UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GERALD ALEXANDER v. DEPARTMENT OF THE NAVY	)	DOCKET NUMBERS DC07528310310 DC07528310948 Date: 6 DEC 1984

OPINION AND ORDER

Gerald A. Alexander (appellant) was suspended for twenty-one days and reduced in grade from a Supervisory Personnel Management Specialist, GM-13, to an unspecified GS-12 position in the Consolidated Civilian Personnel Office (CCPO), Department of the Navy (agency). The agency based its actions on two instances of appellant's alleged "advocating" of his daughter for employment with the agency and also negligence in the management of the Summer Employment Program for 1982.

Appellant filed a petition for appeal with the Board's Washington, D.C. Regional Office. Following a hearing, the presiding official issued an initial decision reversing the agency action. In that decision, the presiding official held, first, that the agency had failed to establish that appellant's actions constituted "advocacy" in violation of 5 U.S.C. §§ 2302(b)(7), and 3110, 5 C.F.R. Part 310 and 310 FPM Subchapter 1, and second, that it had failed to prove the negligence charge.

The agency has filed a timely petition for review contending that the presiding official erred in finding

that appellant's actions did not constitute advocacy. Specifically, it argues that the presiding official misinterpreted the relevant statutes and regulations by finding that appellant did not "advocate" as that item is defined in the American Heritage Dictionary (Second College Edition) and not applying the definition of the term contained in the Office of Personnel Managment (OPM) regulations and the Federal Personnel Manual.

The Office of the Special Counsel has filed an amicus brief in which it argues that the presiding official erroneously defined "advocacy" in the initial decision because the regulations and the FPM implementing instructions provide a clear interpretation of the term.

The petition for review is GRANTED.

Appellant, a public official as that term is defined in 5 U.S.C. § 3110, was charged with two specifications of "advocating" his daughter,[1] Perea Alexander, for a position with the agency.

The first specification concerned a telephone call that appellant made to Sylvia Mitchell, Assistant Administrative Officer, Headquarters, Naval District of Washington (NDW), in June 1982. The presiding official found that although appellant initiated a conversation concerning employment opportunities in NDW, it was only after an inquiry from Ms. Mitchell that appellant indicated his daughter was looking for employment, and it was Ms. Mitchell who asked appellant to send over his daughter's SF-171.[2]

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[1] A daughter is considered a relative under 5 U.S.C. § 3110(a)(3).

[2] See Initial Decision at 4-6. These findings are entitled to deference since the presiding official had the opportunity to observe the demeanor and hear the testimony of the witnesses. Weaver v. Department of the Navy, 2 MSPB 297 (1980).

The second specification concerns appellant's conduct following the conversation. Appellant asked his subordinate, Ms. Tyra Dent, to take his daughter's SF-171 to Ms. Mitchell. Ms. Dent was the designated Coordinator for the 1982 Summer Employment Program and as such, was responsible for the hiring of persons to serve as summer aids within CCPO and the agency commands that it serviced. However, an activity such as NDW could request that a specific individual be appointed by means of a "Recruit 52" form to fill one or more of its available summer positions. After receiving Ms. Alexander's SF-171 from Ms. Dent, Ms. Mitchell determined that a position was not available in WND and shortly thereafter returned the SF-171 to Ms. Dent who refiled Ms. Alexander's application.

In the initial decision, the presiding official found that these actions did not constitute advocacy because the dictionary definition of "advocacy" is "to speak in favor of; recommend" and appellant's conduct did not rise to that level.

Restrictions on the employment of relatives in the federal civil service are found in several statutory and regulatory provisions.[3/] Each of these provisions prohibits a public official from advocating a relative for appointment or employment in the agency in which the person is employed. The relationship between a father and daughter is included in the statutory prohibition. 5 U.S.C. § 3110(a)(3); Roberts v. United States Postal Service, 11 MSPB 106 (1982).

3/ 5 U.S.C. §§ 2302(b)(7); 3110; 5 C.F.R. Part 310.

The term "advocate" is not defined by statute. However, regulations promulgated by OPM[4/] do provide a definition and examples of the term.

Section 310.103 of title 5, Code of Federal Regulations, provides that "a public official shall not advocate one of his relatives for appointment, employment, promotion, or advancement to a position in his agency or in an agency over which he exercises jurisdiction or control." 5 C.F.R. § 310.103(a). This section further states:

> For the purpose of this section, a public official who recommends a relative, or refers a relative for consideration by a public official standing lower in the chain of command, for appointment, employment, promotion, or advancement, is deemed to have advocated the appointment, employment, promotion, or advancement of relative. (Emphasis added.)

5 C.F.R. § 310.103(c).

Because the regulations clearly state what actions constitute advocating, the presiding official erred in considering appellant's action under the definition of advocacy contained in the dictionary, which limits the

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4/ The regulations set forth at 5 C.F.R. §§ 310.101-310.103, although closely related to the nepotism restriction in 5 U.S.C. § 3110, neither derive from nor interpret the statute. These regulations are promulgated under the general authority of 5 U.S.C. § 1104, which authorizes the Director of OPM to prescribe regulations and ensure compliance with the civil service laws. Except for the emergency exceptions contained in §§ 310.201-202, OPM has no authority to interpret or to regulate under 5 U.S.C. § 3110.

definition to recommending. The regulatory definition of the term includes either a recommendation or a referral of the relative for consideration by a subordinate. Therefore, appellant's behavior must be measured against this dual prohibition.[5]

This Board cannot find that appellant's conversation with Ms. Mitchell constitutes advocacy under the statute or regulations. It is clear that Ms. Mitchell was not a subordinate of appellant, nor is there any evidence that appellant spoke in favor of, recommended, commended, or endorsed the employment of his daughter by NDW.[6] Even assuming, arguendo, that appellant's conduct revealed an interest in securing or facilitating his daughter's consideration for employment, as argued by the agency, and his conduct does constitute referral for consideration, such conduct does not violate the regulations since Ms. Mitchell was not lower in the chain of command.

Similarly, the Board cannot find that appellant's request that Ms. Dent take his daughter's SF-171 to

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5/ In its brief, the Office of Special Counsel relies upon 310 FPM § 1-3a(2) which expands upon the "referral for consideration" requirement set forth in the regulations. The FPM, insofar as it includes more than a restatement of statutory and regulatory requirements, constitutes only the Office of Personnel Management's official "guidance" to agencies. See Tuggle v. Consumer Product Safety Commission, MSPB Docket No. DC03518210356 (March 17, 1984); Carter v. Department of the Navy, 6 MSPB 92 (1981).

6/ See Initial Decision at 6.

Ms. Mitchell constituted advocacy [illegible] though Ms. Dent was the coordinator of the summer program [illegible] had hiring authority, in this instance she was merely acting in a ministerial manner by taking the application to Ms. Mitchell, who was the public official considering the application. Ms. Dent could not have facilitated the hiring of appellant's daughter since the initial determination as to whether there was a position available in NDW was to be made by Ms. Mitchell. Therefore, appellant did not "refer" his daughter "for consideration by a public official standing lower in the chain of command", as required by the regulation, since the application was not for Ms. Dent's consideration but rather for Ms. Mitchell's.

Finally, the agency contends that the presiding official's findings concerning the negligence charge were incorrect. These arguments constitute mere disagreement with the factual findings and credibility statements of the presiding official which are entitled to due deference by the Board. See [illegible] Department of the Navy, 2 MSPB 297 (180).[7]

7/ The agency has also introduced as "new and material evidence" affidavits of Frank Sharkey and Susan Reider, to attempt to show that apellant was calling other agency activities looking for employment for his daughter. The agency has not made a sufficient showing that this evidence was unavailable prior to the close of the record and therefore fails to meet the due diligence requirement of 5 C.F.R § 1201.115(a). Avansino v. U.S. Postal Service, 3 MSPB 308 (1980). Further, the Board notes that the evidence would not be relevant since appellant was not charged with contacting these two officials concerning his daughter's employment opportunities with the agency.

Accordingly, the initial decision is AFFIRMED as MODIFIED herein. The agency is hereby ORDERED to cancel the suspension and the reduction in grade taken against appellant Gerald A. Alexander. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Washington, D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose

Washington, D.C.

Stephen E. Manrose
Acting Clerk of the Board