408 US 564, 591 - Supreme Court, 1972. Internal citations omitted.

law—have been the center of substantial legal debate over the years. See [Chambers v. Florida, 309 U. S. 227, 235-236](#), and n. 8 (1940).

[2] Some might think that the words themselves are vague. But any possible ambiguity disappears when the phrase is viewed in the light of history and the accepted meaning of those words prior to and at the time our Constitution was written.

[3] "Due process of law" was originally used as a shorthand expression for governmental proceedings according to the "*law of the land*" as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing...

[4] Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, ... in order to insure against such actions that the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase "due process of law". See [In re Winship](#), 397 US 358, 384 - Supreme Court 1970. Emphasis added.

b. (1) When a tribunal assumes for itself the power to deprive a petitioner of a federal right "our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the "law of the judges." *Ibid.*

(2) When the tribunal chooses to do so without following its established precedents it also deprives the petitioner and "the public of the stability and predictability essential to the effort of a free society to live under a rule of law."⁴⁸

(3). Indeed, "[t]he very essence of civil liberty," wrote Mr. Chief Justice Marshall in [Marbury v. Madison, 1 Cranch 137, 163 \(1803\)](#), "certainly consists in the right of every individual to claim the protection of the laws, whenever he

⁴⁸ See [South Corp. v. U.S.](#) 690 F.2d 1368, 1371 - Federal Circuit, 1982.

receives an injury. One of the first duties of government is to afford that protection".

c. In its [Senate Report 95-969](#), p.30, the Congress stated that : “PARAGRAPH (1) OF THE SUBSECTION AUTHORIZES THE BOARD TO HEAR AND ADJUDICATE ALL MATTERS WITHIN THE JURISDICTION OF THE BOARD, INCLUDING MATTERS FALLING UNDER THIS TITLE, UNDER SECTION 2023 OF TITLE 38 (RELATING TO VETERANS' REEMPLOYMENT RIGHTS), AND UNDER ANY OTHER LAW, RULE, OR REGULATION..”

(1) In *Noble, supra* at 1017, the Court “agreed with the thrust of the subsequent MSPB report that all employees in government are subject to the rights of preference eligibles. *See* 5 U.S.C. § 1302 (1988); 5 C.F.R. § 1201.3(a)(13). The order concedes this. [It] held that it was error by MSPB not to consider Noble's claim on the merits under the VPA, the applicable statutes, and regulations. [I] simply remanded with direction that it do so.”

The *en banc* Court, however, affirmed the Board’s decision denying “jurisdiction over Noble's VPA reemployment rights”. *Id* at 1015. In this case the Board and the *en banc* Court had demonstrated their refusal to fulfill their constitutional duties on protecting veterans rights that Chief Justice Marshall spoke about in *Marbury, supra*. The Congress’ response to those decisions was enactment of VEOA in 1998. *See* 5 U.S.C. 3330a.

(2) In [Campion v. MSPB](#), 326 F. 3d 1210 - Federal Circuit, 2003, the Court had affirmed the Board’s decision (a) “dismissing his appeal from his nonselection for certain Senior Executive Service ("SES") positions for lack of jurisdiction”,

(b) although the legislative history of VEOA, that the petitioner relied upon, clearly shows “that Congress intended to extend § 3330a's right of appeal to both

groups of veterans described in § 3304(f)(1)”⁴⁹: “Any preference eligible or other individual described in section 3304(f)(1) who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference, or any right afforded such individual by section 3304(f), may file a complaint with the Secretary of Labor.” See [H.R. 105-240](#), Section 4, (1997).

(c) In response to those decisions, Congress corrected its technical error in Pub. L. 108–454 by adding subparagraph (b) to [5 U.S.C. 3330a\(a\)\(1\)](#), see *Id.*, Amendments.

(3)(a) In [5 U.S.C. 1302\(b\)](#), Congress directed the OPM to “prescribe and enforce regulations for the administration of the provisions of this title, and Executive orders issued in furtherance thereof, that implement the Congressional policy that *preference shall be given to preference eligibles in certification for appointment*, and in appointment, reinstatement, reemployment, and retention, in the competitive service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.” Emphasis added.

(b) In [Joseph v. FTC](#), 505 F. 3d 1380, 1381 - Federal Circuit, 2007, the Board had (i) nevertheless rejected the veterans contention “that the agency's procedure in filling the vacancy denied him his veterans' preference rights”, as the Court did.

(ii) The Court further noted that “[t]he merit promotion process is used when the position is to be filled by an employee of the agency or by an applicant from outside the agency who has "status" in the competitive service”, *id* at 1382.

(iii) The Court then concluded that “Veterans' point preferences under the competitive appointment process do not apply in the merit promotion process.

⁴⁹ See [Campion](#), *supra* at 1214.

Perkins, 100 M.S.P.R. at 51. Congress has provided, however, that "for all merit promotion announcements . . . veterans . . . are eligible to apply." 5 U.S.C. §§ 3304(f)(3)-(4). Veterans "may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures." 5 U.S.C. § 3304(f)(1). Congress further provided, however, that the latter provision does not "confer an entitlement to veterans' preference that is not otherwise required by law." 5 U.S.C. § 3304(f)(3)." *Ibid.*

(c) As initial matter, it would be worth noting that (i) a statutory interpretation is a question of law that the Court was supposed to review *de novo*. Indeed, a "court does not fulfill its duty to "say what the law is" by merely agreeing to an agency's interpretation of the statutory provision at issue if it is "reasonable." *See Pitsker v. Office of Personnel Management*, 234 F. 3d 1378, 1381 - Federal Circuit, 2000.

ii. It "must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Ibid.*

iii. "All statutes must be construed in the light of their purpose." "To discern Congress' intent [the Court must] examine the explicit statutory language and the structure and purpose of the statute." *Ibid.*

iv. Thus, it must "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Ibid.*

v. It must “look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” *Ibid.*

(d) Thus, if the Court did “carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable”, it would have found the following matters:

(i) the word “*Promotion* means a change of an employee, while serving continuously within the same agency”, see [5 CFR 210.102\(b\)\(11\)](#),

(ii) the Board’s application of OPM regulation regarding “the merit promotion process” to the petitioner’s case was not justified, “because he was a Board” and not “the same agency” employee, *Joseph, ibid*,

(iii) the legislative history of 5 U.S.C. 3304(f)(1) stating that “No preference eligible, and no individual (other than a preference eligible) ...shall be denied the opportunity to compete for an announced vacant position within an agency, in the competitive service or the excepted service, by reason of - (A) not having acquired competitive status; or (B) not being an employee of such agency”, see [H.R. 105-240](#), *ibid*,

(iv) provision of 5 U.S.C. 3304(f)(1) to be inapplicable to this case, because the petitioner was a federal employee “who has "status" in the competitive service”⁵⁰ and who would be eligible for a “Career or Career-Conditional Employment From Registers”⁵¹ or “...By Transfer”⁵² even in the absence of that statute,

(v) the legislative history of [5 U.S.C. 3304\(f\)\(3\)](#) stating that “Nothing in this subsection shall prevent an agency from filling a vacant position (whether by

⁵⁰ See *Joseph, ibid*.

⁵¹ See [5 CFR 315.301](#).

⁵² See *Id* at 315.501 (1995).

appointment or otherwise) solely from individuals on a priority placement list consisting of individuals who have been separated from the agency due to a reduction in force and surplus employees (as defined under regulations prescribed by the Office)”,⁵³

(vi) provision of [5 U.S.C. 3304\(f\)\(3\)](#) was inapplicable to the petitioner’s case as well, because the “agency elected to choose a candidate from the merit promotion certificate, and conducted interviews with the candidates listed on the certificate, including the appellant selecting official ultimately chose Ms. Thomas, an internal candidate”⁵⁴ and there was indication that she was entitled for a priority consideration or a surplus employee,

(vii) the plain language of 5 U.S.C. 3304(f)(3), when read in conjunction with (f)(1) meant that it was not conferring an entitlement to veterans' preference to a *non-preference* eligible veteran, such as the one described in *Campion, supra* at 1214,

(viii) provision of 5 U.S.C. 3304(f)(3) was also inapplicable to the petitioner’s case, because he was entitled for a 10 point preference under 5 U.S.C. 3309(1) and to the appointment under 5 U.S.C. 3318(a) that the Court had cited,

(ix) to the extent that the Board relied on 5 U.S.C. § 3304(f) to describe the intersection of that statute with 5 U.S.C 3309-3318, “its views are entitled to no particular deference”,⁵⁵ because all of those statutes fall outside of the Board’s area of expertise and fall squarely within the OPM’s express authority,⁵⁶

⁵³ See [H.R. 105-240](#), *ibid*.

⁵⁴ See *Joseph v. Federal Trade Commission*, [103 M.S.P.R. 684](#) ¶ 4, 2006.

⁵⁵ Cf. [James v. Von Zemenszky](#), 284 F. 3d 1310, 1320 - Federal Circuit, 2002.

⁵⁶ See [Patterson v. Department of Interior](#), 424 F. 3d 1151, 1156 - Federal Circuit, 2005.

(x) the relevant OPM regulation did not interpret provision of 5 U.S.C. 3304(f) to mean that “Veterans' point preferences under the competitive appointment process do not apply in the merit promotion process”, *see* [5 CFR 315.611](#) (2000),

(e) The Court had finally concluded that (i) “statutory and regulatory provisions defining veterans' rights in seeking and obtaining federal employment require rejection of” petitioner’s contention” without actually pointing to those provisions, (ii) the “addition of points to a veteran's score because of his status applie[d] only in the open competition examination process and not in the merit appointment process”, which is nowhere to be found in neither the legislation nor OPM regulations (iii) the agency to hire the non-veteran in a direct contravention of 5 U.S.C. 3309(1) and 3318(a) statutory requirements.

(f) To the extent that both the Board and the Court had relied on each other’s decisions in *Perkins, supra* and [Brown v. Department of Veterans Affairs](#), 247 F 3d. 1222 - Federal Circuit, 2001, that reliance was misplaced: “Brown involved *internal applicants for promotions*, and the court stated broadly “that veterans are not accorded any preference under the VPA [Veterans Preference Act] when seeking promotion or intra-agency transfers.” Emphasis added. *See Perkins, supra* ¶ 17. It did not involve an *external applicants’* right for a veterans preference under the merit promotion announcement, however. *Cf. Perkins, supra* at ¶ 19.

(g) Therefore, by holding that (i) an external ⁵⁷ and disabled applicant “was given an opportunity to compete for the position, he was properly afforded the veterans’ preference rights to which he was entitled and was, therefore, not entitled to corrective action” in [Keith Madore v. Department of the Air Force](#), p.3, 2013

⁵⁷ *See* [Feds Data Center, 2012](#).

(NP), Member Robbins, who had previously served as an OPM General Counsel,⁵⁸ contravened his previous opinion to the effect that:

(ii) “Agencies are required to fill vacancies by appointing to the position one of the highest three eligibles on the certificate produced by OPM. *See* 5 U.S.C. § 3318(a).

[iii] Veterans are considered "preference eligibles," *see* 5 U.S.C. § 2108, and an appointing authority may not pass over a preference eligible on a certificate to select an individual who is not a preference eligible without the approval of OPM. 5 U.S.C. § 3318(b)(1).” *See* [Evans v. US Office of Personnel Management](#), 276 F. Supp. 2d 34, n.1 - Dist. Court, Dist. of Columbia, 2003.

v. Surely, he could not have meant to agree with the rest of Board members in this case. Say it ain’t so, Member Robbins.

8. The Board and Its Reviewing Court Have Been Consistently Denying Veterans an Equal Protection of Law As Well.

“The Fifth Amendment provides that “[n]o person shall be... deprived of life, liberty, or property, without due process of law... ” In numerous decisions, [Supreme] Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.”⁵⁹

a. “THE COMMITTEE INCLUDED A PROVISION (IN SUBPARAGRAPH (B) OF THIS SUBSECTION) MAKING EXPLICIT THE BOARD'S ENFORCEMENT AUTHORITY. THE BOARD IS AUTHORIZED TO ORDER ANY FEDERAL AGENCY OR EMPLOYEE TO COMPLY WITH ANY ORDER OR DECISION ISSUED BY THE BOARD PURSUANT TO

⁵⁸ *See* <http://www.mspb.gov/About/members.htm>.

⁵⁹ *See* e.g. [Davis v. Passman](#), 442 US 228, 234 - Supreme Court, 1979.

ANY MATTER WITHIN ITS JURISDICTION, AND TO TAKE APPROPRIATE STEPS TO ENFORCE COMPLIANCE WITH ITS ORDER.” See [Senate Report 95-969](#), *ibid*.

(1) In its *one* paragraph analysis of another veteran’s appeal for a corrective action in *Melendez v. Puerto Rico National Guard*, [70 M.S.P.R. 252](#), p.2, 1996, the Board had nevertheless held that:

(a) “the Puerto Rico National Guard is not a federal entity and because the adjutant general is not a federal employee, the Board has no authority to enforce its decision in this case”,⁶⁰

(b) although it previous precedent held that “National Guard technicians are employees of an agency in the executive branch” and therefore, subject to the Board’s compliance orders,⁶¹

(c) although it did not determine the names of either the appropriate agency that took or failed to take the disputed personnel action or the official responsible for compliance with its orders. It simply presumed all the facts in this case.

(d) However, in its lengthy opinion regarding what appears to be non-veteran employees’ appeals in *Washington v. Department of the Navy*, [115 M.S.P.R. 599](#) ¶ 16, 2011 and *Raymond v. Department of the Navy*, [116 M.S.P.R. 223](#) ¶ 29, 2011, the Board took diametrically opposite steps:

(e) it independently found that “Capt. Thomas Luscher is the Executive Officer of the Naval Air Station Joint Reserve Base where the appellant works. Accordingly, we find that Capt. Luscher is the agency’s official responsible for compliance with the Board’s order. See [5 C.F.R. § 1201.183\(a\)\(2\)](#)“, *ibid*,

(f) although, as an Executive Officer, he could not have been the highest

⁶⁰ See *Melendez v. Puerto Rico National Guard*, [70 M.S.P.R. 252](#), p.2, 1996. Emphasis added.

⁶¹ See *Sanford v. Connecticut National Guard*, [50 M.S.P.R. 120](#), pp. 4 & 7 , 1991.

ranking appropriate agency official, as the highlighted Board regulation requires it, because that title belonged to his Commanding Officer,⁶²

(g) it also warned to “impose sanctions for the agency's noncompliance in this case. 5 C.F.R. § 1201.183(b)”,⁶³ although Captain Luscher “was a member of the uniformed services and thus explicitly excluded from the definition of “employee” in section 2105(a)(1)”.⁶⁴

(h) Thus, the Board went above and beyond the reach of law to protect the two agency employees’ rights by (i) identifying an *other* than highest ranking agency official to be responsible for compliance with its orders (ii) in *other* the respondent agency in the case and (iii) threatening to impose fiscal sanctions on an *other* than a federal employee.

(2) In a restoration claim of another previously discharged agency employee the Board in *Tubesing v. Department of Health and Human Services*, [115 M.S.P.R. 327 ¶ 34](#), 2010, the had stated that:

(a) “[a]t no point before the Board has the agency identified the official responsible for full compliance. We determined that Daniel Sosin, Acting Director of the Office of Public Health Preparedness and Response, is the agency official responsible for compliance. 5 C.F.R. § 1201.183(a)(2)”,

⁶² See <http://www.cnic.navy.mil/jrborleans/About/Command/Biographies/index.html>.

⁶³ “The Board's authority to impose sanctions includes the authority to order that the responsible agency official “shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with.” 5 U.S.C. § 1204(e)(2)(A).” See *Raymond*, *ibid*.

⁶⁴ See *e.g.* OSC ex. el. Paul Hardy v. Department of Health and Human Services, [117 M.S.P.R. 174](#) at 7, 2011, where the Board dismissed another ex-service member’s appeal.

(b) although, as in *Melendez*, *ibid*, it could have equally concluded that since “Department of Health and Human Services” was a respondent agency in this case and since its Secretary, as Board members, was appointed by the President by and with the advice and consent of the Senate, the Board had no authority to enforce its decision in this case,⁶⁵

(d) The comparative analysis of these three cases shows that the Board would do little to nothing to afford the protection of law to a veteran, although it was "obligated to follow precedent, and if it chooses to change, it must explain why".⁶⁶ At the same time the Board would go above and beyond to protect the rights of “employees who have been discharged for misconduct”. Cf *Kirkendall*, *ibid*.

b. In another apparently *non-veteran’s* appeal for corrective action the Board in *Von Zemenzsky v. Department of Veterans Affairs*, [80 M.S.P.R. 663](#) ¶ 7, 1999, *aff’d*, [James v. Von Zemenzsky](#), 284 F. 3d 1310 - Federal Circuit, 2002 the Board determined that:

(1) “The Title 38 statutory provisions governing employees of the agency's Veterans Health Administration do not foreclose the Board's exercise of RIF jurisdiction over this appeal” under provisions of the Veterans Preference Act of 1944.

(2) However, in reviewing a *veteran’s* appeal in [Scarnati v. Department of Veterans Affairs](#), 344 F. 3d 1246, 1248 - Federal Circuit, 2003, the Board, through its administrative judge, held a diametrically opposite position:

⁶⁵ See [5 U.S.C. 1204\(e\)\(2\)\(a\)](#).

⁶⁶ "See [Schucker v. FDIC](#), 401 F. 3d 1347, 1354 - Federal Circuit, 2005.

(a) “that appointments to the VHA made under 38 U.S.C. § 7401(1), including the appointments of physicians, are not subject to Title 5 of the United States Code. Therefore, the AJ determined, the provisions of the VEOA, which is a part of Title 5, do not apply to non-selections for positions listed in § 7401(1). Accordingly, Dr. Scarnati had no right of appeal to the Board under the VEOA.”

(b) The Court having found “conclusive support” in [38 U.S.C. 7425](#) titled “*Employees: laws not applicable*”, emphasis added, agreed with the Board and held “that any requirements under Title 5 relating to the civil service appointment process that are different from the Title 38 appointment requirements, including the redress procedures in 5 U.S.C. § 3330a, would be by definition “inconsistent” with the Title 38 appointment process”.

(c) In [Casman v. United States](#), 181 F. Supp. 404, 408 Court of Claims , 1958, the Court’s predecessor had already provided the “short answer to this contention is that plaintiff was not [an agency] employee. What could happen if and when plaintiff [was appointed] is entirely another question and one [the court was] not called upon to answer here.”

(d) The longer answer to that justification is that (a) none of the enumerated Title 5 subchapters under 38 U.S.C. 7425(a)(1) lists the [subchapter I of chapter 33 of title 5](#) that governs the disputed issues of the veterans substantive and appellate rights. “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” See [Andrus v. Glover Constr. Co.](#), 446 US 608, 617 - Supreme Court, 1980.⁶⁷

(e) Moreover, none of the Title 38 Chapter 74 provisions, upon which the

⁶⁷ See also *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#), ¶ 12, 2011.

Court relied, deals with the disputed “selection from certificates” for the position Dr. Scarnati sought under 5 U.S.C. 3318(a). They rather deal with applicants “qualifications” for the same. *See e.g.* 38 U.S.C. 7401(a)(1).

(f) Therefore, *Morton* rules have force in this case more than they did in *Morton* itself: “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. “When there are two acts upon the *same subject*, the rule is to give effect to both if possible The intention of the legislature to repeal `must be clear and manifest.” Emphasis added. *See Morton*, *ibid*.

(g) Furthermore, according to “OPM own guidance, to which the Board has deferred”:⁶⁸ “Unlike other laws, rules and regulations governing Federal human resource management, veterans' preference requirements apply to all executive agencies, including those not covered by Title 5 or that operate alternative personnel systems”,⁶⁹ which is consistent with the Board’s own prior position on this issue expressed in “MSPB report all employees in government are subject to the rights of preference eligibles”, *Noble*, *supra* at 1017.

(h) Thus, the Court had neither (i) explained why and by what “definition” the two system “would be inconsistent” (ii) nor deferred to OPM guidance (iii) nor referred to its prior case in *Noble*, *supra* at 1017 (iv) nor pointed to an evidence of a legislative intent to support its conclusion.

(i) Furthermore, according to the Court’s own precedent, the Board "had

⁶⁸ *See* Dean v. OPM, [115 M.S.P.R. 157](#), n. 11, 2010.

⁶⁹ *See* [DETAILED INFORMATION ON THE MERIT SYSTEM COMPLIANCE ASSESSMENT](#).

jurisdiction to hear the matter in the first instance—that is, subject-matter jurisdiction existed—as long as the petitioner asserted nonfrivolous claims”. Cf. [Spruill v. Merit Systems Protection Board](#), 978 F.2d 679, 687 (Fed. Cir. 1992).

(j) However, the Court did not hold that petitioner failed to non-frivolously allege the Board’s jurisdiction under 5 U.S.C. 3330a. It did not “show a clearly expressed congressional intent contrary to the text of the statute” either. See [Campion](#), *supra* at 1214.

(k) Furthermore, the provision of [38 U.S.C. § 7403\(a\)\(1\)](#), which the Court had also relied upon, expressly states that “[i]n using the authority provided by this subsection, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in [subchapter I of chapter 33 of title 5](#).” See *Id* at (g)(1).

(l) “Since courts must strive to give effect to each subsection contained in a statute, indeed, to give effect to each word and phrase”, the Court had to refuse to follow a course that ineluctably produces judicial nullification of an entire subsection. See [United Technologies, Inc. v. Browning-Ferris Industries, Inc.](#), 33 F. 3d 96, 101-1st Circuit, 1994.

(m) Thus, the Court’s decision in *Scarnati* violated the separation of powers, for "so long as Congress acts within its constitutional power in enacting a .. statute, [courts] must give effect to Congress' expressed intention concerning the scope of conduct prohibited." See [US v. Lynch](#), *supra*, *ibid*.

(n) As far as the Court’s reliance on [Khan v. United States](#), 201 F.3d 1375, Federal Circuit 2000 concern, that reliance was misplaced, because the court’s decision in *Khan* was based on Mr. Fausto’s removal appeal, who was “a non-preference eligible in the excepted service...Like the appellant in Fausto, Dr.

Khan falls within a special category of employee that has been specifically excluded from the procedures and protections set forth in chapter 75 of the CSRA”. Emphasis added. *Id* at 1381.

(o) By contrast, Dr. Scarnati’s case was inapposite to that of Dr. Khan’s, because the former was (a) a “preference eligible” veteran (b) appealing his non-selection for (c) a competitive (i.e. non-excepted service) position, which process was specifically authorized by the appointment statute.

(p) Finally, Congress saw no inconsistency when it (i) extended the application of “ preference eligible requirements to: (1) the General Accounting Office; and (2) positions within the staff of the President, Vice President, and Domestic Policy Staff and Office of Administration”. See [CRS Summary of S. 1021](#).

(ii) It also provided the “procedure for consideration of alleged violations” to its GAO Personnel Appeals Board. See Senate Report [105-340](#), Section 115(c)(3).

(iii) It would be completely inconceivable to conclude that the same Congress had an opposite view with respect to executive agencies, such as DVA and the MSPB.

(iv) Therefore, by holding that “the appellant did not have the right to file an appeal under VEOA” in [Dowd v. Department of Veterans Affairs](#), p.2, 2011 (NP), the Board’s Vice Chairman, who “served “a five-year statutory term as a Member of the GAO Personnel Appeals Board”⁷⁰ and pledged “to engage in extensive research and analysis with regard to those claims”,⁷¹ could not have meant to agree with the Board’s decision in this case. Say it ain’t so Vice Chairman Vagner.

⁷⁰ See <http://www.mspb.gov/About/members.htm>.

⁷¹ See Vice-Chairman Wagner’s testimony at the [Senate Hearing 111-452](#) at p. 6.

9. The Board Hearing Process Is Inadequately Fair.

a. The Board regulation at [5 CFR 1201.51\(d\)](#) states that it “has established certain approved hearing locations, which are listed on the Board’s public website (www.mspb.gov). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.” The latter option, of course, depends on the agencies ability to find an alternate location, if its office that took the disputed personnel action is outside an appellant’s town or even state.

b. However, it does not mean that agencies will be able to do so. Thus, if an agency is unable to find a location near the appellant’s residence, he/she will have to travel thousand miles to the Board’s hearing location if he resides outside of continental states. This inflexibility creates certain inconvenience and extra cost for both parties, such as work absences, their own and witness travel expenses, per diem allowances etc.

c. The resultant issues will have a bearing on (a) the appellant’s ability to attend a hearing, when it is granted “in such a way as to say, “Oh, well, if we must listen to you, pay your own expenses, come up to Washington and we’ll hear you; but see how far you get”⁷² (b) the quantity of witnesses he may have during the hearing, which in turn, will adversely affect the quality of justice he/she will later receive.

⁷² See *Stringer, ibid.*

VI. RECOMMENDATIONS FOR EXECUTIVE ACTION.

1. The proposed regulations at 5 C.F.R. § 1201.56 and .57 as well as current 5 CFR 1208. 13(b) and 23(b) establish lesser protections the Congress guaranteed the veterans in [5 U.S.C. 7701](#). Since Congress had already addressed precisely this issue and the regulations conflict with the statute itself, the Board should not implement the former and repeal the latter.

2. In order to ensure that “a public interest in a civil service free of prohibited personnel practices is being adequately protected”⁷³ the Board should revise 5 CFR 120.118 to reflect the following change: *“If the Board or appellant establishes that such decision is (a) based on or overlooked a prohibited personnel practice, (b) violated his/her due process rights or (c) was otherwise unconstitutional, in which cases the strict requirements of this regulation would not apply.”*

3. In order to accord “veterans the full rights that they are provided under each of those statutes”⁷⁴ the Board should reopen all USERRA and VEOA cases it has adjudicated “to determine if they are consistent with law and merit principles and to provide meaningful redress when violations occur[ed]”.⁷⁵

4. In order to facilitate an effective and efficient resolution of cases at a lower or no cost to anyone the Board should modify its 5 CFR 1201.51(d) to reflect the following change: *“An appellant or respondent may request participation by other suitable means involving mass media technology, such as Skype. Any proposed*

⁷³ See Chairman Grundmann testimony, *ibid.*

⁷⁴ See Vice-Chairman Wagner’s testimony, *ibid.*

⁷⁵ See Chairman Grundmann testimony, *ibid.*

*alternative must be reviewed in advance to ensure that it is consistent with the goals of a fair and equitable process.”*⁷⁶

5. To do otherwise would render the Board’s (a) report to the President and the Congress - misleading (b) regulations - invalid (c) hearing process - unfair (c) decisions - *ultra vires* its authority and (d) “therefore may be made the object of specific relief”, because of the Board’s lack of delegated power “to overrule the congressional policy”⁷⁷ and disregard its specific and mandatory requirements. “A claim of error in the exercise of that power” would not be sufficient.”⁷⁸

⁷⁶ See e.g. [“Procedures for Resolution of Complaints Against Students”](#), at the Swarthmore College.

⁷⁷ See e.g. [Hilton v. Sullivan](#), 334 US 323, 339 - Supreme Court, 1948.

⁷⁸ See [Larson v. Domestic and Foreign Commerce Corp.](#), 337 US 682, 689 - Supreme Court, 1949.