U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 21, 2015

The U.S. Court of Appeals for the Federal Circuit issued the following precedential decision this week:

Petitioner: Ross Vassallo
Respondent: Department of Defense
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: **2015-3101**
MSPB Docket No. PH-3330-13-0049-R-1
Issuance Date: August 14, 2015

Chevron Deference
VEOA Coverage

The petitioner was a veteran employed as a computer engineer by the Defense Contract Management Agency ("DCMA"), a sub-agency within the Department of Defense ("DOD"). DCMA posted a vacancy for the position of Lead Interdisciplinary Engineer, and stated that applications for the position would be limited to current DCMA employees and current DOD employees with the Acquisition, Technology, and Logistics workforce outside of DOD's military components. The petitioner applied for the position, but DCMA rejected it for failure to submit the correct forms. The petitioner appealed the rejection to the Board, alleging that DCMA's failure to consider his application was a violation of the Veterans Employment Opportunities Act ("VEOA"), which states that veterans "may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion

procedures." The word "agency" was not defined in VEOA, but the Office of Personnel Management ("OPM") had previously issued a regulation stating that "agency" meant an "executive agency as defined in 5 U.S.C. 105." At the Board, the administrative judge ("AJ"), relying on OPM's "VetGuide," held that VEOA did not apply to DCMA's posting, because "agency" meant DOD, not DCMA, and the posting did not allow for applications from outside of DOD. The Board initially reversed the AJ, but then reconsidered its decision and denied the petitioner's request for corrective action. In its decision, the Board held that OPM permissibly defined "agency" as an "Executive Agency," such as DOD, in its regulation at 5 C.F.R. § 315.611(b).

Holding: The Court affirmed.

1. The use of the word "agency" in VEOA is ambiguous, and does not necessarily mean "Executive Agency" as used by 5 U.S.C. § 105.

2. OPM's decision to define via regulation the term "agency" to mean "Executive Agency" was afforded deference under *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the statute was ambiguous and OPM's construction of the statute was not arbitrary, capricious, or manifestly contrary to the statute.

The U.S. Court of Appeals for the Federal Circuit issued the following nonprecedential decision this week:

Petitioner: McCarthy Barnes, Jr.
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: **2015-3018**
MSPB Docket No. DC-0752-13-0357-I-1
Issuance Date: August 19, 2015

Holding: The court reversed the Board's final order dismissing the appellant's petition for review for untimeliness based on a finding that the petitioner's 3-day filing delay was excusable because: (1) the filing delay was caused by the petitioner's counsel's attempt to bring the petition into compliance with the Board's rules on the day the petition was due; (2) the Board's electronic appeal system was malfunctioning when the petitioner's counsel attempted to file the petition on two separate days after the original petition due date; and (3) had petitioner's counsel filed a noncompliant petition on the original due date (which

he did not), Board regulations would have granted the petitioner additional time to file his petition.

- **The MSPB did not issue any precedential decisions this week**