

BRIEF FOR RESPONDENT,
DEPARTMENT OF THE DEFENSE,

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2007-3292

STEPHEN W. GINGERY,

Petitioner,

DEPARTMENT OF DEFENSE,

Respondent,

PETITION FOR REVIEW OF A DECISION
OF THE MERIT SYSTEMS PROTECTION BOARD IN
CH3443060582-I-1

STATEMENT OF THE ISSUE

1. Whether the President has unfettered discretion to determine whether to place civil service positions in the excepted service and, therefore, Executive Order 13162 ("EO") establishing the Federal Career Intern Program ("FCIP") and directing that positions filled through FCIP be placed in the excepted service is not subject to judicial review.
2. Given that the FCIP position for which Petitioner Steven W. Gingery applied was in the excepted service, whether the Merit Systems Protection Board ("MSPB" or "board") properly determined that the Department of Defense ("DOD" or "agency") did not violate Mr. Gingery's preference rights under the Veterans

Employment Opportunities Act of 1998 ("VEOA") by using the pass-over procedures set forth at 5 C.F.R. 302.401, rather than the procedures set forth in 5 U.S.C. § 3318, because this Court has already upheld the application of OPM's regulations under Part 302 to the process of filling excepted service positions in situations where, like here, Congress has not spoken to the specific situation presented by the facts addressed by the regulation.

STATEMENT OF THE CASE

I. Nature of the Case

In this appeal, Mr. Gingery and amicus National Treasury Employees Union (NTEU) primarily challenge EO 13162 establishing the FCIP and placing positions filled through that program in the excepted service. They assert that EO 13162 is contrary to statutes governing hiring in the Federal civil service. In addition, Mr. Gingery asserts that, even assuming placement of the position for which he applied in the excepted service was valid, DOD violated his veterans' preference rights by using the pass-over procedures set forth at 5 C.F.R. § 302.401, rather than the procedures set forth at 5 U.S.C. § 3318.

However, both Mr. Gingery and NTEU misconstrue the statutes upon which they rely and misunderstand the fundamental organization of the civil service system, including the discretion afforded the President by Congress, pursuant to 5

U.S.C. §§ 3301 and 3302. Consequently, their arguments lack merit. Moreover, Mr. Gingery fails to appreciate the discretion afforded to OPM to promulgate regulations protecting veterans' preference rights in filling excepted service positions which was upheld by this Court in Patterson v. Department of the Interior, 424 F.3d 1151 (2005).

SUMMARY OF ARGUMENT

The President has discretion, pursuant to 5 U.S.C. §§ 3301 and 3302, to determine whether to place civil service positions in the excepted or competitive (aka classified¹) service. Patterson v. Department of the Interior, 424 F.3d 1151 (Fed. Cir. 2005). As a result, Mr. Gingery's and NTEU's challenge to E.O. 13162, directing that positions filled through the FCIP program be placed in the excepted service, is without merit.

The statutory language, legislative history, and case law all demonstrate that the discretionary authority afforded to the President pursuant to sections 3301 and 3302 is unlimited. Section 3301, a codification of the Act of 1871, authorizes the President to prescribe regulations for the admission of individuals into the civil service. Under this general grant of authority, the President has unlimited authority to determine whether positions are included or excepted from the classified (aka) competitive service. Roth v. Brownell, 117 F. Supp. 362

¹ The terms "competitive service" and "classified service" have the same meaning and are used interchangeably in this brief.

(1953) (rev'd on other grounds), 215 F.2d 500 (1954).

Section 3302, a codification of the Civil Service Act of 1883 ("CSA"), authorizes the President to prescribe rules governing the competitive service that provide for certain merit-based elements only "as nearly as the conditions of good administration will warrant." This grant of authorization is virtually as unqualified as that conferred by the earlier Act of 1871.

Section 3302(1) also authorizes the President to make "necessary exceptions" of positions from the competitive service. The revision notes and Senate and House Committee Reports explicitly provide that the "necessary exceptions" language was included "to preserve the President's power to except positions from the competitive service" previously implied under earlier codifications of the CSA.

The CSA as earlier codified, required competitive examinations of applicants only with respect to positions "now classified or to be classified," and provided that positions would be classified "from time to time, on the direction of the President." 5 U.S.C. § 633. The legislative history authorizing the current codification expressly provided that the purpose of the bill was to restate the statutes in effect with no substantive changes. Thus, the President's discretion to determine whether to place positions in the excepted or competitive service remains unfettered to this day.

Moreover, contrary to the arguments presented by Mr. Gingery and NTEU, the history of civil service administration and legislation has not been a complete embrace of the competitive service and a rejection of the excepted service. Both methods of hiring have been used and valued by the Presidents of this country. E.O.'s placing positions in the competitive and excepted services properly have been given full effect by this and other Courts. Fiorentino v. United States, 221 Ct. Cl. 545 (1979); Patterson, supra; Roth v. Brownell, supra.

Mr. Gingery's and NTEU's virtually complete reliance upon NTEU v. Horner, 854 F.2d 490 (D.C. Cir. 1988) to attack E.O. 13162, is inapposite. Horner involved a challenge under the Administrative Procedure Act ("APA"), 5 U.S.C 702, 704 to an informal rulemaking procedure by which OPM excepted a number of jobs from the competitive service.

However, unlike OPM's rulemaking, the President's determination is not subject to APA review. Moreover, the question of whether a meaningful standard can be gleaned from a statute for the purpose of judging an agency action under the APA is not the same question as whether that statute entrusts a particular decision to the President's broad discretion.

The broad discretion afforded to the President by sections 3301 and 3302, render the E.O. at issue in this case beyond the scope of this Court's review according to the Supreme Court's decision in Dalton v. Spector, 511 U.S. 462 (1994). In that

case, the Supreme Court held that judicial review of presidential action is not available when the statute in question commits the particular decision being challenged to the discretion of the President. Here, the authority granted to the President vests him with discretion at least as broad as that involved in Motions Systems Corporation v. Bush, 437 F.3d 1356 (Fed. Cir. 2006), in which this Court found that the statute "unquestionably grants the President broad discretion" to make the determination delegated to him, thus removing the President's determination in that case from the Court's scope of review.

Finally, the board properly sustained DOD's application of 5 CFR § 302.401 with respect to Mr. Gingery's veterans' preference rights. Congress delegated to OPM, authority to promulgate regulations implementing the requirement that veterans' preference rights be applied to excepted service positions. Section 302.401 is entitled to deference under Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), because it is reasonable and consistent with the purposes of the Veterans' Preference Act of 1944 ("VPA"), Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. §§ 2108, 3309-3320). See Patterson v. Department of the Interior, 424 F.3d 1151 (Fed. Cir. 2005) (OPM regulation addressing how agencies should apply veterans' preference rights to a preference eligible applying for an excepted service position held entitled to Chevron deference and found to be

reasonable and consistent with the VPA.) Thus, the Board's decision should be affirmed by this Court.

ARGUMENT

I. Judicial Review of the MSPB Decision is Limited

The scope of judicial review of decisions of the MSPB is defined narrowly and limited by statute. Graybill v. United States Postal Service, 782 F.2d 1567, 1570 (Fed. Cir.), cert. denied, 479 U.S. 963 (1986); see also Maddox v. MSPB, 759 F.2d 9, 10 (Fed. Cir. 1985) (review in accordance with 5 U.S.C. § 7703c)). An MSPB decision must be affirmed unless it is found to be: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c)(1)-(3) (1994); see also Hayes v. Dep't of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

Decisions by the MSPB regarding issues of law are reviewed by this Court de novo. Hayes v. United States Postal Service, 390 F.3d 1373, 1376 (Fed. Cir. 2004). However, judicial review of Presidential action is not available when the statute in question commits the decision to the discretion of the President. Dalton v. Specter, 511 U.S. 462 (1994).

II. E.O. 13162 Is An Exercise Of The
President's Discretionary Authority Which
This Court Lacks Jurisdiction To Review

Mr. Gingery's and NTEU's primary argument upon appeal is that E.O. 13162 violates 5 U.S.C. § 3302 by placing positions filled through FCIP in the excepted service. They claim that the President can place positions in the excepted service only if he demonstrates that it is "necessary" and "warranted by conditions of good administration," and they allege that no such demonstration has been made. It doesn't appear that this specific argument was raised below². But, in any event, it is without merit.

As we demonstrate below, pursuant to 5 U.S.C. §§ 3301 and 3302, the President enjoys unfettered discretion to determine whether to place positions in the competitive or excepted service. Based upon the Supreme Court's decision in Dalton v. Spector supra, judicial review of the President's determination is precluded because "judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President." Accord Motions Systems Corporation, supra at 1362.

² Mr. Gingery was pro se before the board and we are mindful that appeals by pro se employees should be liberally construed. Before the board, Mr. Gingery broadly claimed that his veterans' preference rights were violated when he was not selected for the position filled through the FCIP hiring authority. Nevertheless, it does not appear that either the agency or the board construed his claim to encompass a direct challenge to the President's E.O. as outside the scope of his statutory authority.

A. The President Has Always Had Broad Discretion
To Determine Which Positions Should Be Placed
In The Competitive Service And Which Should Not

From Congress's first effort to create a civil service system in the Act of 1871, to its second, more successful effort as embodied by the Civil Service Act of 1883, and continuing to this day, Congress has given the President authority to select those positions he wished to be included in the classified or competitive service and those he wished excluded. Congress established the rules applicable to the competitive service but did not identify those positions to be placed into the competitive service. Rather, it identified a pool of positions from which the President was authorized to select those positions he wished to include in the competitive service. Thus, positions in the identified pool remained outside the competitive service absent Presidential action bringing them in.

E.O. 13162 properly cites to 5 U.S.C. §§ 3301 and 3302 to support the President's determination to place FCIP positions in the excepted service. These two statutes provide the President with unfettered authority to determine which positions should be placed in the competitive service and which should not.

5 U.S.C. § 3301(1) provides that:

The President may -

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of the service.

The language in this statute originates, not from the Pendleton Act which is the source of so many modern civil service statutes but, rather, from Congress's first effort to create a civil service system. The Act of 1871, 16 Stat. 514, promulgated under the Administration of President Grant, was the first law establishing a general system of selection for civil service positions.

Chapter 14, subsection 9 of the Act of 1871 provided that:

The President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof.

A quick comparison reveals that the words of the Act of 1871 are virtually identical to the words that appear today in 5 U.S.C. § 3301. The Act of 1871 initially was codified at R.S. 1753, later at 5 U.S.C. § 631, and again later to its present location. But throughout these successive codifications, the exact wording never changed nor was the Act repealed.

In Lewis Mayer's 1922 book, "The Federal Service," he details the history of the United States Civil Service System. Mayer notes that the Act of 1871, conferred "sweeping" authority upon the President. It has been relied upon by Presidents (the precise citations have differed depending upon the codification in effect at the time of the Presidency concerned) as authority for the issuance of Executive Orders placing positions into the competitive service and for Executive Orders placing positions

into the excepted service.

Indeed, in 1941, President Franklin Roosevelt cited to it (then codified as R.S. 1753) inter alia as authority for E.O. 8743, expanding the competitive service to cover a far broader range of Federal positions than had ever before been covered. Pursuant to this E.O., President Roosevelt included attorneys in the competitive service. However, six years later he issued E.O. 9830, in which he again cited it, this time as authority for his determination to except attorneys from the competitive service.

In Roth v. Brownell, 117 F. Supp. 362 (1953) (rev'd. on other grounds), 215 F.2d 500 (1954), the United States District Court for the District of Columbia had occasion to consider the language contained in the Act of 1871, (then codified at 5 U.S.C. § 631, R.S. § 1753) when an attorney challenged his removal taken without affording him the statutory removal procedures applicable to competitive service positions. By that time, President Roosevelt had taken attorneys out of the competitive service and placed them in the excepted service.

The district court found in favor of the Government. It quoted the Act's language authorizing the President to prescribe rules for the admission of persons to the civil service and concluded that:

Under this general grant of authority [the President] may determine whether positions shall be included or excepted from the classified civil service. There is no express limitation on this power.

Id. at 365. Upon appeal, the United States Court of Appeals for the D.C. Circuit reversed, noting that at the time of plaintiffs' appointment, attorneys were in the competitive service and, therefore, his removal from that service had to be in accordance with the applicable statutory rules. But, importantly, the court of appeals agreed that the President had "[c]omplete control over admissions." (It simply held that complete control over admissions did not obviate applicable statutory removal requirements.)

President Roosevelt's E.O. placing attorneys in the excepted service was challenged again in Fiorentino v. United States, 221 Ct. Cl. 545 (1979). In that case, the plaintiff attorney had been appointed after President Roosevelt placed attorneys in the excepted service. The Court of Claims upheld his removal, taken without any of the procedures applicable to competitive service positions, precisely because E.O. 9830 had placed attorney's positions in the excepted service. The Court further held that there was no authority for any executive agency to transfer the attorney plaintiff from the excepted to the competitive service other than by authorization that did not appear to exist.

Clearly, pursuant to 5 U.S.C. § 3301, the President has unlimited authority to determine which positions will be included in the excepted service. Nor is that authority limited in any way by 5 U.S.C. § 3302. To the contrary, it is preserved.

Section 3302 provides that:

The President may - prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for -

(1) necessary exceptions of positions from the competitive service.

This section is a re-codification of the Civil Service Act of 1883 (also known as the Pendleton Act), 22 Stat. 403, which re-codification was accomplished in 1966, as part of a legislative effort to restate in comprehensive form, all statutes in effect relating to Government employees, Federal agencies, and administrative procedure.

In particular, section 3302 is a re-codification of section 2(1) of the Civil Service Act:

That it shall be the duty of said [civil service] commissioners: (1) To aid the president, as he may request, in preparing suitable rules for carrying this act into effect

and section 2(2)1 of that Act:

Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant as follows:

1. For open, competitive examinations for testing the fitness of applicants for the positions in the public service now classified or to be classified hereunder.

Emphasis added. Both the Senate and House Committee Reports expressly stated that the purpose of the 1966 bill was to restate

the statutes in effect "without substantive changes."

The first sentence of section 3302, recodifying section 2(1) of the Pendleton Act, authorizes the President to prescribe rules for the competitive service but places no limitations upon the President's authority. It certainly does not dictate which positions must be made subject to those rules.

Moreover, the second sentence of section 3302, recodifying the qualification in section 2(2)1 of the Pendleton Act that the rules need only be implemented "as nearly as conditions of good administration will warrant," imposes no limitation upon the President's discretion. Rather, it vests power in the President "virtually as unqualified as that conferred by the Act of 1871". The Federal Service, *supra*, at 44.

In Motions Systems Corporation v. Bush, 437 F.3d 1356 (Fed. Cir. 2006), this Court reviewed a statute delegating authority to the President to make a determination concerning the granting of import relief that contained far more specific language than the "as nearly as conditions of good administration will warrant" language of section 3302. In that case, the statute provided that the President must provide import relief "unless the President determines that provision of such relief is not in the national economic interest of the United States." 19 U.S.C. § 2451(k)(1).

The statute further provided that the President could determine that providing relief was not in the national economic

interest "only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451 (k)(2). As in this case, petitioners in Motions Systems argued that the President violated the terms of the statute by opting to protect national interests over domestic industry without evidentiary support.

This Court rejected petitioner's claim. Notwithstanding, the fairly specific language in sections 2451(k)(1) and (2), requiring not only a finding by the President that an adverse impact would result from providing relief but also requiring the President to weigh that adverse impact against the benefits of providing relief, this Court found that the statute "unquestionably grants the President broad discretion" to make the determination delegated to him. 437 F.3d at 1360. Clearly, the same is true with respect to the "as nearly as conditions of good administration will warrant" language of section 3302.

Finally, paragraph 1 of section 3302 provides that the President's rules may provide for "necessary exceptions from the competitive service." The revision Notes and Senate and House committee reports (S. 1380 and H.R. 901, July 21, 1966) explicitly provide this language is included "to preserve the President's power to except positions from the competitive service, previously implied from the power to except from the first rule in former section 633(2)," (i.e. section 2(2)1 of the

Pendleton Act.)

Section 2(2)1 of the Pendleton Act required open, competitive examinations of the fitness of applicants only with respect to positions "now classified or to be classified." However, the Act did not dictate which positions should be placed in the classified service in the future. It expressly left that decision to the President. Specifically, section 6 of the Act provided that positions would be classified "from time to time, on the direction of the President." The President's power to determine which positions to place in the classified service was not limited in any way.

Based upon the foregoing, it is clear that section 3302 vests complete discretion in the President to determine whether to place a position in the competitive service. Accord Patterson v. Department of the Interior, 424 F.3d 1151, 1155, fn. 4 (2005) (Congress has delegated to the President authority to designate civil service positions that are in the excepted service.)

The President's authority to determine whether to place positions in the excepted or competitive service, from time to time, has been withdrawn by Congress as to some agency's positions. For example, pursuant to the Railroad Retirement Act, 45 U.S.C. § 231f(b)(9), all appointments to positions with the Railroad Retirement Board, other than the assistants to the three Retirement Board members, must be made in the competitive

service. On the other hand, pursuant to the Aviation and Transportation Security Administration Act, Pub. L. No. 107-71 (2001), 49 U.S.C. § 114 et seq, Congress required all appointments to the Transportation Security Agency to be made in the excepted service. These statutes demonstrate that when Congress wishes to direct the specific placement of positions in either the excepted or competitive service, it knows how to do so. Further, this demonstration cuts against Mr. Gingery's and NTEU's argument that section 3302 places all civil service positions in the competitive service by default, absent Presidential action excepting them.

NTEU attempts to distract the Court from the dearth of legal support for its position by arguing that competitive hiring is a cornerstone of our civil service system (true, but irrelevant) and by essentially implying that the competitive service is the default location for all positions absent Presidential action directing otherwise. As we have demonstrated, that is not the case.

Initially, after passage of the Pendleton Act, only 10.5 percent of all civil service jobs were included in the competitive service. Biography Of An Ideal: A History of the Federal Civil Service; www.opm.gov/Biographyofanidea. As time went on, various Presidents chose to move a greater or lesser number of jobs into the competitive service through a practice known as "blanketing in." Hugh Heclo, A Government of Strangers

(Brookings Institution Press 2007); OPM's History Of The Civil Service. See also United States v. Mitchell, 89 F.2d 805, 807 (1937) (taking judicial notice that various Presidents have from time to time issued executive orders pursuant to which designated persons were brought into the classified civil service.)

By 1901, nearly 20 years after the Pendleton Act was passed, the percentage of competitive service jobs that had been blanketed in was 41.5 percent of total civil service jobs. Biography of an Ideal, supra. Thereafter, most presidents carried the momentum more or less in favor of increasing the percentage of competitive service positions. However, under intense political pressure from his party, President McKinley chose to remove 5,000 positions from the competitive service. Id. Moreover, under President Franklin Roosevelt, the percentage of competitive service jobs fell from 80 percent to 60.5 percent. Id.

From time to time, Congress extended the list of positions from which the President was authorized to select those he wished to include in the competitive service. The Act of 1940 extended the Civil Service Act to its present breadth. It provided that:

[T]he President is authorized by Executive Order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government.

Codified at 5 U.S.C. § 2302.

Note that the Act of 1940 did not require the President to cover into the classified service particular positions or to justify positions that he decided not to include. It merely "authorized" the President to cover "any" positions that he decided to bring into the classified service. Indeed, it was pursuant to the Act of 1940 that President Franklin Roosevelt issued Executive Orders in 1941 and 1947, including attorneys in the competitive service pursuant to the first E.O. and, subsequently, excluding them pursuant to the second.

Thus, notwithstanding NTEU's attempt to portray the history of the civil service from the Pendleton Act forward as a complete embrace of the competitive service and a rejection of the excepted service, the truth is that both methods of hiring have been consistently used and valued by the Presidents of this country.

Finally, Mr. Gingery and NTEU cite to NTEU v. Horner, 854 F.2d 490 (D.C. Cir. 1988) and Dean v. Department of Agriculture, 104 MSPR 1 (2006) to support their argument that E.O. 13162 is unlawful. However, their reliance upon these cases is inappropriate.

NTEU v. Horner, involved a challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, 704, to OPM's decision, through an informal rulemaking procedure, to except a number of government jobs from the competitive civil service. The United States Court of Appeals for the D.C. Circuit

found that OPM's informal rule-making did not fall within the narrow exceptions of the APA. Rather, it held that several provisions of title 5 of the United States Code, viewed together, provided a meaningful - not rigorous, but neither a meaningless - standard against which to judge OPM's decision to convert positions from competitive to excepted status. Id. at 495.

The court in NTEU did not hold that OPM's decision to place the positions at issue in the excepted service was not necessary for reasons of good administration. Indeed, it stated that that was not even the issue before it. Rather, the issue was whether it was arbitrary and capricious for OPM to make that decision on the basis of the administrative rulemaking record before it.

The decision in NTEU simply is not applicable to this case. Neither Mr. Gingery nor NTEU are challenging OPM's regulations implementing the E.O., its rulemaking procedure, or the sufficiency of the record before it. Rather, they are directly challenging the President's E.O.

However, the President's determination is not subject to APA review because the President is not an agency. Motions Systems Corp, supra, at 1359. And, the question of whether any meaningful standard can be gleaned from section 3302 for the purpose of judging OPM rulemaking under the APA is not the same question as whether that same statute delegates broad discretionary authority to the President. The Supreme Court essentially recognized this distinction in Hampton v. Mow Sun

Wong et al., 426 U.S. 88 (1976).

In Hampton, five aliens brought action against the CSC challenging regulations which excluded all non-citizens from competitive service positions. In a 5-4 decision, the Supreme Court held the regulation unconstitutional in violation of the due process clause of the Fifth Amendment.

The dissenting opinion noted that, pursuant to 5 U.S.C. § 3301, Congress delegated power and authority to the President to prescribe regulations for the admission of individuals into the civil service and that the President, acting under this grant of authority, had authorized the CSC to establish standards with respect to citizenship in relation to the requirements for admission to examinations. It concluded that the delegation of this political decision rendered it not subject to judicial scrutiny.

The majority opinion placed strong emphasis on the fact that it was a CSC regulation and not a Presidential directive that was at issue, saying "[i]t is important to know whether we are reviewing a policy decision made by Congress and the President or a question of personnel administration determined by the Civil Service Commission. Id. at 105. Clearly, different standards apply to Presidential decisions³. An Executive Order issued by

³ Shortly after the Supreme Court's decision in Hampton, on September 2, 1976, the President issued an E.O. providing that no non-citizen could be admitted to a competitive examination. In Ramos v. Civil Service Commission v. Butz, 430 F. Supp. 422 (D.

the President under duly delegated Congressional authority, is part of the law of the United States with the same effects of a federal statute. Givens v. Zerbst, 255 U.S. 11 (1920).

In this case, the determination to place the position sought by Mr. Gingery was made by the President pursuant to an E.O. issued under duly delegated Congressional authority. It is simply not subject to the same type of review as the OPM regulations at issue in NTEU v. Horner. Thus, Horner is not applicable to this case.

In addition, of course, to the extent that Horner can be read as interpreting 5 U.S.C. § 3302 to impose limits upon the President's authority to place positions in the excepted service, it is not supported by the statutory language at issue. Our extended discussion earlier in this section, amply supports the basis for our position.

Mr. Gingery's and NTEU's reliance upon Dean v. Department of Agriculture, supra, also is misplaced. As the MSPB explained in its decision, Dean involved hiring programs established pursuant to a consent decree in a class action under Title VII of the Civil Rights Act. Appointments through these programs were to

Ct. Puerto Rico 1977), a three-judge panel for the United States District Court for the District of Puerto Rico noted that the Supreme Court in Hampton had carefully foreseen and distinguished the event of a Presidential mandate in this area and found that under the language of Hampton, the E.O. was both constitutional and entitled to legal effect. Accord Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978) cert denied 441 U.S. 905 (1979); Mow Sun Wong v. Hampton, 626 F.2d 739 (1980).

positions in the competitive service. However, the competitive service appointments were accomplished without administration of the examination ordinarily required by Civil Service Rules for competitive service appointments.

In Dean, the board noted that pursuant to 5 U.S.C. § 3202(2), the President may prescribe exceptions from the examination requirement when necessary and warranted by considerations of good administration. However, there was no evidence that any exception from the examination requirement had been prescribed by the President or even that OPM had exercised delegated authority to prescribe such an exception. Accordingly, the board held that the appellant's veterans' preference rights were violated by the appointments of the selectees to the competitive service positions for which appellants had applied.

Clearly, Dean is distinguishable from this case. As noted, it involved appointments to competitive service not excepted service positions. It involved an alleged violation of 5 U.S.C. § 3302(2), not 3301(1). And, most importantly, in Dean there was no action by the President to create an exception as required by § 3302(2). Here, by contrast, the President issued an E.O. expressly placing FCIP positions in the excepted service pursuant to 5 U.S.C. §§ 3301 and 3302(1). Thus, the deficiencies of the Dean case are not present in this case.

B. This Court Lacks Jurisdiction To Review A
Wholly Discretionary Decision of the President

As we have seen, Mr. Gingery's and NTEU's arguments amount to a challenge to the President's Executive Order as outside the scope of the broad discretionary authority delegated to him by Congress. The Supreme Court, however, has held that when a statute specifically entrusts a discrete decision to the President and commits that decision to the President's discretion, judicial review of an abuse of discretion claim is not available. Dalton v. Spector, supra.

In Dalton v. Spector, supra, plaintiffs challenged the President's decision to close the Philadelphia Naval Shipyard as a violation of the Defense Base Closure and Realignment Act of 1990. The Court concluded that the challenged Presidential action was discretionary under the Act and that review was precluded by the longstanding rule that: "[Judicial] review [of Presidential] action is not available when the statute in question commits the decision to the discretion of the President." Id. at 474.

This Court applied the Supreme Court's Dalton decision in Motions Systems Corporation, supra. As noted above, that case involved a challenge to the President's determination not to grant import relief pursuant to 19 U.S.C. § 2451 and this Court's finding that the statute at issue delegated President broad discretion to the President to make his determination. Based

upon the Supreme Court's decision in Dalton, this Court further held that judicial review of the President's determination was precluded because "judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President." Id. at 1362.

In this case, we have demonstrated that 5 U.S.C. §§ 3301 and 3302 vest broad discretion in the President to make the specific determination made in this case, that is to determine which positions to place in the excepted service and which positions to place in the competitive service. As a result, the President's decision to place FCIP positions in the excepted service is not subject to judicial review⁴.

C. E.O. 13162 Is Valid On The Merits

Assuming, for the sake of argument, that this Court rejects our argument that the President's discretion pursuant to 5 U.S.C. §§ 3301 and 3302 is so broad as to preclude judicial review, E.O. 13162 is still valid on the merits. To the extent that any reviewable standards can be said to apply to the President's determination to place positions in the excepted service, they can only arguably emanate from the language in section 3302 authorizing "necessary exceptions" "as nearly as conditions of good administration warrant." At most, this language merely

⁴ We note, as we did earlier, that both Mr. Gingery and NTEU have limited their argument upon appeal to challenging E.O. 13162's placement of FCIP positions in the excepted service.

requires that there be some benefit to the operation of Federal agencies that will be realized by the placement of select positions in the excepted service.

We note first, as we did earlier, that it does not appear that Mr. Gingery directly challenged the E.O. before the board. Had he done so, a particular effort might have been made by the agency to submit evidence to the board supporting the President's determination to place FCIP positions into the excepted service⁵. Regardless, the E.O. at issue contains within its text sufficient justification to meet the minimally demands that arguably can be attributed to section 3302.

E.O. 13162 explains that the purpose of FCIP is to provide for the recruitment and selection of exceptional employees for careers in the public sector. Thus, the E.O. contains the explanation of the necessity for the exceptions and the reasons the exceptions are warranted by conditions of good administration. As a result, E.O. 13162 satisfies any standards that can be said to attach to the President's determination pursuant to 5 U.S.C. § 3302.

⁵ Moreover, it does not appear that Mr. Gingery specifically challenged the decision to authorize the agency to use the FCIP hiring authority to fill the particular position for which he applied. Rather, his challenge apparently went generally to the propriety of bypassing the procedures applicable to preference eligibles seeking competitive service positions. Had he challenged the authorization of the FCIP hiring authority for the position for which he applied, an effort might have been made by the agency to submit evidence supporting the decision.

III. The MSPB Properly Determined That
5 C.F.R. § 302.401 Is A Valid Regulation
And Was Properly Applied To Mr. Gingery

Mr. Gingery's second argument upon appeal is that the agency violated his veterans' preference rights by passing over him but failing to follow the pass over procedures set forth at 5 U.S.C. § 3318. Instead, the agency applied the pass over procedures applicable to excepted service appointments which are set forth at 5 C.F.R. § 302.401. Pursuant to these procedures, if the agency pass over a preference eligible, it must put the reasons for the pass over in writing and provide a copy to the preference eligible upon request. In this case, the selecting official did put the reasons in writing. The statement was approved by the Human Resources.

As noted, Mr. Gingery argues that the agency violated his veterans' preference rights by failing to follow the competitive service pass over procedures in 5 U.S.C. § 3318(b)(2). He bases his argument on a misinterpretation of 5 U.S.C. § 3320. Section 3320, a provision of the Veterans' Preference Act (VPA), Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. §§ 2108, 3309-3320), provides that excepted service selections shall be made "in the same manner and under the same conditions required for the competitive service under sections 3308-3318 of [title 5]." Mr. Gingery reads section 3320 as requiring the agency to apply identical pass over procedures for competitive and excepted service hiring. This interpretation is inconsistent with this

court's decision in Patterson v. Department of the Interior.

In Patterson, the petitioner argued that section 3320 required an agency making a selection for an excepted service position to apply the procedures in a provision of the VPA, 5 U.S.C. § 3309, that on its face addressed the application of veterans' preference rights in the context of the selections process used for competitive service appointments. The Government argued, and this court agreed, that the agency properly followed the veterans' preference procedures in 5 C.F.R. Part 302, which were promulgated by OPM pursuant to its delegated authority from Congress. See Patterson, 424 F.3d at 1156-1160 (citing to 5 U.S.C. 1302[®], which authorizes OPM to regulate the administration of the VPA for the excepted service).

Although the veterans' preference procedures in part 302 were not identical to those applicable to the competitive service in section 3309, this court concluded that OPM's part 302 regulation should be accorded deference under Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), as a reasonable interpretation of section 3320.

Patterson, 424 F.3d at 1159. The Court held that OPM's part 302 regulation filled a gap left by Congress in the VPA and struck a reasonable balance between the VPA's purpose to "provide preference eligible veterans' with additional benefits in seeking employment within the civil service system," id. at 1159, and the more flexible excepted service hiring standards applicable to Mr.

Patterson's case.

Like Mr. Patterson, Mr. Gingery seeks to require an agency making an excepted service selection to follow the pass over process set forth in a provision that, on its face, addresses the application of veterans' preference rights in the context of the selections process applicable to competitive service appointments. Specifically, section 3318 pertains to the situation in which an appointing authority is selecting from a list of eligibles on a certificate furnished under section 3317(a) which, in turn, pertains to a certificate created from the top of the "appropriate register." These are clearly provisions that pertain to the selection procedures applicable to competitive service appointments.

As this Court recognized in Patterson, section 3320 extends veterans' preference rights to the excepted service, but delegates to OPM the responsibility for implementing that section. Patterson, 424 F.3d at 1156. In implementing section 3320, OPM promulgated section 302.401, which provides a pass over procedure that is similar, but not identical, to the procedures applicable under 3318(b).

Like section 3318, section 302.401 provides an advantage to veterans' by requiring that preference eligible candidates who are qualified for the position being filled be placed in the category of candidates to be considered first. In addition, like section 3318(b), if a veteran is passed over, section 302.401

requires the creation of a written record of the reasons for the pass over.

In sum, section 302.401, like the regulation at issue in Patterson, constitutes a reasonable interpretation of 3320 because it too satisfies the VPA's mandate to afford preference eligibles an additional benefit in the hiring process. In addition, like the Patterson regulation, and the rest of part 302, 302.401 provides for both advantages to veterans' in applying for and flexibility to agencies in filling excepted service positions. Section 302.401 eliminates some of the procedural hurdles present in the competitive service pass over process but preserves preference rights by requiring agencies to place qualified veterans' in a category to be considered first and to create a formal record of the reasons for any decision to pass over a preference eligible as well as to provide a copy of those reasons to the preference eligible upon request.

Moreover, although the pass over process under 302.401 is internal to the selecting agency, a preference eligible is not without an avenue for independent review of that decision. The preference eligible may challenge the pass over before the Office of the Special Counsel as a prohibited personnel practice under 5 U.S.C. 2302, or with the Department of Labor and the MSPB under the Veterans' Equal Employment Opportunity Act, 5 U.S.C. 3330a (as Mr. Gingery did here).

Accordingly, as in Patterson, OPM in 302.401 struck a

reasonable balance between providing agencies with flexibility in excepted service hiring and fulfilling the VPA's mandate of affording hiring preferences to veterans. As such, OPM's regulation at 302.401 is entitled to deference under Chevron and constitutes a valid exercise of OPM's delegated authority. Therefore, the board's determination to sustain the agency's application of 302.401 should be affirmed.

Conclusion

For the reasons stated above, the decision of the MSPB should be affirmed.

Respectfully submitted,

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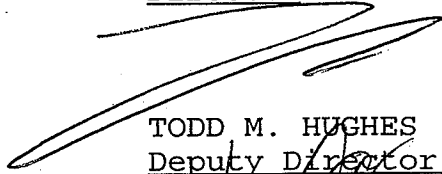
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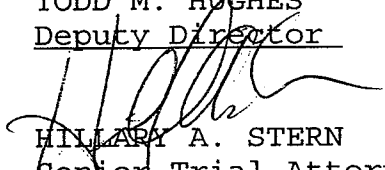
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June 2, 2008

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