

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

2010 MSPB 207

Docket No. SF-3330-10-0024-I-1

**Thomas G. Jarrard,
Appellant,**

v.

**Social Security Administration,
Agency.**

October 28, 2010

Markus W. Louvier, Esquire, Spokane, Washington, for the appellant.

Kathryn A. Miller, Esquire, Seattle, Washington, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his Veterans Employment Opportunities Act of 1998 (VEOA) appeal for failure to state a claim upon which relief can be granted. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DENY the appellant's request for corrective action on the merits.

BACKGROUND

¶2 The appellant is a preference eligible veteran with an 80 percent service-connected disability. Initial Appeal File (IAF), Tab 4 at 18-20. The agency announced vacancies for an unspecified number of Attorney Advisor positions, and the appellant filed an application, notifying the agency that he was a preference eligible disabled veteran. IAF, Tab 6, Subtabs 2E, 2G, 2I. The agency subsequently notified the appellant that it had not selected him for an appointment, IAF, Tab 6, Subtab 2C, and the appellant filed a complaint with the Department of Labor (DOL), arguing that the agency violated his rights under VEOA because it failed to offer him a position without following the passover requirements of [5 U.S.C. § 3318](#), IAF, Tab 4 at 8-12. DOL issued a decision, finding that the appellant failed to establish that the agency violated his veterans' preference rights. *Id.* at 24.

¶3 The appellant filed a Board appeal under VEOA and requested a hearing. IAF, Tab 1 at 2, 5. He argued that the agency knowingly violated the veterans' preference requirements at [5 U.S.C. § 3318](#).¹ *Id.* at 29. The agency admitted that it did not follow these procedures in making its selections for the Attorney Advisor positions, IAF, Tab 13 at 8-9, and that one of the applicants that it selected was a non-preference eligible, IAF, Tab 6, Subtab 2 at 9. However, it argued that section 3318 does not apply to hiring for attorney positions because

¹ The appellant also claimed that the agency knowingly violated the veterans' preference requirements at [5 U.S.C. §§ 2302\(b\)\(11\)](#), [3304\(f\)\(1\)](#), and [3311](#). IAF, Tab 1 at 2-3, 29, Tab 4 at 2. However, the appellant subsequently stated "that a single issue exists which this Board must decide: whether the Agency was required to follow the passover procedures set forth by [5 U.S.C. § 3318](#)." IAF, Tab 13 at 22. Based on this statement, the administrative judge adjudicated only the appellant's [5 U.S.C. § 3318](#) claim. IAF, Tab 14 at 7-12. The appellant has not argued that the administrative judge erred in not adjudicating his other claims, which appear to be largely dependent on his claim under section 3318. IAF, Tab 7 at 15-18. Although the appellant cites to [5 U.S.C. § 3304\(f\)\(1\)](#) again on petition for review, Petition for Review File, Tab 1 at 6, it does not appear that he is attempting to renew his claim under that section as a separate claim.

application of that section presupposes examination and placement on a certificate of eligibles, but applicants for attorney positions are not subject to examination or placement on a certificate. IAF, Tab 5 at 2-8, Tab 9 at 2-4. The appellant argued that section 3318 applies even where there is no examination because section 3318 does not presuppose examination and its application is administratively feasible even in the absence of an examination. IAF, Tab 7 at 8-14, 16.

¶4 The administrative judge issued an order finding that the appellant established Board jurisdiction over his appeal. IAF, Tab 12 at 8-9. He stated, however, that “the appellant will only be granted [his] requested hearing upon a showing there is a genuine dispute of material fact that must be resolved.” *Id.* at 9. He notified the parties that, based on the record to date, he did not anticipate convening a hearing. *Id.* at 2. The administrative judge therefore afforded the parties an additional opportunity to address the merits of the appeal and set a date certain upon which the record on all issues would close. *Id.* at 2-3, 9-10. The appellant responded, again arguing that passover provisions of [5 U.S.C. § 3318](#) apply to excepted service attorney hiring, and that the agency willfully violated his veterans’ preference rights by failing to follow the requirements of that section. IAF, Tab 13 at 25-30.

¶5 Without conducting a hearing, the administrative judge issued an initial decision dismissing the appeal for failure to state a claim upon which relief can be granted. IAF, Tab 14, Initial Decision (ID) at 1, 12. He found that the appellant made a nonfrivolous allegation that the agency violated his veterans’ preference rights, but he agreed with the agency that the passover provisions of [5 U.S.C. § 3318](#) do not apply to selections for attorney positions. ID at 6-12. He further found that the Board could not order the agency to apply those provisions in the appellant’s case because such an order would require a selection process contrary to law. ID at 12.

¶6 The appellant has filed a petition for review, arguing that the passover provisions of [5 U.S.C. § 3318](#) apply even in the absence of an examination, and that the administrative judge failed to address whether it was administratively feasible for the agency to apply that section in the selection process at issue. Petition for Review File (PFR File), Tab 1 at 5-13. The agency has filed a response, addressing the appellant's arguments on review and arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFR File, Tab 3 at 5-18.

ANALYSIS

¶7 For the reasons explained in the initial decision, the administrative judge correctly found that the appellant established Board jurisdiction over his appeal. ID at 5-6. To establish Board jurisdiction over a VEOA claim brought under [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#), an appellant must (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (a) he is a preference eligible within the meaning of VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (c) the agency violated his rights under a statute or regulation relating to veterans' preference. [5 U.S.C. § 3330a](#); *Elliott v. Department of the Air Force*, [102 M.S.P.R. 364](#), ¶ 6 (2006). In this case, the appellant established that he exhausted his remedy with DOL, IAF, Tab 4 at 3, 8-12, 24, and he made nonfrivolous allegations that he is a preference eligible within the meaning of VEOA, *id.* at 3, 18-20, the action at issue took place after October 30, 1998, *id.* at 3, 13, Tab 1 at 28, and the agency violated his rights under a statute relating to veterans' preference, IAF, Tab 1 at 29; *see Jones v. Department of Veterans Affairs*, [113 M.S.P.R. 385](#), ¶ 9 (2010) (an appellant need not state a claim upon which relief can be granted in order to establish jurisdiction over a VEOA claim, and allegations of a veterans' preference violation are liberally construed).

¶8 The Board has the authority to decide the merits of a VEOA appeal without a hearing if there is no genuine dispute of material fact and one party must prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 9 (2008); [5 C.F.R. § 1208.23\(b\)](#). In this case, the appellant acknowledged that there is no genuine dispute of material fact, the disputed issues in this appeal are matters of law, and no evidentiary hearing is necessary. IAF, Tab 13 at 22-24. Accordingly, the administrative judge did not err in issuing the initial decision without a hearing. Nevertheless, because the Board’s analysis on review relies on factual matters outside the appellant’s pleadings, the appropriate disposition for the appeal at this stage is denial on the merits without a hearing rather than dismissal for failure to state a claim upon which relief can be granted. *See Haasz*, [108 M.S.P.R. 349](#), ¶ 8 (“Disposing of a claim in favor of a defending party, without an evidentiary hearing, and based on matters beyond the claimant’s allegations is summary judgment, not dismissal for failing to state a claim upon which relief may be granted.”); *Williamson v. U.S. Postal Service*, [106 M.S.P.R. 502](#), ¶ 9 n.* (2007) (“Because we are considering documentary evidence, dismissal for failure to state [a] claim upon which relief may be granted would be inappropriate.”).

Applicability of [5 U.S.C. § 3318](#) to attorney hiring

¶9 The issue in this appeal is whether the agency violated the appellant’s rights as a preference eligible veteran with an 80 percent service-connected disability when it selected a non-preference eligible applicant for the Attorney Advisor position to which he applied without following the passover provisions of [5 U.S.C. § 3318](#). Under section 3318, where an agency intends “to pass over a preference eligible on a certificate” in favor of a non-preference eligible, the agency must file written reasons for its intended passover with the Office of Personnel Management (OPM), and OPM must determine whether the agency has provided a sufficient basis to warrant the intended passover. [5 U.S.C. § 3318\(b\)\(1\)](#). If the preference eligible is, like the appellant, a veteran with a

compensable service-connected disability of 30 percent or more, he will have the opportunity to respond to the agency's stated reasons for the intended passover, and OPM must consider his response in rendering its decision. 5 U.S.C. § 3318(b)(1)-(2).

¶10 On its face, [5 U.S.C. § 3318](#) applies only to appointments in the competitive service.² However, as the appellant correctly argues, it also applies to appointments in the excepted service. IAF, Tab 7 at 8-12; PFR File, Tab 1 at 6-8; *see* [5 U.S.C. § 3320](#) (“The nominating or appointing authority shall select for appointment to each vacancy in the excepted service . . . from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title.”); *Gingery v. Department of Defense*, [550 F.3d 1347](#), 1351-53 (Fed. Cir. 2008). The agency argues, however, that the section 3318 passover procedures do not apply to selections for attorney positions because they apply only to applicants who are subject to an examination, and attorney positions are a special category of excepted service positions whose applicants are not subject to an examination. IAF, Tab 5 at 2-8, Tab 6, Subtab 2 at 6-8, Tab 9 at 3-4; PFR File, Tab 3 at 8-10, 12-16.

¶11 Regarding the premise that [5 U.S.C. § 3318](#) applies only to applicants who are subject to an examination, the agency reasons as follows. IAF, Tab 5 at 3, Tab 6, Subtab 2 at 6-8, Tab 9 at 3-4; PFR File, Tab 3 at 8-10. By its terms, section 3318 is applicable only to applicants who are “available for appointment on [a] *certificate* furnished under section 3317(a) of this title.” [5 U.S.C. § 3318\(a\)](#) (emphasis supplied). Section 3317(a), in turn, provides that

² Civil service positions in the federal government are divided into the “competitive service” and the “excepted service.” [5 U.S.C. §§ 2102-2103](#). *See generally Patterson v. Department of the Interior*, [424 F.3d 1151](#), 1155 n.4 (Fed. Cir. 2005).

OPM³ “shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of eligibles to consider at least three names for appointment to each vacancy.” Such a register consists of “[t]he names of applicants who have qualified *in examinations* for the competitive service.” 5 U.S.C. § 3313 (emphasis supplied).

¶12 Regarding the premise that applicants for the Attorney Advisor position at issue were not subject to an examination, the agency reasons as follows. IAF, Tab 5 at 2-8; PFR File, Tab 3 at 13-17. In *Patterson v. Department of the Interior*, [424 F.3d 1151](#), 1156-58 & n.5 (Fed. Cir. 2005), the court found that the agency did not assign numerical scores when it assessed applicants for an Attorney Advisor position, and that the agency was not required to do so because attorney positions are in Schedule A of the excepted service, [5 C.F.R. § 213.3102](#)(d), which covers positions “which are not of a confidential or policy-determining character . . . for which it is not practicable to examine,” [5 C.F.R. § 213.3101](#). Moreover, Congress has specifically forbidden the executive branch from developing an examination for attorneys. As explained in *Fiorentino v. United States*, [607 F.2d 963](#), 966 (Ct. Cl. 1979), in 1943 the President directed the Civil Service Commission, which at that time was the central personnel authority for the executive branch, to create a “Legal Examining Unit” for the purpose of examining applicants for federal attorney positions. Congress opposed the idea and responded by prohibiting the Commission from using appropriated funds to finance the Legal Examining Unit. Congress has similarly prohibited OPM, the Civil Service Commission’s successor agency, from using any part of its appropriation “for salaries and expenses of [its] Legal Examining Unit . . . or any successor unit of like purpose.” Omnibus Appropriations Act,

³ Pursuant to its authority under [5 U.S.C. § 1104](#)(a)(2), OPM has delegated this function to employing agencies through interagency agreements. See OPM’s 2007 Delegated Examining Operations Handbook, Chapter 1 § A, available at <http://www.opm.gov/deu/> (follow “Delegated Examining Operations Handbook, 2007” hyperlink).

2009, Pub. L. No. 111-8, 123 Stat. 524, 669 (2009); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2008-09 (2007).⁴

¶13 The Board agrees with the agency’s reasoning, and we find, for the reasons explained above, that applicants for Schedule A attorney positions are not subject to an OPM examination within the meaning of [5 U.S.C. § 3313](#), and are therefore not placed on a certificate of eligibles within the meaning of [5 U.S.C. § 3317\(a\)](#). Since executive agencies hold their authority to examine and select for appointment by delegation from OPM, *see* [5 U.S.C. § 1104\(a\)\(2\)](#), it follows that executive agencies may not conduct examinations for attorney positions, *see* Restatement (Second) of Agency § 3.04 cmt. d, illus. 3 (2006) (an entity lacks capacity to authorize an agent to do an act that is not within the entity’s powers conferred by statute). The appellant concedes that, in applying for the Attorney Advisor position at issue, he was neither examined nor placed on a certificate of eligibles. IAF, Tab 7 at 8; PFR File, Tab 1 at 10. He argues, however, that the passover procedures of [5 U.S.C. § 3318](#) still apply to attorney hiring because it is “administratively feasible” to apply them even where there is no examination and no certificate of eligibles. IAF, Tab 7 at 12-14, 16; PFR File, Tab 1 at 3, 8-13.

¶14 Congress has authorized OPM to issue regulations implementing the statutory veterans’ preference requirements, including veterans’ preference requirements for excepted service hiring. [5 U.S.C. § 1302\(c\)](#); *see Patterson*, 424 F.3d at 1156; 5 C.F.R. part 302 (“Employment in the Excepted Service”). OPM has recognized that the appointment procedures of 5 C.F.R. part 302 may not be applied to selections for certain categories of excepted service positions, including attorney positions. [5 C.F.R. § 302.101\(c\)\(9\)](#). OPM has exempted

⁴ The agency also appears to argue that [42 U.S.C. § 904\(a\)\(1\)](#), which allows it to appoint attorneys “without regard to the civil service laws,” is an additional reason why OPM cannot impose an examination requirement on its attorney selection process. IAF, Tab 5 at 8; PFR File, Tab 3 at 16. The initial decision did not address this argument, and the Board finds it unnecessary to address the argument on review.

selections for these positions from the part 302 appointment procedures, requiring instead that, in selecting for these positions, agencies “shall follow the principle of veteran preference as far as administratively feasible.” 5 C.F.R. § 302.101(c).

¶15 The United States Court of Appeals for the Federal Circuit has upheld the validity of this regulation as it pertains to selections for attorney positions. *Patterson*, 424 F.3d at 1158-60. In *Patterson*, the appellant, a preference eligible veteran, applied for an Attorney Advisor position. 424 F.3d at 1153. When the agency did not select him, he filed a VEOA appeal, alleging that the agency violated his veterans’ preference rights when it did not award him “additional points above his earned rating” as required by [5 U.S.C. § 3309](#). *Id.* at 1154. The court found that the agency did not violate the appellant’s veterans’ preference rights in this regard because, although section 3309 is generally applicable to excepted service hiring pursuant to [5 U.S.C. § 3320](#), it is inapplicable to attorney hiring because appointments to attorney positions are not made using numerical rating and ranking procedures pursuant to an examination. *Id.* at 1158-59. That is, section 3309 is silent on how agencies should apply veterans’ preference to selections for which there is no examination. *Id.* at 1158. The court found that OPM’s regulation requiring agencies to “follow the principle of veteran preference as far as administratively feasible” was a reasonable gap-filling measure to the extent that it addressed how section 3309 should apply to selections for positions where there is no numerical rating and ranking pursuant to an examination. *Id.* at 1158-59; [5 C.F.R. § 302.101\(c\)](#). The court, in turn, found that the agency’s decision to treat the appellant’s veterans’ preference status a “positive factor” in its selection process was a reasonable way of “follow[ing] the principle of veteran preference as far as administratively feasible.” *Patterson*, 424 F.3d at 1159-60 (quoting 5 C.F.R. § 302.101(c)).

¶16 The appellant argues that *Patterson* is inapplicable to the facts of the instant appeal because it does not address the applicability of [5 U.S.C. § 3318](#), the precise statute at issue here. In this regard, the appellant relies on *Gingery*,

550 F.3d at 1351-53, in which the court found that the agency violated the rights of a preference eligible disabled veteran who applied for an excepted service position under the Federal Career Intern Program (FCIP), where the agency selected another candidate without following the procedures set forth in [5 U.S.C. § 3318\(b\)\(2\)](#).⁵ IAF, Tab 7 at 9-13, Tab 13 at 27-29; PFR File, Tab 1 at 7-13. In *Gingery*, the court found that OPM's excepted service passover regulation at [5 C.F.R. § 302.401\(b\)](#) was invalid because it afforded preference eligible disabled veterans lesser protections than those established by Congress at [5 U.S.C. § 3318\(b\)\(2\)](#). 550 F.3d at 1352-54. The court distinguished *Patterson*, reasoning that the statute at issue in *Patterson*, [5 U.S.C. § 3309](#), was impossible to apply in the absence of an examination, and the excepted service applicants in that case were not subject to examination, but "there is no examination requirement in § 3318 and no analogous requirement that would preclude application of § 3318 to the excepted service under § 3320." *Id.* at 1353. The court found that "Congress clearly and unambiguously stated in § 3320 that § 3318 should apply to the excepted service in the same manner it applies to the competitive service." *Id.*

¶17 We agree with the administrative judge that neither *Gingery* nor *Patterson* speaks directly to the issue presented in the instant appeal. *Id.* at 9. That is, *Gingery* involved section 3318 but did not involve attorney hiring, whereas *Patterson* involved attorney hiring but did not involve section 3318. *Id.*

⁵ The administrative judge correctly found that the 2008 *Gingery* panel decision did not overrule or modify the 2005 *Patterson* panel decision because *Patterson*, as the earlier decision, is the law of the circuit unless and until it is overruled by the court sitting en banc. *Id.* at 9; see *Johnston v. IVAC Corp.*, [885 F.2d 1574](#), 1579 (Fed. Cir. 1989); see also OPM, Memorandum for Chief Human Capital Officers (Mar. 12, 2009), available at <http://www.chcoc.gov/Transmittals/> (follow "Clarification of Procedures for Passover of Compensable-Disabled Preference Eligibles in the Excepted Service" hyperlink) (stating OPM's view that *Gingery* did not overrule *Patterson*). The appellant does not disagree with administrative judge's finding. PFR File, Tab 1 at 11.

Nevertheless, for the following reasons, we find that the court’s reasoning in *Patterson* is applicable to facts of the instant appeal.

¶18 As the administrative judge correctly found, the Attorney Advisor position for which the appellant applied is different from the FCIP position at issue in *Gingery*. ID at 9-10. The court noted in *Gingery* that the appointment challenged in that case was made under the FCIP, a Schedule B excepted service hiring authority. 550 F.3d at 1349; see [5 C.F.R. § 213.3202\(o\)](#). Schedule B covers positions “which are not of a confidential or policy-determining character . . . for which it is impracticable to hold open competition or to apply *usual* competitive examining procedures.” [5 C.F.R. § 213.3201\(a\)](#) (emphasis supplied). Thus, there was an “examination” for the FCIP position at issue in *Gingery*, albeit not a “usual” one. See [5 C.F.R. § 213.3201\(o\)\(1\)](#) (requiring agencies to use the procedures of 5 C.F.R. part 302 for making appointments under the FCIP); [5 C.F.R. § 302.302](#) (“Examination of applicants”). Compare [5 C.F.R. § 213.3101\(a\)](#) (Schedule A appointments are authorized where it is not practicable to examine) with [5 C.F.R. § 213.3201\(a\)](#) (Schedule B appointments are authorized where it is impracticable to apply usual competitive examining procedures).⁶ Based on this examination, the agency in *Gingery* created a “certificate” of eligibles after assessing the candidates under the excepted service category rating system. 550 F.3d at 1350; 5 C.F.R. §§ 302.304, .401(a). Mr. Gingery was placed in the highest preference category, *Gingery*, 550 F.3d at 1350, and according to the court, [5 U.S.C. § 3320](#) required the agency to apply the passover procedures at [5 U.S.C. § 3318\(b\)](#) when selecting a non-preference eligible from the certificate over Mr. Gingery, *id.* at 1353-54.

¶19 By contrast, in both *Patterson* and the instant appeal, the appointments at issue were to attorney positions covered by Schedule A. As explained above,

⁶ For these reasons, we disagree with the appellant’s assertion that the FCIP appointment in *Gingery* did not require an examination. IAF, Tab 13 at 27.

such appointments are exempted from the appointment procedures of 5 C.F.R. part 302, of which the category rating system is a part. *See* [5 C.F.R. §§ 302.101\(c\)\(9\)](#) (attorney positions are exempt from part 302 appointment procedures), [.304\(b\)\(5\)](#) (the excepted service category rating system). The Attorney Advisor position could not have been filled pursuant to the category rating system because that system requires an examination, *see* [5 U.S.C. § 3319\(a\)](#) (the category rating system is established pursuant to the [5 U.S.C. § 3304](#) examining authority); [5 C.F.R. § 302.302\(a\)](#) (category rating is made pursuant to an examination where numerical scores are not assigned), and, as the agency correctly argued, applicants for attorney positions cannot be lawfully subjected to an examination, *supra*, ¶ 12.

¶20 In addition, the court in *Gingery* noted that “§ 3318 applies to selection from certificates, which are used in both the competitive and excepted services.” 550 F.3d at 1353. Although this is true of excepted service hiring generally, and of the specific position at issue in *Gingery*, it is not true of the Attorney Advisor position at issue here. The appellant herein cannot claim that he belonged at “the top of the . . . register,” [5 U.S.C. § 3317\(a\)](#), because there was no register within the meaning of 5 U.S.C. chapter 33, subchapter I; examination is a prerequisite for placement on a register, [5 U.S.C. § 3313](#), and the position that the appellant sought was not subject to an examination, *supra*, ¶ 12. Indeed, no applicant for an attorney position could credibly claim to have passed an “examination” within the meaning of 5 U.S.C. §§ 3309-3320.⁷ *See id.*

⁷ Even if the agency erroneously rated and ranked applicants for the Attorney Advisor position and did not follow passover procedures, VEOA would still not authorize the Board to order the agency to follow those procedures in any reconstructed selection process. Although an agency is required to factor veterans’ preference points into ratings made under [5 C.F.R. § 302.302](#), *see* [5 C.F.R. § 302.303\(d\)](#), any rating that the agency might assign under that section to applicants for attorney positions would be unlawful, *see supra*, ¶ 12. Because VEOA entitles a successful claimant to a selection process consistent with law, *see* [5 U.S.C. § 3330c\(a\)](#); *Weed v. Social Security Administration*, [111 M.S.P.R. 450](#), ¶ 7 (2009), *aff’d*, No. 2009-3255 (Fed. Cir. 2010),

¶21 For these reasons, we find that it would be impossible to apply the passover procedures of [5 U.S.C. § 3318](#) to the Attorney Advisor selection process in the same manner as was required for the FCIP selection process in *Gingery*. 550 F.3d at 1353-54. Because application of section 3318 is conditioned on the preference eligible being “on a certificate,” we find that it is silent as to how agencies should apply veterans’ preference rights to a preference eligible who does not appear on a certificate. *Cf. Patterson*, 424 F.3d at 1158 (section 3309 is silent as to how agencies should apply veterans’ preference rights to a preference eligible who is not required to pass an examination).

¶22 Because [5 U.S.C. § 3318](#) is silent as to how veterans’ preference rights should apply to the selection process at issue, the Board will defer to OPM’s regulation providing that, in selecting for attorney positions, agencies must “follow the principle of veteran preference as far as administratively feasible.” [5 C.F.R. § 302.101\(c\)](#). The court in *Patterson* upheld the validity of this regulation with respect to the veterans’ preference requirements in [5 U.S.C. § 3309](#), which are inapplicable to attorney hiring because they presuppose an examination. 424 F.3d at 1158-60. Likewise, we discern no basis to find this regulation invalid with respect to the veterans’ preference requirements at [5 U.S.C. § 3318](#), which are inapplicable to attorney hiring because they presuppose placement on a certificate. The appellant does not dispute the validity of the regulation, but he argues that in order to follow [5 U.S.C. § 3318](#) “as far as administratively feasible,” the agency would have to solicit OPM’s permission for the intended passover, notify the preference eligible of the reasons for the proposed passover, and afford the preference eligible an opportunity to respond. IAF, Tab 13 at 27-29. He argues that the absence of an examination or a

the administrative judge correctly found that the Board could not order the agency to continue with an unlawful rating and ranking procedure in the reconstruction, ID at 12.

certificate of eligibles does not make it administratively unfeasible to follow the procedures of that section. IAF, Tab 7 at 12-14, 16; PFR File, Tab 1 at 5, 8-13.

¶23 The appellant's argument is premised on an overly broad definition of the term "passover." Section 3318 specifies that the passover is on a certificate furnished under [5 U.S.C. § 3317\(a\)](#). The very notion of "passing over" a preference eligible applicant presupposes that he encumbers a position on a certificate; a preference eligible cannot credibly claim to have been "passed over" in favor of another applicant unless he already encumbered a ranked position ahead of the other applicant on a certificate. Without such a certificate, the term "passover" as used in section 3318 is devoid of meaning. To the extent that the appellant is arguing that a "passover" is simply the selection of a non-preference eligible instead of a preference eligible regardless of whether the applicants appeared on a certificate, we find that his definition of the term is inconsistent with the plain language of the statute.

¶24 The appellant suggests elsewhere that "compliance with [5 U.S.C. § 3318\(b\)](#) could be accomplished by simply sending the preference eligible Veteran a letter in a timely manner." IAF, Tab 7 at 14; PFR File, Tab 1 at 7 n.2. To the extent that the appellant is arguing that the agency should have to follow closely analogous procedures to those in [5 U.S.C. § 3318](#) when it cannot follow those procedures as written, we disagree.

¶25 OPM's regulation provides that, in selecting for attorney positions, agencies must "follow the principle of veteran preference as far as administratively feasible." [5 C.F.R. § 302.101\(c\)](#). By its plain language, this regulation vests individual agencies with broad discretion in affording veterans' preference to applicants for attorney positions. It directs agencies to follow the "principle of veteran preference" – a generic concept; it does not direct agencies to follow specific veterans' preference requirements when those requirements cannot be applied as written. *Id.* It also directs agencies to follow the principle "as far as administratively feasible." *Id.* As the agency correctly argues, this

language grants it broad discretion in affording veterans' preference to applicants for attorney positions. IAF, Tab 9 at 3-4; *see Pope v. Department of Transportation*, [421 F.3d 480](#), 481-82 (7th Cir. 2005) (by granting unguided discretion to agencies in applying veterans' preference to applicants for attorney positions, the regulation leaves little room for judicial review of an agency's action). Nothing in the regulation, or in the applicable statute, requires the agency to develop its own veterans' preference requirements analogous to the statutory veterans' preference requirements when the statutory requirements are impossible to apply. Therefore, even if it were "administratively feasible" for the agency to apply procedures similar or analogous to those in [5 U.S.C. § 3318](#), we find that the agency did not violate the appellant's veterans' preference rights by exercising its discretion to apply the principle of veterans' preference in another administratively feasible way.

¶26 In addition, Congress has not authorized the Board to prescribe the procedures for agencies to follow in applying veterans' preference to attorney hiring. That responsibility belongs to OPM, *see* [5 U.S.C. § 1302\(c\)](#); *Patterson*, 424 F.3d at 1156, and OPM has elected to leave the details of applying veterans' preference to attorney hiring up to individual agencies, *see* [5 C.F.R. § 302.101\(c\)](#). The appellant argues that veterans' benefit statutes such as [5 U.S.C. § 3318](#) should be construed in the veteran's favor. IAF, Tab 13 at 26; PFR File, Tab 1 at 5; *see Kirkendall v. Department of the Army*, [479 F.3d 830](#), 843 (Fed. Cir. 2007). Even so, this principle does not authorize the Board to supplant OPM's statutory authority to implement 5 U.S.C. §§ 3318 and 3320.

¶27 It is undisputed that the agency treated the appellant's veterans' preference status as a "positive factor" in its selection process. IAF, Tab 6, Subtab 2 at 6, 9, Subtab A, Tab 9 at 4. We find that the agency's decision to treat the appellant's veterans' preference status as a positive factor in evaluating his application is consistent with OPM's requirement that the agency "follow the principle of

veteran preference as far as administratively feasible.”⁸ IAF, Tab 6, Subtab 2 at 6, 9, Subtab A; [5 C.F.R. § 302.101\(c\)](#); *see Patterson*, 424 F.3d at 1159-60 (the “positive factor” test is a reasonable way of following the requirements of [5 C.F.R. § 302.101\(c\)](#)). In addition, there is no indication in the record that the agency’s own rules require it to do anything other than consider veterans’ preference as a positive factor when selecting for attorney positions. Accordingly, we find that the appellant failed to establish that the agency violated his veterans’ preference rights when it selected a non-preference eligible individual for the Attorney Advisor position to which he applied without following the passover procedures of [5 U.S.C. § 3318](#) or any analogous procedures. We deny the appellant’s request for corrective action on the merits.

ORDER

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

⁸ To the extent that the agency argues that it need not follow any statutory veterans’ preference requirement for attorney hiring as long as it treats veterans’ preference as a “positive factor,” we decline to decide whether the “positive factor” standard satisfies statutory veterans’ preference requirements that are not inapplicable to attorney hiring.

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.