

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

**2006 MSPB 54**

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Docket Nos. AT-0330-03-0076-N-1  
CH-3443-01-0706-N-1

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**David Dean,**

**Appellant,**

**v.**

**Department of Agriculture,**

**Agency.**

**Matthew S. Olson,**

**Appellant,**

**v.**

**Department of Veterans Affairs,**

**Agency,**

**and**

**Office of Personnel Management,**

**Petitioner**

March 22, 2006

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David Dean, Lugoff, South Carolina, pro se.  
Matthew S. Olson, Johnston, Iowa, pro se.

Cynthia D. Davis, Washington, D.C., for the Department of Agriculture.  
Earl E. Parsons, Esquire, Des Moines, Iowa, for the Department of  
Veterans Affairs

Robin S. Richardson, Esquire, Washington, D.C., for the Office of  
Personnel Management

**BEFORE**

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

**OPINION AND ORDER**

¶1 This case is before the Board on the request of the Office of Personnel Management (OPM) to stay enforcement of the Board's final decisions in *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), during the pendency of OPM's petition for reconsideration of those decisions.\* The Board held in each case that the agency violated the appellant's veterans' preference rights by selecting for a competitive service position sought by the appellant a nonpreference eligible applicant who had not taken an examination for the position, where no statute or Executive Order excepted the position from the statutory examination requirement. OPM's request for reconsideration contends that the Board's decisions erred by failing to recognize that the Outstanding Scholar Program under which the agencies' selections were made is an exception to the examination requirement because it was authorized by the consent decree approved by the court in *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981). For the reasons set forth below, OPM's request for a stay is DENIED.

**ANALYSIS**

¶2 The Board may exercise its discretion to stay the enforcement of a final decision pending judicial review or reconsideration by the Board. *Briggs v. National Council on Disability*, 68 M.S.P.R. 296, 299 (1995). In determining whether to grant a stay, the Board considers four criteria: (1) whether the party

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\* We consolidate these cases for decision since the issues raised in each by OPM's request for a stay and its petition for reconsideration are the same.

requesting the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the requesting party will be irreparably harmed absent a stay; (3) whether the issuance of the stay will substantially harm other parties interested in the proceeding; and (4) where the public interest lies. *Special Counsel v. Byrd*, 60 M.S.P.R. 649, 651 (1994). The Board balances the likelihood of success with the other factors. *Briggs*, 68 M.S.P.R. at 299. Where the requester makes a convincing argument that the last three criteria are met, the Board will issue a stay if there is a serious legal question on the merits. If support for a stay based on the last three criteria is slight, however, a stay will be granted only if the possibility for success on reconsideration is strong. *Id.*

¶3 In its stay request, OPM did not articulate an argument for granting its stay request in terms of these four criteria. Rather, it merely expressed its beliefs that the Board's orders are in conflict with the *Luevano* consent decree and that they have "highly complex and far reaching implications." No argument was presented to show harm to OPM or the parties, nor was any attempt made to demonstrate the public interest in a stay. In the absence of such a showing, the only possible basis for a stay is an argument reflecting a strong likelihood that OPM's petition will be successful. However, OPM did not present such an argument with its stay request.

#### ORDER

¶4 Accordingly, the Board denies OPM's request for a stay.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.