

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

2009 MSPB 151

Docket No. CH-3443-06-0582-M-1

**Stephen W. Gingery,
Appellant,**

v.

**Department of Defense,
Agency.**

August 4, 2009

Stephen W. Gingery, Macomb, Michigan, pro se.

Susan L. Lovell, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The U.S. Court of Appeals for the Federal Circuit has reversed our prior decision in this appeal under the Veterans Employment Opportunities Act of 1998 (VEOA), and has remanded the appeal to us. For the reasons stated below, we find that the agency violated the appellant's rights as a preference eligible by failing to comply with the requirements of [5 U.S.C. § 3318](#). We also REMAND this appeal to the Board's Central Regional Office for further proceedings to determine whether the agency violated the appellant's rights in placing positions for which he applied in the excepted service.

BACKGROUND

¶2 The appellant is a preference eligible with a service-connected disability rated at 30% or more. *See* Appeal File, Tab 1 at 4-5; [5 U.S.C. § 2108\(2\)](#) (defining “disabled veteran”); [5 U.S.C. § 2108\(3\)\(C\)](#) (defining “preference eligible” as referring, inter alia, to a “disabled veteran”). In February 2006, he submitted an application for an auditor position with the agency. *See* Appeal File, Tab 7, Subtab 4F at 37-39. The agency considered the appellant’s application under the Federal Career Intern Program (FCIP), but did not select him. *See id.*, Subtab 4E at 12; *id.*, Subtab 4F at 32-34. Instead, it tentatively selected three other candidates under that program for auditor positions, and eventually appointed two of those candidates. *See id.*, Subtab 4B at 1-2. Because the FCIP can be used only to fill positions in the excepted service, and not to fill positions in the competitive service, the positions filled under the FCIP were placed in the excepted service. *See* Exec. Order No. 13,162, § 4(a); [5 C.F.R. § 213.3202\(o\)](#) (listing FCIP positions among those filled under Schedule B of the excepted service). During the same hiring process, however, the agency also filled two auditor positions under competitive service hiring authorities. The selectee for one of those positions was an individual who has been described as eligible for noncompetitive reinstatement to a competitive service position,¹ and the other was a preference eligible whose name appeared on a certificate issued by the Office of Personnel Management (OPM). *See* Appeal File, Tab 7, Subtab 4B at 1-2; *id.*, Subtab 4D at 1.

¶3 Because the FCIP selectees for auditor vacancies were not preference eligibles, and because of the appellant’s status as a compensably disabled veteran, the appellant had higher standing on the FCIP certificate of eligible candidates

¹ In a submission filed after the court remanded this case to us, the appellant has challenged the selection of the candidate described as eligible for noncompetitive reinstatement. Remand File, Tab 3 at 2-3. That selection, however, is not at issue at this stage of this case.

than the selectees. *See id.*, Subtab 4H; *see* [5 C.F.R. § 302.304\(b\)](#) (describing the order in which preference-eligible and other candidates for excepted service position are to be considered). Consistent with [5 C.F.R. § 302.401\(b\)](#), a provision intended to govern the selection of a non-preference-eligible candidate for an excepted service position when a preference-eligible candidate ranks higher on the certificate of eligibles for that position, an agency official involved in the selection process requested and obtained approval from other agency officials to “pass over” the appellant in order to select lower-ranking non-preference-eligible candidates. Appeal File, Subtab 4B at 2; *id.*, Subtab 4E.

¶4 After being notified of his nonselection, the appellant challenged the agency’s actions, alleging in an appeal filed with the Board’s Central Regional Office that the agency had violated his rights as a preference eligible.² Appeal File, Tab 1. The administrative judge to whom the appeal was assigned denied the appellant’s request for remedial action, finding in her initial decision that the agency had not violated any statutory or regulatory provision related to veteran preference. Initial Decision at 11, Appeal File, Tab 19. The appellant filed a petition for review of the initial decision, and we affirmed that decision, finding, *inter alia*, that the agency had complied with the provisions of [5 C.F.R. § 302.401\(b\)](#). *Gingery v. Department of Defense*, [105 M.S.P.R. 671](#), ¶¶ 11-12 (2007), *rev’d and remanded*, [550 F.3d 1347](#) (Fed. Cir. 2008).

¶5 The appellant petitioned the U.S. Court of Appeals for the Federal Circuit for judicial review of our decision; the court has now reversed that decision and remanded the appeal to us; and the appellant has filed submissions in which he challenges various aspects of the selection process and requests retroactive placement in the position for which he applied. Remand File, Tabs 1, 3, *Gingery*, 550 F.3d at 1349, 1354.

² The appellant previously filed a complaint with the Department of Labor, but withdrew the complaint in order to file his appeal. Appeal File, Tab 1 at 11.

ANALYSIS

Compliance with 5 U.S.C. § 3318(b)

¶6 Subchapter 1 of chapter 33, U.S. Code, includes a number of provisions governing the examination, certification, and appointment of candidates for positions in both the competitive service and the excepted service. Under [5 U.S.C. § 3318\(b\)](#), an employing agency is not free to fill a position in the competitive service by appointment of a candidate who is not a preference eligible while declining to select for that position a higher-ranking preference-eligible candidate. If it wishes to “pass over” the preference eligible to select a lower-ranking non-preference-eligible candidate, it must first “file written reasons with [OPM] for passing over the preference eligible.” [5 U.S.C. § 3318\(b\)](#). OPM “shall determine the sufficiency or insufficiency of the reasons submitted by the” agency; “it shall send its findings to the [agency] and to the preference eligible”; and that agency “shall comply with the findings of” OPM. *Id.* Moreover, if the preference eligible the employing agency proposes to pass over has a compensable service-connected disability of 30 percent or more, the agency “shall notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to [OPM] within 15 days of the date of such notification.” [5 U.S.C. § 3318\(c\)](#). This notification is to be made at the same time the agency submits its passover proposal to OPM, *id.*, and the preference eligible’s response is to be considered by OPM in making its determination on the proposal, 5 U.S.C. § 3318(b).

¶7 We have indicated above that the FCIP positions at issue here were in the excepted service, rather than the competitive service, and that [5 U.S.C. § 3318\(b\)](#) applies to selections for competitive service positions. Under [5 U.S.C. § 3320](#), however, selections for positions in the excepted service are to be made “in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of” title 5. In an apparent effort to ensure that procedures for filling excepted service positions conformed to the requirements of [5 U.S.C.](#)

[§ 3318\(b\)](#), OPM promulgated [5 C.F.R. § 302.401\(b\)](#). That regulatory provision does not require either the OPM approval that is required under [5 U.S.C. § 3318\(b\)](#) or the notice to the preference eligible that is required under [5 U.S.C. § 3318\(c\)](#). Instead, it requires the agency only to “record its reasons for” passing over the preference eligible, and to “furnish a copy of those reasons to the preference eligible . . . on request.” [5 C.F.R. § 302.401\(b\)](#).

¶8 Relying on [5 C.F.R. § 302.401\(b\)](#), the agency in this case did not seek OPM approval of a proposal to pass over the appellant in order to select FCIP candidates who were not preference eligible; instead, it sought and obtained that approval internally. Appeal File, Tab 7, Subtab 4B at 2; *id.*, Subtab 4E. In doing so, it recorded its reasons for the passover, consistent with [5 C.F.R. § 302.401\(b\)](#). *Id.*, Subtab 4E. Because the appellant did not request a copy of the reasons for the passover, the agency did not furnish one to him. *See* Appeal File, Tab 17 (the appellant’s submission of September 19, 2006, at 2); [5 C.F.R. § 302.401\(b\)](#).

¶9 Before the court, the appellant argued that [5 C.F.R. § 302.401\(b\)](#) was invalid because it was inconsistent with [5 U.S.C. § 3318\(b\)](#). *See Gingery*, 550 F.3d at 1351. The court concurred in this argument. It found that, in [5 U.S.C. § 3320](#), Congress had made “clear that § 3318 applie[d] in the same manner to the excepted service” as it did to the competitive service. *Id.* at 1352-53. It found further that the regulatory provision gave preference eligibles – and especially those with compensable service-connected disabilities of 30 percent or more – less protection than Congress had guaranteed them in [5 U.S.C. § 3318](#), that it accordingly was inconsistent with the applicable statute, and that its passover provision therefore was invalid. *Id.* at 1354. Because the agency had not complied with the requirements of [5 U.S.C. § 3318](#), as applied to the excepted service through [5 U.S.C. § 3320](#), the court reversed our decision in this case. *Id.*

Compliance with [5 U.S.C. § 3302](#)

¶10 We have indicated above that the FCIP may be used only to fill positions in the excepted service. By electing to fill some of its auditor positions under the

FCIP, the agency was, in effect, electing to except them from the competitive service. While this case was pending in court, the appellant argued that those positions were improperly excepted. *See Gingery*, 550 F.3d at 1354-56 (Newman, J., concurring).

¶11 In [5 U.S.C. § 3302](#), Congress authorized the President to “prescribe rules governing the competitive service,” and it stated that those rules were to “provide, as nearly as conditions of good administration warrant, for . . . (1) necessary exceptions of positions from the competitive service” The appellant evidently argued before the court that the FCIP positions should not have been excepted from the competitive service under this provision without a showing of necessity, that the exception from that service of the auditor positions at issue here had not been shown to have been a “necessary exception” to the procedures required with respect to the competitive service, and that the agency therefore was not authorized to fill the position by appointment from the FCIP list. *See Gingery*, 550 F.3d at 1354-56 (Newman, J., concurring). The court did not reach this issue. Although one judge on the panel that heard this case expressed the view that the court should have addressed the issue, *id.*, the majority declined to do so, *see id.* at 1351 n.1. In referring to that issue, however, the majority specifically noted that, if its remand of the case did not resolve the case, the appellant was “not precluded from renewing his FCIP challenges before the MSPB.” *Id.*

¶12 We have indicated above that the appellant has filed a submission challenging various aspects of the selection process. Specifically, he argues that “OPM failed to give effect to the necessity analysis required under [5 U.S.C. § 3302\(1\)](#).” Remand File, Tab 3 at 3. It appears, therefore, that the appellant does not consider the court’s remand of his case to resolve the issue of whether his rights as a preference eligible were violated during the selection process, and that he still believes the use of the FCIP authority violated those rights. In light

of the appellant's renewed argument, and for reasons provided below, we find that this case must be remanded for further proceedings.

¶13 We note first that, if we were only to order the agency to comply with the requirements of [5 U.S.C. § 3318\(b\)\(1\)](#) and (2), the appellant would receive, at most, appointment to an excepted service auditor position. As we have indicated above, however, one of the auditor vacancies the agency filled during the hiring process at issue here was filled in the competitive service by appointment from a certificate issued by OPM. The appellant competed for that position; his name appeared at the top of the certificate used to fill it; and the agency's failure to select him from that certificate was an issue before the Board. Agency File, Tab 7, Subtab 4B at 2; *id.*, Subtab 4D at 1; Initial Decision at 4, 6-7, Appeal File, Tab 19; *Gingery*, [105 M.S.P.R. 671](#), ¶ 5. Moreover, as correspondence the appellant has submitted following the court's remand of this case suggests, appointment to a competitive service position could be regarded as more desirable than appointment to the same position in the excepted service. *See* Remand File, Tab 1 at 18 (statement by the attorney who represented the appellant before the court that, "[e]ven if [the appellant] were to be hired under a reconstruction of the FCIP certificate, he would still be harmed by . . . avoidance of the FCIP issue since . . . [u]nder the FCIP he would have a two-year probationary period, compared to the one-year period under the competitive certificate").

¶14 Because the candidate selected from the OPM certificate on which the appellant's name appeared also was a preference eligible who was within reach for selection, we indicated in our earlier decision that that selection did not violate the appellant's rights as a preference eligible. *See Gingery*, [105 M.S.P.R. 671](#), ¶ 5; [5 C.F.R. §§ 332.404\(a\)](#), 332.406(b). As explained below, however, absent a determination regarding the validity of the exception from the competitive service of the auditor positions that were filled by FCIP selectees, we

cannot rule out the possibility that the agency's appointment of those selectees violated the appellant's rights as a preference eligible.

¶15 As we indicated in our previous decision in this case, the Board observed in *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#), ¶¶ 2, 14, 21-38 (2005), *aff'd on recons.*, [104 M.S.P.R. 1](#) (2006), that preference eligibles received certain advantages in a competitive examination under [5 U.S.C. § 3309-3318](#), and it concluded that the appointment of a candidate who was not a preference eligible, who had not passed a competitive examination, and who was not appointed under a valid noncompetitive appointing authority violated the rights of the appellant in that case, a preference eligible who had competed unsuccessfully for the same position through a competitive examination. *Gingery*, [105 M.S.P.R. 671](#), ¶ 7. We distinguished *Dean* from the present case on the ground that the FCIP authority used here, unlike the authorities used in *Dean* and similar cases, represented a valid exception to the competitive examination requirement. *Id.* ¶ 9. In relying on this distinction, however, we did not address the concerns that were raised before the court. That is, we did not address the issue of whether the exception of the auditor positions at issue here complied with the "necessity" requirement of [5 U.S.C. § 3302\(1\)](#). In light of the arguments raised below, the statements the court made in remanding this case to us, and the possible effect a determination regarding this issue may have on the remedial action to which the appellant is entitled, we find that the issue must be addressed.

¶16 Finally, we note that the arguments presented to the court regarding the agency's authority to except its auditor positions from the competitive service are not included in the record before us, and that the record on this issue is otherwise undeveloped. Remanding this case to the regional office therefore is appropriate.

ORDER

¶17 For the reasons stated above, we REMAND this appeal to the Central Regional Office. The administrative judge assigned to the appeal shall provide

the parties with an opportunity to present evidence and argument on the issue described above,³ shall provide OPM with an opportunity to intervene in the appeal, and shall issue a new initial decision addressing that issue. The new initial decision shall include an order for appropriate remedial action.⁴

FOR THE BOARD:

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

³ The administrative judge may require one or both parties, on remand, to submit copies of the written submissions filed with the court in this case. *See Gingery*, 550 F.3d at 1354-55 (Newman, J., concurring) (referring to arguments raised below, and characterizing the FCIP exception issue as “the central issue of this appeal”).

⁴ If the administrative judge finds on remand that the FCIP positions were properly excepted from the competitive service, and that the agency accordingly did not violate the appellant’s right as a preference eligible to compete for a competitive service auditor position, the initial decision nevertheless shall include an order that the agency correct its error in filling the FCIP auditor positions. That is, it shall include an order that the agency comply with the provisions of [5 U.S.C. § 3318\(b\)\(1\)](#) and (2) in seeking OPM approval of its proposal to pass over the appellant.