UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 318

Docket No. AT-0330-03-0076-R-1
CH-3443-01-0706-R-1

David Dean,

Appellant,

v.

Department of Agriculture,

Agency,

Matthew S. Olson,

Appellant,

v.

Department of Veterans Affairs,

Agency,

and

Office of Personnel Management,

Petitioner.

October 26, 2006

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

Cynthia D. Davis, Washington, D.C., for the Department of Agriculture.

Earl E. Parsons, Esquire, Des Moines, Iowa, for the Department of Veterans Affairs.

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

BEFORE

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

Vice Chairman Rose issues a separate concurring opinion.

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) seeks reconsideration of the Board's decisions in Dean v. Department of Agriculture, 99 M.S.P.R. 533 (2005), and Olson v. Department of Veterans Affairs, 100 M.S.P.R. 322 (2005). For the reasons set forth below, the Board DENIES OPM's petition for reconsideration and reaffirms its decisions in these cases.

BACKGROUND

¶2 In each of the decisions that OPM asks the Board to reconsider, the Board addressed the appellant's claim that an agency violated his rights under a statute relating to veterans' preference by appointing another individual to a competitive service position for which the appellant had applied. The Board has jurisdiction to hear such claims brought by preference eligible individuals under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. § 3330a(d). The individuals who received the appointments sought by the appellants did not pass an open competitive examination, but were appointed noncompetitively under the Outstanding Scholar Program, a hiring method established for certain positions by the consent decree in a class action under Title VII of the Civil Rights Act.

See Luevano v. Campbell, 93 F.R.D. 68 (D.D.C. 1981). Thus these cases raise issues concerning the relationship between two important policies reflected in federal employment law: affording special preference in hiring to returning veterans and providing effective remedies for discrimination in the workplace.

¶3 Mr. Dean, a veteran with a 30% service-connected disability, applied for the competitive service position of Personnel Management Specialist in response to the Department of Agriculture's vacancy announcement indicating that applications would be accepted from all U.S. citizens. The announcement explained the basis for ranking candidates and stated that qualified candidates would receive points for veterans' preference. Although Mr. Dean was found qualified for the position and was ranked second on a list of eligibles, the agency selected an individual from the Outstanding Scholar Program who was not on the certificate and had no veterans' preference. Mr. Dean filed a complaint with the Department of Labor (DOL) alleging that the agency's action violated his veterans' preference rights, and following the DOL's rejection of his claim, he filed a VEOA appeal with the Board. The administrative judge (AJ) found that the agency's appointment from an Outstanding Scholar certificate, rather than a certificate for which veterans' preference is afforded, violated Mr. Dean's veterans' preference rights. He determined that the *Luevano* consent decree on which the agency relied for its action was insufficient authority to permit its choice not to use competitive examining in filling the position, especially when a qualified veteran applies for an announced vacancy. *Dean,* 99 M.S.P.R. 533, ¶¶ 2-5.

¶4 Mr. Olson also filed a VEOA appeal, after an unsuccessful complaint to DOL, in which he challenged his nonselection for the competitive service position of Veterans Service Representative. He alleged that his rights were violated by the Department of Veterans Affairs when it filled the position for which he applied without affording him veterans' preference by appointing nonpreference eligible candidates under the Outstanding Scholar Program. The

agency responded that Mr. Olson was considered as a current employee with transfer eligibility, but was not selected for a position. It added that its vacancy announcement did not open the positions to the general public, but restricted applications to those with competitive status such as current and former federal employees and certain others who had competitive status by law or Executive Order. However, the agency filled four of the nine vacancies with Outstanding Scholars, who are not internal or status candidates. On appeal, the AJ denied Mr. Olson's VEOA claim. She found that the Outstanding Scholar program was properly authorized by the *Luevano* consent decree as a supplement to the competitive examining process in situations where there is under-representation of blacks and Hispanics. She therefore concluded that the agency's use of the program did not violate Mr. Olson's veterans' preference rights. *Olson*, 100 M.S.P.R. 322, ¶¶ 2-5.

¶5 The Department of Agriculture petitioned for review of the initial decision in Mr. Dean's appeal. On review, the Board held that the agency violated the appellant's rights under 5 U.S.C. § 3304(b), which it found to be a statute relating to veterans' preference. Section 3304(b) states that an individual may be appointed to a position in the competitive service only if the individual has passed a competitive examination or is specifically excepted from such an examination under 5 U.S.C. § 3302. Section 3302(2) provides that the President may prescribe exceptions from the examination requirement in section 3304 when necessary and warranted by considerations of good administration. The Board found that the Outstanding Scholar applicant who was appointed had not passed an examination and that there was no indication that the President had prescribed a rule under section 3302 creating an exception for such individuals or that OPM had exercised delegated authority to do so. The Board also rejected the agency's argument that the *Luevano* decree, in establishing the Outstanding Scholar Program to supplement competitive examination as a remedy for the examination's adverse impact on minorities, had created an exception from

section 3304 that permitted its appointment of the individual who was selected instead of Mr. Dean, a preference eligible veteran. The Board found that *Luevano* did not purport to create such an exception. The consent decree was based on Title VII, which expressly states that it does not repeal or modify any law creating preference for veterans, the Board noted, and the decree recognized that adverse impact from veterans' preference is not a basis for remedial hiring programs. *Dean*, 99 M.S.P.R. 533, ¶¶ 15-36.

¶6 On Mr. Olson's petition for review of the initial decision in his appeal, the Board held, as in *Dean*, that under section 3304(b) an individual may be appointed to the competitive service only if he has passed a competitive examination or is excepted from examination under section 3302. The Board found that there was no dispute that the Outstanding Scholars who were appointed to the position that Mr. Olson sought had not passed the required examination. The Board found no evidence that the President had prescribed a rule specifically excepting them from examination and no showing that the President or OPM made a finding that such an exception was necessary and warranted by considerations of good administration. For the same reasons stated in *Dean*, the Board also determined that the *Luevano* consent decree did not create an exception from competitive examination that supersedes veterans' preference rights under the competitive process. Thus the Board held that Mr. Olson's rights under a statute relating to veterans' preference were violated by the agency's appointments from the Outstanding Scholar list. *Olson*, 100 M.S.P.R. 322, ¶¶ 6-9.

¶7 As noted above, the Director of OPM has filed a petition for reconsideration of these decisions. In addition to briefs from OPM and the parties below, the Board has received a brief of amici curiae in opposition to OPM's petition for reconsideration from the American Legion and the National Veterans Legal Services Program. The alleged misinterpretations of civil service law raised by OPM are common to the *Dean* and *Olson* decisions so that

reconsideration of the decisions together is appropriate. Mr. Dean and the Department of Agriculture appear to have reached a settlement in another proceeding that also resolves all potential enforcement issues arising from the final Board decision in his favor. However, contrary to OPM's argument, this does not mean that we should reopen *Dean* and dismiss that appeal as moot. Certainly that appeal was not moot when the final Board decision on the merits was issued. Moreover, the Director of OPM has independent, statutory standing to seek reconsideration of the Board's decision. *See Horner v. Merit Systems Protection Board*, 815 F.2d 668, 670-71 (Fed. Cir. 1987).

ANALYSIS

5 U.S.C. § 3304(b) is a statute relating to veterans' preference.

¶8 OPM argues that the Board erred in finding that 5 U.S.C. § 3304(b) is a statute "relating to veterans' preference" within the meaning of 5 U.S.C. § 3330a, the provision giving the Board authority to adjudicate the appellants' claims.[1] OPM objects to the Board's finding concerning section 3304(b), which generally requires appointees to the competitive service to have passed an examination, because the statute makes no express reference to veterans' preference and applies to both veteran and nonveteran appointments.[2] In support of its argument, OPM also cites *Patterson v. Department of the Interior*, 424 F.3d 1151 (Fed. Cir.

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[1] 5 U.S.C. § 3330a provides in pertinent part: "(a)(1)(A) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor. . . . (d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board . . . ."

[2] 5 U.S.C. § 3304(b) provides in pertinent part: "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." 5 U.S.C. § 3304(a) requires that competitive service rules shall provide for "open, competitive examinations" that "fairly test the relative capacity and fitness of the applicants for the appointment sought."

2005), which upheld an OPM regulation prescribing how veterans' preference should be applied to attorney positions in the excepted service. According to OPM, the court's decision plainly indicates that statutes relating to veterans' preference include only the statutes "defining veterans' preference rights" enumerated by the court, a list that does not contain section 3304(b). *See id*. at 1155. However, there is no indication in the opinion that these provisions, which define "preference eligible" and govern the rating and ranking of preference eligible individuals in the examination process, are the only ones that relate to veterans' preference, an issue that was not before the court. Since *Patterson* addressed the weight to be given veterans' preference in the excepted service, the court had no occasion to address whether section 3304, which establishes the competitive service examination requirement, is a statute relating to veterans' preference.

¶9 OPM also cites as support for its contention the fact that 5 U.S.C. § 2302(e)(1) does not include section 3304 among the statutes establishing "veterans' preference requirements" that it enumerates for purposes of a companion provision, 5 U.S.C. § 2302(b)(11), that makes personnel actions that violate such requirements "prohibited personnel practices." The list in section 2302(e)(1) is a longer one than the list of such statutes in *Patterson*, a fact that is inconsistent with OPM's argument that the court's enumeration was an exhaustive one. More importantly, like the *Patterson* decision, section 2302(e) does not purport to provide a definition of the broader term "relating to veterans' preference."[3]

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[3] OPM is mistaken in asserting that its position is supported by *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98, ¶ 11 (2000), a regulation review proceeding in which the Board found that 5 U.S.C. § 3304(f) does not establish a veterans' preference requirement. Section 3304(f) entitles preference eligible veterans and certain other veterans to compete for vacant positions in specified circumstances when other applicants outside the government are not being considered. The provision expressly states that it does not confer any entitlement to veterans' preference not otherwise

¶10 Section 3330a does not define "relating to veterans' preference," and the cases cited by OPM do not address the meaning of this phrase. In the absence of a statutory definition, the Board properly interpreted this language in terms of common usage and its ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349 (Fed. Cir. 2001). As the Board noted in *Dean*, the ordinary meaning of the words "relating to" is a broad one: to concern, have a bearing on or connection to. 99 M.S.P.R. 533, ¶ 16, *citing Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992). The Board reasonably determined that section 3304(b) has a bearing on veterans' preference rights because it establishes the principle that open, competitive examinations are the norm and that individuals may not be appointed in the competitive service unless they have passed such an examination or are specifically excepted from examination under section 3302. Without this requirement, the veterans' preference statutes which entitle preference eligible veterans who pass an examination to additional points and a higher ranking would be limited in effect. Absent section 3304(b), these basic provisions would apply only in cases where agencies choose to hold an examination for a vacant position, with the result that the entitlement they confer could be easily circumvented. Since the provisions that explicitly define veterans' preference for the competitive service cannot operate without section 3304(b), the Board correctly concluded that it is a statute relating to veterans' preference. *See Dean*, 99 M.S.P.R. 533, ¶¶ 16-19.

¶11 Alternatively, OPM states that a statute or an OPM regulation may nonetheless entirely exclude the application of Veterans' Preference Act, 5 U.S.C. §§ 3309-3318, to a position. As a case recognizing a statutory exclusion, OPM cites *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246

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required by law. 5 U.S.C. § 3304(f)(3). *Ramsey* did not involve the Board's VEOA jurisdiction and did not address the scope of "relating to veterans' preference."

(Fed. Cir. 2003), which upheld the Board's jurisdictional dismissal of the claim by a disappointed applicant for a physician position at the Department of Veterans Affairs that his veterans' preference rights were violated. The court agreed with the Board that the statutory exclusion of the position that he sought from the coverage of civil service laws generally precluded a claim under VEOA. This case clearly has no application here where there is no contention that the positions sought by the appellants were excluded by statute from civil service law coverage.

¶12 OPM also relies on the court's recognition in *Patterson* that OPM has delegated authority from the President under 5 U.S.C. § 3302(1) to except positions such as the attorney positions involved there from the competitive service. *See* 424 F.3d at 1155 n.4. The court noted that OPM has statutory authority and responsibility to enforce veterans' preference in the excepted service under 5 U.S.C. § 1302(c), and it upheld an OPM regulation issued under this authority that excepted the positions in question from rating and ranking procedures and provided for application of veterans' preference only to the extent that it is administratively feasible. *Id.* at 1157-60. According to OPM, this case illustrates a principle applicable here that it has authority to except positions from veterans' preference requirements. However, *Patterson* involved authority under section 3302(1) to except positions from the competitive service, not authority under section 3302(2) to except appointments to the competitive service from the examination requirement (and thus from veterans' preference). The decision did not find that veterans' preference was entirely inapplicable to the excepted service positions involved, merely that the agency's failure to rate and rank the petitioner was not a violation of the Veterans' Preference Act. Moreover, the court concluded that the Board should have dismissed Mr. Patterson's appeal for failure to state a claim, rather than for lack of jurisdiction, because the Board had jurisdiction under VEOA to consider his claim that his nonselection violated his

veterans' preference rights. *Id*. at 1160. Thus, *Patterson* does not support OPM's argument.

¶13 In this connection, we also note that when OPM placed all positions subject to the *Luevano* consent decree in the excepted service, its action was struck down as arbitrary and capricious. *National Treasury Employees Union v. Horner*, 854 F.2d 490 (D.C. Cir. 1988). This decision further supports our conclusion that OPM's power to place positions in the excepted service does not authorize creation of the Outstanding Scholar Program, which is a non-competitive method of making appointments to positions in the competitive service.

The Outstanding Scholar Program cannot be relied upon to avoid the competitive examination process when veterans' preference rights are at issue.

¶14 OPM argues that the *Luevano* consent decree established the Outstanding Scholar Program under Title VII as a supplementary, noncompetitive hiring authority that is not subject to veterans' preference. By agreeing to this remedial provision of the consent decree, OPM maintains that it effectively exercised its delegated authority under Executive Order 10,577 to except certain individuals from competitive examination for purposes of section 3304(b). It also relies for such an exception on its issuance of two regulations that inform agencies how to use this hiring authority. It thereby challenges the Board's findings in *Dean* that there was no indication the President had delegated authority to OPM to establish an exception from examination for the Outstanding Scholar Program or that OPM had in fact promulgated a rule creating such an exception. 99 M.S.P.R. 533, ¶¶ 31-33. Further, OPM contends that the Board incorrectly held that the *Luevano* consent decree did not intend to create an exception that supersedes veterans' preference rights. According to OPM, the Board erred because it failed to reconcile the Title VII consent decree and the Veterans' Preference Act so as to give effect to both statutes, but instead subordinated Title VII to the Act. Finally, OPM questions the Board's authority to interpret the decree.

¶15 Section 3304(b) permits an individual's appointment to the competitive service without an examination only when the individual has been specifically excepted from examination under section 3302. Section 3302(2) authorizes the President to prescribe rules for necessary exceptions to the examination requirement. OPM maintains that authority to create such an exception was delegated to it by Executive Order 10,577 in section 101, Rule III, "Noncompetitive Acquisition of Status," § 3.2, "Appointments Without Competitive Examination in Rare Cases." This provision, codified at 5 C.F.R. § 3.2, states in relevant part:

> Subject to receipt of satisfactory evidence of the qualifications of the person to be appointed, OPM may authorize an appointment in the competitive service without competitive examination whenever it finds that the duties or compensation of the position are such, or that qualified persons are so rare, that, in the interest of good civil-service administration, the position cannot be filled through open competitive examination. . . . Detailed statements of the reasons for the noncompetitive appointments made under this section shall be published in OPM's annual reports.

OPM contends that a valid delegation from the President need not specifically authorize OPM to create an exception for the Outstanding Scholar Program, and it asserts that the delegation in section 3.2 grants it broad authority that is sufficient for this purpose. But section 3.2, fairly read, appears to grant a rather narrow authority, hardly one that could authorize an extensive hiring program such as the one at issue here. It is directed at situations where an individualized assessment finds that there are too few applicants for a position to make a meaningful competition possible. OPM suggests that the Outstanding Scholar Program falls in this category because it is a response ordered by the *Luevano* decree to the fact that too few minority applicants were available from competitive examinations. However, the situation addressed by *Luevano* was not one where a meaningful competition was not possible, as contemplated by the regulation; rather, it was one where there were many applicants, but the competitive examination used to

rank them was alleged to have had a discriminatory impact on minority applicants.[4]

¶16 Even assuming OPM has delegated authority to do so, there is no evidence that it has issued a rule creating such an exception under section 3302(2). OPM cites two of its regulations that provide agencies guidance in the use of the Outstanding Scholar authority in conjunction with other hiring authorities, suggesting that they were sufficient to establish an exception to section 3304(b). Under the regulation at 5 C.F.R. § 330.205(g) an agency is required to clear its reemployment priority list before making appointments under a direct-hire authority, "which includes the Outstanding Scholar provision." Similarly, 5 C.F.R. § 330.705 specifies the order of selection when an agency fills competitive service vacancies from outside its own workforce, which includes in section 330.705(b)(2) the place in this order of Outstanding Scholar appointments. In *Dean* the Board found that these regulations describe how to make such appointments, but do not serve to authorize them. 99 M.S.P.R. 533, ¶ 34. The regulations do not state that they are establishing Outstanding Scholar appointments as an exception for purposes of section 3304(b), or explain why the exception from examination is necessary, or specify the conditions that permit such appointments to be made. Although section 330.705(b)(2) states that Outstanding Scholar appointments are made under the authority of the *Luevano* decree, this summary reference is insufficient to meet the statutory requirement. Thus we find that OPM has not shown that it has issued a regulation establishing

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[4] OPM also cites its authority under 5 U.S.C. § 3304(a)(3), which permits certain appointments without regard to veterans' preference "where OPM has determined that there is a severe shortage of candidates or there is a critical hiring need." *See* 5 C.F.R. §§ 337.201-337.206 (2005). However, the nonselections at issue in these cases occurred before the effective date of this provision (60 days after November 25, 2002), and its enactment long postdates the initiation of the Outstanding Scholar Program. Furthermore, there is no evidence that OPM has made the requisite findings with respect to the positions covered by the *Luevano* decree. Thus we find that this authority is inapplicable to the issue here.

an exception under section 3304(b), assuming it had delegated authority to do so. Even if OPM had issued such a regulation based on *Luevano*, however, the Board could not uphold it because, for the following reasons, we reaffirm our finding that *Luevano* did not authorize use of the Outstanding Scholar program to override veterans' preference.

¶17 The fundamental basis of OPM's position is that the Outstanding Scholar Program is authorized by the *Luevano* consent decree. Apart from reliance on its regulations referring to the program, OPM argues in the alternative that the *Luevano* decree provision approving this hiring authority, or OPM's consent to the decree, is by itself sufficient for purposes of the section 3304(b) requirement. In other words, because the decree's provision requiring use of the program as a remedy for the discriminatory impact of competitive examinations was within the district court's authority under Title VII, the program must be effected. Logically, the underlying premise is that Title VII impliedly limits or repeals the section 3304(b) requirement to the extent necessary to permit the use of a needed remedy for discrimination. Thus OPM contends that only this reading can appropriately give effect to both statutes, as principles of statutory construction require the Board to do.

¶18 The basic error in OPM's position, however, is its misreading of the *Luevano* decree as authorizing noncompetitive appointments that override veterans' preference. The decree states in ¶ 9 that "[a]ny adverse impact which results from the requirements of the Veterans' Preference Act … may constitute a defense to the determination of adverse impact with respect to any competitive procedures." OPM interprets this language as applying only to situations in which an appointment is made pursuant to competitive procedures, either under the continued interim use of the Professional and Administrative Career Examination (PACE) or under the replacement examinations ordered by the decree. In OPM's view, if the agency chooses to use the Outstanding Scholar

hiring authority instead of competitive procedures, this provision has no relevance.

¶19 The problem with OPM's reading is that it removes any constraint on the agency as to when the Outstanding Scholar authority may be used. Yet clearly this supplementary, noncompetitive hiring authority is authorized to remedy the adverse impact of competitive procedures that perpetuate the under-representation of the *Luevano* plaintiff class in appointments to the positions subject to the decree. *See Luevano*, 93 F.R.D. at 80. The language in ¶ 9 must be read in light of this remedial purpose and consistently with the statement in Title VII that "nothing contained in this title shall be construed to repeal or modify any … law creating special rights or preference for veterans." 42 U.S.C. § 2000e-11. The consent decree language at issue reflects this statutory definition of adverse impact because it in effect provides that the competitive selection of a preference eligible veteran as the result of an examination does not constitute the adverse impact from an examination that the decree addresses. The purpose of the Outstanding Scholar Program approved by the decree is to mitigate the adverse impact of the examination on blacks and Hispanics. It does so by remedying the under-representation of members of the *Luevano* plaintiff class through their noncompetitive appointment as Outstanding Scholars. But in a case where a selection is due to veterans' preference, there is no adverse impact permitting such an appointment from the program.[5]

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[5] In *Luevano*, the court did not resolve the merits of the plaintiffs' claim, and the government did not admit that it had engaged in unlawful discrimination. 93 F.R.D. at 86, 92. To the extent that OPM suggests otherwise in the course of arguing that Title VII and the Veterans' Preference Act create inconsistent obligations for the government, its suggestion is misplaced. Since any judicially-imposed remedy in a Title VII case must take into account the fact that Title VII does not repeal or modify veterans' preference laws, 42 U.S.C. § 2000e-11, a negotiated resolution in a Title VII case, for example, *Luevano*, must also take this fact into account.

¶20 OPM rightly asserts that proper compliance with the consent decree through use of the Outstanding Scholar Program does not violate veterans' preference rights. But what OPM calls compliance with the decree in fact misapplies this hiring authority to permit making Outstanding Scholar appointments where there is no adverse impact, i.e., where a preference eligible veteran is or might be available for appointment as a result of an examination. It is a misapplication of the decree because by its express language the decree recognizes that a selection due to veterans' preference is not adverse impact within the meaning of Title VII.[6]

¶21 OPM argues that to the extent that the Board believes that the *Luevano* consent decree impermissibly conflicts with other federal statutes, the proper course is for the appellants to seek relief from the consent decree by moving to intervene in the *Luevano* proceeding for the purpose of seeking a modification of the decree. We do not agree. In *Martin v. Wilks,* 490 U.S. 755 (1989), the Supreme Court rejected a similar argument. There, white firefighters brought suit alleging that they were being denied promotions because of their race. The employment actions at issue were made pursuant to consent decrees resolving class action complaints alleging that the city of Birmingham, Alabama, (City) and the Jefferson County Personnel Board (Board) had engaged in racially discriminatory hiring and promotion practices in violation of Title VII. The decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring and promotion of blacks as firefighters. The City and the Board argued that because the white firefighters failed to intervene in the

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[6] The appellants and the amici have challenged the administration of the Outstanding Scholar program on other grounds besides the appointment of individuals who were not validly excepted from examination in violation of veterans' preference rights. These objections are based on the appointment as Outstanding Scholars of individuals who are not members of the minority groups represented by the *Luevano* plaintiffs. Such claims raise factual issues outside the scope of this case.

proceedings resulting in the consent decrees, their reverse discrimination claims concerning actions taken under the decrees should be dismissed as collateral attacks on the consent decrees. The Supreme Court disagreed. Allowing the claims to go forward, the Court relied on the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934): "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Martin v. Wilks*, 490 U.S. at 763.

¶22 OPM also objects that the Board's decisions amount to improper second-guessing of the *Luevano* district court because the Board has no authority to review and set aside the court's decision. This objection reflects OPM's view that the Board has invalidated a hiring program established by the district court and in doing so has exceeded its authority. OPM mischaracterizes the Board's decisions. The Board has merely interpreted the consent decree by reference to its language and that of the statute authorizing the decree in the adjudication of a case within the Board's VEOA jurisdiction. The Board has not set aside the Outstanding Scholar hiring authority approved by the district court, as contended. Rather, it has ruled that use of this authority must be consistent with 5 U.S.C. § 3304(b) and with the requirements of veterans' preference and the consent decree's clear intention.

¶23 The Board's decision is based on legal requirements and does not set policy concerning preferred hiring methods. Where the Board has jurisdiction to review a rule issued by OPM establishing a necessary exception from competitive examination, as warranted by conditions of good administration, the Board's review is necessarily deferential to OPM's policy role in matters related to appointment. Here, such deference is not warranted because OPM has not established such a rule. Even were such deference due, it is fundamental that the

Board must interpret and apply the statutes that are applicable to the matters within its jurisdiction, as it has done in deciding these cases.

ORDER

¶24 Accordingly, the petition for reconsideration is denied. This is the Board's final decision in this case. The Director may now seek judicial review pursuant to 5 U.S.C. § 7703(d).

FOR THE BOARD:

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

CONCURRING OPINION OF MARY M. ROSE

in

David Dean v. Department of Agriculture,
MSPB Docket No. AT-0330-03-0076-R-1
&
Matthew S. Olson v. Department of Veterans Affairs,
MSPB Docket No. CH-3443-01-0706-R-1

¶1 Having considered the record and the arguments made by the participants in these cases, as well as the final decisions issued in *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), I concur in the Board's decision to deny OPM's petition for reconsideration and reaffirm those decisions.

¶2 Under 5 U.S.C. § 3304(b), an individual may be appointed in the competitive civil service only if the individual has passed an examination or is "specifically excepted from examination under section 3302 of this title." Section 3302 of Title 5 provides that the President may prescribe rules that shall provide for necessary exceptions of positions from the competitive service, and necessary exceptions from competitive examining requirements.

¶3 In *Dean*, 99 M.S.P.R. 533, ¶ 38, and *Olson*, 100 M.S.P.R. 322, ¶ 9, the Board found that the agencies violated the above requirements, which relate to veterans' preference, when they appointed individuals to positions in the competitive service who had not passed examinations and who were not "specifically excepted" from examination by rules issued under 5 U.S.C. § 3302.

¶4 I write separately to emphasize that there is no indication that OPM has yet complied with the requirements of 5 U.S.C. § 3302 by prescribing rules establishing and administering the Outstanding Scholar Program as a specific exception to competitive examining requirements. In the absence of such rules,

veterans' preference provisions apply to the selection procedures for the positions in question as if the Outstanding Scholar Program did not exist.

¶5 Accordingly, I agree with the relief granted by the Board, which ordered the agencies in these cases to reconstruct the hiring for the positions at issue consistent with the law as interpreted by the Board. *See* 5 U.S.C. § 3330c (if the Board determines that an agency has violated a right described in 5 U.S.C. § 3330a, it shall order the agency to "comply with such provisions").

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Mary M. Rose
Vice Chairman