

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

2009 MSPB 145

Docket No. DA-300A-08-0567-I-1

Kurt Chadwell,

Appellant,

v.

Office of Personnel Management,

Agency.

July 28, 2009

Kurt Chadwell, Irving, Texas, pro se.

Julie L. Ferguson Queen, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Both Chairman McPhie and Vice Chairman Rose issue separate opinions.

ORDER

This case is before the Board by petition for review of the initial decision which dismissed the appeal for lack of jurisdiction. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) ([5 C.F.R. § 1200.3\(b\)](#)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

NOTICE TO THE APPELLANT 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 the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

Kurt Chadwell v. Office of Personnel Management

MSPB Docket No. DA-300A-08-0567-I-1

¶1 I would remand the case to the Administrative Judge (AJ) for a hearing on the merits, because the appellant has established Board jurisdiction under [5 C.F.R. § 300.104\(a\)](#).

BACKGROUND

¶2 The appellant sat for the Office of Personnel Management (OPM) administered Administrative Law Judge (ALJ) examination in May 2007 and received a Notice of Results (NOR) on October 30, 2007. His name and exam score were then placed on the register for referrals to agencies seeking ALJs. Although he was placed on two certificates of eligibles, he was not selected for an ALJ position. OPM next opened the ALJ examination for applications in July 2008, and the appellant again applied. OPM refused to review or process the appellant's application, under its rule that an applicant may only "retake the ALJ examination . . . after one year has passed from the date of the final NOR." IAF Tab 10, Subtab 4a at 1.

¶3 The appellant argues that OPM's rule requiring a 1-year waiting period before an applicant can retake the ALJ examination ("the Rule") constitutes an "employment practice" under [5 C.F.R. § 300.101](#), which violated one or more of the "basic requirements" for employment practices set forth in [5 C.F.R. § 300.103](#). He contends that the Board therefore has jurisdiction over his appeal under [5 C.F.R. § 300.104\(a\)](#). The AJ found that the Rule is not an employment practice because it is "an exercise of OPM's administrative discretion regarding a procedural matter and is not a substantive or merits consideration that affects the qualification standards for the position at issue." Initial Decision (ID) at 18, IAF Tab 26.

ANALYSIS

¶4 I believe that the AJ interpreted “employment practices” too narrowly. In particular, her perceived distinction between a “substantive or merits consideration” and a “procedural matter” is both unworkable as a principled test to guide future decisions and inconsistent with the Federal Circuit’s approach to employment practice cases. I would instead find that the Rule is an employment practice because it (1) imposes a barrier to eligibility for consideration over which the appellant has no control; and (2) precludes reexamination of applicants following a period of time during which they have become more qualified for the position based on the standards measured by the examination itself. It is also clear that the Rule violates at least one of the basic requirements for employment practices. I would therefore have the Board exercise jurisdiction over the appellant’s claim and remand the case to the AJ for a hearing on the merits.

¶5 The Board has jurisdiction under [5 C.F.R. § 300.104](#)(a) when the challenged practice is (1) “an employment practice” under [5 C.F.R. § 300.101](#) that OPM is involved in administering; and (2) the employment practice is alleged to have violated one of the “basic requirements” for employment practices set forth in [5 C.F.R. § 300.103](#). The first condition must be shown by a preponderance of the evidence. The second requirement is satisfied by a nonfrivolous allegation. *Mapstone v. Department of the Interior*, [110 M.S.P.R. 122](#), ¶ 7 (2008). The “basic requirements” are that an employment practice be (1) based on a “job analysis” that sets forth duties of and qualifications for the position; (2) relevant to performance in the position; and (3) not discriminatory. 5 C.F.R. § 300.103.

¶6 “The term ‘employment practices’ includes the development and use of examinations, qualification standards, tests and other measurement instruments.” [5 C.F.R. § 300.101](#). Over the course of the last 25 years, the Federal Circuit has repeatedly disagreed with both OPM and the Board regarding the scope of the phrase “employment practices.” In each such case, the Federal Circuit has articulated a more expansive meaning than that urged by OPM or adopted by the Board. In *Dowd v. United States*, [713 F.2d 720](#), 723 (Fed. Cir. 1983), the court

explained that the use of the word “includes” in § 300.101, “suggests a broad meaning. The term itself, ‘employment practices,’ has a naturally broad and inclusive meaning . . . The definition is couched in inclusive language, which does not imply that anything within the natural meaning is excluded.” *Dowd*, 713 F.2d at 723. It does not, therefore, apply to merit based tests alone. *Id.* at 724; *see also Prewitt v. Merit Systems Protection Board*, [133 F.3d 885](#), 887 (Fed. Cir. 1998) (“‘employment practice’ is to be construed broadly and should not be restricted to the ‘examinations, measurement tools, and qualifications relating to merit’ referred to in [5 C.F.R. § 300.101](#)”); *Maule v. Merit Systems Protection Board*, [812 F.2d 1396](#), 1399 (Fed. Cir. 1987) (rejecting argument that “an employment practice relates only to ‘a substantive judgment on the qualification’ of applicants”). The *Dowd* court further explained that “employment practice” must be construed in light of the broad purpose of subpart 300 “to establish principles to govern . . . the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking and selection of individuals . . .” *Id.* (quoting 5 C.F.R. § 300.101).

¶7 The Rule at issue here affects the recruitment of individuals for ALJ positions – it precludes from consideration an entire class of individuals who have received their examination results less than a year prior to a new application period. The Rule as applied also amounts to the imposition of a qualification standard. One of the qualifications measured by the ALJ examination is an applicant’s “Accomplishment Record” performing related work. This portion of the examination scores applicants based upon their descriptions of specific examples of related work they have performed. IAF Tab 10, Subtab 4b at 23-32. Consequently, each time an applicant takes the ALJ examination after an interim period of continued service in a position performing related work, his qualifications for an ALJ position as reflected in his score on the “Accomplishment Record” portion of the examination could potentially improve. Moreover, following the administration of the 2008 ALJ examination, the appellant was retained on the ALJ register and considered for ALJ employment

based on his 2007 ALJ examination score. IAF Tab 10, Subtab 4a at 1. He was therefore denied the benefit of the additional examination score points he could have earned based on his increased experience between May 2007 and July 2008. And perhaps most importantly, he thereafter competed for ALJ positions against 2008 examinees whose examination scores were enhanced by the additional experience they gained during the same period. It is therefore clear that denying the appellant the opportunity to take the ALJ examination again in 2008 directly impacted the measurement of his qualifications for the position.

¶8 The AJ relied upon *Maule v. Office of Personnel Management*, [40 M.S.P.R. 388](#), *aff'd*, 892 F.2d 1050 (Fed. Cir. 1989) (Table), for the proposition that “[e]mployment practices that are appealable to the Board typically are required to encompass ‘merit’ considerations that are generally applied in making Federal hiring decisions.” IAF Tab 26 at 17. In *Maule*, the Board held that OPM’s rejection of an application as untimely under regulations requiring the timely filing of applications and establishing exceptions under which untimely applications may be accepted, was not an employment practice.

¶9 I agree that application procedures over which the applicant has control, such as meeting application deadlines or including required content with application materials, are not “employment practices” within the meaning of [5 C.F.R. § 300.101](#). Such requirements in no way relate to an applicant’s qualifications for a position, and any barrier to entry they exert can be overcome by the simple exercise of due diligence by applicants. Thus, while I disagree that a merits/procedural distinction is a workable standard for identifying employment practices, the outcome in *Maule* was correct under the standards I enunciate here.¹ In contrast, the requirement that an applicant wait a year after receiving a

¹ The Vice Chairman suggests that the *Maule* Board was given a mandate from the Federal Circuit to recognize a distinction between procedural and merits considerations. Vice Chairman’s Separate Opinion at 5 (“The court, however, explicitly directed the Board in *Maule*, [40 M.S.P.R. 388](#), to consider such a distinction in determining whether OPM’s action constituted an employment practice.”). But the court’s decision cannot reasonably be so read. The court merely deferred the question to the Board for

NOR before retaking the ALJ examination, creates an absolute bar to the applicant being considered for the position based upon his *current* qualifications. I do not believe such a requirement can be deemed “a mere procedural decision” that is not an employment practice. Rather, it is a qualification standard that affects the recruitment, measurement, ranking and selection of individuals for ALJ positions.

¶10 While I recognize that OPM’s interpretation of the intended scope of its grant of authority to the Board is entitled to great deference, it need not be followed where, as here, it is unreasonable. *Maule*, 40 M.S.P.R. at 394.

¶11 Moreover, the Federal Circuit has not adhered to the merits/procedural distinction put forth in the ID. In *Vesser v. OPM*, [29 F.3d 600](#) (Fed. Cir. 1994), the court held that a rule barring recipients of annuities from competing for ALJ positions imposed a qualification standard and was an employment practice. But the receipt of a retirement annuity has no bearing whatsoever on the “merits” or “substance” of an applicant’s qualifications to perform the work of an ALJ.² Similarly, in *Lackhouse v. Merit Systems Protection Board*, [773 F.2d 313](#) (Fed.

consideration “in the first instance.” *Maule*, 812 F.2d at 1399. To the extent the court telegraphed any position on the issue, it was one of hostility. *Id.* (noting that a similar argument had been rejected in *Dowd*, and characterizing OPM’s new position that “mere procedural decision[s]” are not employment practices as an “attempt[] to distinguish *Dowd*”).

² The Vice Chairman contends that whether the rule barring annuitants from competing for ALJ positions was an employment practice “was not really at issue in *Vesser*.” Vice Chairman’s Separate Opinion at 6. But the court expressly identified as the “threshold issue” “whether the action taken is an employment practice within the meaning of the regulations.” 29 F.3d at 603. Moreover, the court’s analysis makes clear that in removing the appellant’s name from the register of eligibles based on his status as an annuitant, the agency used a qualification standard that constituted an employment practice. *Id.* In so holding, the court rejected the narrower definition proffered by OPM under which only standards that “determine a candidates ability to perform the duties and responsibilities of a job” constitute employment practices. *Id.* In short, disqualifying the appellant due solely to his status as an annuitant was an employment practice, notwithstanding that the status had no bearing on the merits of his candidacy as measured by his ability to perform the duties and responsibilities of the position.

Cir. 1985), the court deemed an employment practice a rule under which applicants being considered for 78 vacant positions would be eliminated from consideration after being passed over three times. That rule also did not directly relate to the merits of the applicants' qualifications to perform the jobs. They had already been rated and their ratings were the basis for comparison with other candidates. It appears to have been simply a matter of administrative convenience that individuals were dropped from consideration after being included on the list of eligibles and ultimately not hired for three separate vacancies.

¶12 In addition to its being an employment practice, it is also clear that the one year waiting period rule violates the basic requirement that employment practices be relevant to performance in the position. In fact, prohibiting applicants from retaking the exam following a period of time during which their qualifications will necessarily have improved has the effect of reducing the qualifications of the pool of candidates from which ALJ positions are filled. Accordingly, the appellant has established jurisdiction under [5 C.F.R. § 300.104\(a\)](#), and the case should be remanded to the AJ for a hearing on the merits.

Neil A. G. McPhie
Chairman

SEPARATE OPINION OF MARY M. ROSE

in

Kurt Chadwell v. Office of Personnel Management

MSPB Docket No. DA-300A-08-0567-I-1

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, I would grant the PFR under [5 C.F.R. § 1201.115](#) and affirm the ID as modified, still dismissing the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a non-veteran, applied for an administrative law judge (ALJ) position under the Office of Personnel Management's (OPM's) May 4, 2007 Vacancy Announcement. Initial Appeal File (IAF), Tab 1 at 1, Tab 7, subtab 2, Tab 10, subtabs 1 at 2-3, 4e at 2, 4g. On October 30, 2007, OPM issued a Notice of Results (NOR) advising him that he had successfully completed all parts of the ALJ examination; that, accordingly, his name had been placed on the new register for referrals to agencies; that his final numerical rating was 69.79; and that he could file an appeal of the NOR with the ALJ Appeals Panel if he believed that his final numerical rating was wrong.¹ *Id.*, Tab 10, subtabs 4d, 4e. The appellant stated that he was placed on two certificates of eligibles issued to the Social Security Administration, but that he was not selected for an ALJ position. *Id.*, Tab 7 at 10, Resp. at 10.

¶3 The appellant also applied for an ALJ position under OPM's July 30, 2008 Vacancy Announcement. IAF, Tab 1 at 5, 9-10, Tab 7, subtab 1, Tab 10, subtab 4b. The announcement contained the following section:

¹ The administrative judge (AJ) noted that the appellant filed an appeal of his numerical rating with the ALJ Appeals Panel but that the outcome was unclear from the record. ID at 2-3; IAF, Tab 10, subtab 4c.

Retaking the ALJ Examination: You may retake the ALJ examination when the examination is open to the receipt of new applications if:

- You received an “ineligible” rating or did not score among the highest group of AR [Accomplishment Record] scores from all applicants; or
- You received a NOR with a final numerical rating and **after one year has passed from the date of the final NOR** (NOTE: With the exception of 10-point veterans, applicants on the current ALJ register who received a Notice of Results dated October 30, 2007, with a final numerical rating, are **not** eligible to retake the ALJ examination at this time).

Id., Tab 7, subtab 1 at 6-7, Tab 10, subtab 4b at 7. On August 14, 2008, OPM responded to the appellant’s application by citing the above provision; noting that his NOR, listing a final numerical rating, was dated October 30, 2007; and stating that, since 1 year had not passed since the date of that NOR, he was ineligible to retake the examination under the 2008 vacancy announcement. OPM further stated that, accordingly, it would not review or process his 2008 application, and that his 2007 application remained his application of record on the current ALJ register. *Id.*, Tab 1 at 9-10; Tab 10, subtab 4a at 1.

¶4 The appellant filed an appeal asserting that what he characterized as the “1-Year NOR Rule” was an unlawful employment practice.² IAF, Tab 1 at 3, 5-6. He requested a hearing. *Id.* at 2. The AJ dismissed the appeal for lack of jurisdiction without granting the appellant his requested hearing. *Id.*, Tab 26.

¶5 The appellant has filed a PFR. PFR File, Tab 1. OPM has filed a response opposing the PFR. *Id.*, Tab 3. After the record closed on review, the appellant

² The appellant also claimed that OPM’s action was a constructive negative suitability determination, and the AJ, although noting OPM’s new regulations, adjudicated his appeal as such. IAF, Tabs 1, 26. The appellant has explicitly withdrawn that claim on review. PFR at 8 n.1. Therefore, I have not further considered it. See [5 C.F.R. § 1201.114\(b\)](#) (the Board normally will consider only issues raised in a timely filed PFR or in a timely filed cross-PFR).

submitted additional alleged new evidence, which OPM moved to strike.³ *Id.*, Tabs 4, 5.

ANALYSIS

¶6 The appellant asserts, inter alia, that the ID applied the wrong law to the issue of pleading an employment practices appeal pursuant to [5 C.F.R. § 300.104](#)(a). PFR at 19. He asserts that the AJ erroneously cited *Mapstone v. Department of the Interior*, [106 M.S.P.R. 691](#) (2007) (*Mapstone I*)⁴ because, as he brought to her attention, the controlling case law on the employment practices jurisdictional issue is *Mapstone v. Department of the Interior*, [110 M.S.P.R. 122](#) (2008) (*Mapstone II*). He argues that proper application of *Mapstone II* to the jurisdictional allegations and the supporting evidence requires vacating the ID as it related to the employment practices claim. PFR at 19.

¶7 I would grant the appellant’s PFR because I agree that the AJ erred in citing *Mapstone I* as setting forth the correct jurisdictional standard in an employment practices appeal. The AJ stated that, to establish jurisdiction, the appellant must “show” the following:

- (1) the action in question constitutes an employment practice within the meaning of 5 C.F.R. Part 300, Subpart A; (2) the employment practice violates the basic requirements of [5 C.F.R. § 300.103](#); and (3) OPM is involved in the administration of those practices.

ID at 11. In *Mapstone II*, however, the Board specifically stated as follows:

The Board has jurisdiction under [5 C.F.R. § 300.104](#)(a) when two conditions are met: First, the appeal must concern an employment practice that OPM is involved in administering; and second, the employment practice *must be alleged* to have violated one of the

³ Because I conclude that the AJ properly dismissed the appeal for lack of jurisdiction, I would find it unnecessary to consider OPM’s motion to strike.

⁴ Although, as the appellant points out, the AJ incorrectly abbreviated the citation to *Mapstone*, PFR at 19; ID at 11, her citation to the Merit Systems Protection Board Reporter was correct.

“basic requirements” for employment practices set forth in [5 C.F.R. § 300.103](#). *Meeker v. Merit Systems Protection Board*, [319 F.3d 1368](#), 1373 (Fed. Cir. 2003); *Prewitt v. Merit Systems Protection Board*, [133 F.3d 885](#), 887 (Fed. Cir. 1998); *Scott v. Department of Justice*, [105 M.S.P.R. 482](#), ¶ 10 (2007) (Emphasis added). In *Mapstone I*, the Board cited to that standard, but inadvertently omitted that the second condition is met by a nonfrivolous allegation that the employment practice violated one of the “basic requirements” for employment practices set forth in 5 C.F.R. § 300.103(b).

Mapstone II, [110 M.S.P.R. 122](#), ¶ 7.

¶8 The difference in the standards between *Mapstone I* and *Mapstone II* thus involved whether the appellant must “show” or make “a nonfrivolous allegation” that an employment practice violated a basic requirement in [5 C.F.R. § 300.103](#). Under both standards, the appellant must show that the action constituted an employment practice to establish jurisdiction. As set forth below, the appellant has failed to make that showing.

¶9 The AJ correctly found that the purpose of 5 C.F.R. Part 300, subpart A was to establish principles to govern the federal government’s employment practices that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment; that the term “employment practice” as defined in [5 C.F.R. § 300.101](#), includes the development and use of examinations, qualification standards, tests, and other measurement instruments; and that, although the term was to be construed broadly, an individual agency action or decision that is not made pursuant to or as part of a rule or practice of some kind does not qualify as an employment practice. ID at 16-17; *see Prewitt*, 133 F.3d at 887. The AJ found that, although practices other than merit-based tests have been found to fall within the definition of employment practice if they affect selection, appealable employment practices typically encompass “merit” considerations that are generally applied in making federal hiring decisions and that mere procedural decisions are not employment practices. *Id.* at 17; *see Dow v. Office of Personnel Management*, [68 M.S.P.R. 285](#), 289-90 (1995). The AJ

concluded that OPM’s 1-year waiting period for retaking the ALJ examination was an exercise of its administrative discretion regarding a procedural matter and was not a substantive or merits consideration that affects the qualification standards for the position. ID at 18; *see Maule v. Office of Personnel Management*, [40 M.S.P.R. 388](#), 393 (finding that OPM’s decision to reject an application as untimely and not to reopen a closed register was procedural, and not an employment practice), *aff’d*, 892 F.2d 1050 (Fed. Cir. 1989) (Table).

¶10 In his separate opinion, the Chairman states that the U.S. Court of Appeals for the Federal Circuit “has not adhered to the merits/procedural distinction put forth in the ID.”⁵ Sep. Op., ¶ 11. He further states as follows:

In *Vesser v. OPM*, [29 F.3d 600](#) (Fed. Cir. 1994), the court held that a rule barring recipients of annuities from competing for ALJ positions imposed a qualification standard and was an employment practice. But the receipt of a retirement annuity has no bearing whatsoever on the “merits” or “substance” of an applicant’s qualifications to perform the work of an ALJ.

Sep. Op., ¶ 11.

¶11 The Chairman appears to be stating that *Vesser* implicitly disagreed with distinguishing between procedural and merits considerations in determining whether a rule constitutes an employment practice. The court, however, explicitly directed the Board in *Maule*, [40 M.S.P.R. 388](#), to consider such a distinction in determining whether OPM’s action constituted an employment practice. *Id.* at 391-92.⁶ Although in doing so, the Board apparently agreed with

⁵ The ID does not show that the AJ used a strict “merits/procedural distinction” as the standard for determining that the 1-Year NOR Rule was not an employment practice. As discussed above, the ID indicates that the AJ recognized the possibility that “practices other than merit-based tests” can meet the definition of “employment practices.” ID at 17.

⁶ The Chairman suggests that, in remanding *Maule* to the Board, the court “telegraphed . . . hostility” to recognizing a distinction between procedural and merits considerations in determining whether a rule is an employment practice. Sep. Op., ¶ 9 n.1. The court simply observed, though, that the government’s argument that an employment practice

OPM that the court had expanded the definition of employment practices appealable to the Board “beyond merit-based tests,” it specifically found that “such definition does not include mere procedural decisions.” *Id.* at 393. The Board stated that “[p]rocedural decisions do not meet this definition and are not, in themselves, the ‘merit considerations’ the court has found appealable under part 300.” *Id.* In *Maule*, [892 F.2d 1050](#), the court affirmed the Board’s decision. Thus, the court did not ultimately object to distinguishing between procedural and merits considerations in determining whether a rule is an employment practice. Therefore, the AJ correctly found, as previously noted, that although practices other than merit-based tests have been found to fall within the definition of employment practice if they affect selection, appealable employment practices typically encompass “merit” considerations that are generally applied in making federal hiring decisions and that mere procedural decisions are not employment practices. *Id.* at 17.

¶12 Further, to the extent that the Chairman is citing *Vesser* for the proposition that a rule can be an employment practice without involving a merit-based test, he has not explained how *Vesser* warrants a different outcome in this case. Specifically, he has not explained how the court’s holding that a rule barring recipients of annuities from competing for ALJ positions is an employment practice has any bearing on whether a rule requiring a 1-year waiting period before an applicant can retake the ALJ examination is an employment practice.

¶13 In any event, whether the rule was an “employment practice” was not the focus of the court’s decision in *Vesser* because the Board had found that it constituted an employment practice. Therefore, the court summarily stated that

relates only to “a substantive judgment of the qualification” of applicants “is reminiscent of that offered by the government and rejected by this court in *Dowd v. United States*, [713 F.2d 720](#), 723 (Fed. Cir. 1983).” *Maule v. Merit Systems Protection Board*, [812 F.2d 1396](#), 1399 (Fed. Cir. 1987). As explained above, the court did not ultimately object to such a distinction in *Maule*.

“employment practices include qualification standards,” and that, “[a]pplying the requisite broad and inclusive meaning to the term employment practices, we hold that the Board, in removing Mr. Vesser’s name from the register of eligible ALJ candidates based on his status as an annuitant, used a qualification standard under [5 C.F.R. § 300.101](#).” 29 F.3d at 603. The bulk of the decision was devoted to considering the merits of Mr. Vesser’s appeal. *Id.* at 604-06. Indeed, the Board has subsequently factually distinguished *Vesser*. In *McKnight v. Department of Defense*, [103 M.S.P.R. 255](#) (2006), *aff’d*, 227 F. App’x. 913 (Fed. Cir. 2007), the Board found that central to the court’s reasoning was Mr. Vesser’s offer to waive his annuity if selected as an ALJ. *Id.*, ¶ 12. The Board proceeded to conclude that it lacks jurisdiction over an employment practice claim filed by an annuitant challenging a policy governing the appointment of annuitants at the Department of Defense. *Id.*, ¶ 13.

¶14 The appellant contends that the AJ incorrectly relied on decisions involving agencies other than OPM, i.e., *Prewitt*, [133 F.3d 885](#) (Fed. Cir. 1998), and *Richardson v. Department of Defense*, [78 M.S.P.R. 58](#) (1998), and in citing the proposition that an individual agency action or decision that is not made pursuant to or as part of a rule or practice of some kind does not qualify as an “employment practice.” PFR at 19-20. He asserts that the decisions and proposition are irrelevant to his appeal because he alleged that the employment practice was committed directly by OPM. *Id.* at 20. The appellant has not shown that whether OPM or another agency is involved changes the standard. As *Prewitt* stated, “OPM’s involvement in an agency’s selection process may be sufficient to characterize the agency action as a practice applied by OPM.” 133 F.3d at 888.

¶15 The appellant further contends that the AJ incorrectly distinguished *Bush v. Office of Personnel Management*, [315 F.3d 1358](#) (Fed. Cir. 2003), from his appeal, arguing that *Bush* supports his jurisdictional allegations. He asserts that, like *Bush*, his appeal involved OPM’s use of the ALJ examination; that *Bush*’s

inability to make it onto the ALJ register because the process had been suspended, while he is already on the register, “is a distinction without a significant legal difference”; that, like Bush, he sought to avail himself of the guarantee that examinations be “open competitive”; and that the processing of his application for the 2008 Vacancy Announcement “has effectively been ‘suspended’ against his will by OPM, much like OPM suspended the processing of Bush’s ALJ examination.” PFR at 20.

¶16 The AJ addressed the appellant’s contention, finding that his reliance on *Bush* was misplaced. She correctly found that, in *Bush*, the court held that OPM’s suspension of the processing of Bush’s ALJ examination while OPM developed a new ALJ examination was an employment practice, noting its finding that “OPM’s decision to develop a new ALJ examination comes squarely within the definition of ‘employment practice’ that includes ‘the development and use of examinations.’” ID at 17-18; *Bush*, 315 F.3d at 1360. The AJ further noted that OPM’s practice prevented the appellant from getting his name on the selection register, whereas here the appellant acknowledged that his name has appeared on two certificates of eligibles. The AJ thus found that *Bush* did not support the appellant’s claim that OPM’s decision to impose a waiting period before retaking the ALJ examination was an employment practice. ID at 17-18. Indeed, the appellant has not shown that OPM engaged in a practice that prevented him from getting on the ALJ register; rather, he asserts that he is seeking to get onto the ALJ register “with a higher score.” PFR at 20.

¶17 The appellant also contends that the AJ incorrectly interpreted and applied [5 C.F.R. § 930.201\(b\)](#) (2008) and [5 C.F.R. § 332.101\(a\)](#) (2008). He asserts that the mandate that examinations be “open competitive” is a substantive requirement, not a mere procedural matter. PFR at 20-21. The appellant’s contention does not show adjudicatory error. The appellant, in effect, is arguing that OPM’s practice violated one of the “basic requirements” for employment practices set forth in [5 C.F.R. § 300.103](#), i.e., the second part of the jurisdictional

standard, without showing that the 1-Year NOR Rule was an employment practice. The AJ appropriately found it unnecessary to make findings on that issue absent proof that the appellant was affected by an employment practice. ID at 18 n.8.

¶18 Because the AJ correctly found that the appellant failed to show that the “1-Year NOR Rule” is an employment practice, her error in citing *Mapstone I* instead of *Mapstone II* did not prejudice the appellant’s substantive rights. Therefore, it does not warrant a different outcome in this case.⁷ See *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

Mary M. Rose
Vice Chairman

⁷ In that regard, the AJ’s citation to *Mapstone I* in her show-cause orders does not warrant a different outcome because, as previously noted, the appellant’s submissions below show that he was aware of the standard set forth in *Mapstone II*. IAF, Tab 7, Resp. at 1, Tab 24, Ex. 1 at 1-2.