Appeal No. 2007-3292

IN THE

United States Court of Appeals for the Federal Circuit

STEPHEN W. GINGERY,

Petitioner,

—v.—

DEPARTMENT OF DEFENSE,

Respondent.

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

BRIEF OF PETITIONER STEPHEN W. GINGERY

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11 January 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GINGERY v. DEFENSE

No. 2007-3292

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

STEPHEN W. GINGERY certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

STEPHEN W. GINGERY

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

N/A

4. ☐ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

No additional laws firms or counsel.

11 January 2008
Date

Signature of counsel

Andrew J. Dhuey
Printed name of counsel

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STATEMENT OF RELATED CASES

Petitioner believes that the following pending case is a "related case" under Federal Circuit Rule 47.5(b): *National Treasury Employees Union v. Linda M. Springer, Director, U.S. Office of Personnel Management*, No. 1:07-cv-00168-RWR (D.D.C. filed Jan. 24, 2007). Like Petitioner in the instant case, the plaintiff in this related case challenges the validity of the Federal Career Intern Program. Petitioner is informed and believes that the defendant in this related case is disputing the plaintiff's standing, and that there has not yet been any briefing or ruling on the merits of plaintiff's claims.

JURISDICTIONAL STATEMENT

Subject matter jurisdiction over Petitioner STEPHEN W. GINGERY's initial complaint for violation of his veteran's preference rights with the Merit Systems Protection Board is based upon 5 U.S.C. § 3330a(d). The appellate jurisdiction of this Court over the final decision of the Merit System Protection Board is based on 28 U.S.C. §1295(a)(9).

On July 30, 2007, Petitioner filed a timely Notice of Appeal of the Merit System Protection Board's final decision of May 30, 2007, which Petitioner received on June 1, 2007. This final decision rejected Petitioner's claims in their entirety; no claims remain pending.

STATEMENT OF THE ISSUES

1. Whether the Department of Defense unlawfully used the Federal Career Intern Program to depart from statutory competitive service hiring procedures, and thus wrongfully deprived Petitioner of his statutory veterans' preference rights in the hiring process for the position of auditor.

2. Whether, assuming *arguendo*, that excepted service regulations apply to the hiring process for the auditor position sought by Petitioner, the Department of Defense wrongfully passed over Petitioner by failing to comply with the requirements of 5 U.S.C. §§ 3318(b) and 3320.

STATEMENT OF THE CASE

In early 2006, Petitioner STEPHEN W. GINGERY and seven other applicants applied for the position of auditor (GS-0511) with the Respondent DEPARTMENT OF DEFENSE ("the agency"). A-9.[1] While the agency acknowledged that Mr. Gingery was entitled to veterans' preference in the hiring process (A-7), it used the Federal Career Intern Program ("FCIP") to pass over Mr. Gingery and hire two individuals who were not preference eligible. A-13.

Mr. Gingery filed a complaint alleging violation of his statutory veterans' preference rights with the Department of Labor, which was unable to resolve the matter. A-2. Mr. Gingery then filed an appeal with the Central Regional Office of the Merit Systems Protection Board ("the Board"), requesting corrective action for the agency's violation of his statutory veterans' preference rights. *Id.*

On October 2, 2006, the administrative judge assigned to the appeal ruled, *inter alia*, that the agency did not violate Mr. Gingery's veterans' preference rights because the agency properly followed the excepted service procedures of the FCIP. A-13-16. Mr. Gingery petitioned for review of the

[1] Both the initial decision of the administrative judge (A-7-17) and the Board's decision on petition for rehearing (A-1-6) are included as addenda to this brief.

administrative judge's decision, and on May 30, 2007, the Board reopened the case and affirmed the administrative judge's ruling. A-6.

Mr. Gingery received notice of the Board's ruling on June 1, 2007 and timely filed a Notice of Appeal with this Court on July 30, 2007. JA-25-28.

STATEMENT OF THE FACTS

Since the pertinent facts are undisputed in this appeal, Petitioner sets forth only a brief account of the facts necessary for this Court to resolve this case.

Mr. Gingery honorably served in our nation's military, and in the course of that service became burdened with a disability of 30% or more, as certified by the Department of Veterans Affairs ("the DVA"). JA-23. Despite his disability, Mr. Gingery earned a Bachelors degree in Accounting under the DVA's Vocational Rehabilitation Program, a Masters of Business Administration degree in Finance and worked for several years as an auditor. JA-24.

When the agency sought applicants for three auditor positions (GS levels 7-9), Mr. Gingery and seven others applied for the vacancies. A-9. Of these eight applicants, only Mr. Gingery was entitled to veterans' preference. *Id.* To fill two of these vacancies, the agency used the Federal Career Intern Program ("FCIP"). A-13-16. Using the excepted service

procedures of the FCIP, the agency placed the applicants into categories, pursuant to 5 C.F.R. § 302.401. A-14. The agency eventually winnowed the applicant pool down to seven candidates, with Mr. Gingery in Category 1, no candidates in Categories 2-3, and six candidates in Category 4. *Id.*

Notwithstanding Mr. Gingery's higher category ranking, the agency passed over Mr. Gingery twice to hire two applicants through the FCIP. A-15. In passing over Mr. Gingery in the hiring process, the agency invoked 5 C.F.R. § 302.401(b), which requires only that the agency record and make available its reasons for passing over a preference eligible. *Id.* The decision to pass over Mr. Gingery was approved by the agency's Human Resources Manager, with no involvement of the Office of Personnel Management ("the OPM"). A-10.

Mr. Gingery filed a grievance with the Department of Labor, asserting the agency's violation of his veterans' preference rights. A-2. After the Department of Labor was unable to resolve this dispute, Mr. Gingery appealed to the Board. *Id.* The Board, through an initial decision by an administrative judge (A-7-17) and a decision made in response to Mr. Gingery's petition for review (A-1-6), rejected Mr. Gingery's claim of violation of his veterans' preference rights.

SUMMARY OF ARGUMENT

The agency violated Mr. Gingery's veterans' preference rights by using the excepted service procedures of the FCIP in filling the vacancies for the auditor position, and by failing to use the OPM-supervised passover procedures of 5 U.S.C. § 3318. The FCIP is invalid in its entirely, since it was promulgated without any executive branch finding or even assertion that such a massive shift from competitive service hiring to the excepted service was "necessary" for "conditions of good administration" under 5 U.S.C. § 3302(1). By improperly using the FCIP hiring procedures, the agency wrongfully denied Mr. Gingery the opportunity to take a competitive examination under 5 U.S.C. § 3304(a)(1), the entitlement to receive a 10-point rating bonus under 5 U.S.C. § 3309(1) and the benefit of OPM review and consent for the decision to pass him over in the hiring process under 5 U.S.C. § 3318.

ARGUMENT

I. THE AGENCY DEPRIVED PETITIONER OF HIS VETERANS' PREFERENCE RIGHTS BY USING THE FEDERAL CAREER INTERN PROGRAM TO FILL JOB VACANCIES THAT SHOULD HAVE BEEN FILLED THROUGH COMPETITVE SERVICE RULES.

For the Board, consideration of whether the agency's hiring under the FCIP had improperly circumvented Mr. Gingery's veterans' statutory

preference rights began and ended with the observation that the FCIP "was expressly authorized by Executive order promulgated under 5 U.S.C. § 3302." A-5. As discussed below, the Board ended its analysis prematurely, since exceptions to competitive service hiring rules are permissible only where "necessary" for "conditions of good administration". 5 U.S.C. § 3302(1).

In fact, the executive order creating the FCIP, and the regulations implementing it, run afoul of 5 U.S.C. § 3302(1) and render the FCIP invalid in its entirety. The agency's improper use of the FCIP to avoid open and competitive examinations (with substantial bonus points for veterans such as Mr. Gingery), and to avoid OPM oversight of the decision to pass over Mr. Gingery in the hiring process, wrongfully deprived him of his statutory veterans' preference rights.

A. A *de Novo* Standard of Review Applies to the Board's Construction of Applicable Civil Service Statutes and Regulations in Determining Whether the Agency Denied Petitioner His Veterans' Preference Rights.

Under the statute applicable to this petition for review of the Board's decision, this Court

> shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (2) obtained without procedures required by law, rule, or regulation having been followed[.]

5 U.S.C. § 7703(c). All pertinent facts are undisputed. The parties dispute the proper construction of various civil service statutes and regulations. This Court reviews the Board's statutory and regulatory constructions *de novo*. *Augustine v. Department of Veterans Affairs*, 503 F.3d 1362, 1365 (Fed. Cir. 2007).

B. Competitive Service Hiring Rules Would Normally Apply to Fill Vacancies for the Auditor Position Sought by Petitioner.

Since the GS-0511 auditor position is in the executive branch, vacancies must normally be filled according to competitive service rules, unless "specifically excepted from the competitive service by or under statute". 5 U.S.C. § 2102(a)(1)(A). The OPM has not used its authority under 5 C.F.R. § 6.1(a) to except this specific auditor position from the competitive service.[2]

C. The Agency Improperly Used the Federal Career Intern Program to Fill Vacancies for the GS-0511 Auditor Position.

Using the FCIP, the agency passed over Mr. Gingery twice in filling vacancies for the GS-0511 auditor position. A-15. This was unlawful, since the FCIP is an invalid exception to competitive service hiring rules.

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[2] The GS-0511 auditor position is not among those listed in the OPM's annual reports of all excepted positions. *See* 70 Fed. Reg. 2,284 (Jan. 12, 2005) and 71 Fed. Reg. 58,680 (Oct. 4, 2006).

1. OPM May Make Exceptions to the Competitive Service Hiring Rules Only Where Necessary for Conditions of Good Administration.

The OPM does not have unfettered discretion to except positions from the competitive service. Only where warranted by "conditions of good administration," is the executive branch authorized by statute to specify "necessary exceptions of positions from the competitive service." 5 U.S.C. § 3302(1). As the D.C. Circuit observed:

> These provisions make it clear . . . that competitive service [is] the norm rather than the exception; OPM is to depart from the norm only when "necessary" for "conditions of good administration". Therefore, the discretion Congress gave to OPM is not unfettered.

National Treasury Employees Union v. Horner, 854 F.2d 490, 495 (D.C. Cir. 1988) (internal quotation marks omitted).

2. The FCIP Was Implemented with No Finding or Supporting Data That It Was Necessary for Conditions of Good Administration to Except Such Hiring from the Competitive Service.

Executive Order 13,162, which created the FCIP, asserts that it was issued under, *inter alia*, the authority granted the president under 5 U.S.C. §§ 3301 and 3302, but it makes no claim (much less a studied finding) that such a large-scale removal of hiring through the competitive service was "necessary" under 5 U.S.C. § 3302(1).

The thrust of this Executive Order is not that there was any *necessity* in dispensing with the carefully designed statutory competitive service rules, but rather that doing so would be, essentially, a good idea:

> The purpose of the [FCIP] is to attract exceptional men and women to the Federal workforce who have diverse professional experiences, academic training, and competencies, and to prepare them for careers in analyzing and implementing public programs. . . . The Program is another step in the Administration's effort to recruit the highest caliber people to the Federal Government, develop their professional abilities, and retain them in Federal-departments and agencies. Cabinet secretaries and agency administrators should view the Program as complementary to existing programs that provide career enhancement opportunities for Federal employees, and departments and agencies are encouraged to identify and make use of those programs, as well as the new Program, to meet department and agency needs.

Exec. Order 13,162, §§ 1-2.

There is no disputing that attracting exceptional applicants to the federal workforce, developing their professional abilities, and keeping them on the job are laudable goals. But if these goals are sufficient to remove the hiring for virtually any position from the competitive service, without any finding that competitive service rules *impede* these goals, then the "necessary" limitation of executive discretion to remove positions from the competitive service under 5 U.S.C. § 3302(1) is meaningless. Hiring for the entirety of the competitive service could be excepted if these goals are sufficient, despite the absence of such necessity.

The implementing regulation for the FCIP, 5 C.F.R. § 213.3202(o), gives agencies full, unfettered discretion to use the FCIP to fill vacancies in virtually *any* position:

> Each agency will determine the appropriate use of the FCIP relating to recruitment needs in geographical areas, specific occupational series, and grades, pay bands or other pay levels, ensuring that programs are developed and implemented in accordance with the merit system principles.

5 C.F.R. § 213.3202(o)(10). Like Executive Order 13,162, upon which it was promulgated, 5 C.F.R. § 213.3202(o) imposes no requirement that FCIP exceptions from the competitive service are "necessary", as required by 5 U.S.C. § 3302(1). Nor is there any requirement that the agency find it impracticable to administer "open, competitive examinations", which are generally required under 5 U.S.C. § 3304(a)(1)[3] unless a "necessary" exception applies under 5 U.S.C. § 3302(1).

3. Agencies Have Made the FCIP the Primary Method of Hiring for a Large Portion of the Federal Workforce.

Eager to dispense with competitive service hiring requirements, agencies have made the FCIP the *primary* hiring method for GS levels 5-9. In fiscal year 2001, agencies filled 18,158 such positions through the

[3] 5 U.S.C. § 3304(a)(2)-(3) provide other exceptions to the "open, competitive examination" requirement.

competitive service, and 423 positions through the FCIP.[4] By 2004, agencies had shifted about 7,000 such positions from the competitive service to the FCIP: competitive service hiring had dropped to 11,473 and FCIP had risen to 7,017.[5] In 2005, the most recent year for which Petitioner can find data, FCIP hiring had skyrocketed to over 11,000 positions.[6] As the Board's Director of Policy and Evaluation puts it, the FCIP is "becoming the hiring method of choice".[7] The exception has become the rule, and without any reasoned finding or even a bare assertion that this was "necessary" for "conditions of good administration" under 5 U.S.C. § 3302(1).

4. Since the FCIP Is an Exception to Competitive Hiring Rules Made with no Finding or Supporting Data That It Was Necessary for Conditions of Good Administration, It Is Invalid in Its Entirety.

In *Horner*, *supra*, the D.C. Circuit reviewed the propriety of the OPM's exception of various positions from the competitive service. 854 F.2d at 493. While the OPM had made detailed findings that such

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[4] *Building a High-Quality Workforce, The Federal Career Intern Program*, October 3, 2005, at 25 (available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=224108&version=224327&application=ACROBAT).

[5] *Id.*

[6] Steve Nelson, *Director's Perspective*, Issues of Merit, September 2006, at 3 (available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=224544&version=224763&application=ACROBAT).

[7] *Id.*

exceptions were appropriate under 5 C.F.R. § 6.1 (which implements 5 U.S.C. § 3302(1)), *id.* at 493, the court rejected these OPM exceptions:

> Accordingly, on the record before us, we simply do not know whether OPM "examine[d] the relevant data" and made "a rational connection between the facts found and the choice made." *See* [*Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).] We are therefore constrained to find that OPM's action in this case was arbitrary and capricious.

854 F.2d at 499.

Unlike in *Horner*, this Court cannot determine whether OPM "made a rational connection" between the "relevant data" and its actions in excepting the hiring of at least 11,000 positions per year from the competitive service through the FCIP. *There is no data.*[8] There is not even a presidential or administrative *claim* that these exceptions from the competitive service are necessary in any way to achieve the goals of the FCIP. There is, instead, a complete disregard for the requirements of 5 U.S.C. § 3302(1), which this Court should not countenance.

[8] *See* OPM's announcements of the interim rule to implement the FCIP at 65 Fed. Reg. 78,077 (Dec. 14, 2000) and the final rule at 70 Fed. Reg. 44,219 (Aug. 2, 2005). At no point did the OPM even assert any type of necessity for excepting FCIP hiring from the competitive service under 5 U.S.C. § 3302(1).

D. The Agency's Improper Use of the FCIP Deprived Petitioner of His Veterans' Preference Rights.

According to the Board, one of the "features" of the FCIP is that "Veterans' preference applies but agencies have several options on how to apply the rules".[9] Here, the agency used two features of the FCIP to deprive Mr. Gingery of his statutory veterans' preference rights.

First, it held no "open, competitive examinations", which are generally required under 5 U.S.C. § 3304(a)(1). A-5. Had the agency done this, Mr. Gingery would have received 10 additional rating points on a passing examination grade. 5 U.S.C. § 3309(1); *see* Veterans Administration certificate at JA-23. Given Mr. Gingery's substantial auditing experience (JA-24), it would have been very advantageous for him to take a rated, competitive examination, and to have the benefit of a 10-point bonus. Instead, the agency chose the "option" under the FCIP of dispensing with the examination requirement (A-5) and using a category rating system (A-14), which masked Mr. Gingery's superior talent as an auditor.

Second, the FCIP gave the agency the "flexibility" to dispense with the passover procedure of 5 U.S.C. § 3318 and instead to follow the minimal requirements of 5 C.F.R. § 302.401(b). A-10, 15. The latter regulation for

[9] *Building a High-Quality Workforce, supra*, at 17.

the excepted service merely requires the agency to "record its reasons" for passing over, and "furnish a copy of those reasons . . . on request." *Id.*

Statutory passovers in the competitive service are much more rigorous, requiring the involvement and consent of the OPM. 5 U.S.C. § 3318(b). Mr. Gingery, with a service-related disability of 30% or more (JA-23), would have been entitled to respond to the agency's reasons for passing him over, and the OPM would have been obliged to take Mr. Gingery's response into account in determining whether the agency's reasons for passing him over were sufficient. *Id.*

Improperly bypassing the requirements of 5 U.S.C. § 3318(b) is no inconsequential technicality. This Court has recognized that the OPM's role in passovers is vital:

> The fundamental error committed by the board was its failure to determine compliance with the requirements of 5 U.S.C. §§ 3317(b) and 3318(b), which require that the appointing authority file with OPM the reasons for a proposed pass over and that OPM shall determine the sufficiency, or insufficiency, of the reasons given. . . .
>
> While the board is correct in that the OPM's role under 5 U.S.C. § 3317(b) is limited, it is nonetheless a critical role, particularly with respect to a claim of discrimination. The reasons for each pass over of a preference eligible candidate must be submitted to the OPM for approval. OPM's role is to ensure that the agency's reasons are sufficient.

Lackhouse v. Merit Systems Protection Board, 734 F.2d 1471, 1473-74 (Fed. Cir. 1984). Congress also recognized the vital importance of the OPM's role in passovers for veterans with a service-related disability of 30% or more (such as Mr. Gingery); the OPM's role in the passovers of these veterans "may not be delegated" to any other agency. 5 U.S.C. § 3318(b)(4).

Thus, through improper use of the FCIP, the agency deprived Mr. Gingery of the "critical" OPM oversight of the agency's decision to pass him over. Instead, the agency merely recorded its reasons for passing Mr. Gingery over (A-15), with no notice to the OPM (A-10), no opportunity for Mr. Gingery to respond, and no OPM determination of the sufficiency or insufficiency of the reasons for passing Mr. Gingery over. *See* 5 C.F.R. § 302.401(b).

II. EVEN IF THE AGENCY'S USE OF THE FCIP IN THE HIRING PROCESS WAS PROPER, IT VIOLATED PETITIONER'S VETERANS' PREFERENCE RIGHTS BY FAILING TO OBTAIN OPM APPROVAL FOR PASSING OVER PETITIONER.

In response to Mr. Gingery's argument that the agency failed to comply with the OPM passover procedures of 5 U.S.C. § 3318(b), the administrative judge ruled as follows:

> The appellant has not cited any case which would support his assertion that the agency was required to utilize the procedures set forth in 5 U.S.C. § 3318(b). Moreover, I find that the statutory provision cited by the appellant specifically refers to certificates of eligibles furnished under 5 U.S.C. § 3317(a), which states the agency is obligated to inform the OPM or any preference eligible who is passed over, *only* in those situations where the employing agency utilized the competitive certification process and chooses non-preference eligibles over higher ranked preference eligibles.

A-15 (emphasis in original). In so ruling, the administrative judge completely ignored the requirement of 5 U.S.C. § 3320 that veterans' preference in the competitive service also applies to the excepted service. Although the agency complied with the passover requirements of 5 C.F.R. § 302.401(b), that regulation is invalid as applied here, for it is inconsistent with the requirements of 5 U.S.C. §§ 3318(b) and 3320.

A. Congress Has Extended Competitive Service Veterans' Preference Rules to the Excepted Service, Including the OPM Passover Procedures of 5 U.S.C. § 3318.

The OPM passover procedures set forth in 5 U.S.C. §§ 3317 and 3318 are on their face competitive service hiring requirements, but Congress has required excepted service hiring to be executed "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of [Title 5]." 5 U.S.C. § 3320. Thus, the OPM's role in preference eligible passovers, which "may not be delegated" to any other

agency in the case of a veteran with Mr. Gingery's service-related disability (JA-23), is mandatory even in excepted service hiring. 5 U.S.C. § 3318(b)(4).

B. The Excepted Service Passover Regulation, 5 C.F.R. § 302.401(b), Is Invalid as Applied to Job Applicants with Petitioner's Level of Veterans' Preference.

It is undisputed that in passing over Mr. Gingery, the agency followed the minimal requirement of 5 C.F.R. § 302.401(b) (record and make available reasons for passing over) rather than the procedures of 5 U.S.C. § 3318. A-15. The question, then, is whether this regulation, as applied here, is a reasonable interpretation of the statutory requirements of 5 U.S.C. §§ 3318 and 3320. The answer is that this regulation is plainly inconsistent with the statutory OPM passover procedures, at least as applied to Mr. Gingery.

In *Patterson v. Dept. of the Interior*, 424 F.3d 1151 (Fed. Cir. 2005), a veteran applying for an attorney position contended that he was wrongfully denied his 5-point rating bonus under 5 U.S.C. § 3309. *Id.* at 1157. Since there was no formal examination required for the position at issue (a point undisputed by Mr. Patterson), the agency there found that an "administratively feasible" way to implement veterans' preference for Mr.

Patterson was to consider his preference eligible status a "positive factor" in the hiring process. *Id.* at 1156.

To answer the question of whether the OPM's regulations at issue in *Patterson* were valid, this Court noted that its "first task is to determine 'whether Congress has directly spoken to the precise question at issue.'" *Id.* at 1158 (*quoting Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842 (1984)). This Court found that Congress had not spoken to the precise question of how to apply veterans' preference in making hiring decisions for attorney positions, since the 5-point bonus under 5 U.S.C. § 3309 applied only to examinations, and that the OPM had validly used its authority to eliminate the examination requirement for attorney positions. *Id.* at 1158-59. Given the congressional silence on the precise question at issue, this Court gave deference under *Chevron* to the OPM's "administratively feasible" approach to veterans' preference, and held that the "positive factor" given to Mr. Patterson's veterans' status was a "reasonable and consistent" interpretation of applicable veterans' preference statutes. *Id.* at 1159-60.

The case at hand follows the path of *Patterson*, but only to the point of determining whether Congress has directly spoken to the precise question at issue. Here, the precise question is what are the procedural requirements

in excepted service hiring for passing over a preference eligible job applicant with a service-related disability of 30% or more?

Congress spoke to this question quite specifically and restrictively. To pass over someone with Mr. Gingery's preference eligibility: i) the agency must "file written reasons" with the OPM "for passing over the preference eligible", ii) the agency must "notify the preference eligible of the proposed passover, of the reasons therefore, and of his right to respond", iii) the OPM shall rule on the "sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible" and iv) the OPM's role in such a passover "may not be delegated" to any other agency. 5 U.S.C. § 3318.

The excepted service passover regulation, 5 C.F.R. § 302.401(b), can hardly be called an interpretation of 5 U.S.C. § 3318 (as applied to the excepted service under 5 U.S.C. § 3320) – it is a complete elimination of that statute's mandates. Under this regulation, the agency – with no OPM involvement required – need only "record its reasons" for passing over and "furnish a copy of those reasons . . . on request." 5 C.F.R. § 302.401(b). OPM review and consent is eliminated from the process altogether, even though Congress specifically prohibited such delegation in 5 U.S.C.

§ 3318(b)(4), and despite this Court's view that OPM's review of such passovers is a "critical role". *Lackhouse,* 734 F.2d at 74.

Unlike the situation in *Patterson*, where the preference eligible attempted to force the square peg of a 5-point rating bonus into the round hole of a hiring process that validly omitted numerical ratings, here there is no practical difference between competitive service passovers under 5 U.S.C. § 3318 and excepted service passovers under the category rating approach of 5 C.F.R. § 302.401. Congress specifically *allowed* the executive branch to eliminate the examination requirement for the position at issue in *Patterson*, but for preference eligibles such as Mr. Gingery, Congress expressly *prohibited* the delegation of the OPM's passover authority to any other agency.

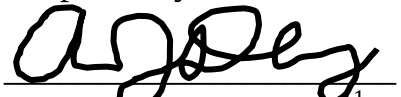
Under *Chevron*, here "Congress has spoken on the precise question at issue". 467 U.S. at 842. Since, in the case of preference eligibles described in 5 U.S.C. § 2108(3)(C), the minimal passover requirements of 5 C.F.R. § 302.401(b) are flatly inconsistent with the statutory requirements of

5 U.S.C. §§ 3318 and 3320, "that is the end of the matter".[10] 467 U.S. at 842. It is undisputed the agency did not follow the OPM passover requirements of 5 U.S.C. §§ 3318 and 3320. A-10, 15. Since the agency was obliged to do so in order to pass over Mr. Gingery's application, it thus violated Mr. Gingery's veterans' preference rights.

CONCLUSION

The decision of the Board should be reversed and remanded for further proceedings consistent with this Court's decision that the agency violated Mr. Gingery's veterans' preference rights.

Respectfully submitted,



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STEPHEN W. GINGERY

[10] Even if Congress had been silent on the "precise question at issue", and *Chevron* deference were to apply, the complete and unjustified elimination of OPM's statutorily-required role in excepted service passovers would be invalid, for it is not a "reasonable interpretation" of the applicable statute under *Patterson*, 424 F.3d at 1159.

[11] Counsel thanks this Court for the great honor of requesting his *pro bono* appearance in this case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 138

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

Stephen W. Gingery,

Appellant,

v.

Department of Defense,

Agency.

May 30, 2007

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

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

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision denying his request for relief under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons stated below, we DENY the petition, REOPEN this appeal on our own motion, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The appellant's request for relief under VEOA is DENIED.

BACKGROUND

¶2 In early 2006, the agency in this case decided to fill three auditor positions at its office in Sterling Heights, Michigan. *See* Appeal File, Tab 7, Subtab 4B at

1. It posted an announcement on an internet web site, Monster.com; it included in the announcement a statement that the agency was "also accepting resumes . . . for our Career Intern Program"; and it asked the Office of Personnel Management (OPM) for certificates of candidates eligible for appointment at the GS-7 and GS-9 levels. Appeal File, Tab 7, Subtab 4B at 1; *id.*, Subtab 4I. After interviewing the appellant and other candidates, it hired two applicants under the Federal Career Intern Program (FCIP),[1] one applicant whose name appeared on an OPM certificate, and, apparently, one applicant whom the agency described as eligible for noncompetitive reinstatement. *See id.*, Tab 7, Subtab 4B; *id.*, Subtab 4H at 1; Appeal File, Tab 10, Attachment 1 (OPM certificates) at 6.

¶3 The appellant, who was not among the selectees, filed a complaint with the Department of Labor; and, when that department failed to resolve his complaint, he filed an appeal with the Board's Central Regional Office. Appeal File, Tab 1; *id.*, Tab 7, Subtab 4C; *id.*, Tab 17 at 11. In his appeal, he alleged that the agency's actions related to the selections described above violated his rights as a compensably disabled preference eligible, and he requested appropriate corrective action. *Id.*, Tab 1. The administrative judge to whom the appeal was assigned issued an initial decision denying the request; the appellant has petitioned for review; and the agency has responded to the petition. Initial Decision, Appeal File, Tab 19; Petition for Review (PFR), PFR File, Tabs 1, 3.[2]

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[1] The agency evidently made tentative job offers to three applicants under the FCIP, but it later withdrew one of those offers. *See* Appeal File, Tab 7, Subtab 4B at 2; *id.*, Subtab 4H at 1.

[2] The appellant has filed a subsequent submission, objecting to the agency's response to his petition and requesting that the Board "reject" that response. PFR File, Tab 4. The appellant's submission consists essentially of arguments he made previously in his petition for review, however, and provides no basis for disregarding the agency's response. The appellant's request therefore is DENIED.

ANALYSIS

¶4 As the administrative judge noted, the Board has jurisdiction, in a VEOA appeal such as this, to determine whether the agency violated the appellant's rights under a statutory or regulatory provision relating to veteran preference. *See* 5 U.S.C. § 3330a(a)(1), (d); Initial Decision at 2. We agree with the administrative judge that the appellant has failed to show such a violation.

¶5 We note first that the appellant has shown no error in the administrative judge's findings and conclusions concerning the selection of another preference eligible from the OPM certificate or concerning the appointment of the applicant the agency described as reinstatement eligible. As explained below, he also has not shown that the agency violated his rights in its consideration and appointment of the FCIP candidates.

¶6 On petition for review, the appellant argues that the agency's hiring under the FCIP constitutes improper circumvention of his preference rights. PFR at 11-14. In support of this argument, he relies on *Deems v. Department of the Treasury*, 100 M.S.P.R. 161 (2005), *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), *aff'd on recons.*, 104 M.S.P.R. 1, (2006), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), *aff'd on recons. sub nom. Dean v. Department of Agriculture,* 104 M.S.P.R. 1, (2006). PFR at 11.[3]

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[3] The appellant also refers to the fact that the agency interviewed him only once, while it conducted second interviews of some other candidates who eventually were selected for the FCIP positions; he asserts that he should have been interviewed twice, once in connection with an FCIP position and once in connection with a non-FCIP position; and he argues that, because it interviewed him only once, the agency failed to give him proper consideration. PFR at 13-14.

This issue does not appear to have been raised below, and the only reason given for this failure – i.e., the appellant's alleged inability to understand "technical jargon" – is inadequate. *See Morrison v. Department of the Army*, 77 M.S.P.R. 655, 659 n.4 (1998) (while pro se appellants are not expected to proceed with the precision of an attorney in a judicial proceeding, they may not escape the consequences of inadequate representation); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review

¶7 The appellant has misinterpreted the decisions he cites. The Board did not indicate in those decisions that noncompetitive hiring authorities could never be used to hire candidates not entitled to preference when qualified preference-eligible candidates were available. Instead, it indicated that, under 5 U.S.C. § 3304, an individual could be appointed in the competitive service only if he had passed an examination or qualified for appointment under a valid noncompetitive appointing authority. *Dean*, 99 M.S.P.R. 533, ¶¶ 10-38; *see Olson*, 100 M.S.P.R. 322, ¶ 6. The Board observed in *Dean* that preference eligibles received certain advantages in a competitive examination under 5 U.S.C. §§ 3309-3318, and it concluded that the appointment in that case of a candidate not entitled to veteran preference violated the appellant's preference rights because the appointee did not pass a competitive examination and was not appointed under a valid noncompetitive appointing authority. *Dean*, 99 M.S.P.R. 533, ¶¶ 14, 21-38.

¶8 The appointments at issue in *Dean* and *Olson* were made under the Outstanding Scholar Program (OSP). *See Olson*, 100 M.S.P.R. 322, ¶ 2; *Dean*, 99 M.S.P.R. 533, ¶ 7. In its decisions in those cases, the Board found that the OSP did not create an exception that superseded preference rights under the competitive process. *Olson*, 100 M.S.P.R. 322, ¶ 7; *Dean*, 99 M.S.P.R. 533, ¶¶ 23-38. In *Deems*, 100 M.S.P.R. 161, ¶ 13, it made the same finding regarding the Clerical and Administrative Support Positions (CASP) assessment tool. In the absence of any showing that the selectees in those cases had passed an examination or had been specifically excepted from examination under 5 U.S.C. § 3302, the Board concluded that the agencies had violated the appellants' preference rights by appointing the selectees to the competitive service positions

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absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). Moreover, even if the argument described above were properly before the Board, we would see no merit in it. The appellant has cited no basis for finding that the agency was obligated, under a statute or regulation relating to veteran preference, to interview him separately for the FCIP and non-FCIP positions, and we know of none.

for which the appellants had applied. *Olson*, 100 M.S.P.R. 322, ¶¶ 8-9; *Dean*, 99 M.S.P.R. 533, ¶¶ 30-38; *Deems*, 100 M.S.P.R. 161, ¶ 16.

¶9 There is no indication that the two FCIP appointees in this case "passed an examination," as that term is used in 5 U.S.C. § 3304. The FCIP authority used here, however, differs from those used in the cases on which the appellant relies because it represents a valid exception to the competitive examination requirement. Unlike the OSP and CASP programs, it was expressly authorized by an Executive order promulgated under 5 U.S.C. § 3302. *See* Exec. Order No. 13,162, Preamble, 65 Fed. Reg. 43,211 (July 6, 2000).

¶10 The purpose of the FCIP is "to attract exceptional men and women to the federal workforce who have diverse professional experiences, academic training, and competencies, and to prepare them for careers in analyzing and implementing public programs." Exec. Order No. 13,162, § 1. The Executive order establishing the program authorizes 2-year Schedule B excepted appointments at the GS-5, -7, and -9 levels, and provides that appropriate veteran preference criteria are to be applied. *Id.*, §§ 3(b), 4(a). An FCIP appointee is to receive developmental assignments "consistent with [the appointee's] competencies and career interests . . . ," and he may be converted to a career or career-conditional appointment upon successful completion of his internship. *Id.*, § 4(b)(1); 5 C.F.R. §§ 213.3202(o)(6), 315.712.

¶11 OPM is authorized to promulgate regulations needed to carry out the purposes of the Executive order, *id.*, § 6, and in fact it has done so. Under regulations applicable to excepted appointments such as those under the FCIP, an agency may evaluate candidates under a "category rating" system as an alternative to traditional rating and ranking with numerical scores. *See* 5 C.F.R. §§ 213.3202(o), 302.304, 302.401. Under the category rating system, preference-eligible candidates who are qualified for the position being filled must be placed in the category of candidates to be considered first, but when there are fewer than

three candidates in that category, the agency may consider those in a lower category or categories. *See id.*

¶12 The administrative judge in this case found that the agency had complied with the relevant provisions of part 302 regarding the ranking and selection of candidates for the positions at issue here, including the provisions governing the selection of candidates who were not preference eligibles when there were higher-ranking preference-eligible candidates. Initial Decision at 7-9. Specifically, she found that the agency had ranked preference-eligible candidates higher than candidates not entitled to preference; that the selectees were nevertheless within reach for selection under 5 C.F.R. § 302.401(a); and that the agency complied with 5 C.F.R. § 302.401(b), which required it to "record its reasons" for passing over the appellant and to furnish a copy of the reasons to the appellant "on request." *Id.* She also indicated that, although the appellant had not been furnished a copy of those reasons at the time of his nonselection, the agency was not required to furnish a copy at that time because the appellant had not requested one. *Id.* at 8 & n.4.[4] The appellant has identified no error in these findings, and none is apparent to us.

¶13 For the reasons stated above, we see no error in the administrative judge's finding that the agency did not violate the appellant's preference rights. The initial decision is AFFIRMED AS MODIFIED.

ORDER

¶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)).

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[4] A copy of the document stating the agency's reasons for passing over the appellant is included in the record in this case. Appeal File, Tab 7, Subtab 4E.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

STEPHEN W. GINGERY,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-3443-06-0582-I-1

DATE: October 2, 2006

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

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

BEFORE
Gay F. Chase
Administrative Judge

INITIAL DECISION

Stephen W. Gingery is entitled to 10-point preference based on a compensable service connected disability of 30% or more. Mr. Gingery is not currently employed by the Federal government. The Defense Contract Audit Agency (DCAA) sought to hire three auditors for the Great Lakes Branch, Sterling Heights Office, Sterling Heights, Michigan.[1] As a result, DCAA placed an advertisement on Monster.com, an independent recruiting website, to recruit GS-7 and GS-9 auditor applicants for the Federal Career Intern Program (FCIP). The announcement also noted that DCAA was accepting resumes at auditor.jobs@dcaa.mil for the auditor vacancies. The appellant applied for the

[1] The DCAA ended up hiring four auditors rather than the three initially sought.

position through both the Monster announcement and the latter e-mail, which generated two OPM certificates, one at the GS-7 level and one at the GS-9 level. Although the appellant was interviewed for the auditor vacancies, he was not selected. The agency selected one reinstatement-eligible candidate, one five-point veteran from an Office of Personnel Management (OPM) certificate and two FCIP candidates.

On March 16, 2006, the appellant filed a Veterans Equal Opportunity Act of 1998 (VEOA) claim with the Department of Labor (DOL) which was later terminated. On June 7, 2006, the appellant filed a petition for remedial action with the Board, claiming that DCAA denied his veterans' preference and passed him over for an audit trainee position located in Sterling Heights, Michigan. The appellant revised his complaint on September 5, 2006, to state that the DCAA willfully violated his veterans' preference rights under the VEOA when it failed to select him for any of the auditor-trainee positions, failed to request permission from the Office of Personnel Management to pass him over and failed to notify him of its intent to pass him over in accordance with the procedures set forth under 5 U.S.C.
§ 3318 (b). The appellant filed additional submissions to support his allegations on September 6, 2006, and September 19, 2006.

Under the VEOA, the Board has appellate jurisdiction over the appeal of a preference-eligible alleging a violation of any statute or regulation relating to veterans' preference. *See* 5 U.S.C.A. § 3330a (West Supp. 2006). Because the appellant has exhausted his right to seek relief from the Secretary of Labor, his petition for remedial action is now ripe for adjudication by the Board. *See* 5 U.S.C.A. § 3330a (b) (1) (West Supp. 2006); *Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, 210 ¶ 5 (2001). Because there is no factual dispute material to determining the appellant's entitlement to relief under the VEOA, I decided this petition for remedial action without holding the hearing the

appellant requested. *See Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, 399 ¶ 9 (2001); *Sherwood*, 88 M.S.P.R. at 212 ¶ 11.[2]

For the reasons set forth below, the appellant's petition for remedial action is DENIED.

ANALYSIS AND FINDINGS

Undisputed Facts

The following facts are not in dispute. DCAA placed an advertisement on Monster.com, an independent recruiting website, to recruit GS-7 and GS-9 auditor applicants for the FCIP. The announcement noted that DCAA was also accepting resumes at auditor.jobs@dcaa.mil for the auditor vacancies. The appellant applied for the position through both the Monster announcement and the latter e-mail. The advertisement on monster.com was opened on February 3, 2006, and closed on February 13, 2006. As a result of the Monster announcement, seven applicants, including the appellant, were referred to the selecting official for consideration and interviews. An eighth applicant was referred based on his reinstatement eligibility. Of the eight applicants, only the appellant had veterans' preference.

Five applicants including the appellant, were interviewed by a panel of three supervisory auditors. However, the interview panel did not recommend the appellant for a second interview, because of his poor work history, his firing from

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[2] The appellant filed a motion on September 25, 2006 requesting a hearing in this matter and also requesting that I recuse myself alleging that I was abusive, combative and did no fairly preside over the close of the record conference held on September 7, 2006. I have addressed the request for a hearing above. With respect to the appellant's motion that I recuse myself, I have reviewed the conference tape and conclude there is no merit to the appellant's allegations. Therefore, the appellant's motion is denied. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980).

a CPA firm because "he was not working out," and poor college grades. Based on the panel's recommendation, Mr. AhKao, the selecting official, decided not to hire the appellant. (*See* Agency file at tab 1.) On March 2, 2006, Mr. AhKao executed an interoffice memorandum requesting to pass over a veteran (appellant) under the Career Intern Program (CIP) appointment authority. (*See* Agency file at tab 4E.) The pass-over request was approved by William Oelfke, Human Resources Manager. (*See* Agency file at tab 1.) Mr. AhKao interviewed the other four candidates and recommended all of them for hire to the regional audit manager. The selectees were extended tentative job offers, however, one selectee was not extended a final offer as a result of security requirements.[3]

On February 21, 2006, DCAA received two OPM certificates, one for the GS-7 level auditor and one for the GS-9 level auditor which were generated based on the resumes received by DCAA at auditor.jobs@dcaa.mil. (*See* Agency file at tabs 4D and 4G.) The appellant appeared seventh with a score of 88 on the OPM certificate of eligibles for Auditor (Contract Audit), GS-0511-07. The appellant was noted as a non-veteran on this certificate of eligibles. The agency made no selection from this certificate of eligibles.

The original GS-9 certificate was returned to OPM. OPM re-issued a certificate of eligibles for Auditor (Contract Audit), GS-0511-09, on April 10, 2006. The appellant appeared first on the certificate and OPM noted his veterans' preference as CPS (compensable service-connected disability of 10 percent or more) followed by Jason R. Bruno whose veterans' preference was noted as TP (5 point tentative veteran preference) who was followed by Adina N. Williams who had no veterans' preference. Mr. Bruno was later selected to fill one of the auditor positions from the OPM certificate as a result of an earlier selectee's inability to meet the security requirements of the position.

[3] One of the selectees was a reinstatement-eligible candidate while the other three were selected through the CIP process.

Burden of Proof

Because the matter at issue is the agency's failure to select the appellant for a position, the VEOA is the only basis for the Board's jurisdiction over this appeal. Where VEOA is the only basis for the Board's jurisdiction, the Board has no authority to adjudicate the "merits" of the agency's selection action, i.e., the Board cannot decide whether the selection was proper and should be sustained. *See Ruffin*, 89 M.S.P.R. at 400. Rather, the Board only has the authority to determine whether the agency violated a statutory or regulatory provision relating to veterans' preference. *See Ruffin*, 89 M.S.P.R. at 400. Therefore, in order to prevail in this appeal, the appellant must cite a statutory or regulatory provision relating to veterans' preference and he must show the agency violated such provision in the process of failing to select him for the position of Auditor, GS-0511-07/09.

Auditor, GS-0511-07 (OPM Certificate # PH-06-RCS-01263S0 dated February 21, 2006.)

During the telephonic close of the record conference held on September 7, 2006, the appellant raised concerns with respect to the way the agency handled this certificate. The appellant was ranked seven out of eight candidates with a score of 88. The appellant was noted as a non-veteran on this certificate of eligibles. The appellant believed the agency had the responsibility to inform OPM of his veterans status where he failed to properly note his status in the application process. However, the agency chose not to make a selection from the GS-07 certificate. Under 5 C.F.R. § 330.101, an appointing officer may fill a position in the competitive service by any of the methods authorized in 5 C.F.R. part 330. Nothing in the regulation requires an agency to make a selection, and it can cancel a vacancy announcement without making a selection. *See Ward v. Office of Personnel* Management, 79 M.S.P.R. 530, 534 (1998) (an agency has

discretion as to which sources it will use to fill its positions and it may select or not select from the applicants who responded to a vacancy announcement), *aff'd*, 194 F.3d 1333 (Fed. Cir. 1999) (Table). Because the agency made no selection from this certificate, the error on the certificate regarding the appellant's veterans' preference did not impact the selection process. Consequently, the appellant did not prove the agency violated his veterans' preference when it elected not to select from the GS-07 certificate.

Auditor, GS-0511-09 (OPM Certificate # PH-06-RCS-01535S0 dated April 10, 2006.)

During the telephonic close of the record conference held on September 7, 2006, the appellant alleged that a non-veteran was selected over him from the initial GS-9 certificate. The appellant further alleged that the non-veteran selected over him was unable to satisfactorily complete the background security check and as a result was not hired. There is nothing in the record to indicate that a selection was made from the original GS-9 certificate dated February 21, 2006. To the contrary, the agency asserts that the GS-9 certificate was replaced because OPM erred when assigning veterans' preference to certain candidates listed on that certificate. (*See* Agency file at tab 1.)

The agency received the re-issued GS-9 certificate on April 10, 2006. As stated above the appellant was listed first on the certificate and was afforded ten-point veterans' preference based on a compensable service connected disability of 10% or more. Second on the certificate was a five-point veteran. The agency selected the five-point veteran from the GS-9 certificate of eligibles for one of its auditor vacancies. Under 38 U.S.C. § 4214(b)(1)(C), a veteran who is entitled to disability compensation shall be given preference for an appointment over other veterans. However, OPM's regulations at 5 C.F.R.§ 332.404 set forth a 'rule of three' that applies when an agency fills a vacancy from a certificate where some or all of the candidates are entitled to veterans' preference. Under that rule, the agency may select from among the highest scoring candidates. There is no

prohibition against passing over a ten-point veteran to select a five-point veteran. *See Spigner v. Department of Air Force*, 86 M.S.P.R. 677, 681 (2000). Consequently, the appellant did not prove the agency violated his veterans' preference rights when it selected a five-point veteran for one of its auditor vacancies.

Auditor, GS-0511-07/09 (Federal Career Intern Program Referral.)

The appellant asserts the agency violated his veterans' preference rights when it failed to select him for the position of auditor-trainee under the FCIP. The appellant also asserts that the agency failed to notify both him and the OPM of the proposed passover. The appellant specifically claims the Agency violated 5 U.S.C. § 3318(b)(1) and (2). 5 U.S.C. § 3318 refers to competitive service, selection from certificates. 5 U.S.C. § 3318(b)(1) holds that if an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the OPM for passing over the preference eligible. 5 U.S.C. § 3318(b)(2) holds that in the case of a preference eligible who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the OPM, notify the preference eligible of his proposed passover.

The agency filled two auditor vacancies under the FCIP. The FCIP was created under Executive Order 13162 for the purpose of attracting exceptional men and women to the Federal workforce who have diverse professional experience, academic training, and competencies, and to prepare them for careers in analyzing and implementing public programs. Vacancies filled under the FCIP are filled under Schedule B of the excepted service. When filling such positions, agencies are required to follow the procedures set forth at 5 C.F.R. Part 302, Employment in the Excepted Service. In accordance with 5 C.F.R. § 302.201, an agency may consider candidates using a numerical rating and ranking system and

applying additional points to preference eligibles or a **preference category method** when referring eligible candidates without ranking, noting the appropriate veterans' preference category.

According to DCAA's Northeast Region Career Intern Program (CIP) operating procedures, employment lists are prepared for locations that have auditor-trainee vacancies using the preference category method set forth above. (*See* Agency file at tab 4j.) When establishing such lists, the names of eligible candidates will consist of several groups: Group 1 - preference eligibles having a compensable service-connected disability of 10 percent or more; Group 2 - other ten-point preference eligibles; Group 3 - five-point preference eligibles and Group 4 - non-preference eligibles. No numerical scores are assigned. Under 5 C.F.R. § 302.401, when making an appointment from a list on which candidates have not received numerical scores, an agency must make its selection from the highest available preference category as long as at least three candidates remain in that group. If fewer than three candidates remain, consideration may be extended to the next category. Pursuant to 5 C.F.R. § 302.401(b), an agency may pass over a preference eligible and select a non-preference eligible, but shall record its reasons for doing so, and shall furnish a copy of those reasons to the preference eligible or his representative **on request.**[4]

As stated earlier, the agency referred eight applicants to the selecting official for consideration and interviews. One applicant was a reinstatement eligible. Of the other seven applicants, only the appellant was entitled to veterans' preference. Therefore, he was the only candidate in Group 1. There were no candidates in Groups 2 and 3. The other six candidates were in Group 4. As a result, the agency was able to consider the candidates in Group 4 despite the fact that the candidates were not preference eligibles. The appellant was

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[4] There is no indication from the record that the appellant made a request for the reasons for his non-selection.

considered and interviewed but not selected. The selecting official provided a written statement of his reasons for not selecting the appellant in accordance with 5 C.F.R. 302.401(b) and two non-preference eligible candidates were selected. (*See* Agency file at tab 4E.) I find that based on the information in the record the agency was in full compliance with 5 C.F.R. Part 302 when making selections for the vacant auditor positions under the FCIP.

As stated earlier, the appellant asserted that the agency violated his veterans' preference rights when he was non-selected and the agency failed to request permission from the OPM to pass him over and failed to notify him in accordance with the procedures set forth in 5 U.S.C. § 3318(b). The appellant has not cited any case which would support his assertion that the agency was required to utilize the procedures set forth in 5 U.S.C. § 3318 (b). Moreover, I find that the statutory provision cited by the appellant specifically refers to certificates of eligibles furnished under 5 U.S.C. § 3317(a), which states the agency is obligated to inform the OPM or any preference eligible who is passed over, **only** in those situations where the employing agency utilizes the competitive certification process and chooses non-preference eligibles over higher ranked preference eligibles.

As stated earlier, the agency made its selections from a certificate generated under the FCIP program established under Schedule B of the Excepted Service which is not subject to the procedures set forth under 5 U.S.C. § 3318 (b). The Board has generally found that the agency does not violate an appellant's veterans' preference rights by appointing a candidate by means other than competitive examining or direct-hire authority. *See Ruffin v. Department of the Treasury*, 93 M.S.P.R. 369, 373 (2003); *Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, 212 (2001). Consequently, the appellant's veterans' preference rights were not violated when the agency selected two non-preference eligible employees and provided a written statement of its reasons for not selecting the appellant in accordance with 5 C.F.R. § 302.401(b).

Veterans are not accorded limitless rights and benefits under veterans' preference statutes. *Brown v. Department of Veterans Affairs*, 247 F.3d 122. 1224 (Fed. Cir. 2001). The practices applicable to filling positions in the excepted service need not fully comport with those of the competitive service. A variety of more flexible and informal procedures are used to recruit and select new employees into the excepted service. *National Treasury Employees Union v. Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988); *see* 5 C.F.R. § 6.3(b) (2006) (to the extent permitted by law and the provisions of this part, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.) Even in filling a competitive service position, where the regulations and statutes are more specific, the Board has held that an agency's failure to accord an appellant his full ten-point veterans' preference entitlement need not necessarily lead to a finding that his rights under VEOA were violated, depending on the circumstances of the case. *See Abell v. Department of the Navy*, 92 M.S.P.R. 397, 402 (2002).

Auditor, GS-0511-07/09 (Reinstatement Eligibility.)

The appellant asserts the agency violated his veterans' preference rights when it failed to select him for the position of auditor-trainee. The agency selected Mr. Mark Vaeth for one of the auditor vacancies on the basis of his reinstatement eligibility. *See* 5 C.F.R. § 315.401(a), (b) (2006) (an agency may appoint by reinstatement a person who was previously employed under a career or career-conditional appointment; there is no time limit on the reinstatement eligibility of a person who completed the service requirement for career tenure). OPM rules give the agency the discretion to fill vacancies by any properly authorized method. *See* 5 C.F.R. 330.101 (2006). Therefore, the agency's decision to invoke the reinstatement authority under 5 U.S.C. § 3316 to select one of the successful candidates was within the agency's discretion. *See Sherwood v.*

Department of Veterans Affairs, 88 M.S.P.R. 208, 212 (2001). Further, the Office of Personnel Management's (OPM), VetsInfo Guide provides that:

> [e]ligible veterans receive many advantages in Federal employment, including preference for initial employment and a higher retention standing in the event of layoffs. However, the veterans' preference laws do not guarantee a veteran a job, nor do they give veterans preference in internal agency actions such as promotion, transfer, reassignment and **reinstatement**.

Consequently, the appellant did not prove the agency violated his veteran's preference rights when it selected a reinstatement eligible for one of its auditor vacancies.

Finally, to the extent the appellant is arguing with the agency's decision not to select him, i.e., his allegations that the agency failed to give him bonafide consideration, and that his qualifications were superior to those selected, the Board has explicitly stated that the VEOA does not provide the Board with authority to review the merits of any personnel action, but, instead provides the Board only with authority to determine whether the agency has violated a statutory or regulatory provision relating to veterans' preference. *Ruffin*, 89 M.S.P.R. at 401. The appellant has not shown that the agency violated any statutory or regulatory provision related to veterans' preference.

DECISION

The appellant's petition for remedial action is DENIED.

FOR THE BOARD:

Gay F. Chase
Administrative Judge

PROOF OF SERVICE

The undersigned attorney hereby certifies that two true and correct copies of the following document:

BRIEF OF PETITIONER
STEPHEN W. GINGERY

were deposited in the United States mail on the 11th day of January 2008 in a postage-paid envelope addressed to:

Brian T. Edmunds, Esq.
U.S. Dept. of Justice – Civil Div.
1100 L Street N.W., Room 12076
Washington, D.C. 20530

Separately, on 11 January 2008, the undersigned attorney sent via Federal Express (overnight service) to the clerk of this Court, twelve true and correct copies and one additional copy for return, of the above-referenced brief.

On this 11th day of January, 2008, I declare under penalty of perjury that the foregoing is true and correct.

By: 
ANDREW J. DHUEY

Attorney for Petitioner,
STEPHEN W. GINGERY

CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

The undersigned attorney hereby certifies, on this 11th day of January, 2008, that this brief was produced using 14 point Times New Roman font in Microsoft Word, 2002 version, and contains exactly 4,306 words and 486 lines of text, which is in compliance with the typeface and length limitations of Fed.R.App.P. 32(a)(7).

By: 
ANDREW J. DHUEY

Attorney for Petitioner,
STEPHEN W. GINGERY