

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

NATIONAL TREASURY
EMPLOYEES UNION,
Petitioner,

DOCKET NUMBER
CB-1205-11-0017-U-1

v.

DATE: January 8, 2013

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Luke Chesek, Esquire, Washington, D.C., for the petitioner.

Joanna S. Abrahams, Esquire, Washington, D.C., for the agency.

BEFORE

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

FINAL ORDER

The petitioner requests that we review, pursuant to our authority under [5 U.S.C. § 1204](#)(f), an advisory opinion issued by the Office of Personnel

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117](#)(c).

Management (OPM) which was requested by the Federal Labor Relations Authority (FLRA) in the course of its adjudication of *U.S. Department of Veterans Affairs, Ralph H. Johnson Medical Center*, 60 F.L.R.A. 46 (2004). Request File (RF), Tab 1. For the reasons discussed below, we hold that the OPM advisory opinion is not a “rule” for purposes of 5 U.S.C. § 1204(f) and therefore not within our review authority.

Under section 1204(f), the Board has original jurisdiction to review “any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103.” The petitioner contends that the advisory opinion is a rule because it “interprets the legal effect of a rule,” namely [5 C.F.R. § 335.103\(c\)\(1\)\(i\)](#).² RF, Tab 1 at 6. Therefore, according to the petitioner, it meets the definition of a “rule” under the Administrative Procedures Act (APA). The APA defines “rule” to mean, inter alia, “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” See [5 U.S.C. § 551\(4\)](#). The petitioner states that the APA definition is so broad that it includes “nearly

² That provision states:

(c) Covered personnel actions – (1) Competitive actions. Except as provided in (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under § 335.102 of this part and to the following actions:

(i) Time-limited promotions under § 335.102(f) of this part for more than 120 days to higher graded positions (prior service during the preceding 12 months under noncompetitive time-limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total). A temporary promotion may be made permanent without further competition provided the temporary promotion was originally made under competitive procedures and the fact that might lead to a permanent promotion was made known to all potential candidates

[5 C.F.R. § 335.103\(c\)\(1\)\(i\)](#). The petitioner does not challenge the regulation on its face. RF, Tab 1 at 1.

every statement an Agency may make.” RF, Tab 1 at 6 (quoting *Chaney v. Heckler*, [718 F.2d 1174](#), 1186 (D.C. Cir. 1983), *rev’d on other grounds*, [470 U.S. 821](#) (1985)).

The Board’s review authority under [5 U.S.C. § 1204\(f\)](#) is not as far-reaching as the petitioner asserts. Generally, an OPM rule or regulation is one that was first published as a proposed rule in the Federal Register and subjected to notice and comment procedures. See [5 U.S.C. § 1103\(b\)](#). In some instances, the Board has held that an OPM issuance that meets the definition of a “rule” under [5 U.S.C. § 551\(4\)](#) may be reviewable even if it was not subjected to notice and comment. See *Pollard v. Office of Personnel Management*, [52 M.S.P.R. 566](#), 569 n.1 (1992) (finding that a provision of the Federal Personnel Manual (FPM) is a rule for purposes of the Board’s regulation review authority). The Board has emphasized, however, that such provisions are rules to the extent that they directly implement or interpret statutory provisions. See, e.g., *Kligman v. Office of Personnel Management*, [103 M.S.P.R. 614](#), ¶ 14 (2006) (OPM’s Delegated Examining Operations Handbook does not directly implement or interpret statutory provisions and therefore does not appear to be subject to the Board’s regulation review authority); *Brooks v. Office of Personnel Management*, [59 M.S.P.R. 207](#), 210 n.4 (1993) (The provisions of the FPM are rules for purposes of the Board’s review authority because they directly implement and interpret statutory provisions). Here, the FLRA requested that OPM explain the effect of its regulation at [5 C.F.R. § 335.103\(c\)\(1\)\(i\)](#) on an arbitral remedy of a retroactive temporary promotion exceeding 120 days. See *Veterans Affairs*, 60 F.L.R.A. at 47. OPM’s advisory opinion interprets a regulation, but it does not purport to interpret or implement a statute. Therefore, it is not a “rule” within the Board’s review authority. See *Kligman*, [103 M.S.P.R. 614](#), ¶ 14.

We are further persuaded that the advisory opinion is not a “rule” because it was requested by the FLRA in the exercise of its adjudicatory functions.

See [5 U.S.C. § 7105\(i\)](#). OPM’s advisory opinion was not binding on the FLRA. The advisory opinion had “general or particular applicability” only to the extent that the FLRA was persuaded by it and chose to apply it to the facts of the case before it. In that regard, we note that the FLRA’s deference to OPM’s interpretation of an OPM regulation is not the same as the FLRA being bound by the advisory opinion.

Under these circumstances, we hold that OPM’s advisory opinion is not a “rule” for purposes of section 1204(f). Accordingly, the petitioner’s request for regulation review is DENIED. 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 the date of this order. 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 about the United States Court of Appeals for the Federal Circuit 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.