

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 138

Docket No. CH-3443-06-0582-I-1

**Stephen W. Gingery,
Appellant,**

v.

**Department of Defense,
Agency.**

May 30, 2007

Stephen W. Gingery, Macomb, Michigan, pro se.

Susan L. Lovell, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision denying his request for relief under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons stated below, we DENY the petition, REOPEN this appeal on our own motion, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The appellant's request for relief under VEOA is DENIED.

BACKGROUND

¶2 In early 2006, the agency in this case decided to fill three auditor positions at its office in Sterling Heights, Michigan. See Appeal File, Tab 7, Subtab 4B at

1. It posted an announcement on an internet web site, Monster.com; it included in the announcement a statement that the agency was “also accepting resumes . . . for our Career Intern Program”; and it asked the Office of Personnel Management (OPM) for certificates of candidates eligible for appointment at the GS-7 and GS-9 levels. Appeal File, Tab 7, Subtab 4B at 1; *id.*, Subtab 4I. After interviewing the appellant and other candidates, it hired two applicants under the Federal Career Intern Program (FCIP),¹ one applicant whose name appeared on an OPM certificate, and, apparently, one applicant whom the agency described as eligible for noncompetitive reinstatement. *See id.*, Tab 7, Subtab 4B; *id.*, Subtab 4H at 1; Appeal File, Tab 10, Attachment 1 (OPM certificates) at 6.

¶3 The appellant, who was not among the selectees, filed a complaint with the Department of Labor; and, when that department failed to resolve his complaint, he filed an appeal with the Board’s Central Regional Office. Appeal File, Tab 1; *id.*, Tab 7, Subtab 4C; *id.*, Tab 17 at 11. In his appeal, he alleged that the agency’s actions related to the selections described above violated his rights as a compensably disabled preference eligible, and he requested appropriate corrective action. *Id.*, Tab 1. The administrative judge to whom the appeal was assigned issued an initial decision denying the request; the appellant has petitioned for review; and the agency has responded to the petition. Initial Decision, Appeal File, Tab 19; Petition for Review (PFR), PFR File, Tabs 1, 3.²

¹ The agency evidently made tentative job offers to three applicants under the FCIP, but it later withdrew one of those offers. *See* Appeal File, Tab 7, Subtab 4B at 2; *id.*, Subtab 4H at 1.

² The appellant has filed a subsequent submission, objecting to the agency’s response to his petition and requesting that the Board “reject” that response. PFR File, Tab 4. The appellant’s submission consists essentially of arguments he made previously in his petition for review, however, and provides no basis for disregarding the agency’s response. The appellant’s request therefore is DENIED.

ANALYSIS

¶4 As the administrative judge noted, the Board has jurisdiction, in a VEOA appeal such as this, to determine whether the agency violated the appellant's rights under a statutory or regulatory provision relating to veteran preference. *See* 5 U.S.C. § 3330a(a)(1), (d); Initial Decision at 2. We agree with the administrative judge that the appellant has failed to show such a violation.

¶5 We note first that the appellant has shown no error in the administrative judge's findings and conclusions concerning the selection of another preference eligible from the OPM certificate or concerning the appointment of the applicant the agency described as reinstatement eligible. As explained below, he also has not shown that the agency violated his rights in its consideration and appointment of the FCIP candidates.

¶6 On petition for review, the appellant argues that the agency's hiring under the FCIP constitutes improper circumvention of his preference rights. PFR at 11-14. In support of this argument, he relies on *Deems v. Department of the Treasury*, 100 M.S.P.R. 161 (2005), *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), *aff'd on recons.*, 104 M.S.P.R. 1, (2006), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), *aff'd on recons. sub nom. Dean v. Department of Agriculture*, 104 M.S.P.R. 1, (2006). PFR at 11.³

³ The appellant also refers to the fact that the agency interviewed him only once, while it conducted second interviews of some other candidates who eventually were selected for the FCIP positions; he asserts that he should have been interviewed twice, once in connection with an FCIP position and once in connection with a non-FCIP position; and he argues that, because it interviewed him only once, the agency failed to give him proper consideration. PFR at 13-14.

This issue does not appear to have been raised below, and the only reason given for this failure – i.e., the appellant's alleged inability to understand “technical jargon” – is inadequate. *See Morrison v. Department of the Army*, 77 M.S.P.R. 655, 659 n.4 (1998) (while pro se appellants are not expected to proceed with the precision of an attorney in a judicial proceeding, they may not escape the consequences of inadequate representation); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review

¶7 The appellant has misinterpreted the decisions he cites. The Board did not indicate in those decisions that noncompetitive hiring authorities could never be used to hire candidates not entitled to preference when qualified preference-eligible candidates were available. Instead, it indicated that, under 5 U.S.C. § 3304, an individual could be appointed in the competitive service only if he had passed an examination or qualified for appointment under a valid noncompetitive appointing authority. *Dean*, 99 M.S.P.R. 533, ¶¶ 10-38; *see Olson*, 100 M.S.P.R. 322, ¶ 6. The Board observed in *Dean* that preference eligibles received certain advantages in a competitive examination under 5 U.S.C. §§ 3309-3318, and it concluded that the appointment in that case of a candidate not entitled to veteran preference violated the appellant's preference rights because the appointee did not pass a competitive examination and was not appointed under a valid noncompetitive appointing authority. *Dean*, 99 M.S.P.R. 533, ¶¶ 14, 21-38.

¶8 The appointments at issue in *Dean* and *Olson* were made under the Outstanding Scholar Program (OSP). *See Olson*, 100 M.S.P.R. 322, ¶ 2; *Dean*, 99 M.S.P.R. 533, ¶ 7. In its decisions in those cases, the Board found that the OSP did not create an exception that superseded preference rights under the competitive process. *Olson*, 100 M.S.P.R. 322, ¶ 7; *Dean*, 99 M.S.P.R. 533, ¶¶ 23-38. In *Deems*, 100 M.S.P.R. 161, ¶ 13, it made the same finding regarding the Clerical and Administrative Support Positions (CASP) assessment tool. In the absence of any showing that the selectees in those cases had passed an examination or had been specifically excepted from examination under 5 U.S.C. § 3302, the Board concluded that the agencies had violated the appellants' preference rights by appointing the selectees to the competitive service positions

absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). Moreover, even if the argument described above were properly before the Board, we would see no merit in it. The appellant has cited no basis for finding that the agency was obligated, under a statute or regulation relating to veteran preference, to interview him separately for the FCIP and non-FCIP positions, and we know of none.

for which the appellants had applied. *Olson*, 100 M.S.P.R. 322, ¶¶ 8-9; *Dean*, 99 M.S.P.R. 533, ¶¶ 30-38; *Deems*, 100 M.S.P.R. 161, ¶ 16.

¶9 There is no indication that the two FCIP appointees in this case “passed an examination,” as that term is used in 5 U.S.C. § 3304. The FCIP authority used here, however, differs from those used in the cases on which the appellant relies because it represents a valid exception to the competitive examination requirement. Unlike the OSP and CASP programs, it was expressly authorized by an Executive order promulgated under 5 U.S.C. § 3302. *See* Exec. Order No. 13,162, Preamble, 65 Fed. Reg. 43,211 (July 6, 2000).

¶10 The purpose of the FCIP is “to attract exceptional men and women to the federal workforce who have diverse professional experiences, academic training, and competencies, and to prepare them for careers in analyzing and implementing public programs.” Exec. Order No. 13,162, § 1. The Executive order establishing the program authorizes 2-year Schedule B excepted appointments at the GS-5, -7, and -9 levels, and provides that appropriate veteran preference criteria are to be applied. *Id.*, §§ 3(b), 4(a). An FCIP appointee is to receive developmental assignments “consistent with [the appointee’s] competencies and career interests . . . ,” and he may be converted to a career or career-conditional appointment upon successful completion of his internship. *Id.*, § 4(b)(1); 5 C.F.R. §§ 213.3202(o)(6), 315.712.

¶11 OPM is authorized to promulgate regulations needed to carry out the purposes of the Executive order, *id.*, § 6, and in fact it has done so. Under regulations applicable to excepted appointments such as those under the FCIP, an agency may evaluate candidates under a “category rating” system as an alternative to traditional rating and ranking with numerical scores. *See* 5 C.F.R. §§ 213.3202(o), 302.304, 302.401. Under the category rating system, preference-eligible candidates who are qualified for the position being filled must be placed in the category of candidates to be considered first, but when there are fewer than

three candidates in that category, the agency may consider those in a lower category or categories. *See id.*

¶12 The administrative judge in this case found that the agency had complied with the relevant provisions of part 302 regarding the ranking and selection of candidates for the positions at issue here, including the provisions governing the selection of candidates who were not preference eligibles when there were higher-ranking preference-eligible candidates. Initial Decision at 7-9. Specifically, she found that the agency had ranked preference-eligible candidates higher than candidates not entitled to preference; that the selectees were nevertheless within reach for selection under 5 C.F.R. § 302.401(a); and that the agency complied with 5 C.F.R. § 302.401(b), which required it to “record its reasons” for passing over the appellant and to furnish a copy of the reasons to the appellant “on request.” *Id.* She also indicated that, although the appellant had not been furnished a copy of those reasons at the time of his nonselection, the agency was not required to furnish a copy at that time because the appellant had not requested one. *Id.* at 8 & n.4.⁴ The appellant has identified no error in these findings, and none is apparent to us.

¶13 For the reasons stated above, we see no error in the administrative judge’s finding that the agency did not violate the appellant’s preference rights. The initial decision is AFFIRMED AS MODIFIED.

ORDER

¶14 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)).

⁴ A copy of the document stating the agency’s reasons for passing over the appellant is included in the record in this case. Appeal File, Tab 7, Subtab 4E.

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.