UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

99 M.S.P.R. 533

DAVID DEAN,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
AT-0330-03-0076-I-1

DATE: August 5, 2005

David Dean, Columbia, South Carolina, pro se.

Cynthia D. Davis, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that granted the appellant's request for redress under the Veterans Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339, 1998 U.S.C.C.A.N. (112 Stat.) 3182, codified at 5 U.S.C. § 3330a, and ordered the agency to retroactively appoint the appellant to the position in question and to pay him back pay and liquidated damages. The appellant has filed a cross petition for review asserting that the administrative judge (AJ) erred when he did not order the agency to provide interim relief. For the following reasons, we GRANT the agency's petition for review, DENY the appellant's cross petition for review, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. We find that, although the

agency violated the appellant's rights under a statute relating to veterans' preference, the appropriate remedy is the issuance of a Board order requiring the agency to comply with the statute it violated.

BACKGROUND

¶2 The appellant is a veteran with a 30% service-connected disability who applied for the position of Personnel Management Specialist, GS-201-07, with the agency's Natural Resources Conservation Service in Columbia, South Carolina. Appeal File (AF), Tab 7 at 17, 25-26. A vacancy announcement (Number AR122434) indicated that the position was career/career conditional, that applications would be accepted from all U.S. citizens, and that the "basis for rating" would be "the extent and quality of experience and training relevant to the duties of the position, based on information contained in their applications and their responses to the occupational questions." AF, Tab 6, Subtab 4g. The announcement indicated that qualified candidates would be assigned a score between 70 and 100 and that points for veterans' preference would be added if supported by documentation. *Id*.

¶3 The agency notified the appellant that he was qualified for the position and that his name would be referred for consideration. AF, Tab 7 at 25. Although he subsequently was ranked second on a list of eligibles with a rating of 105.0, AF, Tab 6, Subtab 4e, the agency, under the authority of the Outstanding Scholar Program, selected an individual with no veterans' preference. AF, Tab 6, Subtab 4a. The selectee's Standard Form 50-B, "Notification of Personnel Action," identified the position as being in the competitive service. AF, Tab 10, Ex. 3.

¶4 After the appellant filed a complaint with the Department of Labor (DOL) claiming that his veterans' preference rights had been violated, and after DOL notified him that his claim did not have merit, he filed this appeal. AF, Tab 1. He asserted that the agency "willfully and deliberately violated statute and regulation by selecting a so-called Outstanding Scholar" who was not a veteran.

AF, Tab 7 at 2. The appellant claimed that the agency violated 5 U.S.C. § 3318 by passing him over in favor of a non-veteran without seeking and obtaining the approval of the Office of Personnel Management (OPM). *Id*. at 5. The appellant asserted that the agency's "'practice of issuing multiple certificates' corresponding to different recruitment categories, regardless of whether preference eligible[s] have been exhausted, and then selecting from the certificate that the non-veteran had been placed on nullified the Appellant['']s veterans' preference." *Id*. The agency responded that it followed its own policies and guidelines, as well as OPM regulations and directives, in the selection process. AF, Tab 6, Subtab 1; Tab 10.

¶5 The AJ found that the appeal was timely filed and within the Board's jurisdiction. AF, Tab 12 at 1-2. Based on the written submissions of the parties, because the appeal did not present disputes of material fact, the AJ found that the agency violated the appellant's veterans' preference rights by selecting a non-veteran under the Outstanding Scholar Program for the position without notifying the appellant and OPM that it proposed to pass him over. *Id*. at 5. The AJ found that the agency's use of an Outstanding Scholar certificate, rather than a certificate for which veterans' preference is afforded, nullified the appellant's veterans' preference. *Id*. The AJ found that the only authority that appeared to support the agency's argument and OPM's guidance was the consent decree in *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981), *id*. at 6, but he was not satisfied that a consent decree – an agreement between an executive agency and private parties approved by a district court judge – was sufficient authority for an agency to choose not to use competitive examining, "frustrating the intent of Congress to afford a veterans' preference, especially when a qualified veteran with statutory preference in such an examination applies for an announced vacancy." *Id*.

¶6 Regarding the remedy, the AJ found that an order to comply with the statute or regulation under 5 U.S.C. § 3330c(a) should include an order for retroactive

appointment in this case since otherwise the Board's order would provide no relief to the appellant because the selection process in question is now over. *Id*. at 7. The AJ also found that an order that did not include retroactive appointment would "amount to an injunction against future wrongdoing with respect to persons who are not a party to this proceeding," and such an order would exceed the Board's jurisdiction unless those individuals first exhausted their DOL remedy pursuant to 5 U.S.C. § 3330a(d)(1). *Id*. The AJ concluded that the likely intent of the statute was not to provide prospective relief to others, but to provide make-whole relief to the appellant, and that the appellant established clear entitlement to the position for which the agency selected a non-veteran. *Id*. Upon finding that the agency's violation was willful, the AJ ordered the agency to appoint the appellant retroactively to the GS-7 Personnel Management Specialist position in Columbia, South Carolina, to compensate him for any loss of wages or benefits, and to pay him an additional amount, equal to back pay, as liquidated damages under 5 U.S.C. § 3330c(b). *Id*. at 7-8. The AJ did not order interim relief. *Id*. at 8-9.

ANALYSIS

¶7 The question before us is whether the agency violated the appellant's veterans' preference rights under 5 U.S.C. §§ 3302, 3304(b) when it used the Outstanding Scholar Program, the product of a consent decree in a Title VII lawsuit,[1] to select a nonpreference eligible who had not taken an examination for the position in question, rather than the appellant, a veteran, who was found qualified for the position under a competitive examination process. In its starkest terms, this case presents a conflict between two significant employment policies: the policy of creating special preference and protection to aid in the readjustment

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[1] *Luevano Consent Decree*, 1981 WL 402614 (1981). *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981)(court order approving decree).

and rehabilitation of returning veterans and the policy of preventing and remedying discrimination in the work place. However, Title VII, which addresses discrimination in employment, resolves the conflict in favor of veterans' rights by providing that: "[N]othing contained in this title shall be construed to repeal or modify any…law creating special rights or preference for veterans." 42 U.S.C. § 2000e-11. Further, the consent decree which gave rise to the Outstanding Scholar Program, grew out of the policies of Title VII and expressly provided that any adverse impact resulting from the requirements of the Veterans' Preference Act[2] may constitute a defense to the determination of adverse impact with respect to any competitive procedures. We find, therefore, that the Outstanding Scholar Program cannot be relied upon to avoid the competitive examination process when veterans' rights are at issue, absent specific legislation or Executive Order.

¶8 We further find, as explained below, that the appellant has proven that the agency violated his rights under a statute "relating to veterans' preference" as required by VEOA, namely, 5 U.S.C. § 3304(b), because the agency's noncompetitive appointment of an individual to a position in the competitive service did not comport with sections 3304(b) or 3302, and because there is no specific legislation or Executive Order permitting the Outstanding Scholar Program to be used in opposition to veterans' rights.

5 U.S.C § 3304(b) is a statute relating to veterans' preference.

¶9 Today's civil service laws trace their origin to the Pendleton Civil Service Act of 1883, 22 Stat. 403, which "provided for the creation of a classified civil service and required competitive examination for entry into that service." *Arnett v. Kennedy*, 416 U.S. 134, 149 (1974). As the Supreme Court observed, the Act was "designed to eliminate the abuses associated with the patronage system from

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[2] 5 U.S.C.§ 3318.

much of the federal service," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 106 (1976) (footnote omitted), and instituted a "system of merit appointment, based on competitive examination, . . . replacing a patronage system in which appointment had often been treated as a method of rewarding support at the polls," *id*. at 107. The Senate Report on the bill made this purpose clear:

> The single, simple, fundamental, pivotal idea of the whole bill is, that whenever, hereafter, a new appointment or a promotion shall be made in the subordinate civil service in the departments or larger offices, such appointment or promotion shall be given to the man who is best fitted to discharge the duties of the position, and that *such fitness shall be ascertained by open, fair, honest, impartial competitive examination*. The impartiality of those examinations is to be secured by every possible safeguard. They are to be open to all who choose to present themselves. There will be tests of fitness of the applicant for the particular place to which he aspires.

S. Rep. No. 576, 47th Cong., 1st Sess. at 13-14 (1882) (emphasis supplied).

¶10 Congress retained the principle of appointment by merit throughout its various amendments and compilations of civil service law. Under 5 U.S.C. § 3304(a)(1), the President may prescribe rules which shall provide, "as nearly as conditions of good administration warrant," for "open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought." Similarly, in enacting a set of merit system principles to govern federal personnel management, Congress reiterated that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301(b)(1). Thus, Congress provided that "[a]n 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." 5 U.S.C. § 3304(b).

¶11 Section 3302 of Title 5 of the United States Code, in turn, provides that the President "may prescribe rules governing the competitive service" and that those

rules "shall provide, as nearly as conditions of good administration warrant, for – (1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of section[] . . . 3304(a) . . . ." Thus, Congress intended that competitive examinations would be the norm for appointments in the competitive service and that exceptions from the norm, in the form of rules prescribed by the President, are permitted when "necessary" for "conditions of good administration." *See National Treasury Employees Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (Congress clearly intended that competitive-service employees be selected on the basis of competitive examinations wherever practical); *National Treasury Employees Union v. Horner*, 654 F. Supp. 1159, 1161 (D.D.C. 1987) ("The structure and purpose of the civil service laws at issue here demonstrate that Congress intended appointment to the civil service through competitive examination to be the norm . . . .").

¶12 The Veterans' Preference Act of 1944, Pub. L. No. 359, ch. 287, 58 Stat. 390, as amended, was enacted to aid in the readjustment and rehabilitation of veterans. *Mitchell v. Cohen*, 333 U.S. 411, 418 (1948). Congress believed that the problems of returning veterans were particularly acute and merited special consideration because their normal employment and mode of life had been seriously disrupted by their service in the armed forces and they could not be expected to resume their regular activities without reemployment and rehabilitation aids. *Id*. The Federal Government, in its capacity as an employer, took the lead in such a program, and the Veterans' Preference Act was adopted, creating special preference and protection for returning veterans at every stage of federal employment. *Id*. at 418-19.

¶13 Veterans' preference in hiring for competitive-service positions takes two basic forms. First, by statute, agencies are permitted to appoint certain veterans noncompetitively. For example, veterans with compensable service-connected disabilities of 30% or more may receive "noncompetitive appointment[s] leading to conversion to career or career-conditional employment." 5 U.S.C. § 3112. In

addition, veterans of certain conflicts are eligible for noncompetitive "excepted" appointments at or below particular grades to positions otherwise in the competitive service. *See* 38 U.S.C. § 4214(b); 5 C.F.R. § 307.101(d).

¶14 The second form that veterans' preference takes in hiring comes into play in the competitive examining process. An integral part of the examining process is the assignment of numerical scores, followed by the rating and ranking of candidates according to those scores. 5 U.S.C. § 3309; 5 C.F.R. § 337.101(a) (OPM, or an agency operating under a delegation of authority from OPM pursuant to 5 U.S.C. § 1104(a)(2), "shall assign numerical ratings" to candidates). Under the Veterans' Preference Act, specific statutory provisions apply to the rating and ranking of preference eligible individuals. Preference eligibles have points added to their passing scores on examinations. *See* 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b). Preference-eligible veterans are entitled to five additional points, and disabled veterans,[3] as well as selected survivors, dependents, and parents of certain veterans and military service members, are entitled to ten additional points. 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b). Once the scores of the candidates for a position have been modified to include any additional points, the names of applicants who have qualified for appointment to the competitive service are entered onto "registers or lists of eligibles," in rank order, with preference eligibles ranked ahead of others with the same rating. *See* 5 U.S.C. § 3313; 5 C.F.R. § 332.401. For positions other than scientific and professional positions in grades GS-9 or higher, disabled veterans who have a compensable service-connected disability of 10 percent or more are entered onto registers in order of their ratings ahead of all remaining applicants. 5 U.S.C. § 3313(2)(A);

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[3] A disabled veteran is defined as an individual who was honorably separated from the armed forces and who has a service-connected disability or is receiving compensation, disability retirement benefits, or a pension administered by the Department of Veterans Affairs or a military department. 5 U.S.C. § 2108(2). The statute defines all disabled veterans as preference eligible. 5 U.S.C. § 2108(3)(c).

5 C.F.R. § 332.401. An examining authority certifies "enough names from the top of the appropriate register" to permit the appointing authority "to consider at least three names for appointment to each vacancy in the competitive service." 5 U.S.C. § 3317(a). The appointing authority "shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a)." 5 U.S.C. § 3318(a). If an appointing authority "proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with [OPM] for passing over the preference eligible" and obtain OPM's approval. 5 U.S.C. § 3318(b)(1). For a preference-eligible veteran with a 30% or more disability, the veteran is entitled to notice of the proposed passover and an opportunity to respond to OPM. 5 U.S.C. § 3318(b)(2).

¶15 To determine whether the agency violated 5 U.S.C. § 3304(b) when it appointed, in the competitive service, an individual from the Outstanding Scholar list who had not passed an examination and who was not "specifically excepted from examination under section 3302" of title 5, we must first determine if section 3304(b) is a statute "relating to veterans' preference," as required by VEOA. *See* 5 U.S.C. § 3330c (the Board may order a remedy under VEOA only if it determines that an agency has violated a right described in section 3330a, i.e., an individual's right "under any statute or regulation relating to veterans' preference"). As set forth below, we find that it is.

¶16 Absent a distinct definition in a statute or regulation, the words in a statute are assumed to carry their "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Union Pacific R.R. Co. v. Hall*, 91 U.S. 343, 347 (1875) ("Congress may well be supposed to have used language in accordance with the common understanding."); *Butterbaugh v. Department of Justice*, 91 M.S.P.R. 490, ¶ 13 (2002), *rev'd on other grounds*, 336 F.3d 1332 (Fed. Cir. 2003). The Supreme Court has held, in analyzing the Airline Deregulation Act, that the ordinary meaning of the words "relating to" is a broad

one. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992). The Court held that the phrase means "to stand in some relation; to have bearing or concern; to pertain; to refer; to bring into association with or connection with." The Court noted that, in a case involving an interpretation of the same phrase under the Employee Retirement Income Security Act of 1974 (ERISA), it had held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with, or reference to, such a plan." *Id*. at 384. Thus, the Court held in *Morales* that, "[s]ince the relevant language of the ADA [Airline Deregulation Act] is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline 'rates, route, or services' are pre-empted." *Id*.

¶17 VEOA does not define the phrase "relating to," nor does any applicable regulation. Thus, the ordinary meaning, as defined by the Supreme Court, should be applied. We find that 5 U.S.C. § 3304(b) "stand[s] in some relation to," has a bearing on, concerns, and "has a connection with" veterans' preference rights. By establishing the principle that examinations are the norm and that individuals may not be appointed in the competitive service unless they have passed an examination or are specifically excepted from examination under 5 U.S.C. § 3302, section 3304(b) ensures that the veterans' preference provisions that are a part of the examination process, such as 5 U.S.C. § 3309 (a preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating), 5 U.S.C. § 3313 (the names of preference eligibles who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles ahead of others having the same rating) and 5 U.S.C. § 3318(b) (appointing authorities proposing to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible shall file written reasons with OPM for passing over the preference eligible), will generally be applied to the appointment process for positions in the competitive service.

¶18 Without an overarching statute "relating to veterans' preference" and enforceable under VEOA, and which provides that appointments may be made in the competitive service only if an individual has passed an examination or is specifically excepted from examination under 5 U.S.C. § 3302, the enforcement of such fundamental veterans' preference provisions as 5 U.S.C. §§ 3309, 3313, and 3318, would occur only when an agency actually held an examination. We believe that such a result would not only be inconsistent with the applicable statutory language, but would be inconsistent with the Congressional intent that VEOA address "a variety of strategies recently used by agencies that threaten veterans' preference, whether that is their intended effect or not." H.R. Rep. No. 105-40 (1997). Indeed, Congress expressed concern about testimony provided during the congressional hearings that veterans' preference in the federal workplace "is often ignored or circumvented and that its continued viability is threatened on several fronts." *Id*. The Senate similarly believed that "it is vital that the Federal Government open to veterans as many employment opportunities as possible." *Young v. Federal Mediation and Conciliation Service*, 93 M.S.P.R. 99, ¶ 6 (2002) (quoting S. Rep. No. 105-340, at 15, 17 (1998)), *aff'd*, 66 Fed. Appx. 858 (Fed. Cir. 2003).

¶19 By ensuring that statutes such as 5 U.S.C. §§ 3309, 3313, and 3318 are applied by agencies unless there exists an exception to examination that meets the criteria of 5 U.S.C. § 3302, section 3304(b) is intrinsically connected to those statutes in a way that prevents veterans' preference rights in the federal workplace from being ignored or circumvented. This interpretation of the "relating to" language in section 3330a, which supports a finding that section 3304(b) is a statute "relating to" veterans' preference rights, is also consistent with the fact that VEOA is a remedial statute and the general principle that remedial statutes should be construed to suppress the evil and advance the remedy. *See Williams v. Department of the Navy*, 90 M.S.P.R. 669, ¶ 7, *vacated*

on other grounds, 55 Fed. Appx. 538 (Fed. Cir. 2002); *Pastor v. Department of Veterans Affairs*, 87 M.S.P.R. 609, ¶ 13 (2001).

The appellant has proven a violation of his rights under Section 3304(b).

¶20 Having determined that section 3304(b) is a statute "relating to" veterans' preference rights, we must next ascertain whether the agency violated section 3304(b) in the selection here at issue. Section 3304(b) provides that "[a]n 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."

a. The noncompetitive appointment in this case of an individual to a position in the competitive service did not comport with sections 3304(b) and 3302.

¶21 Here, there is no indication that the individual selected by the agency and appointed in the competitive service took or passed an approved examination. In fact, the agency explained that "[a]n application was received from an applicant with eligibility for Personnel Management Specialist, GS-201-7, with eligibility as an Outstanding Scholar," and the agency "decided to appoint this individual at the GS-7 grade level as a Career Conditional Appointment with a Legal Authority of 'Direct Hire OPM Authority, ACWA Outstanding Scholar Program.'" AF, Tab 10, Agency Response at 5. The agency asserted that, because the appellant and other preference eligibles provided no evidence of qualification as an Outstanding Scholar, "no numerical ranking was completed." *Id.*; *see also* AF, Tab 6, Subtab 1 at 3 ("After considering the applicants on the list and certificate, the Agency decided to fill the position with an applicant with qualifications as an Outstanding Scholar."). In a February 21, 2002 "Memorandum for the Record," Dory Stevenson, Human Resources Manager, wrote: "I decided to pursue the Outstanding Scholar route to hire another person," and "we can do this with direct hire since the provision to clear the CTAP/ICTAP eligibles was met when

the original announcements were made." AF, Tab 6, Subtab 4a. These actions by the agency appear to be consistent with OPM's "background information" on the Outstanding Scholar Program, which provides that rating and ranking are not required and suggests that applicants need not receive a passing score in an examination. AF, Tab 10, Ex. 5 ("Unlike the Outstanding Scholar program, the Bilingual/Bicultural program requires that applicants receive a passing score through the alternative examining procedure."); *see also* AF, Tab 6, Subtab 4l (under the agency's internal Merit Promotion Plan, all non-competitive candidates and candidates eligible for appointment under special hiring authorities are identified and forwarded to the selecting official once the vacancy announcement has closed; they are not rated and ranked).

¶22 Under these circumstances, the noncompetitive appointment, i.e., without examination, of an individual to the position in the competitive service at issue in this case does not comport with sections 3304(b) and 3302, unless the individual the agency appointed was "specifically excepted from examination under section 3302" of title 5.

b. The *Luevano* consent decree did not purport to create an exception that supersedes veterans' preference rights under the competitive process.

¶23 Notwithstanding our earlier finding that the Outstanding Scholar Program, in and of itself, cannot be relied upon to avoid the competitive examination procedures when veterans' rights are at issue, as explained below, the *Luevano* consent decree was not intended to create an exception that supersedes veterans' preference rights.

¶24 In 1981, the federal district court of the District of Columbia approved a consent decree (hereinafter "Luevano decree" or "decree") resolving a class employment discrimination action. The action was brought by "a nationwide class of blacks and Hispanics" against OPM and "all Federal departments, agencies, and corporations subject to section 717 of the Civil Rights Act of 1964, as amended, which have used, are using, or may use the PACE." Luevano

Consent Decree, 1981 WL 402614 (1981). The plaintiffs alleged that the Professional and Administrative Career Examination (PACE), which was used "to identify qualified individuals for employment into entry level jobs in over 100 professional and administrative occupations in the Federal service, was culturally biased and "discriminate[d] against class members in violation of Title VII of the Civil Rights Act of 1964 …." Id., ¶ 10; Luevano v. Campbell, 93 F.R.D. 68, 72 (D.D.C. 1981) (court order approving decree).

¶25 The *Luevano* decree provided that OPM must eliminate the PACE within three years and develop in its place alternative examinations for particular job categories or groups of job categories. *Id.* at 78. The decree established "special programs," including the Outstanding Scholar Program, under which applicants were excepted from the competitive examination process, and required their use "to eliminate any adverse impact against class members" based on any continued "use of the PACE register" during the three-year period. *Luevano,* 93 F.R.D. at 79. "It [was] the intent of the parties that these special programs are supplemental to the interim use of the PACE and alternative examining procedures to assure equal employment opportunity in the Federal service" and was "not the intent of the parties that use of these special programs shall replace the interim use of the PACE or the use of alternative examining procedures…." *Decree,* 1981 WL 402614, ¶ 14.

¶26 The decree also provided that "[a]ny adverse impact which results from the requirements of the Veterans' Preference Act, 5 U.S.C. § 3318, will be taken into account and may constitute a defense to the determination of adverse impact with respect to any competitive procedures." *Id.* at ¶ 9. This language suggests that the special programs established by the decree were not intended to override veterans' preference rights.

¶27 The court decision approving the decree did not find that the civil rights laws alleged to have been violated by the PACE examination superseded veterans' preference laws. To have done so would have been contrary to the

provision in Title VII stating that "[N]othing contained in this subchapter [which prohibits discrimination in employment] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans." 42 U.S.C § 2000e-11. And the court expressly found that the purpose of the decree *accorded* with the underlying policies of Title VII:

¶28

> 36. The parties have agreed, and the Court finds, that the purpose of the Decree is to provide, in accord with the underlying policies of Title VII and the Civil Service Reform Act of 1978, for the elimination of the PACE, and for the development of alternative examining procedures which will eliminate adverse impact against blacks and Hispanics as much as feasible, and which will validly and fairly test the relative capacity of applicants to perform PACE occupations.

Luevano, 93 F.R.D. at 80.

¶29 Although the court originally envisioned retaining jurisdiction for only five years, subject to renewal, the parties have not argued or shown that the court's jurisdiction has terminated. It thus appears that OPM and other federal agencies continue to be bound by the decree.[4] This does not mean, however, that they are bound to use the decree's special programs, such as the Outstanding Scholar Program, to supersede veterans' preference rights. To the contrary, such a use would be inconsistent with the express provisions of Title VII and the acknowledgement of veterans' preference rights in the decree itself.

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[4] *See National Treasury Employees Union v. Horner*, 654 F. Supp. 1159, 1166 n.5 (D.D.C. 1987) (in setting aside, as arbitrary and capricious, OPM's actions that were inconsistent with the *Luevano* decree, the court noted that its order "in no way excuses defendants from any obligations they may have under the Decree" which "in essence, defined OPM's obligations under Title VII, while this Order concerns only the civil service laws" and that "OPM is obliged to abide by both statutes, and may not satisfy one at the expense of the other"), *aff'd and remanded on other grounds*, 854 F.2d 490 (D.C. Cir. 1988).

c. The individual the agency appointed was not "specifically excepted from examination under section 3302" of title 5.

¶30 As set forth above, section 3302 provides that the President "may prescribe rules governing the competitive service" and that those rules "shall provide, as nearly as conditions of good administration warrant, for – (1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of section[] 3304(a) . . . ."

¶31 Here, there is no indication that the President prescribed a rule for a specific exception from the provisions of 5 U.S.C. § 3304(a) based on the Outstanding Scholar Program. Exceptions from the provisions of 5 U.S.C. § 3304(a) have been prescribed by Presidents in the past. For example, Exec. Order No. 11,521, 35 Fed. Reg. 5311 (1970), *reprinted as amended in* 5 U.S.C.A. § 3302 note at 210-12 (1996), permits excepted appointments, to be known as "veterans readjustment appointments," to positions in the competitive service; Exec. Order No. 12,125, 3 C.F.R. 375 (1980), *reprinted in* 5 U.S.C.A. § 3301 note at 198 (1996), permits severely physically handicapped and mentally retarded individuals to acquire competitive status without competitive examination; and Exec. Order No. 10,577, 19 Fed. Reg. 7521 (1954), *reprinted as amended in* 5 U.S.C.A. § 3301 note at 179-88 (1996), delegates to OPM the authority to except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable. There is also no indication that the President delegated to OPM the authority to promulgate a rule creating a specific exception from examination under section 3302(2) based on the Outstanding Scholar Program. *Cf. Fish v. Department of the Navy*, 29 M.S.P.R. 595, 597 (1986) (the President has the power to except positions from the competitive service under 5 U.S.C. §§ 3301 and 3302, and OPM, "under delegating authorities," exercises that power on behalf of the President); *Harris v. Department of State*, 24 M.S.P.R. 514, 515 (1984) (the authority to prescribe conditions for federal reemployment under the Taiwan

Relations Act of 1979 was delegated by the President to the Director of OPM under Exec. Order 12,143, 44 Fed. Reg. 37,191 (1979)), *aff'd*, 785 F.2d 320 (Fed. Cir. 1985) (Table).

¶32 In explaining why it interpreted the original version of VEOA as requiring a new excepted appointing authority under 5 U.S.C. § 3304, OPM stated that "absent specific legislation or Executive order, OPM has no authority to permit the noncompetitive appointment of candidates in the competitive service." 65 Fed. Reg. 14,431 (2000). Here, the agency has not identified "specific legislation or [an] Executive order" permitting the noncompetitive appointment of candidates in the competitive service under the Outstanding Scholar Program.

¶33 Even assuming that the President delegated such authority to OPM, OPM has not promulgated a "rule," as section 3302 requires, establishing the Outstanding Scholar Program as a specific exception to the examination process with regard to veterans' preference rights. Congress required OPM to adhere to the notice and comment procedures of the Administrative Procedures Act when promulgating any rule. *See* 5 U.S.C. § 1103(b) (the Director of OPM "shall publish in the Federal Register general notice of any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees"); *National Treasury Employees Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988). No rule establishing the Outstanding Scholar Program as an exception under section 3302 has been subject to such notice and comment procedures.

¶34 We note that, under 5 C.F.R. § 330.101, "[a]n appointing officer may fill a position in the competitive service by any of the methods authorized in this chapter." The current version of Chapter I, Title 5 C.F.R., contains two references to the Outstanding Scholar Program. *See* 5 C.F.R. §§ 330.205(g) (an agency must clear its reemployment priority list before making appointments under a direct-hire authority, "which includes the Outstanding Scholar provision"); 330.705(b)(2) (setting forth actions subject to an order of selection

in filling vacancies from outside the agency's workforce, which includes noncompetitive appointments to the competitive service, "(e.g., the types listed in part 315, subpart F of this chapter, as well as Outstanding Scholar and Bilingual/Bicultural appointments *made under the authority of the Luevano consent decree*)") (emphasis added). Although these regulations describe actions agencies must take when making appointments under the Outstanding Scholar Program, they do not "authorize" appointments under that program; rather, section 330.705(b)(2) refers to the *Luevano* consent decree as authorizing the appointment. In any event, there is no indication that these regulations are based on specific legislation or an Executive order authorizing OPM to permit the noncompetitive appointment of candidates in the competitive service.

¶35 There is also no indication that OPM's Delegated Examining Operations Handbook is based on such legislation or Executive order. As its title suggests, that document is a "handbook" that provides guidance for agencies that have been delegated examining authority by OPM. The 2003 Handbook "provides agencies with guidance, options, and, where necessary, specific operational procedures that are designed to ensure that examining programs comply with merit system laws and regulations." Handbook, Introduction at i. The Handbook also provides that it is to be used in conjunction with specific authorities in agency delegation agreements, applicable laws in Title 5, United States Code, and regulations published in the Code of Federal Regulations. *Id*. Thus, the Handbook is subject to, and may not override, such statutes as 5 U.S.C. § 3304(b).

¶36 Finally, as previously noted, in granting the President the authority to create exceptions from open, competitive examinations in making appointments in the competitive service under section 3302, Congress required that the exceptions be necessary and warranted by considerations of good administration. *Horner*, 854 F.2d at 499 ("Congress expressly provided that OPM should consider 'conditions of good administration' in deciding whether exceptions from the competitive service are 'necessary' . . . ."); *National Treasury Employees*

Union v. Horner, 654 F. Supp. 1159, 1162, 1165 (D.D.C. 1987) (while Congress has given the Executive branch the authority to except certain positions from the requirement that selections of Federal personnel be based on relative ability, knowledge, and skills, after fair and open competition, including competitive examinations for testing applicants for appointment, Congress has directed that such exceptions be made when necessary and warranted by considerations of good administration). Even assuming that the other requirements of section 3302, discussed above, have been met, there has been no showing that an exception to the examination process, in the form of the Outstanding Scholar Program, was determined by the President or OPM to be necessary and warranted by considerations of good administration. The *Luevano* decision did not find that the civil rights laws alleged to have been violated by the PACE examination superseded veterans' preference laws, and, as noted earlier, it does not appear that the court would have been correct had it so found. *See* 42 U.S.C. § 2000e-11.

¶37 We recognize that the above analysis could affect federal employee hiring for positions in the competitive service that are covered by the *Luevano* consent decree. Congress, however, has charged the Board with adjudicating appeals under VEOA and ordering a remedy when there has been a violation of an individual's rights under any statute or regulation relating to veterans' preference. The Board's role as an adjudicatory agency under VEOA is not to set policy regarding preferred methods of federal employee hiring involving veterans' rights. Indeed, that policy has already been set forth in title VII, which resolves the conflict between veterans' rights and discrimination law in favor of veterans' rights. Nor is it the Board's role to determine when necessary exceptions from competitive examinations are warranted by "conditions of good administration." That responsibility lies with the President, Congress, and OPM. If the President, Congress, or OPM determines that the Outstanding Scholar Program is a necessary exception to competitive examination, which overrides

veterans' rights, they may compel a different result by enacting a statute, issuing an Executive order, or promulgating a regulation to that effect. *See Reid v. Department of Commerce*, 793 F.2d 277, 284 (Fed. Cir. 1986) ("'The remedy for any dissatisfaction with the results in particular cases lies with Congress and not this court. Congress may amend the statute; we may not.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)).

¶38 For the foregoing reasons, we find that the agency violated the appellant's rights under 5 U.S.C. § 3304(b), a statute relating to veterans' preference, when it appointed to the Personnel Management Specialist position an individual who had not passed an examination and who had not been specifically excepted from examination under 5 U.S.C. § 3302.

The appellant's cross petition for review is denied.

¶39 The appellant asserts in his cross petition for review that the AJ erred when he did not order the agency to provide interim relief. In support of this argument, the appellant asserts that the AJ found in his favor, "[t]he facts and the law of the case warranted Interim Relief," and the acting agency officials engaged in egregious misconduct that the AJ found was willful and deliberate.

¶40 Under 5 U.S.C. § 7701(b)(2)(A), if an employee is the prevailing party in a Board appeal "under this subsection," the employee shall be granted the relief provided in the decision effective upon the making of the decision and remaining in effect pending the outcome of any petition for review, unless, among other things, "the deciding official determines that the granting of such relief is not appropriate." The AJ in this case noted that the Board in *Augustine v. Department of Veterans Affairs*, 88 M.S.P.R. 407 (2001), *vacated on other grounds*, 95 M.S.P.R. 293 (2003) (Table), had declined to rule on the identical legal issues presented in this case without further briefing by the parties and other interested groups. AF, Tab 12 at 8-9. The AJ concluded that awarding interim

relief was inappropriate because the Board in *Augustine* could decide those issues differently than the AJ had decided them. *Id*. at 9.

¶41 Even assuming that a VEOA appeal under 5 U.S.C. § 3330a is subject to the interim relief provisions of 5 U.S.C. § 7701, *see Scharein v. Department of the Army*, 91 M.S.P.R. 329, ¶ 5 n.2 (declining to address the propriety of awarding interim relief in a VEOA appeal because the Board found that the agency complied with the AJ's interim relief order), *review dismissed*, 44 Fed. Appx. 478 (Fed. Cir. 2002), we find that the appellant has shown no abuse of discretion by the AJ in declining to order interim relief in this case. Therefore, we deny the appellant's cross petition for review.

<u>The appropriate remedy in this case is not retroactive appointment; rather, the agency must comply with the applicable law</u>.

¶42 The agency asserts that the AJ erred in determining that the proper remedy in this case is retroactive appointment, an award of back pay, and an award of damages equivalent to the back pay award. PFR at 19-24. We agree.

¶43 VEOA provides that, if the Board determines that an agency has violated a statute or regulation relating to veterans' preference, it "shall order the agency to comply with such provisions." 5 U.S.C. § 3330c. VEOA further provides that, when there has been a violation, the Board is to "award compensation for any loss of wages or benefits" and, when the Board determines that the violation was willful, an amount equal to back pay is to be awarded as liquidated damages. *Id*. The Board's regulations reiterate these statutory provisions. 5 C.F.R. § 1208.25 ("If the Board determines that a Federal agency has violated the appellant's VEOA rights, the decision of the Board . . . will order the agency to comply with the statute or regulation violated . . . ."). As set forth above, the agency violated the appellant's rights under a statute relating to veterans' preference. Therefore, reading the provisions of section 3330c as a whole, we find that the agency, in reconstructing the hiring for the Personnel Management Specialist position in Columbia, South Carolina, must comply with the requirement, set forth at

5 U.S.C. § 3304(b), that "[a]n 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."

¶44 We are aware of no provisions within VEOA stating that an individual whose rights have been violated is automatically entitled to the position sought. Rather, 5 U.S.C. § 3330c reflects that such an individual is entitled to a selection process consistent with law. This reading of the statute comports with the holding of our reviewing court that the Board is not authorized to supplant remedies Congress expressly provided or to create new remedies which it believes Congress overlooked. *See King v. Jerome*, 42 F.3d 1371, 1375-76 (Fed. Cir. 1994). Moreover, this approach is consistent with the statutory provision regarding the award of compensation for "any" loss of wages or benefits suffered by reason of a violation of a veterans' preference right. 5 U.S.C. § 3330c. An individual can suffer such losses only if he would have been hired by the agency in the absence of a violation of his rights.

¶45 We also disagree with the view that a failure to order a retroactive appointment in this case would result in no relief for the appellant and would merely amount to an injunction against future wrongdoing. The relief for the appellant in this case, as required by statute, is an order from the Board requiring the agency to comply with the violated provisions of a statute relating to veterans' preference, and an award of compensation for any loss of wages or benefits suffered by reason of the violation. While the Board can order the agency to comply with the violated law, it is unclear whether the appellant is entitled to an award of compensation because it is unknown whether he would have been selected for the position if the proper procedures had been followed. Moreover, there is no basis for rejecting the statutorily-mandated remedy based on a concern as to how a Board order in this case may affect persons who are not parties in this proceeding. The impact, if any, of this order on non-parties is subject to any future case that may involve such an issue.

ORDER

¶46 We ORDER the agency to reconstruct the hiring for the GS-201-7 Personnel Management Specialist position in Columbia, South Carolina, consistent with the requirement set forth at 5 U.S.C. § 3304(b) that "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." *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 30 days after the date of this decision.

¶47 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶48 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶49 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be

found at 5 C.F.R. §§ 1201.202, 1201.203, and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT
REGARDING YOUR 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 the office that issued the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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

Washington, D.C.