

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

87 M.S.P.R. 98

ADAM T. RAMSEY,

Appellant,

DOCKET NUMBER

CB-1205-99-0065-U-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,

Agency.

DATE: October 10, 2000

Adam T. Ramsey, Lorton, Virginia, pro se.

Raymond Limon, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board on the petitioner's request for review of regulations promulgated by the Office of Personnel Management (OPM) to implement the staffing provisions of the Veterans Employment Opportunities Act (VEOA) of 1998. *See* Sec. 2 of the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, 112 Stat. 3182, amending 5 U.S.C. § 3304(f). The petitioner's fundamental argument is that OPM regulations at 5 C.F.R. §§ 213.3201(a), 213.3202(n) (1999) and 335.106¹ conflict with the purpose of 5

¹ In his first submission, the petitioner requested review of 5 C.F.R. § Parts 213 and 214. RF, Tab 1. In his response to OPM's Motion to Dismiss, the petitioner has not

U.S.C. § 3304(f) and require employees to commit prohibited personnel practices. Request File (RF), Tabs 1 and 6. For the reasons set forth below, we DENY the petitioner's request to declare these regulations invalid.

BACKGROUND

¶2 In enacting VEOA, Congress provided for a special appointing authority for preference eligibles or veterans with at least three years of active service, thus allowing them to compete for vacant positions under merit promotion procedures² if the hiring agency accepts applications from individuals outside its own workforce.³ Sec. 2, Pub. L. 105-339. OPM promulgated regulations to implement the staffing provisions of VEOA, setting forth special selection procedures for certain veterans under merit promotion procedures and creating a Schedule B, excepted appointing authority under 5 C.F.R. § Part 213, to permit agencies to place these individuals. 5 C.F.R. § 335.106 and 5 C.F.R. § 213.3202(n)(1999).

¶3 In legislation enacted after the petitioner filed his request, Congress amended the VEOA to clarify that an eligible veteran who competes and is selected under the agency's merit promotion procedures "shall receive a career or career-conditional appointment, as appropriate." *See* Sec. 511 (c) of the Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, 113 Stat. 1545. The amendment thus eliminated the original VEOA provision under which OPM created the Schedule B appointing authority to permit the noncompetitive

disagreed with OPM's conclusion that he was challenging sections 213.3202(n) (1999) and 335.106. RF, Tab 6; *see also* RF, Tab 5.

² *See* 5 C.F.R. § 335.103, Agency Promotion Programs, setting forth provisions of merit promotion plans, including the requirements that actions under a promotion plan should be based solely on job-related criteria and that candidates, in order to be eligible for promotion or placement, must meet the minimum standards prescribed by OPM.

³ Agencies have discretion to open vacancies to the public and to accept applications from individuals outside their own workforce. *See* 5 C.F.R. § 302.102(a) and 5 C.F.R. § 330.101 *et seq.*

appointment of veterans. *See* H.R. 106-470, 145 Cong. Rec. H11997 (daily ed. Nov. 16, 1999); 5 U.S.C. § 3304(f)(2). OPM has revised its original implementing regulation to announce that, after November 30, 1999, no new appointment could be made under that authority. 65 Fed. Reg. 14,431 (Mar 17, 2000); 5 C.F.R. § 212.3202(n) (1999). OPM added a new regulation, 5 C.F.R. § 315.611, to address the career or career-conditional appointment of certain veterans. 65 Fed. Reg. 14,432.

¶4 The petitioner requests Board review on the basis that the "regulations create a hiring authority which imposes 'basic qualification standards'" or "'artificial barriers' to veteran [sic] employment in the Federal Government." RF, Tab 1 at 1.

ANALYSIS

¶5 The Board has original jurisdiction to review rules and regulations issued by OPM. 5 U.S.C. § 1204(f). In exercising that jurisdiction, the Board is authorized to declare OPM rules and regulations invalid if it determines that their implementation would require an employee to commit prohibited personnel practices, as defined in 5 U.S.C. § 2302(b). *Id. See, e.g., Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 887 (1998).

¶6 With his petition for regulation review, the petitioner attached a copy of OPM's interim regulations implementing VEOA, highlighting in yellow OPM's reference to its creation of Schedule B appointing authority and its explanation that Schedule B "positions are subject to basic qualification standards." RF, Tab 1. As noted above, OPM revised its regulations, eliminating the Schedule B appointing authority in order to conform to the VEOA amendments which provided that individuals appointed under merit promotion procedures were to receive appointments in the competitive service. Those amendments were retroactive to October 31, 1998, the effective date of the VEOA. *See* Sec. 511(c)(1) of the Veterans Millennium Health Care and Benefits Act. Thus, to the extent that the petitioner is challenging the appropriateness of a Schedule B

appointing authority in 5 C.F.R. § 213.3202(n) (1999), we find that his request is moot in light of OPM's revisions which canceled that authority.

¶7 To the extent, however, that the petitioner can show that, while the regulation was in effect, an agency invalidly implemented 5 C.F.R. §§ 213.3201(a) and 213.3202(n) (1999) by requiring any employee to commit a personnel practice prohibited by 5 U.S.C. § 2302(b), the Board could require the agency to correct the invalid implementation. 5 U.S.C. § 1204(f)(4)(B). Therefore we find that the petitioner's request for review of these regulations is not moot with respect to his request that the Board declare the regulations invalidly implemented. However, for the reasons set forth below, we reject the petitioner's arguments that minimum qualification standards should not be applied to VEOA appointments.

¶8 The petitioner objects to OPM's application of minimum qualification standards to VEOA appointments and claims that OPM's regulations require an agency to commit a prohibited personnel practice under 5 U.S.C. § 2302(b)(4)⁴ by obstructing a veteran's right to compete for employment. RF, Tab 6 at 5. He argues that the VEOA entitles a veteran to be included on the certificate of eligibility for a position without evaluation of his application by personnel specialists. RF, Tab 1 at 3. He contends that a veteran's application should not be subject to basic qualification standards, which he contends are "barriers" which prevent a veteran from competing with other applicants. The petitioner specifically complains that specialized experience requirements and time-in-grade requirements "narrow the scope of the Act so as to make it ineffectual." *Id.* at paragraph 17. Indicating that he has applied for "upwards of a hundred jobs under the provisions of the Act" but has been told that he "can't compete for the positions," the petitioner claims that personnel specialists have imposed

⁴ This subsection prohibits any employee who has authority to take, direct others to take, recommend, or approve any personnel action from "deceiv[ing] or willfully obstruct[ing] any person with respect to such person's right to compete for employment." 5 U.S.C. § 2302(b)(4).

"artificial barriers to veterans' competition, such as specialized experience requirements and time in grade [sic] requirements." *Id.* at paragraphs 17 - 19. He also complains that, despite his attaching a copy of OPM's explanation of the VEOA provisions, "personnel specialists refuse to certify [him] as eligible to compete." *Id.* at paragraph 19. The petitioner thus argues that, under the VEOA and given his status as a veteran, merely applying for a position qualifies him for placement on the certification/eligible list and entitles him to evaluation by the hiring official or panel. In support of his argument that failure to meet minimum qualification requirements should not exclude a veteran as unqualified for a position, the petitioner cites to language in "senate committee report 105-30". RF, Tab 1 at 4.

¶9 The final version of VEOA, however, does not include the Senate Report language upon which the petitioner relies. The plain language of the statute only prohibits an agency from denying a preference eligible or veteran the opportunity to compete; it does not provide that veterans will be considered eligible for positions for which they are not qualified. Because the VEOA is not a noncompetitive-entry authority, like the Veterans Readjustment Act, it does not exempt veterans from the eligibility criteria such as time-in-grade restrictions that would be applicable to all candidates. 5 U.S.C. § 3304(f). In enacting VEOA, Congress specified that the agencies would apply merit system principles in accepting applications from individuals outside its own workforce. Sec. 2, Pub. L. 105-339. Merit system principles require that recruitment of Federal employees should be from "qualified individuals." 5 U.S.C. § 2301(b)(1). Because the VEOA did not exempt covered veterans from meeting minimum qualification standards in order to compete for vacant positions under merit promotion procedures, we cannot find that an agency committed a personnel practice prohibited by 5 U.S.C. § 2302(b)(4) by implementing 5 C.F.R. §§ 213.3201(a) and 213.3202(n) (1999) to exclude a covered veteran who did not meet the minimum qualification standards from consideration for such positions.

¶10 Further, to the extent that the petitioner challenges OPM's regulation at 5 C.F.R. § 335.106, that regulation merely repeats, almost verbatim, the statutory language of 5 U.S.C. § 3304(f)(1). Because Congress did not authorize the Board in 5 U.S.C. § 1204(f) to review statutory provisions, the petitioner's challenge to a rule or regulation that merely repeats the statutory language must fail. *See, e.g., Pavlopoulos v. Office of Personnel Management*, 58 M.S.P.R. 620, 624 (1993).

¶11 Insofar as the petitioner is arguing that OPM's regulations implementing VEOA will result in an employee committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(11), that is, a violation of veterans' preference requirements, we find that Congress specifically excluded the provisions under 5 U.S.C. § 3304(f) from veterans' preference requirements. Applying the maxim *expressio unius est exclusio alterius*,⁵ since section 3304 is not included as a "veterans' preference requirement," at 5 U.S.C. § 2302(e)(1), we find that the regulations implementing 5 U.S.C. § 3304(f) cannot be a basis for committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(11). In addition, 5 U.S.C. § 3304(f)(3) provides that subsection (f) shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law.

¶12 For these reasons, the petitioner has not shown that the OPM regulations at issue obstruct a veteran's right to compete or otherwise cause an employee to commit a prohibited personnel practice. Consequently, we DENY the petitioner's request to declare these regulations invalid.

ORDER

We DENY the petitioner's request that we review OPM's regulations at 5 C.F.R. §§ 213.3201(a), 213.3202(n) (1999), and 335.106. This is the final order of the Merit Systems Protection Board in this petition. 5 C.F.R. § 1203.21.

⁵ This maxim means that "to express or include one thing implies the exclusion of the other or of the alternative." Black's Law Dictionary, 7th Edition (1999).

**NOTICE TO THE PETITIONER REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.