

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

2009 MSPB 159

Docket No. DE-3330-08-0490-I-1
DE-4324-09-0086-I-1

Alvern C. Weed,

Appellant,

v.

Social Security Administration,

Agency.

August 10, 2009

Alvern C. Weed, Kalispell, Montana, pro se.

Pamela M. Wood, Esquire, and Sandra T. Krider, Esquire, Denver,
Colorado, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed for lack of jurisdiction his appeals filed under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the following reasons, we GRANT the petition for review, REVERSE the initial decision, FIND that the Board has jurisdiction over these appeals, and REMAND the appeals for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a ten-point compensable preference eligible veteran, filed a 2005 Board appeal alleging that the agency violated veterans' preference rules when it made no selection from a competitive service vacancy announcement for two GS-0105-05/07 Social Insurance Specialist (Claims Representative) positions for which he had applied in the agency's Montana Field Office in Kalispell, Montana, and instead noncompetitively selected in January 2005 two non-preference eligible applicants for those positions under the Outstanding Scholar Program. *See Weed v. Social Security Administration*, [107 M.S.P.R. 142](#), ¶ 2 (2007), *appeal dismissed*, [571 F.3d 1359](#) (Fed. Cir. 2009). The administrative judge (AJ) and the Board found that the agency violated the appellant's statutory rights and ordered the agency to reconstruct the hiring for the positions. *Weed*, [107 M.S.P.R. 142](#), ¶¶ 3-4, 15. The appellant subsequently filed a petition seeking enforcement of the Board's order. *See Weed v. Social Security Administration*, [111 M.S.P.R. 450](#), ¶ 2 (2009); *Weed v. Social Security Administration*, [110 M.S.P.R. 468](#), ¶ 3 (2009).

¶3 The appellant filed the instant appeal in September 2008 alleging that the agency violated his veterans' preference rights under [5 U.S.C. § 3318\(b\)](#), discriminated against him in violation of USERRA, and retaliated against him for his successful Board appeal and an Equal Employment Opportunity Commission appeal. Initial Appeal File, MSPB Docket No. DE-3330-08-0490-I-1 (IAF-0490), Tab 1 at 2-3, 10. The appellant asserted that between January 1, 2006, and April 10, 2008, the agency filled vacancies for the same or comparable positions for which he had applied in 2005 under the noncompetitive authority of the Federal Career Intern Program (FCIP) without providing public notice of the vacancies and, despite his pending petition for enforcement in his prior Board appeal, without advising the appellant of the vacancies or otherwise providing him with an opportunity to compete for the vacancies. IAF-490, Tab 1 at 3. The

appellant claimed that the agency used the FCIP as an “intentional artifice” to exclude him from the opportunity to compete for the positions. *Id.*

¶4 The AJ docketed separate appeals under VEOA and USERRA and ordered the appellant to show that the Board had jurisdiction over the appeals. IAF-0490, Tab 2; Initial Appeal File, MSPB Docket No. DE-4324-08-0086-I-1 (IAF-0086), Tabs 2, 4. After the parties filed their responses,¹ the AJ ordered the parties to submit evidence and argument on the question of whether the appellant, who had not applied for any of the four positions in question, had standing to pursue a VEOA or USERRA appeal concerning his nonselection. IAF-0490, Tab 8. After the parties filed their responses to this order, and based on the written record, the AJ dismissed the appeals for lack of jurisdiction. IAF-0490, Tab 13, Initial Decision (ID) at 2. The AJ found with respect to the VEOA appeal that although the appellant was a preference eligible and had exhausted his administrative remedies with the Department of Labor, and although the selections at issue took place after the October 30, 1998 enactment of VEOA, the appellant “failed to cite any veteran’s preference law, rule or regulation that the agency violated in failing to notify him of FCIP positions in Kalispell, Montana,” and “failed to make a nonfrivolous allegation that the agency violated any veteran’s preference laws when it failed to consider him for positions for which he did not apply.” ID at 5-6. The AJ distinguished this case from *Gingery v. Department of Defense*, [550 F.3d 1347](#) (Fed. Cir. 2008), finding that unlike Mr. Gingery, the appellant did not apply for any of the FCIP positions at issue, and therefore failed to raise a nonfrivolous allegation that the agency “failed to provide him with proper

¹ The agency presented evidence showing that it filled under the FCIP two Claims Representative positions and two Contact Representative positions in its Kalispell, Montana District Office on September 5, 2006, July 8, 2007, and September 30, 2007. IAF-0490, Tab 4, Narrative Response at 1 and Subtabs 1(a), 2(a), 3(a), 7(a).

passover rights under [5 U.S.C. § 3318](#)(b); misapplied the FCIP, or otherwise violated his veteran's preference rights" ID at 6.²

¶5 Regarding the USERRA appeal, the AJ found that the appellant's allegations relating to prohibited personnel practices, reprisal, and the agency's failure to comply with the Board's order to reconstruct the 2005 hiring process, were not relevant to the issue of discrimination based on his prior military service. ID at 7-8. The AJ further found that "without evidence that he applied for the positions at issue, the appellant cannot establish by preponderant evidence he was 'denied ... employment, reemployment, retention in employment, promotion, or any benefit of employment' because of military service," and that he therefore failed to make a nonfrivolous allegation that he was denied initial employment or a benefit of employment under USERRA. ID at 8.

¶6 The appellant asserts on review that although he did not formally apply for the positions in question, his failure to do so was due to the agency's unlawful use of the FCIP to personally deny him public notice of the vacancies and thereby circumvent veterans' preference laws. Petition for Review (PFR) at 2. The appellant claims that the agency therefore denied him an opportunity to compete for vacancies filled outside the agency's workforce under [5 U.S.C. § 3304](#), that he nonfrivolously alleged that the agency discriminated against him based on his status as a veteran in violation of USERRA when it used the FCIP to avoid notifying him of the vacancies and hiring him, and that the FCIP is illegal on its face because it circumvents statutory rights. PFR at 3-4.

¶7 The agency has filed a response in opposition to the petition for review, and the National Treasury Employees Union (NTEU), after having been granted leave to do so by the Clerk of the Board, has filed a brief as amicus curiae in

² The AJ found that because the appellant otherwise failed to make nonfrivolous allegations of Board appellate jurisdiction, she had not determined whether he also lacked standing to file appeals under the VEOA and USERRA because of his failure to apply for the positions at issue. ID at 6 n.3.

support of the appellant. PFR File, Tabs 4, 6-7. The parties have filed responses to the brief submitted by NTEU. *Id.*, Tabs 10-11. We have considered all of submissions filed by the parties and NTEU on review.

ANALYSIS

¶8 We first find that the Board has jurisdiction over the appellant's USERRA appeal. Under [5 U.S.C. § 4311\(a\)](#), a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation. To establish Board jurisdiction over a USERRA discrimination appeal arising under section 4311(a), the appellant must allege the following: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Lubert v. U.S. Postal Service*, [110 M.S.P.R. 430](#), ¶ 11 (2009).

¶9 It is well established that a claim of discrimination under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous, particularly where, as here, the appellant is pro se. *Wilson v. Department of the Army*, [111 M.S.P.R. 54](#), ¶ 9 (2009). This approach to Board jurisdiction in USERRA cases has been noted with approval by our reviewing court. *See Yates v. Merit Systems Protection Board*, [145 F.3d 1480](#), 1484 (Fed. Cir. 1998); *see also* H.R. Rep. No. 103-65, at 23 (1993), *reprinted in* 1994 U.S.C.A.A.N. 2449, 2456 ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced."). Further the weakness of the assertions in support of a claim is not a basis to dismiss the USERRA appeal for lack of

jurisdiction; rather, if the appellant fails to develop his contentions, his USERRA claim should be denied on the merits. *Wilson*, [111 M.S.P.R. 54](#), ¶ 9.

¶10 Here, the appellant has nonfrivolously alleged that he performed active military duty in the U.S. Army from 1972 to 1976. *E.g.*, IAF-0086, Tab 5 at 1. As the AJ found, the appellant did not apply for the positions in question. Nevertheless, under the particular circumstances of this case, we find that the appellant has still nonfrivolously alleged that the agency denied him initial employment based on his performance of duty in the uniformed service. *See* [38 U.S.C. § 4311\(a\)](#). The appellant asserted below that because of his prior application for similar positions with the agency, as well as his prior Board appeal, the agency was aware of his military service when it filled the positions at issue in this case, and that the agency “wrongfully and intentionally denied Appellant initial employment when it used the . . . FCIP . . . to appoint nonveterans, or veterans in a lower preference category, to positions in its KFO [Kalispell Field Office] in calendar years 2006 and 2007, when the Agency knew that Appellant’s veteran’s preference category would have placed him above all persons appointed to those positions.” IAF-0086, Tab 5 at 2. The appellant alleged that his prior active military service was a motivating factor in the agency’s decision to deny him initial employment through the use of the FCIP. *Id.*³ In essence, the appellant nonfrivolously alleged that the agency denied him

³ The appellant also alleged that the agency’s use of the FCIP to deprive him of initial employment was based on discrimination for a “previous action against the Agency to enforce protections afforded him under USERRA and other statutes relating to veterans rights” IAF-0086, Tab 5 at 2-3. Section 4311(b), however, provides that an employer may not discriminate in employment against any person because such person has, among other things, “taken an action to enforce a protection afforded any person *under this chapter*” (emphasis added). The appellant’s prior Board appeal against the Social Security Administration involved a VEOA claim, not an action to enforce a protection under chapter 43 of title 38. It is not clear what activity under [38 U.S.C. § 4311\(b\)](#) forms the basis for the appellant’s claim. Accordingly, the AJ shall afford the parties an opportunity to address this issue on remand.

initial employment based on his performance of duty in the uniformed services by deliberately using the FCIP as its method of hiring in order to avoid providing him with public notice of the vacancies and his veterans' preference rights, given the likelihood that he would have applied for these positions. Such a nonfrivolous allegation is enough to establish jurisdiction in this case. *See Wilson*, [111 M.S.P.R. 54](#), ¶10 (finding that a claim by the appellant that agency officials "didn't like the fact" of his Army National Guard service was sufficient to establish jurisdiction over the USERRA appeal).

¶11 We note that in *Jolley v. Department of Housing & Urban Development*, 299 F. App'x 969, 973 (Fed. Cir. 2008), the court affirmed the Board's dismissal of a USERRA appeal for lack of jurisdiction where the appellant admitted that he did not apply for the position in question because he believed that doing so would have been futile. *Jolley*, however, is distinguishable from this appeal. Mr. Jolley was "interested in" and aware of the vacancy for which he did not apply, *see id.* at 971, but chose not to apply for it based on his belief that doing so would have been futile. Here, by contrast, the appellant has nonfrivolously alleged that he did not apply for the vacancies because he was not aware of them, and that he was not aware of the vacancies because the agency deliberately used the FCIP hiring procedures to avoid having to issue public notice of the vacancies, thereby denying him initial employment.⁴ Thus, the appellant has alleged that the agency deliberately took or failed to take some type of action that effectively denied him initial employment. *See Isabella v. Department of State*, [102 M.S.P.R. 211](#), ¶ 9 (2006) (finding no jurisdiction over the appellant's claim that his military service prevented him from applying for a position because the appellant did not allege

⁴ According to the agency's FCIP guide for the Denver Region, the use of recruitment bulletins and vacancy announcements is not required, FCIP vacancies are not posted on OPM's USAJOBS website, and managers are responsible for recruiting external job applicants through "normal recruitment efforts such as paid advertising, on-line job listings, job fairs, college visits, referrals, etc." IAF-0086, Tab 6, Subtab 2u at 5.

that the agency took or failed to take any action based upon his military status or obligations). Having found jurisdiction over the appellant's USERRA appeal, we further find that the appellant is entitled to a hearing on the merits. *See Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶¶ 17-18 (2008).

¶12 Regarding the appellant's VEOA appeal, VEOA provides redress for preference-eligible individuals whose rights have been violated under any statute or regulation relating to veterans' preference. [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#). Aggrieved individuals may file a complaint seeking relief from the Secretary of Labor. [5 U.S.C. § 3330a\(a\)\(1\)\(B\)](#). If that remedy proves unavailing, the complainant may appeal to the Board. [5 U.S.C. § 3330a\(d\)\(1\)](#). In general, in order to establish jurisdiction over a VEOA appeal, an appellant must: (1) Show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA, (ii) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶ 7 (2007). Allegations of a VEOA violation "should be liberally construed" and an allegation, in general terms, that an appellant's veterans' preference rights were violated is sufficient to meet the requirement of a nonfrivolous allegation establishing Board jurisdiction. *See Slater v. U.S. Postal Service*, 2009 MSPB 128, ¶ 6; *Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 8 (2006). An appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 6 (2008).

¶13 As the AJ found, the appellant exhausted his administrative remedies with DOL and nonfrivolously alleged that he is a preference eligible and that the selections at issue took place after the October 30, 1998 enactment of VEOA. ID at 5. We further find, contrary to the AJ, that the appellant nonfrivolously alleged that the agency violated his rights under a statute relating to veterans'

preference, and therefore established Board jurisdiction over his VEOA appeal. *See Davis*, [105 M.S.P.R. 604](#), ¶¶ 9-10. As set forth above, an allegation in general terms that veterans' preference rights were violated meets the requirements of a nonfrivolous allegation. The appellant alleged that the agency's use of the FCIP violated his veterans' preference rights by not affording him an opportunity to compete for the vacancies,⁵ and he specifically cited [5 U.S.C. § 3318\(b\)](#), IAF-0490, Tab 1 at 2-3, 10, which provides that 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, it shall file written reasons for passing over the preference eligible with the Office of Personnel Management (OPM), which shall determine the sufficiency or insufficiency of those reasons. *See Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#), ¶ 8 n.2 (2009) (holding that section 3318 is a statute relating to veterans' preference).

¶14 Because the appellant's name did not appear on any certificate used to fill the positions at issue here, the agency did not have occasion to request OPM approval to pass over the appellant in order to select an individual who was not a preference eligible. We find, however, that the appellant's pro se allegation that the agency improperly used the FCIP to circumvent his veterans' preference rights should be interpreted as a more general challenge to the agency's authority

⁵ In order to establish Board jurisdiction over a "right to compete" VEOA claim under [5 U.S.C. § 3330a\(a\)\(1\)\(B\)](#), the appellant must (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (i) he is a veteran within the meaning of [5 U.S.C. § 3304\(f\)\(1\)](#), (ii) the actions at issue took place on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act of 2004, and (iii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of [5 U.S.C. § 3304\(f\)\(1\)](#). *Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 31 (2007). To the extent that the appellant may be alleging a violation of [5 U.S.C. § 3304\(f\)\(1\)](#), he must be notified on remand of the proper jurisdictional test for such a claim. *See Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). We need not at this time address the merits of such a claim.

to use the FCIP to fill the positions at issue in this case. In this regard, the appellant alleged that the agency's use of the FCIP circumvented "competitive merit system principles," denied him his "right to compete under the VEOA," and "prejudice[d] . . . other disabled veterans who were denied the opportunity to compete for those positions due to the SSA's use of the FCIP to circumvent competitive procedures." IAF-0490, Tab 1 at 10. The appellant further claimed that if the Board were to find that his allegations were frivolous

such a conclusion would be an open invitation for *carte blanche* use of the FCIP by Federal agencies out of malice, and to the prejudice of a specific person or group of people. Such a conclusion would also promote the use of the FCIP as a subterfuge to engage in prohibited personnel practices as well as mere circumvention of the VEOA.

IAF-0490, Tab 12 at 2. In essence, the appellant appears to be claiming that the Claims Representative and Contact Representative positions should have been advertised to the members of the public as positions in the competitive service, *see* [5 U.S.C. § 3330](#)(b), (d) (the list of vacant positions in the competitive service shall be available to members of the public), rather than to a narrower group of potential candidates under the FCIP as positions in the excepted service.⁶

¶15 Although the appellant did not apply for the positions in question, we find that this fact does not deprive the Board of jurisdiction under the circumstances of this appeal. First, we note that there is no requirement in the applicable statute or in the Board's general jurisdictional test that requires a nonfrivolous allegation that an application has been filed in order to nonfrivolously allege a violation of a statute or regulation relating to veterans' preference. *Cf. Downs*, [110 M.S.P.R.](#)

⁶ The record reflects the following FCIP recruitment efforts for the positions at issue between February 1 and June 10, 2007: The district manager spoke to a few senior seminar classes at the University of Montana about job opportunities at the agency, posted potential jobs on the University of Montana's job opportunity website, and distributed several hundred agency brochures in different locations on campus. IAF-0490, Tab 4, Subtab 4.

[139](#), ¶ 16 (under [5 U.S.C. § 4304\(2\)](#), the appellant's discharge from the Army under other than honorable conditions deprived the Board of jurisdiction over his USERRA claim, despite the fact that he met the Board's general USERRA jurisdictional test). In addition, the appellant in this case previously applied for a similar position in the same location and has submitted an affidavit indicating that he would have applied for the vacancies at issue if the agency had advertised and filled them as positions in the competitive service. IAF-0490, Tab 9, Ex. 4. In this regard, the appellant asserted that the agency's use of the FCIP to fill the positions in the Kalispell Field Office

was an intentional artifice to exclude Appellant from the opportunity to compete for those positions, for which Appellant was exceptionally well qualified to fill. Furthermore, the SSA knew full well that Appellant would have applied for all Kalispell positions, and . . . knew full well it would be hard pressed to support selection of anyone other than the Appellant for at least one of those positions. Consequently, the SSA, at the Kalispell Field Office, the Missoula District Office, and at the Denver Regional Office, separately, or in concert, intentionally used the FCIP to make excepted service appointments to the Kalispell positions expressly for the purpose of intentionally circumventing the VEOA, and intentionally to exclude Appellant, personally, from the opportunity to compete for those positions, and to retaliate against him for his previous VEOA and EEOC appeals.

IAF-0490, Tab 1 at 3. The Board's statement in *Letchworth v. Social Security Administration*, [101 M.S.P.R. 269](#), ¶ 7 n.5 (2006), that Mr. Letchworth did not raise a nonfrivolous allegation that his veterans' preference rights were violated when he did not apply for certain positions, does not control in this case. In *Letchworth*, [101 M.S.P.R. 269](#), ¶ 6, a vacancy announcement listed numerous locations in which positions would be filled and required applicants to identify the locations for which they sought consideration. The Board held that because the appellant sought to be considered for only three locations, he could not object to the selection of nonveterans in other locations. *Id.*, ¶¶ 6, 7 n.5. Here, by contrast, the appellant did not *choose* not to apply for the positions; instead, he

nonfrivolously alleged that he did not apply precisely because the agency violated his veterans' preference rights by using the FCIP instead of competitive hiring procedures, thereby effectively depriving him of notice of the vacancies.

¶16 The FCIP may be used only to fill positions in the excepted service. *See* Exec. Order No. 13,162, § 4(a); [5 C.F.R. § 213.3202](#)(o) (listing FCIP positions among those filled under Schedule B of the excepted service). By electing to fill the Claims Representative and Contact Representative positions under the FCIP, the agency was, in effect, electing to except them from the competitive service. Under [5 U.S.C. § 3302](#), Congress authorized the President to “prescribe rules governing the competitive service,” and it stated that those rules were to “provide, as nearly as conditions of good administration warrant, for . . . (1) necessary exceptions of positions from the competitive service” Having found that the Board has jurisdiction over this appeal, we turn to the merits of this appeal and find that the appellant’s argument that the agency should not have been permitted to use the FCIP to circumvent his veterans’ preference rights directly implicates section 3302. In fact, the appellant alleges on review that the FCIP is illegal on its face, and cites to the court’s decision in *Gingery*, 550 F.3d at 1354-56, which includes in Judge Newman’s concurring opinion arguments relating to the issue of whether the agency’s use of the FCIP met the “necessity” showing set forth in [5 U.S.C. § 3302](#). PFR at 4. In addition, NTEU specifically argues in its amicus curiae brief that the agency violated section 3302 through its use of the FCIP. PFR File, Tab 7 at 26-29, 36-47.

¶17 As set forth above, VEOA provides redress for violations under any statute or regulation relating to veterans’ preference. [5 U.S.C. § 3330a](#)(a)(1)(A). Although the Board has held that [5 U.S.C. § 3304](#)(b) is a “statute . . . relating to veterans’ preference” within the meaning of [5 U.S.C. § 3330a](#)(a)(1)(A),⁷ the

⁷ Section 3304(b) provides, in relevant part, 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 title 5.

Board has not squarely addressed the question of whether section 3302 qualifies as such a statute.⁸ Accordingly, the AJ shall provide the parties on remand with an opportunity to present evidence and argument on this issue, shall provide OPM with an opportunity to intervene in the appeal, and shall issue a new initial decision addressing that issue and, if the AJ finds that section 3302 relates to veterans' preference under section 3330a(a)(1)(A), the issue of whether the exception of the Claims Representative and Contact Representative positions complied with the "necessity" requirement of [5 U.S.C. § 3302\(1\)](#). See *National Treasury Employees Union v. Horner*, [854 F.2d 490](#), 495 (D.C. Cir. 1988) (provisions of title 5 of the U.S. Code, including 5 U.S.C. § 3302, provide a "meaningful – not a rigorous, but neither a meaningless – standard" against which to judge an OPM decision to except positions from the competitive service).

¶18 In addressing the above issues, the parties should also address, as appropriate, the question of whether the statutory scheme permits the exclusion of particular positions from the competitive service by individual agencies, rather than solely by the President or OPM. See *Fish v. Department of the Navy*, [29 M.S.P.R. 595](#), 597 (1986) (the President has the power to except positions

⁸ In *Deems v. Department of the Treasury*, [100 M.S.P.R. 161](#), ¶ 9 (2005), the Board stated that section 3302 was a "statute which applies to veterans' preference," without providing any supporting analysis. In *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#), ¶ 36 (2005), *reconsideration denied*, [104 M.S.P.R. 1](#) (2006), the Board addressed section 3302 within the context of determining whether there was a violation of section 3304(b), noting that "[e]ven 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." However, the Board repeatedly held that section 3304(b) was a statute "relating to" veterans' preference, and that the agency had violated that statute, not section 3302. *Id.*, ¶¶ 19-20, 38. The majority opinion in *Gingery*, 550 F.3d at 1351 n.1, noted that the Board could address on remand Mr. Gingery's argument "regarding whether the FCIP or the decision to place the auditor positions into the excepted service via the FCIP was lawful," but it did not address the question of whether section 3302 was a statute relating to veterans' preference.

from the competitive service, and OPM, under delegating authorities, exercises the power on behalf of the President). As set forth above, [5 U.S.C. § 3302](#) provides that “the President” may prescribe rules that shall provide, as nearly as conditions of good administration warrant, for necessary exceptions of positions from the competitive service. Moreover, section 3302 provides that “[e]ach officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.” This statement could be regarded as indicating that the rules identifying particular positions as necessary exceptions from the competitive service are to be issued by the President and/or OPM and *carried out* by officers and individuals in agencies, not issued by those officers and individuals. In this regard, we note that [5 U.S.C. § 3304](#)(a)(3) provides that the President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for authority for agencies to appoint, without regard to the provision of sections 3309 through 3318, candidates directly to positions for which public notice has been given and OPM has determined that there exists a severe shortage of candidates or there is a critical hiring need. Section 3304(a) further provides that OPM “shall prescribe, by regulation, criteria for identifying such positions and may delegate authority to make determinations under such criteria.” These provisions of section 3304(a) arguably support the proposition that Congress knew how to grant OPM the authority to delegate to agencies the responsibility for identifying positions not subject to competitive procedures, and that it did so with respect to section 3304(a), but did not do so with respect to section 3302. OPM, nevertheless, appears to have delegated to agencies, like the agency in this case, the authority to identify positions for the FCIP. *See* [5 C.F.R. § 213.3202](#)(o)(10)(iii) (each agency must describe in writing how it will use the FCIP, including identifying the positions or occupations that will be covered).⁹

⁹ The record includes the agency’s FCIP “Guide for Managers” for the Denver Region, dated April 2007. IAF-0490, Tab 4, Subtab 5. Assuming that OPM may delegate the authority to identify particular FCIP positions to individual agencies, the parties should

ORDER

¶19 Accordingly, we REVERSE the initial decision, FIND that the Board has jurisdiction over these appeals, and REMAND the appeals for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

address on remand whether the agency in this case prescribed its own rules setting forth “necessary exceptions” of positions from the competitive service under the FCIP.