



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for July 2, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Edward M. Avalos

Respondent: Department of Housing & Urban Development

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2019-1118](#)

Docket Number: DE-0752-18-0004-I-1

Date Issued: June 26, 2020

Chapter 75 Jurisdiction

- Improper appointments
- Current continuous service

Merit System Principles

- Political influence in appointments
- Variations

Efficiency of the service standard

The petitioner was a Level III Senior Executive for the Department of

Agriculture who applied for a competitive service GS-15 Field Office Director position with the Department of Housing and Urban Development, the respondent agency in this appeal. A Regional Administrator with whom the petitioner was professionally acquainted was involved in developing the vacancy announcement and assessing the candidates. The petitioner did not appear on the certificate of eligibles, which contained only one candidate, a preference eligible veteran. Dissatisfied with the certificate, the Regional Administrator allowed it to expire without a selection. She then revised the vacancy announcement and reposted it. This time, the petitioner appeared on the certificate as the only candidate, and the agency selected him. The petitioner resigned his position with the Department of Agriculture on September 16, 2016, and began his new Field Office Director position the next day.

In April 2017, the Office of Personnel Management (OPM) noticed that agency had appointed the petitioner without its approval. After investigating, OPM determined that the appointment was not free from political influence and in compliance with merit system principles, so it instructed the agency to regularize it. After assessing the petitioner's appointment, the agency determined that it could not certify that it met merit and fitness requirements because the Regional Administrator's involvement created the appearance of a prohibited personnel practice.

The agency issued the petitioner a notice of proposed termination on the basis that his appointment was improper. After the petitioner responded, the agency separated him from service effective September 14, 2017.

The petitioner filed a Board appeal. The administrative judge found that the Board had jurisdiction over the appeal under 5 U.S.C. chapter 75, that the agency reasonably concluded that it could not certify that the petitioner's appointment was free from political influence, and that the only option for the agency to regularize the appointment was to remove the petitioner. The initial decision became the final decision of the Board, and the petitioner sought review before the Federal Circuit.

A. Jurisdiction

1. The agency argued that OPM's failure to approve the petitioner's appointment rendered the appointment invalid, and absent a valid appointment, the petitioner lacked Board appeal rights. The court disagreed, finding that absent an absolute statutory prohibition on an appointment or fraud, misrepresentation, or concealment by an appointee material to the appointment, an appointee who meets the

definition of an "employee" for purposes of chapter 75 has Board appeal rights. Although the petitioner's appointment violated several statutes, none of these constituted an "absolute statutory prohibition" categorically barring the petitioner from the Field Office Director position.

2. Although the petitioner may not have received a proper appointment according to the requirements of 5 U.S.C. § 2105, the court has more generously defined the scope of appointment in applying the statutory definition of "employee" under 5 U.S.C. § 7511. The former section implicates substantive rights, whereas the latter section implicates only procedural rights. The court declined to interpret the applicable statutes in such a way that the petitioner would lose his appeal rights based on the very facts that he was disputing, without any post-termination process to dispute those facts.
3. The agency argued, that the petitioner was not a competitive-service "employee" with adverse action Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(i) because he had not completed his 1-year initial probationary period at the time of his termination. However, the court found the petitioner satisfied the alternative definition of "employee" under section 7511(a)(1)(A)(ii) by having 1 year of current continuous service at the time of his termination. The makeup of the civil service is broad and includes political appointees; the petitioner's prior service as a Level III Senior Executive counted toward his 1 year of current continuous service.

B. Merits

1. The administrative judge found that the agency could not reasonably certify that the petitioner's competitive service appointment was free from political influence. The court found substantial evidence to support this conclusion, including the fact that the Regional Administrator abandoned the first certificate of eligibles rather than seeking permission to pass over the preference eligible veteran, and recordkeeping errors prevented the agency from concluding that the Regional Administrator recused herself from the selection process. This was especially so considering the deference owed to the findings that the administrative judge made after hearing live testimony.
2. The petitioner argued that his removal did not promote the efficiency of the service because it was not taken for performance or conduct reasons. The court disagreed, finding that the efficiency of the service

standard is sufficiently broad to encompass other legitimate Government interests, including upholding the Merit Systems Principles and preventing the appearance of political influence in competitive-service appointments.

3. Because the agency has broad discretion in deciding what action to take to promote the efficiency of the service, it was not required to seek a variation from OPM's regulations under 5 C.F.R. § 5.1 in lieu of removal. Furthermore, even if the agency were required to seek a variation, it had a reasonable basis to determine that OPM would not grant one. Variations may be authorized only when they are within the spirit of the regulations and support the integrity of the competitive service, and a variation in this case would not meet that standard.

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