UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 102

Docket No. CB-1205-12-0007-U-1

Kenneth A. Potter,

Petitioner,

v.

Office of Personnel Management,

Agency.

September 4, 2012

Kenneth A. Potter, Mystic, Connecticut, pro se.

Robert J. Girouard, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The petitioner requests that the Board review an instruction in the VetGuide, a veterans hiring manual maintained by the Office of Personnel Management (OPM) and intended to assist human resources personnel. MSPB Docket No. CB-1205-12-0007-U-1, Request File (RF), Tab 1 at 1. For the reasons discussed below, we DENY the petitioner's request.

BACKGROUND

¶2 The petitioner, a Supervisory Human Resources Specialist at an undisclosed agency, seeks review under 5 U.S.C. § 1204(f) of the following question and instruction in the VetGuide:

> Q: Can a current career/career conditional employee who lacks time-in-grade apply as a VEOA [Veterans Employment Opportunities Act] candidate under an agency merit promotion announcement?
>
> A: No. Such an employee remains subject to time-in-grade restrictions. The VEOA is not a noncompetitive entry authority like the VRA [Veterans Recruitment Authority] where an employee could be given a new appointment at a higher grade.

RF, Tab 1 at 1. The petitioner alleges that this instruction causes human resources personnel to commit a prohibited personnel practice under 5 U.S.C. § 2302(b)(11) because applying time-in-grade restrictions to veterans or preference eligibles who are current federal employees denies them an opportunity to compete, violating veterans' preference requirements. RF, Tab 1 at 8-11. The petitioner asks the Board to reconsider its case law to the contrary—in particular, *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98 (2000), and *Styslinger v. Department of the Army*, 105 M.S.P.R. 223 (2007). RF, Tab 1 at 3, 7.

¶3 OPM responds that the instruction challenged by the petitioner is "a straightforward application of 5 C.F.R. § 300.603(a), [a regulation addressing advancement in the competitive service] . . . as applied to merit promotion of VEOA candidates." RF, Tab 6 at 4-5. OPM contends that the petitioner fails to distinguish *Ramsey* and *Styslinger* or offer a "persuasive reason for the Board to depart from its well-reasoned precedent" in these cases; fails to establish that the time-in-grade requirements have required or would require any employee to violate § 2302(b); and fails to identify any law, rule, or regulation implementing or directly concerning the merit principles that the time-in-grade requirement would violate. RF, Tab 6 at 4-9.

ANALYSIS

¶4 The Board has original jurisdiction to review rules and regulations promulgated by OPM. 5 U.S.C. § 1204(f). The Board is authorized to declare an OPM rule or regulation invalid on its face, if the Board determines that the provision would, if implemented by an agency, on its face, require any employee to violate a prohibited personnel practice as defined by 5 U.S.C. § 2302(b). *See* 5 U.S.C. § 1204(f)(2)(A). Similarly, the Board has authority to determine that an OPM regulation has been invalidly implemented by an agency, if the Board determines that the provision, as implemented, has required any employee to violate a prohibited personnel practice. 5 U.S.C. § 1204(f)(2)(B).

¶5 The Board's regulations direct the individual requesting review to provide the following information: the requester's name, address, and signature; a citation identifying the challenged regulation; a statement (along with any relevant documents) describing in detail the reasons why the regulation would require or has required an employee to commit a prohibited personnel practice; specific identification of the prohibited personnel practice at issue; and a description of the action the requester desires the Board to take. 5 C.F.R. § 1203.11(b); *see DiJorio v. Office of Personnel Management*, 54 M.S.P.R. 498, 500 (1992).

¶6 Here, the petitioner has identified an instruction in the VetGuide, which the agency agrees restates 5 C.F.R. § 300.603(a) and should be construed as a challenge to that regulation. RF, Tab 6 at 4-5. He alleges that this regulation requires human resources personnel to commit a prohibited personnel practice because applying time-in-grade restrictions to veterans or preference eligibles who are current federal employees denies them an opportunity to compete for merit promotion positions. RF, Tab 1 at 3, 7. He claims that this violates "veterans['] preference requirement[s]" under 5 U.S.C. § 2302(b). RF, Tab 1 at 7-9. He concedes that the Board has held that time-in-grade requirements do not deny veterans the right to compete or violate veterans' preference requirements,

but asks the Board to reconsider this holding. RF, Tab 1 at 3, 7. We conclude that the petitioner has made nonfrivolous allegations establishing a claim within the Board's jurisdiction under 5 U.S.C. § 1204(f), but decline to exercise our discretion to review the regulation.

¶7 In determining whether to exercise its regulation review authority, the Board considers, among other things, the likelihood that the issue will be timely reached through ordinary channels of appeal; the availability of other equivalent remedies; the extent of the regulation's application; and the strength of the arguments against the validity of its implementation. *McDiarmid v. U.S. Fish and Wildlife Service*, 19 M.S.P.R. 347, 349 (1984). Here, consideration of these factors persuades us to decline the request for review.

¶8 First, the issue petitioner raises not only could be timely reached through appeal, but has been reached, resulting in at least two Board decisions contrary to the petitioner's argument. In *Ramsey*, the Board held that the VEOA "does not exempt veterans from the eligibility criteria such as time-in-grade restrictions that would be applicable to all candidates." 87 M.S.P.R. 98, ¶ 9. In *Styslinger*, the Board affirmed this holding. 105 M.S.P.R. 223, ¶ 33. Thus, under Board precedent, applying time-in-grade restrictions to veterans or preference eligibles who are current federal employees does not deny them the right to compete for merit promotion positions, and does not violate any preference requirement. Second, remedies equivalent to what the petitioner could obtain under § 1204(f) review are available through the Board appeal process to any veteran or preference eligible who establishes that he has been denied the right to compete. *See* 5 U.S.C. § 3330a *et seq.*

¶9 The third *McDiarmid* factor—the extent of the regulation's application—weighs in favor of review. The time-in-grade requirement potentially applies to numerous veterans and preference eligibles who are current federal employees and apply for merit promotions.

¶10 Finally, with regard to the fourth factor, the petitioner has not presented a strong argument that the regulation is invalid, in light of our case law to the contrary. *See Styslinger*, 105 M.S.P.R. 223; *Ramsey*, 87 M.S.P.R. 98.

¶11 Taken as a whole, the *McDiarmid* factors weigh against review and persuade us not to exercise our discretion to review 5 C.F.R. § 300.603(a) or the equivalent instruction in the VetGuide. *See McDiarmid*, 19 M.S.P.R. at 349. Accordingly, the petitioner's request for regulation review is DENIED.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this proceeding. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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.