UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 213

Docket Nos. AT-3330-10-0534-I-1
AT-3330-09-0953-I-1

David Dean,

Appellant,

v.

Office of Personnel Management,

Agency,

and

Larry Evans,

Appellant,

v.

Department of Veterans Affairs,

Agency.

November 2, 2010

David Dean, Lugoff, South Carolina, pro se.

Ronald Robinson, Elgin, South Carolina, for appellant Larry Evans.

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

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

Andres Grajales, Esquire, Washington, D.C., for amicus American Federation of Government Employees.

Gregory O'Duden, Esquire, Barbara Atkin, Esquire, and Barbara Sheehy, Esquire, Washington, D.C., for amicus National Treasury Employees Union.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellants petition for review of the initial decisions issued in their respective appeals, both of which denied relief under the Veterans Employment Opportunities Act of 1998 (VEOA). We consolidate these appeals for purposes of this decision only under 5 U.S.C. § 7701(f)(1). For the reasons given below, we GRANT the appellants' petitions for review, REVERSE the initial decisions, FIND a violation of the appellants' veterans' preference rights, and ORDER corrective action.

BACKGROUND

General Background Common to Both Appeals

¶2 In 2000, President Clinton issued Executive Order No. 13,162, thereby creating the Federal Career Intern Program (FCIP). The purpose of 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. Appointments under the FCIP are to positions in Schedule B of the excepted service and are not to exceed two years, unless extended by the employing agency, with the concurrence of the Office of Personnel Management (OPM), for up to one additional year. *Id.*, § 4(a). According to the Executive Order, "service as a Career Intern confers no rights to further Federal employment in either the competitive or excepted service upon the expiration of the internship period," although "[c]ompetitive civil service status may be granted to a Career Intern who satisfactorily completes the internship and meets all other requirements prescribed by the OPM." *Id.*, § 4(b)(3), (4). The Executive

Order further provides, however, that when an employee holding a career or career-conditional appointment accepts an FCIP appointment and fails to complete his or her internship for reasons unrelated to misconduct or suitability, he or she has a right to return to career or career-conditional employment at a grade and pay no lower than the grade and pay he or she had under the prior appointment. *Id*., § 4(b)(5). Finally, the Executive Order charged OPM with promulgating regulations governing the FCIP, and ensuring that "appropriate veterans' preference criteria" are applied in the selection of Career Interns. *Id*., §§ 3(b), 6. OPM has issued regulations to implement the Executive Order. Those regulations delegate to individual agencies the authority to decide which positions will be filled under FCIP. 5 C.F.R. § 213.3202(o)(10).

Evans

¶3 In 2009, the Department of Veterans Affairs (DVA) issued three vacancy announcements for nine GS-7 Veterans Service Representative (VSR) positions in Columbia, South Carolina: (1) No. 2009-295-SC, which was limited to individuals eligible for appointment under the Veterans Recruitment Authority (VRA), the VEOA, and CTAP (career transition assistance for displaced employees); (2) No. VB259652, which identified the FCIP as the appointing authority; and (3) No. VB2596520, which was open to all U.S. citizens. Evans Initial Appeal File (IAF), Tab 9, Subtabs 4G, 4H, 4I. Appellant Evans, a preference-eligible veteran with a 60% service-connected disability who was a non-probationary GS-4 File Clerk with the DVA, applied for the VSR position and requested consideration under the VRA only. Evans IAF, Tab 1 at 1, 3; Tab 9, Subtab 4A; Tab 11 at 1, 4.

¶4 The DVA prepared separate certificates for applicants it found qualified under the VRA, the VEOA, the FCIP, and the all sources announcement. Evans IAF, Tab 9, Subtabs 4C-4F. The appellant's name appeared on the VRA certificate. *Id*., Subtab 4C. The selecting official filled all nine VSR positions from the FCIP certificate. *Id*., Subtabs 4A at 1, 4E.

¶5 The appellant filed a complaint with the Department of Labor (DoL) claiming that DVA had violated his veterans' preference rights, but DoL did not resolve the complaint to his satisfaction so he filed this appeal under the VEOA. Evans IAF, Tab 1; Tab 9, Subtab 4B. The administrative judge denied relief, holding that the FCIP is a valid appointing authority and was not used to circumvent the appellant's veterans' preference rights. Evans IAF, Tab 17.

¶6 The appellant has filed a petition for review in which he contends that his rights under 5 U.S.C. § 3302(1), one of the authorities under which Executive Order No. 13,162 was issued, were violated by the DVA's use of the FCIP. Evans PFR File, Tab 1. Section 3302(1) states that the President "may prescribe rules governing the competitive service," and that the rules shall provide, "as nearly as conditions of good administration warrant," for "necessary exceptions from the competitive service." In light of the importance of the appellant's challenge to the use of FCIP, the Board published a notice allowing interested parties to file amicus briefs on the following issues:

> Is 5 U.S.C. [§] 3302(1) a "statute * * * relating to veterans' preference" on which a claim under VEOA may be based? *See* 5 U.S.C. [§] 3330a(1)(A); (2) if so, may OPM delegate to other executive agencies the authority to except positions from the competitive service under 5 U.S.C. [§] 3302(1)?; and (3) if the answers to (1) and (2) are "yes," what must an agency do to justify the use of the FCIP to fill a vacant position, considering the requirement of 5 U.S.C. [§] 3302(1) that exceptions to the competitive service be "necessary" so as to provide for "conditions of good administration"?

75 Fed. Reg. 25,885 (daily ed. May 10, 2010).[1] In response, the American Federation of Government Employees (AFGE) has filed a brief amicus curiae in

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[1] In previous cases the Board has questioned whether FCIP, as structured, was consistent with 5 U.S.C. § 3302(1) and veterans' preference rules, but to date it has not resolved the issue. *See Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶¶ 14-18 (2009); *Gingery v. Department of Defense*, 112 M.S.P.R. 306, ¶¶ 11-15 (2009).

which it argues, among other things, that 5 U.S.C. § 3302(1) is a statute relating to veterans' preference and that the FCIP violates the rights of preference eligible veterans because OPM has not justified placement of FCIP positions in the excepted service. Evans PFR File, Tab 5. The National Treasury Employees Union (NTEU) has also filed a brief amicus curiae; it argues, among other things, that 5 U.S.C. § 3302(1) is a statute relating to veterans' preference, that OPM may not delegate to individual agencies the authority to place positions in the excepted service, and that OPM has not justified placement of FCIP positions in the excepted service. Evans PFR File, Tab 6. Neither OPM nor any other federal agency has responded to the notice, and DVA has not responded to the PFR.

Dean

¶7 Appellant Dean, a preference-eligible veteran with a 30% service-connected disability, filed a complaint with DoL alleging that FCIP systematically violates his right to compete for federal employment because vacancies under FCIP are not considered subject to the statutory public notice requirement. DoL found that his complaint lacked merit, and he filed this appeal against OPM. Dean IAF, Tab 1; Tab 3 at 1, 2; *see* 5 U.S.C. §§ 3327(b) (requiring agencies to provide OPM with information about competitive-service vacancies); 3330(b)-(d) (requiring OPM to make available to the public a government-wide list of competitive-service vacancies). In a later submission, the appellant alleged that federal agencies frequently post FCIP vacancy announcements on web sites that are accessible only to students and alumni of particular colleges, and that agencies send recruiters to college job fairs, who make appointments under FCIP "on the spot." The appellant alleged that as a result of such practices, he and other veterans are being shut out of job opportunities. He further alleged that OPM's own figures show that from 2001-2009 over 99,000 individuals were hired under FCIP. Dean IAF, Tab 21 at 6-7. The administrative judge asked the parties to brief the following issues:

> [W]hether 5 U.S.C. §§ 3302, 3327 and 3330 are statutes relating to veterans' preference within the meaning of 5 U.S.C. § 3330a(a)(1)(A) on which a claim under VEOA may be based. And, if so, does OPM's failure to require agencies to publish notice of FCIP vacancies on USAJOBS website violate veterans' preference rights.

Dean IAF, Tab 23.

¶8 In response, OPM argued that 5 U.S.C. § 3302 does not relate to veterans' preference. It further argued that positions filled under FCIP are not subject to 5 U.S.C. §§ 3327 & 3330 because those provisions apply only to the competitive service and FCIP is an excepted-service hiring program. It further argued that the statutory right to compete for certain positions conferred on veterans under 5 U.S.C. § 3304 is limited to merit promotion actions, and thus, the right to compete does not apply to positions filled under FCIP. Dean IAF, Tab 27. The appellant argued that 5 U.S.C. § 3302 is a statute relating to veterans' preference, and that OPM has not justified, as required by section 3302, placement of positions filled under FCIP in the excepted service. He further argued that he and other veterans have a statutory right to compete for vacancies that is being thwarted by FCIP, since agencies may fill positions under FCIP without public notice. Dean IAF, Tab 28.

¶9 The administrative judge issued an initial decision finding that the appellant had established VEOA jurisdiction, but that he failed to state a claim upon which relief may be granted. According to the initial decision, OPM has no obligation to ensure public notice of vacancies filled under FCIP because such positions are in the excepted service and the public notice requirement applies only to positions in the competitive service. Dean IAF, Tab 32.

¶10 The appellant has filed a petition for review in which he argues that the administrative judge did not address his argument that OPM has failed to justify, under 5 U.S.C. § 3302, placement of FCIP positions in the excepted service. Dean PFR File, Tab 1. OPM has not responded to the petition for review.

ANALYSIS

The Board has jurisdiction over these appeals.

¶11 The VEOA empowers the Board to adjudicate claims for violation of an "individual's rights under any statute or regulation relating to veterans' preference." *See* 5 U.S.C. § 3330a(a)(1)(A), (d). To establish jurisdiction over such a claim, an appellant must show that he exhausted his remedies with DoL and non-frivolously allege that he is a preference eligible veteran, the action(s) at issue took place on or after the October 30, 1998 enactment date of VEOA, and the agency violated his rights under a statute or regulation relating to veterans' preference. *Jones v. Department of Veterans Affairs*, 113 M.S.P.R. 385, ¶ 9 (2010); *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377, ¶ 6 (2003). Claims of veterans' preference violations "should be liberally construed," and an allegation, in general terms, that an individual's veterans' preference rights were violated is sufficient to satisfy the last jurisdictional element. *Slater v. U.S. Postal Service*, 112 M.S.P.R. 28, ¶ 6 (2009); *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006).

¶12 We agree with the administrative judge that appellant Evans has established jurisdiction. Specifically, Evans has presented undisputed evidence that he exhausted his remedy before DoL; it is undisputed that Evans is a preference-eligible veteran; it is undisputed that the action he challenges took place in 2009; and he has non-frivolously alleged that his statutory veterans' preference rights were violated when DVA used FCIP to fill the position for which he applied.[2]

¶13 Similarly, we agree with the administrative judge that appellant Dean has established jurisdiction. Specifically, Dean has presented undisputed evidence that he exhausted his remedy before DoL; it is undisputed that Dean is a

[2] DVA has not filed a cross petition for review or otherwise argued that the administrative judge erred in finding jurisdiction over the *Evans* appeal.

preference-eligible veteran; it is undisputed that the actions he challenges took place after 1998; and he has non-frivolously alleged that his statutory veterans' preference rights have been violated by the placement of FCIP positions in the excepted service, with the resultant exemption from the requirement that vacancies be publicly announced.[3]

¶14 Before the administrative judge, and relying on *Jolley v. Department of Housing & Urban Development*, 299 F. App'x 969 (Fed. Cir. 2008) (non-precedential), OPM argued that Dean's appeal is barred by his failure to apply for a particular position. Dean IAF, Tab 27 at 3 n.1. The Board may follow non-precedential Federal Circuit decisions that it finds persuasive. *Worley v. Office of Personnel Management*, 86 M.S.P.R. 237, ¶ 8 (2000). Leaving aside whether we find *Jolley* persuasive, that decision has no application here because it holds that a claim of discrimination under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4311, 4324, may not be pursued with regard to a position for which the individual claiming discrimination never applied. By contrast, Dean's appeal arises under the VEOA, 5 U.S.C. § 3330a, and it is governed by Board VEOA precedent. *See Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶ 15 (2009) (an individual's failure to apply for a position filled under FCIP does not bar him from pursuing a VEOA appeal when he claims that his failure to apply was caused by an agency's decision not to publicize the vacancy). Whereas in *Letchworth v. Social Security Administration*, 101 M.S.P.R. 269, ¶ 7 n.5 (2006), the Board held that a veteran who applied for vacancies in some locations but not others could not complain that non-veterans were hired in locations for which he chose not to apply, in *Weed* the Board made clear that a VEOA claim may be pursued where, as here, the appellant alleges that as a result of an agency's violation of veterans'

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[3] OPM has not filed a cross petition for review or otherwise argued that the administrative judge erred in finding jurisdiction over the *Dean* appeal.

preference rules he was prevented from applying for a position. To hold otherwise would create a gaping loophole in the VEOA; it would make some alleged violations of veterans' preference rights immune from review just because they are hidden. Congress could not have intended such a perverse result. *Cf. Kirkendall v. Department of the Army*, 479 F.3d 830, 841 (Fed. Cir. 2007) (en banc) (rejecting a "narrow" interpretation of the VEOA's deadline provisions in light of the VEOA's important purpose of creating a right of redress for veterans' preference violations); *Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 19 (2005) (the VEOA is a remedial statute that should be construed so as to "suppress the evil and advance the remedy"), *aff'd on recon.*, 104 M.S.P.R. 1 (2006).

5 U.S.C. § 3302(1) is a statute relating to veterans' preference.

¶15 As stated above, the VEOA empowers the Board to grant relief for violations of an "individual's rights under any statute or regulation relating to veterans' preference." 5 U.S.C. § 3330a(a)(1)(A), (d). The VEOA does not define "relating to," nor does any applicable regulation. In the absence of a distinct definition, the Board assumes that the words "relating to" carry their "ordinary, contemporary, common meaning." *Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 16 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Thus, a "statute . . . relating to veterans' preference" is one that "stands in some relation to," "has a bearing on," "concerns," or "has a connection with" veterans' preference rights. *Id.* The statute at the heart of this appeal provides that --

> The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for -- (1) necessary exceptions from the competitive service.

5 U.S.C. § 3302(1). As detailed below, we agree with appellant Dean and amici AFGE and NTEU that section 3302(1) is a statute relating to veterans' preference because veterans' preference is a central feature of the system for examining

candidates for entry into the competitive service; the creation of exceptions from the competitive service necessarily implicates veterans' preference rights.

¶16 We begin by observing that statutory preference for veterans in federal employment is not new. It has existed in some form since the Civil War,[4] and the current rules can be traced to the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387. President Franklin D. Roosevelt, in a letter endorsing the Act, said this:

> I believe that the federal government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed forces that, when they return, special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the nation, and then expect them to resume their normal activities without having any special consideration shown to them.

February 26, 1944 letter from President Franklin D. Roosevelt to Congressman Robert Ramspeck (available online at *The American Presidency Project*, "Public Papers" section[5]). These considerations are no less relevant today, and they apply to the "men *and women* who have risked their lives in defense of the United States." *Kirkendall*, 479 F.3d at 841 (emphasis supplied). Veterans' preference rules and the VEOA's enforcement mechanism are "an expression of gratitude by the federal government" toward the nation's veterans, *id*., whose "normal employment and mode of life" can be "seriously disrupted by their service," *Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 12.

¶17 With that backdrop, we now turn to the specific features of veterans' preference in the statutory competitive examination system, which were described

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[4] *See VetGuide* Appendix D: *A Brief History of Veterans' Preference*, available online at www.opm.gov/staffingPortal.

[5] *See* http://www.presidency.ucsb.edu/ws/index.php?pid=16495&st=&st1=.

in *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶ 8 n.3 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007), as follows:

> An integral part of the competitive examining process is the assignment of numerical scores, followed by the rating and ranking of candidates. 5 U.S.C. § 3309; *see* 5 C.F.R. § 337.101(a) (the Office of Personnel Management (OPM), or an agency operating under a delegation of authority from OPM, "shall assign numerical ratings" to candidates). 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; disabled veterans and certain relatives of disabled veterans are entitled to ten additional points. 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b). After the candidates' scores have been adjusted to include any additional points, the names of applicants who have qualified for appointment 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); 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 . . . 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).

See also Deems v. Department of the Treasury, 100 M.S.P.R. 161, ¶¶ 10-11 (2005) (describing veterans' preference in competitive examinations).

¶18 In 2002, Congress created "alternative ranking and selection procedures" for competitive-service positions. 5 U.S.C. § 3319.[6] Under these procedures, which are known as "category rating," an examining agency defines two or more quality categories; candidates are assessed and those with similar proficiency are placed in the same category; disabled veterans are placed in the highest category; within a category, preference eligible veterans are listed ahead of non-preference eligibles; the two highest categories may be combined if there are fewer than three candidates in the highest category; and a non-preference eligible may not be selected ahead of a preference eligible in the same category unless pass over procedures at 5 U.S.C. §§ 3317(b) or 3318(b), as applicable, are followed. *Id*.

¶19 In *Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶¶ 9-19, the Board held that 5 U.S.C. § 3304(b) -- which 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" -- is a "statute relating to veterans' preference." The Board reasoned that section 3304(b) established competitive examinations as "the norm," thereby ensuring that the veterans' preference rights which are part of the examination process would generally be applied. Section 3304(b) is "intrinsically connected" to veterans' preference rights because it ensures that such rights are not circumvented or ignored by agencies simply choosing not to conduct competitive examinations. *Id*., ¶ 19. We likewise observe in the present case that 5 U.S.C. § 3302(1) establishes placement of positions in the competitive service as the norm, with exceptions only as "necessary" for "good administration." *See National Treasury Employees Union v. Horner*, 854 F.2d 490, 495 (D.C. Cir.

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[6] The statute authorizing alternative ranking and selection procedures by its own terms applies where OPM is exercising its authority under 5 U.S.C. § 3304, which expressly governs competitive-service examinations, and where an agency is exercising competitive examining authority under a delegation from OPM under 5 U.S.C. § 1104(a)(2). *See* 5 U.S.C. § 3319(a).

1988) (the competitive service is "the norm," exceptions from which may only be made when "necessary" for "conditions of good administration"). Veterans' preference in hiring has its force and effect under the two methods for assessing candidates for the competitive service, as discussed above, namely, traditional competitive examining with rating and ranking and the alternative category rating system. By establishing competitive-service hiring as the norm, section 3302(1) is intrinsically connected to veterans' preference rights in that it ensures that such rights are not circumvented or ignored. We hold that 5 U.S.C. § 3302(1) is a "statute relating to veterans' preference" upon which a VEOA claim may be based.[7]

Appellant Dean has established a violation of his veterans' preference rights.

¶20 Dean argues that OPM has failed to justify placement of positions filled under FCIP in the excepted service; that this improper placement allows agencies to avoid the statutory requirement that notice of competitive-service vacancies be made to the public; and that as a result, his veterans' preference rights have been systematically violated. As detailed below, we agree, and we find that FCIP is flawed in a second way as well.

¶21 We begin our analysis with 5 U.S.C. § 3302(1), which states that the President "may prescribe rules governing the competitive service," and that the rules shall provide, "as nearly as conditions of good administration warrant," for "necessary exceptions from the competitive service." Pursuant to this authority, in 1954 the President issued Executive Order No. 10,577, 19 Fed. Reg. 7521

[7] Our holding is not altered by the Presidential Memorandum issued May 11, 2010, which directs agencies, "no later than November 1, 2010," to adopt category rating under 5 U.S.C. § 3319 as their primary method of examining candidates for entry into the competitive service. *See* Memorandum at sec. 1(a)(3). As noted above, veterans' preference is a key component of both category rating and traditional rating and ranking.

(reprinted at 5 U.S.C.A. § 3301 note).[8] This Executive Order was amended by over a dozen subsequent Executive Orders issued between 1955 and 2001. The current version appears at 5 C.F.R. Parts 1-10, The Civil Service Rules. Those Rules provide, in relevant part, as follows:

> § 1.1 Positions and employees affected by the rules in this subchapter.
>
> The rules in this subchapter shall apply to all positions in the competitive service and to all incumbents of such positions. Except as expressly provided in the rule concerned, the rules in this subchapter shall not apply to positions and employees in the excepted service.
>
> § 1.2 Extent of the competitive service.
>
> The competitive service shall include: (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by the Office of Personnel Management (hereafter referred to in this subchapter as OPM) under § 6.1 of this subchapter; and (b) all positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject to the civil service laws by statute. OPM is authorized and directed to determine finally whether a position is in the competitive service.
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> * * *
>
> § 6.1 Authority to except positions from the competitive service.
>
> (a) OPM may except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable. These positions shall be listed in OPM's annual report for the fiscal year in which the exceptions are made.

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[8] The 1954 Executive Order actually amended earlier Executive Orders governing the competitive service. For present purposes it is unnecessary to trace the history of the Civil Service Rules because the relevant portions of the Rules have not changed since the FCIP was created in 2000.

> (b) OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule.
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> (c) Notice of OPM's decision granting authority to make appointments to an excepted position under the appropriate schedule shall be published in the Federal Register.
>
> § 6.2 Schedules of excepted positions.
>
> OPM shall list positions that it excepts from the competitive service in Schedules A, B, and C, which schedules shall constitute parts of this rule, as follows:
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> *Schedule A.* Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> *Schedule B.* Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.
>
> *Schedule C.* Positions of a confidential or policy-determining character shall be listed in Schedule C.

¶22 The President may delegate authority for "personnel management functions" to OPM. 5 U.S.C. § 1104(a)(1). Civil Service Rule 6.1 on its face is a delegation from the President charging OPM with determining exceptions from the competitive service under 5 U.S.C. § 3302(1). We assume solely for purposes of this decision that OPM may further delegate, to individual agencies, the authority to place positions in the excepted service. *See* 5 U.S.C. § 1104(a)(2) (OPM "may delegate, in whole or in part, any function vested in or delegated to" OPM). FCIP is flawed under 5 U.S.C. § 3302(1), a law relating to veterans' preference, because it is inconsistent with the Civil Service Rules that govern placement of positions in the excepted service and because it does not require the justification of placement of positions in the excepted service as required by statute.

FCIP is inconsistent with the Civil Service Rules that govern placement of positions in the excepted service under 5 U.S.C. § 3302(1).

¶23 OPM's rules for the FCIP, implementing Executive Order No. 13,162, appear at 5 C.F.R. § 213.3202(o). There is nothing in those rules to prohibit an agency from deciding whether to fill a particular position with a competitive-service appointment or an excepted-service Schedule B appointment under FCIP on an ad hoc basis, after applications are received. The *Evans* case is illustrative. DVA advertised for multiple VSR vacancies under an open competitive announcement and an FCIP announcement (among other authorities), assessed the candidates and prepared certificates corresponding to the different announcements, and then decided to fill the positions using excepted-service appointments under FCIP.[9] Civil Service Rule 6.1(b), which provides that "OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule," clearly contemplates that a position must be classified as competitive-service or excepted-service even before a vacancy announcement is issued. This reading of the rule is supported by Civil Service Rule 6.2, which provides that Schedule B of the excepted service is reserved for "[p]ositions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination."

¶24 This facet of FCIP has a major effect on veterans' preference, as shown by what DVA did in *Evans*. DVA conducted a competitive examination for the VSR

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[9] What DVA did in *Evans* is not unique. *See, e.g., Gingery*, 112 M.S.P.R. 306, ¶ 2 (in "the same hiring process," the Department of Defense filled two Auditor positions in the competitive service and two Auditor positions in the excepted service under FCIP). In any event, we do not base our decision on how frequently agencies postpone, until after applications are received and a competitive examination is conducted, deciding whether to fill a particular position with a competitive-service appointment or an excepted-service appointment under FCIP. The evidentiary records in these cases are not developed on the issue, and how often this practice occurs is not dispositive. Rather, the important fact is that OPM's rules governing FCIP allow this practice.

position and generated a certificate with the names of 25 candidates, all of whom were preference-eligible veterans, and all of whom received scores (unadjusted for veterans' preference) of close to 100 on a 100-point scale. Evans IAF, Tab 9, Subtab 4F. Having conducted a competitive examination and having identified 25 highly-qualified candidates, DVA cannot plausibly claim that holding a competitive examination for the VSR position was or would have been "impracticable"; yet, DVA filled all nine of the VSR positions with FCIP appointments under Schedule B, which is reserved for "[p]ositions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination." Eight of the nine candidates that DVA selected from the FCIP certificate were non-veterans who by all indications could not have been selected ahead of the 25 veterans on the competitive certificate. *Id*., Subtab 4E; 5 C.F.R. §§ 332.401-332.406.

¶25 We hold that FCIP is inconsistent with the Civil Service Rules that govern placement of positions in the excepted service under 5 U.S.C. § 3302(1) -- a law relating to veterans' preference -- because it allows an agency to invoke an appointing authority reserved for "positions . . . for which it is not practicable to hold a competitive examination" after the agency holds a competitive examination that yields highly-qualified preference-eligible candidates.

FCIP violates the rights of preference-eligible veterans under 5 U.S.C. § 3302(1) because it does not require agencies to justify placement of positions in the excepted service as required by section 3302(1).

¶26 Again, 5 U.S.C. § 3302(1) provides that the President "may prescribe rules governing the competitive service," and that "[t]he rules shall provide, as nearly as conditions of good administration warrant, for -- (1) necessary exceptions from the competitive service." OPM, and by extension, agencies acting under a delegation of authority from OPM, do not have unfettered discretion to place positions in the excepted service under section 3302(1). *National Treasury Employees Union v. Horner*, 854 F.2d at 495. Rather, section 3302(1) establishes

that exceptions from the competitive service must be justified as "necessary" for "conditions of good administration." *Id.* We acknowledge that the issue before the court in *National Treasury Employees Union v. Horner*, 854 F.2d at 498, was whether OPM's placement of certain positions in the excepted service was "arbitrary and capricious" under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), whereas the issue in these cases is whether the appellants' rights under a "statute . . . relating to veterans' preference" have been violated, 5 U.S.C. §§ 3330a(a), (d). We have already found that 5 U.S.C. § 3302(1) is a statute relating to veterans' preference, however, so the court's decision is instructive insofar as the court held that section 3302(1) establishes a substantive standard that must be satisfied for a position to be placed properly in the excepted service.

¶27 Executive Order No. 13,162, which created the FCIP, does not except any particular position from the competitive service. Similarly, OPM's regulations implementing Executive Order No. 13,162 do not except any particular position from the competitive service. *See* 5 C.F.R. § 213.3202(o). Instead, OPM's regulations governing the FCIP leave it to individual agencies to determine which positions will be filled under FCIP. 5 C.F.R. § 213.3202(o)(10). Those regulations, the relevant portion of which is reproduced in full as a footnote below, do not themselves find that excepting FCIP positions from the competitive service is "necessary" for "conditions of good administration," nor do they require individual agencies to make such findings.[10] As a result, the regulations violate 5 U.S.C. § 3302(1).

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[10] The relevant portion of OPM's regulations provides as follows:

> (10) *Agency responsibilities.* Each agency will determine the appropriate use of the FCIP relating to recruitment needs in geographical areas, specific occupational series, and grades, pay bands or other pay levels, ensuring that programs are developed and implemented in accordance with the merit system principles. Each agency must describe in writing how it will use the FCIP, including, but not limited to, such aspects as: (i) Delegating the authority to develop FCIPs (e.g., department-wide

¶28 Appellant Dean has been injured by this violation because as a preference eligible veteran he has a right to compete, under merit promotion procedures, for vacancies for which an agency is accepting applications from outside its workforce. *See* 5 U.S.C. § 3304(f)(1); 5 C.F.R. § 335.106; *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 12 (2006).[11] He also has a right to file an application for any position to be filled via competitive examination under an all-sources vacancy announcement. The requirement that agencies notify OPM of vacancies for which they will consider applicants from outside their workforces, and the related requirement that OPM make available to the public a list of vacancies for which agencies will consider applicants from outside their workforces, by their own terms apply only to the competitive service. 5 U.S.C. §§ 3327(b), 3330(b)-(d). Appellant Dean is thus being deprived of the right to

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> versus bureaus and agency components); (ii) Defining the roles and responsibilities of supervisors and other key officials in FCIP administration, such as human resources staff, budget and finance staff, career counselors, or mentors; (iii) Identifying the positions or occupations that will be covered under the FCIP; (iv) Developing procedures for accepting applications, and evaluating and selecting candidates according to part 302 of this chapter on employment in the excepted service and any other applicable requirements; (v) Designing, implementing, and documenting formal program(s) for the training and development of employees selected under the provisions of this Program, including the type and duration of assignments; (vi) Deciding how to inform the career interns of what will be expected during the internship, including developmental assignments and performance requirements; and (vii) Planning, coordinating, implementing, and monitoring program activities.

5 C.F.R. § 213.3202(o)(10).

[11] According to OPM, appellant Dean's statutory right to compete has not been affected because that right applies only to positions filled under merit promotion procedures and FCIP appointments are not made under merit promotion procedures. Dean IAF, Tab 27 at 7. We disagree because OPM's own guidance, to which the Board has deferred, provides that the right to compete under 5 U.S.C. § 3304(f) is triggered when an agency accepts applications from outside its workforce. 5 C.F.R. § 335.106; *Brandt*, 103 M.S.P.R. 671, ¶ 12.

apply for positions when agencies fill the positions under FCIP without public notice, since he cannot apply for a job about which he has no knowledge.

¶29 We wish to emphasize what we do not hold. Amicus NTEU asserts in *Evans* that FCIP violates the merit system principles because it allows hiring without "fair and open competition." Evans PFR File, Tab 6 at 2. The cases before us, however, arise under the VEOA; the sole issue is whether the appellants' rights under a statute or regulation relating to veterans' preference have been violated. 5 U.S.C. §§ 3330a(a), (d). Further, appellant Dean asserts that in the last 10 years over 99,000 individuals have been appointed under FCIP, and amicus NTEU asserts that hiring under FCIP has become standard practice (rather than the exception) in some agencies for some occupations. Dean IAF, Tab 22 at 6; Evans PFR File, Tab 6 at 13. The evidentiary records have not been developed with regard to these assertions, though, and in any event our holding does not depend on our making findings of fact about the frequency of the use of FCIP. Rather, our holdings stated above are based purely on our interpretation of the relevant laws and regulations.

¶30 In this connection, we overrule the statement in *Gingery v. Department of Defense*, 105 M.S.P.R. 671, ¶ 9 (2007), *rev'd on other grounds*, 550 F.3d 1347 (Fed. Cir. 2008), that FCIP is "a valid exception to the competitive examination requirement" because it is "authorized by an Executive Order." The *Gingery* decision did not discuss whether the key features of FCIP discussed herein are permitted under 5 U.S.C. § 3302(1).

As relief, appellant Dean is entitled to have OPM comply with 5 U.S.C. § 3302(1).

¶31 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." 5 U.S.C. § 3330c(a). In a typical VEOA non-selection case, 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, ¶ 9, *aff'd*, 355 F. App'x 417 (Fed. Cir. 2009) (non-precedential). Appellant Dean does not claim that OPM has denied him any particular job, however. Rather, he claims 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. These other government agencies are not before the Board and as a result we cannot order relief against them. Moreover, we cannot discount the possibility that, notwithstanding the lack of any requirement in OPM's regulations that agencies justify their use of the FCIP under 5 U.S.C. § 3302(1), there may be some agencies that have provided sufficient justification. Accordingly, the relief to which appellant Dean is entitled and that operates against the only agency currently before the Board in his case is to order OPM to comply with 5 U.S.C. § 3302(1).[12]

¶32 The Board has recognized that in unusual cases its decisions may have such a far-reaching impact on the workings of the government that the normal timeline for compliance should be extended. *See, e.g., Sink v. U.S. Postal Service*, 65 M.S.P.R. 628, 635 (1995). This appears to be such a case. At the same time, untold numbers of veterans are potentially being shut out of job opportunities for which they would have preference, because the agencies are filling the positions under FCIP without public notice. It is also significant to note that our decision today cannot come as a complete surprise to OPM, given that in two precedential decisions issued in August 2009 the Board raised serious questions about whether FCIP ran afoul of 5 U.S.C. § 3302(1). *See Weed*, 112 M.S.P.R. 323, ¶¶ 17-18; *Gingery*, 112 M.S.P.R. 306, ¶ 15. Balancing the foregoing considerations, we conclude that OPM must comply with 5 U.S.C. § 3302(1) within 120 days of the

[12] In light of this holding, it is unnecessary to decide whether OPM may delegate to individual agencies the authority to place positions in the excepted service.

date of this decision instead of the customary 30 days. *See Sink*, 65 M.S.P.R. at 635 (considering the "magnitude" of its decision finding that the Postal Service violated the reduction in force rules in a nationwide restructuring that affected thousands of employees, the Board extended the ordinary compliance period to 120 days).[13]

Appellant Evans has established a violation of his rights under 5 U.S.C. § 3302(1) and is entitled to reconstruction of the hiring process for the VSR position.

¶33 As stated above, appellant Evans applied for the VSR position under the VRA. The VRA authorizes appointments of certain veterans in the competitive service without competition. *See* 38 U.S.C. § 4214; 5 C.F.R. §§ 307.101 – 307.104. As the discussion above indicates, DVA has not justified, under 5 U.S.C. § 3302(1), filling the nine VSR positions at issue with excepted-service appointments. While there could be some agency that has justified filling a position under a Schedule B FCIP appointment, DVA actually conducted a competitive examination and determined that 25 candidates applying under the open competitive announcement were highly qualified. Evans IAF, Tab 9, Subtab 4F (open competitive certificate). DVA therefore has not shown, much less purported to determine, that it was "not practicable to hold a competitive examination," 5 C.F.R. § 6.2, for the VSR position. DVA also determined that appellant Evans was qualified for a VRA appointment. *Id*., Subtab 4C at 1 (VRA certificate). Therefore, the appropriate remedy is to reconstruct the hiring process consistent with the law to ascertain whether the appellant would have been selected for the position he sought. *See Gonzalez*, 110 M.S.P.R. 567, ¶ 9.

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[13] We are aware that on May 11, 2010, the President ordered OPM to review the FCIP and to provide "recommendations concerning the future of that program" within 90 days. *See* Presidential Memorandum of May 11, 2010, § 2(c). We are not privy to those recommendations, and as of today we have no knowledge of any planned modifications to FCIP that could affect the remedy here.

ORDER IN DEAN V. OPM, AT-3330-10-0534-I-1

¶34 We ORDER OPM to comply with 5 U.S.C. § 3302(1). OPM must complete this action no later than 120 days after the date of this decision.

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

¶36 No later than 30 days after OPM 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 in this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. 5 C.F.R. § 1201.182(a).

ORDER IN EVANS V. DVA, AT-3330-09-0953-I-1

¶37 We ORDER DVA to reconstruct the hiring process for the nine GS-0996-07 VSR positions in Columbia, South Carolina for which the appellant applied in 2009. DVA must complete this action no later than 30 days after the date of this decision.

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

¶39 No later than 30 days after DVA 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 in this appeal if the appellant believes that DVA did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that DVA has not fully carried out the

Board's Order, and should include the dates and results of any communications with DVA. 5 C.F.R. § 1201.182(a).

¶40 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 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 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. 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:

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