

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

**2012 MSPB 39**

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Docket Nos. AT-3330-10-0534-C-2  
AT-3330-10-0534-R-1  
AT-3330-09-0953-R-1

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**David Dean,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency,**

**and**

**Larry Evans,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

March 22, 2012

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David Dean, Lugoff, South Carolina, pro se.

Ronald Robinson, Elgin, South Carolina, for Appellant Evans.

Antonio A. San Martin, Jr., and Robin M. Richardson, Esquire,  
Washington, D.C., for the Office of Personnel Management.

Charles T. Bell, Jr., Esquire, Decatur, Georgia, for the Department of  
Veterans Affairs.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman

## OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) petitions for reconsideration of the Board's decision in *Dean v. Office of Personnel Management and Evans v. Department of Veterans Affairs*, [115 M.S.P.R. 157](#) (2010). Appellant Dean petitions the Board to review the decision of the Atlanta Regional Office in Docket No. AT-3330-10-0534-C-2, a petition for enforcement of the same decision that OPM requests us to reconsider. Because the enforcement and reconsideration cases are closely related, we JOIN these cases pursuant to [5 C.F.R. § 1201.36](#) to expedite processing. For the reasons set forth below, Appellant Dean's petition for review is DENIED, the initial decision in AT-3330-10-0534-C-2 is AFFIRMED AS MODIFIED, and OPM's petition for reconsideration is DISMISSED as WITHDRAWN.

## BACKGROUND

¶2 The Federal Career Intern Program (FCIP) was a hiring authority authorized in 2000 by Executive Order No. 13,162. In 2009, the Department of Veterans Affairs (DVA) issued three different vacancy announcements to cover nine GS-7 Veterans Service Representative (VSR) positions in Columbia, South Carolina. MSPB Docket No. AT-3330-09-0953-I-1, Initial Appeal File (Evans IAF), Tab 9, Subtabs 1 at 1, 4G, 4H, 4I. One announcement was limited to individuals eligible for appointment under the Veterans Recruitment Authority (VRA), the Veterans Employment Opportunities Act of 1998 (VEOA), and the career transition assistance for displaced employees (CTAP); another was limited to FCIP; and the third was open to all U.S. citizens. *Id.* Appellant Evans, a preference eligible veteran with a 60% service-connected disability, applied for consideration under the VRA only. *Id.*, Tab 1 at 1, 3; Tab 9, Subtab 4A; Tab 11 at 1-2. The selecting official filled all nine VSR positions from the FCIP certificate. Evans IAF, Tab 9, Subtabs 4A at 1, 4E. Appellant Evans then filed a complaint with the Department of Labor (DOL) claiming that DVA had violated

his rights as a preference eligible veteran. *Id.*, Subtab 4B. After the administrative judge denied his claim, Appellant Evans filed a petition for review. Evans IAF, Tab 17; MSPB Docket No. AT-3330-09-0953-I-1, Petition for Review File, Tab 1.

¶3 Appellant Dean, a preference eligible veteran with a 30% service-connected disability, did not apply for a specific vacancy, but filed a complaint under VEOA with DOL alleging that the FCIP systematically violated his right to compete for federal employment because vacancies under the FCIP were not considered subject to the statutory public notice requirement. *See* MSPB Docket No. AT-3330-10-0534-I-1, Initial Appeal File (Dean IAF), Tabs 1, 3. After DOL held that Appellant Dean's complaint lacked merit, he filed a VEOA appeal with the Board, in which he contended that his rights as a preference eligible veteran were violated by the government's use of FCIP. *See* Dean IAF, Tab 1, Tab 3 at 1. After the administrative judge denied his claim, Appellant Dean filed a petition for review. Dean IAF, Tab 32; MSPB Docket No. AT-3330-10-0534-I-1, Petition for Review File, Tab 1.

¶4 On petition for review, the Board consolidated Appellant Dean's case with that of Appellant Evans. *Dean*, [115 M.S.P.R. 157](#), ¶ 1. In its decision on the consolidated cases, the Board held that the FCIP was flawed because it was inconsistent with the Civil Service Rules that govern placement of positions in the excepted service and because it did not require a justification for placement of positions in the excepted service as required by statute. *Id.*, ¶ 22. Following the issuance of this decision, the President abolished the FCIP by Executive Order and instituted the new Pathways hiring program, ostensibly to replace the FCIP. Exec. Order No. 13,562.

¶5 Appellant Dean filed two petitions for enforcement regarding the Board's decision, the second of which is pertinent to the matter before us. In the compliance action, Appellant Dean requested that the Board hold: (1) that Pathways is invalid; and (2) that all individuals appointed by the FCIP who are

currently in a probationary period be terminated. MSPB Docket No. AT-3330-10-0534-C-2, Compliance Appeal File (CAF), Tab 1 at 8. OPM responded that the Executive Order terminating the FCIP rendered Appellant Dean's petition for enforcement moot. CAF, Tab 9 at 7. The administrative judge found OPM's arguments persuasive and held that the revocation of the FCIP rendered moot OPM's obligation under the Board's final decision. CAF, Tab 16, Compliance Initial Decision at 2. Appellant Dean filed a timely petition for review of that decision and OPM filed a timely response in opposition. *See* MSPB Docket No. AT-3330-10-0534-C-2, Compliance Petition for Review File, Tabs 1, 3.

¶6 Additionally, OPM filed a petition for reconsideration of the Board's decision that held the FCIP was flawed. *See* Reconsideration Appeal File (RAF). OPM's request for reconsideration addresses both appellants' cases. *See* RAF, Tab 22. However, OPM expressed its willingness to withdraw its request for reconsideration in the event that the Board holds that the President's Executive Order ending the FCIP "moots the Board's order directing OPM to bring itself into compliance with [5 U.S.C. § 3302](#)(1) within 120 days." RAF, Tab 22 at 5 n.1.

#### ANALYSIS

The Executive Order rescinding FCIP moots OPM's obligations under the Board's order.

¶7 The VEOA provides that upon finding that an agency has violated a statute or regulation relating to veterans' preference, the Board "shall order the agency to comply with [the statute or regulation violated] and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved." [5 U.S.C. § 3330c](#)(a). Therefore, in a typical VEOA nonselection appeal, the Board orders reconstruction of the hiring process consistent with the law to ascertain whether the appellant would have been selected for the position he sought. *See Gonzalez v. Department of Homeland Security*, [110 M.S.P.R. 567](#), ¶ 6, *aff'd per curiam*, 355 F. App'x 417 (Fed. Cir. 2009). However, in the case in chief, Appellant Dean did not claim that OPM had denied him any particular job.

Rather, he claimed that OPM's violation of [5 U.S.C. § 3302\(1\)](#) deprived him of his right to know about and apply for jobs elsewhere in the government. The other government agencies were not before the Board and we could not order relief against them. We thus held that the relief to which Appellant Dean was entitled was to order OPM to comply with [5 U.S.C. § 3302\(1\)](#). Therefore, the complete rescission of the FCIP renders Appellant Dean's petition for enforcement moot, and we DENY it for this reason.<sup>1</sup> Accordingly, we also DISMISS OPM's petition for reconsideration as WITHDRAWN.

The Board lacks jurisdiction over Appellant Dean's challenge to the Pathways hiring program.

¶8 In his petition for enforcement, Appellant Dean also requests the Board to find the Pathways hiring program invalid. He asserts that he has "standing to challenge" the Pathways Program because the Executive Order that authorizes Pathways has been issued. RAF, Tab 23 at 7; *see* CAF, Tab 1 at 5-8.

¶9 Any party may petition the Board for enforcement of a final decision or order issued pursuant to the Board's appellate jurisdiction. [5 C.F.R. § 1201.182\(a\)](#); *see Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984) (the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order). Appellant Dean, though, does not seek to enforce a final board decision or order regarding the Pathways Program. Rather, he essentially asks the Board to decide a new VEOA appeal, i.e., to determine that the Pathways Program violates his rights protected under the VEOA. The Board lacks authority to do so pursuant to its jurisdiction to enforce its final decisions and orders. As correctly noted by the administrative judge below, the appellant must file a new appeal if he wishes to challenge the

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<sup>1</sup> We note that the rescission of the FCIP does not necessarily render moot other appeals from individuals who file VEOA appeals alleging that an agency's use of FCIP violated a statute or regulation relating to veterans' preference, and who also allege that such a violation resulted in their failure to be selected for a specific position.

Pathways Program under the VEOA.<sup>2</sup> CAF, Tab 16, Compliance Initial Decision at 3.

### ORDER

¶10 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

### NOTICE TO THE APPELLANTS 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

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<sup>2</sup> To establish jurisdiction over a VEOA appeal, the appellant must: (1) show that he exhausted his remedy with the Department of Labor (DOL), and (2) make non-frivolous allegations that (a) he is a preference eligible within the meaning of the VEOA, (b) the action took place on or after October 30, 1998, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. See [5 U.S.C. § 3330a](#); *White v. U.S. Postal Service*, [114 M.S.P.R. 574](#), ¶ 8 (2010). We note the appellant has not made any specific allegation that an agency has violated his veterans' preference rights by application of the Pathways Program, or that he has exhausted his remedy at DOL regarding the matter.

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, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). 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:

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