

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

100 M.S.P.R. 322

MATTHEW S. OLSON,
Appellant,

DOCKET NUMBER
CH-3443-01-0706-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 5, 2005

Matthew S. Olson, Johnston, Iowa, pro se.

Earl E. Parsons, Esquire, Des Moines, Iowa, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that denied his request for redress under the Veterans Employment Opportunities Act of 1998 (VEOA). For the following reasons, we GRANT the appellant's petition for review, REVERSE the initial decision, and FIND that the appellant proved that the agency violated his rights under a statute relating to veterans' preference.

BACKGROUND

¶2 After exhausting his remedy before the Department of Labor, the appellant, a GS-5 Financial Technician with the U.S. Department of Agriculture, filed a timely VEOA appeal challenging his nonselection for a GS-996-7 Veterans

Service Representative position with the agency's Des Moines, Iowa, Regional Office, and the agency's selection of candidates for that position under the Outstanding Scholar Program. Appeal File (AF), Tab 1. The appellant asserted that the agency did not rate and rank candidates, apply veterans' preference by augmenting examination scores, and follow proper guidelines under the pass-over provisions of 5 U.S.C. § 3318. *Id.*; *see* AF, Tab 4.

¶3 The agency asserted that it had the discretion to fill the positions by any authorized method and that the vacancy announcement in question was not announced through a delegated examining unit authorized by the Office of Personnel Management (OPM) and was not open to the general public under competitive examining procedures. AF, Tab 7, Subtab 1. Rather, applications were "restricted to those 'status' candidates, who had already obtained competitive status, and either are current Federal employees or previously had been Federal employees." *Id.* The agency asserted that applications were also accepted from candidates who had never been federal employees, but who had competitive status based on statute, Executive Order, or civil service rules, including the Veterans Readjustment Act and provisions for 30% disabled veterans. *Id.* The agency claimed that, because the appellant had competitive status as a current federal employee, he was referred as a promotion candidate based on his transfer eligibility and considered, but not selected. *Id.* Of the nine Veterans Service Representative vacancies that the agency filled, four were filled under the Outstanding Scholar Program. AF, Tab 13.

¶4 The Board's administrative judge (AJ) certified an interlocutory appeal on the question of "[w]hether the *Luevano* consent decree or other authority authorizes the agency to fill its Veterans Services Representative positions without using competitive examination procedures." AF, Tab 15. In its decision, the Board, after noting that an interlocutory appeal should be based on a ruling, not a "question," answered the AJ's question, as phrased, in the affirmative. *Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶¶ 10-11, 16 (2002).

The Board declined to address, however, issues beyond the scope of the certified question, including whether the Outstanding Scholar appointing authority was “properly authorized” in general or under the particular facts presented. *Id.*, ¶ 17. The Board, therefore, returned the appeal for further adjudication. *Id.*, ¶¶ 17-18.

¶5 After receiving additional submissions from the parties, the AJ denied the appellant’s request for redress under VEOA. AF, Tab 20. The AJ noted that the appellant argued that the Outstanding Scholar Program was unauthorized because it had not been approved by Congress or the President and because there was no evidence that it helped fill the minority void at the Des Moines Regional Office. *Id.* at 10. Nevertheless, the AJ concluded that, because the agency’s use of the program was consistent with OPM’s requirement that it be invoked “as a supplement to the competitive examining process where the under-representation of Blacks and Hispanics exists,” and the Veterans Service Representative positions met the additional criteria set forth in *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981), the agency’s use of the program did not violate the appellant’s veterans’ preference rights. *Id.* The AJ also found that the agency did not violate the appellant’s veterans’ preference rights by filling three positions with VEOA-eligible applicants and by failing to select him as a status-eligible applicant. *Id.* at 11-12. The appellant asserts on review that the AJ “never even considered whether OPM had the jurisdiction to authorize the Luevano Consent Decree” and simply found that the agency followed OPM’s guidelines.

ANALYSIS

The appellant has proven a violation of his rights under a statute relating to veterans’ preference.

¶6 For the reasons set forth below, we find that the agency violated 5 U.S.C. § 3304(b) when it appointed individuals in the competitive service from the Outstanding Scholar list even though they had not passed an examination and were not “specifically excepted from examination under section 3302 of this

title.” As set forth in the Board’s Opinion and Order in *Dean v. Department of Agriculture*, MSPB Docket No. AT-0330-03-0076-I-1, ¶¶ 9-19 (August 5, 2005), section 3304(b) is a statute “relating to veterans’ preference,” as required by VEOA. *See* 5 U.S.C. § 3330c (the Board may order a remedy under VEOA only if it determines that an agency has violated a right described in section 3330a, i.e., an individual’s right “under any statute or regulation relating to veterans’ preference”). Under 5 U.S.C. § 3304(b), an 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.” Here, there is no indication that the individuals who were selected by the agency under the Outstanding Scholar Program, and who were subsequently appointed in the competitive service, took an approved examination, let alone passed such an examination. In fact, the agency explained that the Outstanding Scholar hiring authority and the *Luevano* consent decree provide that “outstanding scholars are eligible for direct hire without the necessity of an examining procedure.” AF, Tab 18. Applicants meeting the Outstanding Scholar eligibility requirements were referred separately without ranking or the application of veterans’ preference. *Id.*

¶7 As we have found in *Dean*, however, the *Luevano* decree, which is the source of the Outstanding Scholar Program, does not create an exception that supersedes veterans’ preference rights under the competitive process. The decree is based on the policies of Title VII, which prescribes that “[N]othing contained in this subchapter [which prohibits discrimination in employment] shall be construed to repeal or modify any...law creating special rights or preference for veterans.” 42 U.S.C. § 2000e-11. Further, the decree suggests that its special programs were not intended to override veterans’ preference rights. It provides that “any adverse impact which results from the requirements of the Veterans’ Preference Act, 5 U.S.C. § 3318, will be taken into account and may constitute a

defense to the determination of adverse impact with respect to any competitive procedures.” 1981 WL 402614, ¶ 9.

¶8 Nor do we find, for the reasons expressed in *Dean*, that the individuals the agency appointed were “specifically exempted from examination under section 3302” of title 5. Thus, there is no indication that the President prescribed a rule for a specific exception from the provisions of 5 U.S.C. § 3304(a) with respect to veterans’ rights based on the Outstanding Scholar Program. Further, even assuming that the other requirements of section 3302 have been met, there has been no showing that an exception to the examination process with regard to veterans’ rights, in the form of the Outstanding Scholar Program, was determined by the President or OPM to be necessary and warranted by considerations of good administration.

¶9 Accordingly, we find that the agency violated the appellant’s rights under a statute relating to veterans’ preference, namely, 5 U.S.C. § 3304(b), when it appointed individuals, who had not passed an examination and who had not been specifically excepted from examination under 5 U.S.C. § 3302, to the Veterans Services Representative positions in the competitive service.

The agency is ordered to comply with the applicable law.

¶10 The appellant requests on review that the Board order the agency to retroactively appoint him to a Veterans Services Representative position and award him back pay and damages. In *Dean*, the Board duly considered the appropriate relief for an appellant who establishes that the agency violated his rights under VEOA. The Board determined that the immediate remedy is for it to order the agency to comply with the violated provisions of a statute relating to veterans’ preference by reconstructing the hiring for the position in question, in compliance with the requirement, set forth at 5 U.S.C. § 3304(b), 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.” The Board also found that the appellant is entitled to an award of compensation for any loss of wages or benefits suffered by reason of the violation, *Dean*, slip op. ¶¶ 44-46, and that he may seek such compensation during a subsequent Board proceeding. *Id.*

ORDER

¶11 We ORDER the agency to reconstruct the hiring for the Veterans Services Representative position at issue in this case, namely, the GS-996-7 position in Des Moines, Iowa, consistent with the requirement set forth at 5 U.S.C. § 3304(b) that “an 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.” See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 30 days after the date of this decision.

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

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

¶14 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), section 3330c(b). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.203, and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST DAMAGES**

You may be entitled to be compensated by the agency for any loss of wages or benefits you suffered because of the violation of your veterans' preference rights. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

**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

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, <http://fedcir.gov/contents.html>. 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:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.